IN THE SUPREME COURT
STATE OF FLORIDA

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

Appellant,

vs.

STATE OF FLORIDA, and TAXPAYERS, PROPERTY OWNERS and CITIZENS OF ALACHUA COUNTY, FLORIDA, et al.,

Appellees.

Case No. 93,344

On Appeal From The Eighth Judicial Circuit
In And For Alachua County, Florida

APPELLEE FLORIDA POWER CORPORATION'S ANSWER BRIEF

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PRELIMINARY STATEMENT

References to the attached Appendix will be indicated as "App. ___". The order that is the subject of this appeal is referred to as "Order" and included at App. 1, and the taxing ordinance at issue ("the Ordinance") is included at App. 2. References to Appellant Alachua County's Appendix will be indicated as "County's App. ___". Emphasis is added, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

This is a direct appeal from a final order in which the trial court denied validation of bonds based on the unconstitutionality of the underlying funding source.[1/] (Order, App. 1). See State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994) (subsumed within bond validation is the legality of the financing by which the bond is secured); Art. V, §3(b)(2), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(B)(i); §75.08, Fla. Stat. (1997). As the funding source for the bonds, Alachua County ("the County") attempted to impose an electric utility privilege fee through Ordinance No. 92-12, adopted on August 12, 1997 ("the Ordinance"). (App. 2).

Under this Ordinance, the County imposed a monthly fee of three percent (3%) of an electric utility's gross revenues received from Alachua County customers if the utility used a County right-of-