IN THE SUPREME COURT OF FLORIDA

ALACHUA COUNTY, FLORIDA, a political subdivision of the State of Florida
Appellant,

v.

STATE OF FLORIDA, et al
Appellees.

CASE NO.: 93,344

ANSWER BRIEF OF FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.

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REFERENCES

FECA = Florida Electric Cooperative Association, Inc.

Clay = Clay Electric Cooperative, Inc.

CFEC = Central Florida Electric Cooperative, Inc.

In referring to the Initial Brief of Alachua County, FECA will use the reference "AC". In referring to the Appendix of Alachua County, FECA will use the reference "AC Appendix _____". References to FECA's Appendix will simply be "Appendix".

STATEMENT OF THE CASE AND FACTS

Florida Electric Cooperatives Association, Inc., adopts the Statement of Facts of Florida Power Corporation and supplements said statement with the following summary:

On August 12, 1997, Alachua County adopted Ordinance No. 97-12 (referred to as 97-12 and as "the Ordinance") the full text of which is attached to Alachua County's Brief as Appendix C, and which imposes a privilege fee of three percent (3%) of gross revenues on each electric utility doing business in Alachua County (incorporated and unincorporated areas) if any of the facilities of such an electric utility are located on county owned property. The Ordinance does not provide for the acceptance, approval, or agreement of the electric utilities that are affected.

On September 9, 1997, Alachua County amended 97-12 by adopting Ordinance 97-13 which added a new subsection (F) to Section 2.05 which essentially changed the date for collection and payment of the privilege fee to October 1, 1998.

The Ordinance states the purpose of the privilege fee in Section 1.01 as:

> "(A) Reasonable compensation for the privileges granted in this Ordinance to use and occupy the County Rights-of-way. . .;
>
> (B) Fair rental return on the privileged use of public property for a proprietary purpose; and
>
> (C) Payment of the cost of regulating the County Rights-of-way. . .".

Also on September 9, 1997, Alachua County adopted Resolution 97-101 in which the County stated its intent that the proceeds of the privilege fees collected shall be used

". . . to provide reduction of the county-wide millage rate and thus achieve a balance in tax equity between property owners and other citizens within the County". Resolution 97-101 amended Resolution 97-80 (AC Appendix F) which was adopted on August 12, 1997, which among other things, stated the County's intent that the privilege fee proceeds will be used to "lessen the burden on the ad valorem tax payer".

On October 14, 1997, Alachua County adopted Resolution 97-116 (AC Appendix E), in which it amended Resolution 97-79, which is the initial resolution authorizing the issuance of $20,000,000.00 in capital improvement revenue bonds. Resolution 97-79 (AC Appendix D) is the authorizing resolution referred to in Alachua County's Complaint for Validation (AC Appendix B, paragraph 5, and Exhibit B). Resolution 97-79 as amended by 97-116, identifies eight capital projects of the County and pledges the privilege fee proceeds to the payment of the bonds sought to be validated. **None of the projects identified in the bond resolution relate to the County rights-of-way or the County road system**.

SUMMARY OF ARGUMENT[1]

Ordinance 97-12 imposes an illegal "Privilege Fee" on electric utilities equal to three percent (3%) of the gross receipts from their customers within the unincorporated and incorporated areas of Alachua County. It is plainly and simply a county-wide gross receipts tax, no matter how the County wishes to characterize it. The Ordinance claims that the purpose of the Privilege Fee is for payment of the cost of regulation of the county rights-of-way, for a fair rental return on the privileged use of public property and as reasonable compensation for the privileges granted, but in truth, as the County has stated by resolution, the real purpose is entirely different. The proceeds of the unilaterally imposed fee will be used either to generate revenue to offset a reduction in the County's millage rate (Resolution 97-101), or to fund capital improvement projects that are not related to the use of County rights-of-way by the electric utilities (Resolution 97-79 and 97-116).

1. The Privilege Fee Ordinance can not be characterized as a franchise fee ordinance. A valid franchise from the government possess three (3) characteristics: the granting of a privilege to carry on a business of a public nature, a bilateral contract that is bargained for or negotiated, and a grant of vested rights to the grantee for consideration for the franchise.

The Ordinance lacks all three of these characteristics. First, Clay Electric

[1]FECA will omit case citation in this summary for clarity, except for the one case FECA believes is the key decision that disposes of the Ordinance; State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994).

Cooperative, Inc. ("Clay"), Central Florida Electric Cooperative, Inc. ("CFEC"), Florida Power Corporation ("FPC"), Florida Power and Light Company ("FPL") and City of Gainesville ("COG") have all historically provided service to their customers in Alachua County prior to the enactment of the Ordinance pursuant to permits received from the County. Since the electric utilities have constructed facilities with the County's knowledge, consent, and permission on County Rights-of-Way long before the Privilege fee was imposed, there is no additional privilege or permission to grant to the electric utilities. The County has already licensed the utilities, by permit, to use those portions of County property where their facilities are located.

The electric cooperatives are unique in that they have already been granted the privilege and right to use County rights-of-way in Section 425.04(11), Florida Statutes, by the State of Florida.

Second, the Ordinance was unilaterally imposed rather than bargained for or negotiated. Third, the Ordinance does not grant any vested rights as consideration for the franchise that it purports to grant. Consequently, the Ordinance fails as a valid franchise. Indeed, as FPC has stated in its trial memorandum, whether the Ordinance imposes a valid franchise or not, should not be an issue - the Ordinance is clearly and plainly not a franchise by its very terms.

2. The Ordinance imposes an impermissible regulatory fee or a fee for services rendered. Florida courts have tested the validity of these types of fees under the **use** and **amount** requirements. The "use" requirement mandates that the revenue generated by the fee be used to defray the public costs associated with the regulation or the service

provided. Ordinance 97-12 does not earmark the fees for regulation and does not even create a true regulatory scheme. Under the use requirement, ordinances must "earmark" the collected revenue to insure that the revenue will be appropriately used for its intended purpose. By Resolutions 97-79, 97-80, 97-101 and 97-116, the County has in fact earmarked the revenue, not for regulation of the County road system, not for County rights-of-way, and not for protection of the citizens from electric utilities using public property, but either for capital improvement projects enumerated in Resolution 97-79 as amended, or for "tax equity" as provided in Resolution 97-101. To distinguish a user fee from a tax it must be a fee charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and therefore may avoid the charge. State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994). Herein lies the fatal flaw of this Ordinance. The party paying the user fee in this case is the county resident who uses electricity and pays the electric bill. That electric consumer has no choice but to pay the fee, unless he chooses to forgo using electricity - not a viable choice. The utility which is charged with collecting the fee also has no real choice, because to avoid the fee it will have to move its existing system (which is already permitted) off county property, and it will be virtually impossible to avoid crossing county property at some point.

The "amount" requirement mandates that the amount of the fee imposed must be commensurate with the costs of regulating the party the fee is imposed on or with the costs to provide the services. Ordinance 97-12 fails this test because there is no evidence that

the revenue it generates bears any relationship to the cost of regulation. It fails as a fee for services rendered because there is no reasonable connection between the amount of the fees and the services County would provide. The County never evaluated its investment in its rights-of-way or its current costs of "regulating" those rights-of-way, so it does not even know what its costs are, if any. The fee is imposed whether an electric utility has one pole in a County right-of-way or 1,000 poles.

3. Ordinance 97-12 is essentially a county wide gross receipts tax. The Constitution of the State of Florida provides that taxes other than ad valorem taxes must be authorized by general law. Section 125.01, Florida Statutes contains a general grant of authority to counties to levy and collect taxes. Section 125.01(1)(r), Florida Statutes. However, the statute does not suffice as a general law permitting the imposition of a gross receipts tax by a county. The Florida Legislature has not promulgated any general law granting a county the authority to levy a gross receipts tax, and in the absence of such a grant, County's attempted imposition of a this tax is illegal. The County has already imposed a ten percent (10%) public service tax by Ordinance 92-16, pursuant to its authority under its charter and Section 166.231, Florida Statutes. The privilege fee will be an additional charge to the electric consumers in Alachua County.

4. Where a state or any of its political subdivisions exacts a tax that it is without power to impose, it is a taking of property without due process of law in violation of the United States and Florida Constitutions, which are intended to forbid and prevent arbitrary and oppressive governmental activity which adversely affects the life, liberty, and property rights of any person. For the reasons stated in Section 3 above, the Privilege Fee

contained in Ordinance 97-12 is nothing more than an arbitrary and illegal tax. As such, Ordinance 97-12 constitutes a taking of property and a violation of due process rights under the United States and Florida Constitutions.

ARGUMENT

I. ALACHUA COUNTY ORDINANCE NO. 97-12 MAKES NO ATTEMPT TO GRANT A FRANCHISE

There is no question that Alachua County has the authority to grant non-exclusive franchises to electric utilities under the authority of the Constitution of the State of Florida and Florida Statutes. See Article VIII, Section 1(g), Florida Constitution; Section 125.01, Florida Statutes (1997). Whether the County has the authority to grant the franchise is not the issue here. By its very terms the Ordinance is not, and can not be construed as a franchise because it fails the requirements for a valid franchise.

The District Court of Appeal, Fifth District defined a franchise as "a special privilege conferred by the government on individuals or corporations that does not belong to citizens of a county generally by common right." City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 223 (Fla. 5th DCA 1991) quoting 12 McQuillin, Municipal Corporations Section 34.03 (3d ed.). Similarly, the Second District defined a franchise as "a contract with a sovereign authority by which the grantee is licensed to conduct such a business within a particular area". West Coast Disposal Service, Inc. v. Smith, 143 So. 2d 352, 353 (Fla. 2d DCA 1962). After a franchise is conferred the franchise becomes a property right in the legal sense of the word. Mount Dora, 579 So. 2d at 223-224; West Coast Disposal, 143 So. 2d at 354; Leonard v. Baylen Street Wharf Company, 52 So. 718 (Fla. 1910).

Florida case law has determined the characteristics of a valid franchise and the

evaluation of those characteristics clearly establish that the Ordinance is not a franchise. These characteristics are, first, that a franchise confers a privilege for the right to carry on a business of a public nature. Second, that as a contract, a franchise from the government must satisfy the general requirements for a contract. See West Coast Disposal, 143 So. 2d at 353. Specifically, this means that a franchise must be a bilateral agreement that is bargained for or negotiated. See Santa Rosa County v. Gulf Power Company, 635 So. 2d 96, 103 (Fla. 1st DCA 1994) citing City of Plant City v. Mayo, 337 So. 2d 966, 968, 973 (Fla. 1976). Third, since a franchise becomes a property right once granted, a grantee will receive vested rights as consideration for the franchise. Plant City, 337 So. 2d at 968, 973; See Mount Dora, 579 So. 2d at 223-224.

Because a true franchise confers a privilege for the right to carry on a business of a public nature it is obvious that Ordinance 97-12 does not have this characteristic. The Ordinance does not grant, or purport to grant, a privilege of carrying on a business. The electric utilities affected by the Ordinance may conduct their business whether they are using County rights-of-way or not in a strictly legal sense. The practical effect, however, of the Ordinance will be to force the payment of the privilege fee from the electric utilities, because it is virtually impossible to provide the electric distribution facilities necessary without crossing over or upon the extensive County road system at some point. Even if the Ordinance was designed to grant a privilege of doing business, what additional privileges does the County have to grant? The electric utilities have provided service to customers in Alachua County for many years prior to the enactment of the Ordinance with the knowledge, consent and permission of the County. The electric utilities have been

providing an essential public service to the citizens of Alachua County, and have been using public rights-of-way for that purpose, prior to the enactment of the Ordinance. Alachua County holds the County's property in trust for the benefit of all of the County's citizens. Jarrell v. Orlando Transit Co., 167 So. 664 (Fla. 1936). The effect of the Ordinance is to charge the very citizens who own the County property a fee for its use, because the privilege fee is passed directly to them. The County has no authority to exact a toll from its citizens for the provision of a vital public service (electricity) by the electric utilities.

The electric cooperatives, Clay and CFEC, have been granted permission to use county rights-of-way by virtue of Section 425.04(11), Florida Statutes. While the First District Court of Appeal has interpreted that statute to mean that a county can still impose reasonable regulations on the use of public right-of-way, Santa Rosa, the statute nonetheless grants Clay and CFEC the very privilege that the Ordinance attempts to grant in Section 2.01(A). The County may enact a specific regulatory scheme for the use of its rights-of-way by electric utilities, adopt a fee or charge for such regulation, and set the fee or charge in an amount that bears a direct relationship to the cost of the regulation. Otherwise it may not impose a fee simply to raise revenue or to charge for a privilege that has already been granted.

The Ordinance is not a contract that was bargained for or negotiated. In Plant City, the Supreme Court addressed an appeal from a Public Service Commission ("Commission") order that required an electric utility to allocate municipal franchise fees to only those customers within the city limits, rather than spreading the cost of the franchise

fees among all of the customers of the utility system. Plant City, 337 So. 2d at 973. The Commission's order referred to the franchise fee as a franchise tax, which on appeal raised the issue of whether the franchise was a fee or a tax. Id. The Supreme Court held that the franchise fees assessed by the municipalities were not taxes. Id. The court reasoned that the franchise fees were unlike other governmental levies because "the charges here are bargained for in exchange for specific property rights relinquished by the cities." Id.

In the instant case, it is absolutely clear that Ordinance 97-12 was imposed rather than bargained for or negotiated. First, Section 1.02(6) refers to the "Electric Utility Privilege Fee imposed under this Ordinance". Second, prior to the enactment of Ordinance 97-12, the electric utilities were not asked to agree to its provisions, nor did they ever explicitly or implicitly agree to its provisions. Instead, and despite the language found in Section 2.01 and elsewhere that purports to "grant" a privilege, the Ordinance is plainly and simply a unilateral imposition of a fee on the electric utilities and their customers. Unlike the franchise in Plant City Ordinance 97-12 was not in any way bargained for or negotiated and hence is not a bilateral contract.

The third characteristic of a franchise is the granting of a vested property right to the grantee in consideration for its franchise. The Ordinance does not grant any vested rights, and indeed the County agrees that the electric utilities acquire no vested rights under the Ordinance. In Plant City, as mentioned above, the ordinances enacted by the municipalities relinquished specific property rights to the utilities. Plant City, 337 So. 2d at 973; Santa Rosa, 635 So. 2d at 103. The County may argue that the First District's holding in Santa Rosa stands for the proposition that a County has the legal authority to

impose a franchise fee. Not only should this Court consider its holding in City of Port Orange as controlling over any contrary holding in Santa Rosa, but also the Santa Rosa holding is quite narrow, and is confined to a franchise ordinance that by its very terms called for the agreement of all the utilities affected by it. The ultimate resolution of the ordinance in Santa Rosa was its termination because the utilities did not all agree to be bound by it. Id., at 103. Indeed, the First District acknowledged the controlling authority of Plant City when it determined that the ordinance was valid as a franchise because the charges were bargained for in exchange for specific property rights relinquished. Id. Such is not the case here.

By failing to grant any vested rights as consideration for its franchise, Ordinance 97-12 fails to comport with the third characteristic of a valid franchise.

Ordinance 97-12 lacks all characteristics of a valid franchise and does not purport to be one. The only issues for this Court to determine are whether the fee is valid as a regulatory fee, a fair rental fee, or a tax.

II. ALACHUA COUNTY ORDINANCE NO. 97-12 IMPOSES AN IMPERMISSIBLE REGULATORY FEE AND AN IMPERMISSIBLE FEE FOR SERVICES RENDERED

A. ORDINANCE NO. 97-12 IMPOSES AN IMPERMISSIBLE REGULATORY FEE

It is well settled that a local government, through its police power, has the power to regulate any business, occupation or trade in order to protect the public health, safety and welfare. Broward County v. Janis Development Corp., 311 So. 2d 371, 375 (Fla. 4th DCA 1975); Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170, 172 (Fla. 1960) The power to regulate includes the power to license as a means of regulation. Janis

Development, 311 So. 2d at 375; Tamiami Trail Tours, 120 So. 2d at 172; State ex rel. Harkow v. McCarthy, 171 So. 314, 317 (Fla. 1936). A license fee is defined as a charge imposed by the government for the granting of a privilege to engage in a particular business, occupation or trade, and is levied primarily to cover the cost and expense of regulation. Black's Law Dictionary 921 (6th ed. 1990).

In the instant case, the Privilege Fee imposed by Ordinance 97-12 is alleged to be a regulatory fee based on its own provisions. In the language defining "Electric Utility Privilege Fee" (Section 1.01), the Ordinance states that the Privilege Fee is for the "payment of the cost of regulating the County Rights-of-Way and protecting the public in the use and occupancy of such County Rights-of-Way". Section 1.02(D) states that it was determined that "[r]egulation of the use of County Rights-of-Way by Electric Utilities among competing road and utility uses is essential to maximize the effective and efficient use of the County Rights-of-Way". Again, in the definition of Electric Utility Privilege Fee (Section 1.01), the Ordinance also states that the Privilege Fee is "reasonable compensation for the privileges granted in this Ordinance to use and occupy County Rights-of-Way for construction, location or relocation of Electric Facilities". These provisions plainly purport to be regulatory in nature and submit the Ordinance to scrutiny as a regulatory fee.

Generally, Florida courts have evaluated the permissibility of a regulatory fee by subjecting it to two overlapping legal requirements: the "use" and "amount" requirements. In the instant case, Ordinance 97-12 must satisfy both the use and the amount requirements to be a valid regulatory fee.

1. The Use Requirement

The use requirement mandates that the revenue generated by a regulatory fee be used to defray the costs associated with the regulation of a business entity. City of Key West v. Marrone, 555 So. 2d 439, 440 (Fla. 3d DCA 1990); Janis Development, 311 So. 2d at 375; Tamiami Trail Tours, 120 So. 2d at 172. Implicit in this requirement is that the revenue generated by the regulatory fee is actually expended on the regulation of the business entity. Williams v. Hawkins, 372 So. 2d 1010 (Fla. 4th DCA 1979); Janis Development, 311 So. 2d at 375; Tamiami Trail Tours, 120 So. 2d at 172; Bateman v. City of Winter Park, 37 So. 2d 362, 363 (Fla. 1948).

In City of Key West v. Marrone the Third District addressed whether a city ordinance that regulated mobile vendors constituted a regulatory fee or a tax. Marrone, 555 So. 2d at 440. The court held that the fees imposed by the ordinance were proper to defray the cost of regulation of mobile vendors, because the City has established an extensive regulatory scheme, created by the ordinance. Id. In addition to mandatory fees for licensing, processing and solid waste collection, the regulatory scheme restricted the business hours of mobile vendors, the location of mobile vendor carts and the transferability of mobile vendor licenses. Id. The ordinance required that owners possess liability insurance and personally accompany their carts. Id. In this respect, the Marrone court applied the use requirement and upheld the ordinance because the revenue generated from the ordinance was used to defray the cost associated with extensive regulation of mobile vendors.

In Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170 (Fla. 1960), this Court addressed whether a city ordinance that regulated truck freight zones within the city

constituted a regulatory fee or a tax. The court held that because the ordinance imposed a mandatory fee but did not actually regulate truck operators, the ordinance was a tax with the sole purpose to generate revenue for the city. Id. at 172-173. The Court reasoned that "where a license is required and a fee exacted solely for revenue purposes and the payment of such fee gives the right to carry on business without any further conditions, it is a tax. Id. citing Bateman v. City of Winter Park, 37 So. 2d 362 (Fla. 1948). The ordinance required truck operators to apply for a permit to use city freight zones at an annual cost of $10.00, but imposed no other requirements once the permit was issued. Tamiami Trail Tours, 120 So. 2d at 173. This Court applied the use requirement and invalidated the ordinance because it imposed a purported regulatory fee but did not actually regulate the truck operators who were required to pay the fee.

In the instant case there is nothing in the record to show that the revenue generated by Ordinance 97-12 will be used to defray the cost associated with the regulation of the electric utilities and it does not create a true regulatory scheme. Unlike the extensive regulatory scheme that was created by the ordinance in Marrone, there is no regulatory scheme created by Ordinance 97-12.

Aside from the requirement to pay the Privilege Fee, the only aspect of regulation within Ordinance 97-12 is the condition that the electric utilities secure a permit from the County prior to the construction, location or relocation of electric facilities within county rights-of-way. [Section 2.02(A)]. Other than this token condition relating to permits, the Ordinance is similar to the ordinance in Tamiami Trail Tours in that it exacts a fee for the right to carry on a business and imposes no other requirements. Consequently, the

Ordinance is merely a tax with the sole purpose to raise general revenue for the County.

More importantly none of the revenue generated by Ordinance 97-12 will be earmarked for the regulation of the electric utilities. Rather, the County has determined that the revenues will be used "to provide reduction of the county-wide millage rate and thus achieve a balance in tax equity between property owners and other citizens within the County". (Resolution 97-101). Contrary-wise, the County has also pledged the proceeds of the fee to pay for the eight capital improvement projects specified in Resolution 97-116, none of which relate to the use of County rights-of-way. So no matter which of the two uses of the revenue the County has claimed the revenue will be used for, neither constitutes the proper earmarking for a regulatory or user fee. As stated in Williams "[i]f the license fee was unconnected with the cost of regulating the utilities which would pay the fee, then it is a tax and illegal. Williams, 372 So. 2d at 1010.

2. The Amount Requirement

The amount requirement mandates that the fee imposed by a regulatory fee is commensurate with the cost of regulation. Janis Development, 311 So. 2d at 375; Tamiami Trail Tours, 120 So. 2d at 172. The analysis of this requirement assumes that the fee collected has in fact been earmarked for the appropriate regulation or user fee. The cost of regulation may involve a variety of governmental activities depending on the dynamics of a particular fee, but typical regulation includes licensing, supervision, inspection and enforcement. Id.; Bozeman v. Brooksville, 82 So. 2d 729 (Fla. 1955). Further, Section 166.221, Florida Statutes "Regulatory fees" specifically codifies this requirement by stating that "[a] municipality may levy reasonable business, professional,

and occupational regulatory fees, commensurate with the cost of the regulatory activity". Section 166.221, Florida Statutes (1993).

In Janis Development, the Fourth District addressed whether a county land use fee constituted a fee or a tax. (311 So. 2d at 374) The court recognized that "[t]he only purpose for which a city might impose a fee is for offsetting the necessary expense of regulation" and then considered the amount of revenue that would be generated by the ordinance. Id. at 375. It was undisputed that the expected revenue from the ordinance was approximately $6,000,000 in its first year, and the court concluded that it was "impossible that such revenue could approximate any cost of regulation." Id. The court concluded that the revenue generated by the ordinance was not commensurate with the cost of regulation, determined that the fee was actually a tax and consequently its validity must be evaluated under the county's authority to tax. Id.

The Privilege Fee imposed by the Ordinance is equal to three percent (3%) of the gross revenues received by each electric utility from customers within Alachua County. [Section 2.05(A)(1)] The sole "regulation" in Ordinance 97-12, aside from payment of the Privilege Fee, is that permits be secured prior to construction, location or relocation of electric facilities. The record shows that Alachua County's cost in providing this "regulation" bears no relationship to three percent (3%) of the gross revenues from the electric customers within the County. As in Janis Development, it is similarly impossible that the revenue generated from Ordinance 97-12 could approximate the cost of this purported regulation. Thus Ordinance 97-12 fails to satisfy the amount requirement because the Privilege Fee bears no relationship to the cost of regulation. The failure of the

Privilege Fee to satisfy the amount requirement alone is sufficient to invalidate Ordinance 97-12 as a regulatory fee.

B. ALACHUA COUNTY ORDINANCE NO. 97-12 IMPOSES AN IMPERMISSIBLE FEE FOR SERVICES RENDERED OR FAIR RENTAL RETURN.

In contrast to a regulatory fee that is designed to regulate a business, occupation or trade, in order to protect the public health, safety and welfare, a fee for services rendered, also known as an impact or user fee, is designed to be a specific charge for the use of publicly owned or publicly provided facilities or services. Jacksonville Port Authority v. Alamo Rent-A-Car, Inc., 600 So. 2d 1159, 1162 (Fla. 1st DCA 1992) citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-622, 101 S.Ct. 2946, 2955, 69 L.Ed.2d 884, 896-897 (1981).

In the instant case, the Privilege Fee imposed by Ordinance 97-12 must also be analyzed as a fee for services rendered based on its own provisions. Section 1.01(B) states that the Privilege Fee is for the "fair rental return on the privileged use of public property." Section 1.02(E) states that "All citizens of . . . the County, through the past allocation of County revenues, have a economic investment in the acquisition, construction and maintenance of the County Rights-of-Way". Id. This provision plainly indicates that the Privilege Fee is intended to be a user fee, based on the costs incurred by Alachua County to acquire, construct or maintain its rights-of-way. Hence, Ordinance 97-12 must be analyzed as a fee for services rendered.

Florida courts have also evaluated user fees with the use and amount requirements. Not only must Ordinance 97-12 satisfy both the use and amount requirements to be a valid

fee for specific services rendered or a fair rental return, it must also be a true user fee.

1. Ordinance 97-12 is NOT a true User Fee Ordinance

Before considering the use and amount requirements, the first inquiry is whether the Ordinance satisfies the legal requirement as a true user fee enactment. The label that the County places on what it wishes to collect is not controlling. Its power to tax may not be expanded by calling what it is collecting a fee rather than a tax. Port Orange, at 3. In Port Orange the city sought to enact a transportation utility fee to be paid by owners and occupants of developed properties in the city. Undeveloped properties were not subject to the "fee". The proceeds of the fee were pledged to pay transportation utility bonds to finance the cost of constructing, maintaining, and improving city transportation facilities. (Id., at 2-3). In reversing the lower court, which upheld the fee as a valid user fee, this Court held that what the city designated as a transportation utility fee was a tax which must be authorized by general law. Id., 3. The court's summary of a valid user fee is instructive:

> "User fees are charges based upon the proprietary right of the governing body permitting the use of the instrumentality involved. Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society, . . . and they are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and therefore avoiding the charge. . . . The City's transportation utility fee falls within our definition of a tax, not our definition of a user fee. . . . A valid user fee [involves] a voluntary choice to connect into an existing instrumentality of the municipality. The Port Orange fee, unlike Dunedin's impact fee, is a mandatory charge imposed upon those whose only choice is owning developed property within the boundaries of the municipality. . . . What the City's transportation utility fee does is to convert the roads and the municipality into a toll road

system. . . ". Id., at 3-4

The utilities and their customers have no real choice in this case. Either they stop using electricity, or remove their existing facilities from county property. Neither option is viable, and the second option is practically impossible.

2. The Use Requirement/Services Rendered/Fair Rental

The use requirement mandates that the revenue generated by a fee for services rendered must be used to defray the public costs necessary to provide the service. See Alamo, 600 So. 2d at 1162; Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 144 (Fla 4th DCA 1983); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. 4th DCA 1983); Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So. 2d 314, 317-318 (Fla. 1976). The use requirement is also known as the "earmarking" requirement, such that the ordinance must specifically provide how and when the revenue collected will be expended to fulfill its intended purpose. Dunedin, 329 So. 2d at 321; Janis Development, 311 So. 2d at 375.

In Jacksonville Port Authority v. Alamo Rent-A-Car, Inc. the First District addressed whether a resolution enacted by the Jacksonville Port Authority ("JPA") that imposed a six percent (6%) gross receipts fee against an off-airport car rental company for access to airport facilities constituted a fee for services rendered or a tax. Alamo, 600 So. 2d at 1160. The court held that fee imposed by the ordinance was a permissible fee for services rendered and not a tax. Id. at 1162-1164. The basis of the holding was that the car rental company received a special benefit from the government owned airport because it relied

exclusively on the airport to generate customers. Id. at 1162. Thus, the fee was permissible because it was "tied exclusively to Alamo's use of the airport facilities to conduct its business." Id. at 1162.

In Alamo it was stipulated that the revenue generated from the resolution was earmarked for the support of three airports located in Jacksonville, although the car rental company only used public roads at one of those airports. Id. at 1161. The First District cited several federal cases which held that the fees were not restricted to the support of the public facilities that were used by the car rental company, but may apply to general airport maintenance and operations. Id. at 1163 citing Alamo Rent-A-Car, Inc. v. Board of Supervisors of Orange County, 221 Cal.Rptr 19, 25 (1990). This is analogous to the earmarking requirement that Florida courts have used to invalidate fees for services rendered. Similarly, the Supreme Court in Dunedin and the Fourth District in Janis Development each held that a municipal sewer impact fee and a county land use fee, respectively, were both impermissible taxes because each ordinance failed to specifically provide how and when the revenue generated from the them would be expended to fulfill their stated purposes. Dunedin, 329 So. 2d at 321; Janis Development, 311 So. 2d at 375.

In the instant case, the revenue generated by Ordinance 97-12 is not earmarked for the acquisition, construction, maintenance or otherwise of Alachua County rights-of-way. Consequently, Ordinance 97-12 is not a valid fee for services rendered because the Privilege Fee fails to satisfy the earmarked use requirement.

3. The Amount Requirement/Services Rendered/Fair Rental.

The amount requirement mandates that the fee imposed for services rendered be commensurate with the public costs made necessary by the user. Home Builders, 446 So. 2d at 144; Hollywood, 431 So. 2d at 611; Dunedin, 329 So. 2d at 317-318, 320-321; Janis Development, 311 So. 2d at 375. The courts have not required that the fee imposed equal the exact pro rata share of the individual user, although they have required that there be a rational nexus or a reasonable connection between the funds collected and the benefits that accrue to the user. Hollywood, 431 So. 2d at 611-612.

In Hollywood, the Fourth District addressed a road impact fee ordinance that was imposed by Palm Beach County upon the commencement of any new land development activity that generated more traffic. Id. at 142. The amount of the fee imposed was based on a complex formula that considered a number of variables including the costs of road construction and the number of motor vehicle trips generated by different types of land use. Id. The court held that the road impact fee ordinance satisfied the amount requirement and was a valid fee. Id. at 145.

Although the fee in Hollywood was based on a complex formula, the courts have not required this degree of accuracy. In Alamo, the six percent (6%) fee imposed against the off-airport rental car companies was calculated based on the ten percent (10%) fee that was charged against the on-airport rental car companies. Alamo, 600 So. 2d at 1161. The JPA stipulated that the on-airport companies enjoyed a 2%-3% competitive advantage over the off-airport companies by way of "walk-up" customers. Id. As such, the rationale for the four percent (4%) differential was to narrow the competitive gap between on and off airport companies. Id. The court held that the six percent (6%) fee was just and reasonable and

consistent with the public interest. Id. at 1166.

In the instant case, unlike the fees imposed in Hollywood and Alamo, the amount of the Privilege Fee imposed by Ordinance 97-12 was not based on any formula or other perceivable methods, and as such, there is no rational nexus or reasonable connection between the funds that Alachua County seeks to collect, the service that would be provided to the electric utilities, or a fair rental value for the use of County property. Only if the electric utilities had no electric facilities on Alachua County rights-of-way would they not be required to pay the Privilege Fee. But if a utility has one pole on County right-of-way, it will be charged the same fee as it would if it had 1,000 or more poles on the right-of-way. The fee charged, therefore, is imposed with no regard to the actual use of the right-of-way, and hence can not under any theory constitute a fair rental return.

Alachua County does not even know the extent of electric facilities on its rights-of-way, although its position in this case would suggest it need only find one pole or wire to justify the fee. It does not know, nor has it evaluated what a fair rental return would be.

The privilege fee fails because it does not meet the requirements of Alamo, Dunedin and Janis, that the fee for services rendered be earmarked to the service or use provided or allowed. It also fails because it is not based on any specific or clear identifiable formula related to the use, other than a formula that says if you have one pole or more, you pay the entire fee.

III. ALACHUA COUNTY ORDINANCE NO. 97-12 IMPOSES AN ILLEGAL TAX

If the Privilege Fee imposed by Ordinance 97-12 is not a valid regulatory fee or a fair rental (fee for services rendered), and if the Ordinance is not a valid franchise fee, then

the last question is whether it is a valid tax. The validity of a tax must be evaluated under the constitutional and statutory provisions that relate to the taxing authority of a county. There is no statute that authorizes Alachua County to levy a privilege tax (essentially a gross receipts tax) and without such authority its attempt to impose such a tax is invalid and illegal.

Alachua County has the power of self-government as provided by general or special law and may enact ordinances not inconsistent with general or special law. Article VIII, Section 1(g), Florida Constitution. No tax may be levied in the State of Florida except according to law, and all forms of taxation, except ad valorem taxes, are preempted to the state. Article VII, Section 1(a), Florida Constitution. Counties may be authorized by general law to levy other taxes. Article VII, Section 9(a), Florida Constitution. The Florida Legislature has codified the powers of counties by statute. See Section 125.01, Florida Statutes, et seq. Pursuant to Section 125.01(1)(r), Florida Statutes, the Legislature restated the constitutional limitation on a county's authority to tax as that authority when provided by general law.

Statutes authorizing local governments to tax are to be strictly construed. City of Tampa v. Birdsong Motors, 261 So. 2d 1, 3 (Fla. 1972) Any doubts about a power the government is attempting to exercise must be construed against the government and in favor of the general public. Id. In Birdsong, the city enacted an ordinance that imposed a gross sales tax on businesses operating in Tampa. Id. at 2-3. The city asserted that it had authority to levy the tax pursuant to former Section 167.43, Florida Statutes which addressed municipal powers to raise revenue through taxes, assessments and licenses.

Id. at 3-4 citing Section 167.43, Florida Statutes (1971). As a result, automobile dealers in the city filed suit to enjoin enforcement of the tax by asserting that the ordinance imposed an illegal tax. Id. at 2.

In Birdsong, this Court held that under the Constitution of the State of Florida a municipality's power to levy a tax, other than an ad valorem tax, must be authorized by general law. Id. at 3; Belcher Oil Company v. Dade County, 271 So. 2d 118, 122 (Fla. 1972) The Birdsong court continued, "[a]ny tax not authorized by general law must necessarily fall by virtue of the preemption clause". 261 So. 2d at 3. The Supreme Court held that the general language of Section 167.43 did not authorize the city to levy the tax in question and found no other general law that granted the city the authority to levy the tax. Id. at 4. Consequently, the tax was illegal and it was invalidated. Id.

Alachua County relies on City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976) and its progeny for the proposition that its Privilege Fee is not an impermissible tax, but rather consideration paid by the utilities for the grant of a franchise. See Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 103 (Fla. 1st DCA 1994); City of Hialeah Gardens v. Dade County, 348 So. 2d 1174, 1180 (Fla. 3d DCA 1977); Plant City, 337 So. 2d at 973. However, the comfort that Alachua County finds in Plant City and its progeny is fleeting because the court's holding was limited to the conclusion that the franchise fees assessed by the municipalities were not taxes, rather than the sweeping conclusion that all franchise fees are not taxes. Plant City, 337 So. 2d at 973.

In the instant case, and as discussed above, the elements of a true government franchise include negotiation and the relinquishment of specific property rights between a

political subdivision and a utility. In Plant City, this Court clearly identified the presence of these elements in the municipalities' franchises. Id. at 968. In the instant case, Ordinance 97-12 by its own terms imposes the Privilege Fee unilaterally and the County admits the electric utilities will not acquire any vested rights. Thus, in Plant City, prior to holding that the franchise fees were not taxes, the Court concluded that they were true franchises as evidenced by negotiation and the relinquishment of specific property rights. Any claim by Alachua County that its Privilege Fee, like the franchise fee in Plant City, is not a tax is unwarranted because Plant City is factually distinguishable.

There is no statute that authorizes Alachua County to levy a gross receipts tax and without such authority any attempt by it to impose such a tax is invalid. Article VII, Section 1(a), Florida Constitution. As this Court stated in Birdsong, any doubt about a county's authority to enact a tax must be resolved against the county and in favor of the general public. Birdsong, 261 So. 2d at 3.

Although not a reported decision, a similar case was decided in Calhoun County in Case No. 91-235. (A copy of the court's order, the ordinance, and FECA's brief is attached hereto as an appendix. This appendix is also attached to FECA's Trial Memorandum which is filed in the record of this case.) In that case Calhoun County sought to impose a "franchise fee" by Ordinance No. 91-02, of ten percent (10%) of the gross sales of certain utilities including Florida Public Utilities Company, the City of Blountstown, West Florida Electric Cooperative, Inc., Gulf Coast Electric Cooperative, Inc., and St. Joseph Telephone and Telegraph Company. Calhoun County stated **in the Ordinance itself** that all funds collected would be used to defray the cost and expense of providing emergency medical

services. (Ordinance 91-02, page 4, Section 6, Appendix). The court found that the franchise fee was really a tax, and invalidated the ordinance. (Appendix, Order dated May 29, 1992).

In the instant case, Alachua County has stated (although not in 97-12 itself) that it will use the proceeds of the privilege fee to reduce the county-wide millage rate and achieve tax equity, or to pay for capital improvement projects unrelated to its road system. The court in Calhoun stated:

> "All parties agree that there is statutory and case law authority to allow a county to impose a franchise fee. The problem here is whether the fee imposed is a franchise fee or a tax. In reviewing the memoranda and court file, the Court can find no relationship between the fee imposed and the cost incurred by the County as a consequence of granting the franchise. Indeed, it appears that the sole purpose of the Ordinance is to raise revenue. Without a specific statutory grant, the County lacks authority to impose a tax." (Appendix, Order dated May 29, 1992)

And as FECA stated in its briefs on the subject, when something looks like a duck, quacks, and walks like a duck, it very likely is a duck. (Appendix, Reply Brief of FECA, page 5)

IV. ALACHUA COUNTY ORDINANCE NO. 97-12 VIOLATES THE ELECTRIC UTILITIES' RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

If the Privilege Fee imposed by Ordinance 97-12 is an illegal tax, then Ordinance 97-12 constitutes a violation of the electric utilities' rights to due process under the United States and Florida Constitutions. The Fourteenth Amendment of the Constitution of the United States provides that no state shall "deprive any person of life, liberty or property, without due process of law". U.S. Constitution amended XIV, Section 1, Article I, Section

9 of the Constitution of the State of Florida provides that "[n]o person shall be deprived of life, liberty or property without due process of law". Article I, Section 9.

The Supreme Court of the United States has held that "the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, in violation of the 14th Amendment." Frick v. Pennsylvania, 268 U.S. 473, 488-489, 69 L.Ed. 1058, 1062 (1924); Bickell v. Lee, 5 F.Supp 720 (D.C.Fla. 1934). Further, the First District has held that the due process clauses of the State and Federal Constitutions are intended to forbid and to prevent arbitrary and oppressive governmental activities which adversely affect life, liberty, and property rights of any person. Department of Business Regulation v. Smith, 471 So. 2d 138, 142 (Fla. 1st DCA 1984) quoting Heller v. Abess, 184 So. 2d 122, 123 (Fla. 1938).

CONCLUSION

The Alachua County Ordinance 97-12, is invalid under any acceptable legal theory or premise, because it,

1) is not a franchise,

2) is not a valid regulatory fee,

3) is not a valid fee for services provided or a fair rental return, and

4) is not a valid tax.

The Ordinance is not a franchise because it was not negotiated, and was unilaterally imposed without the consent of any utility. It is not a valid regulatory fee, or fee for services because the Ordinance fails to establish a regulatory scheme, or any nexus between the three percent (3%) gross receipts charge, and any cost, service, or rental value. It is not a valid tax because the County does not possess the authority to impose a gross receipts tax or an additional utility tax. As such, the Ordinance constitutes a taking of property without due process or compensation, in violation of the Florida and United States Constitutions. FECA respectfully requests that this Court uphold the trial court's determination that the Ordinance is invalid for the reasons stated herein.

Respectfully submitted,

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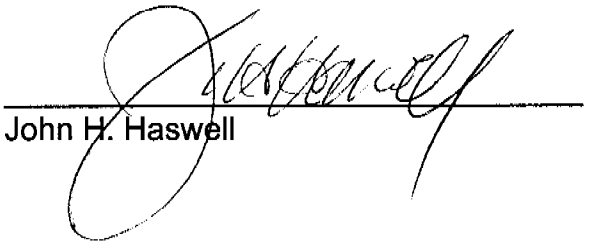
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 31st day of August, 1998, to all parties on the attached service list.



John H. Haswell

APPENDIX TO ANSWER BRIEF OF
FLORIDA ELECTRIC COOPERATIVES ASSOCIATION, INC.

1. Order dated May 29, 1992 by Judge Russell A. Cole, Jr., in Case No. 91-235-CA, styled "Calhoun County, a political subdivision of the State of Florida, Plaintiff, vs. Florida Public Utilities Company; West Florida Electric Cooperative Association, Inc.; Gulf Coast Electric Cooperative, Inc.; and St. Joseph Telephone and Telegraph Company, Defendants."

2. Brief of FECA as Amicus Curiae filed April 29, 1992.

3. Reply Brief of FECA as Amicus Curiae filed May 21, 1992.

4. Ordinance No. 91-02, Calhoun County.

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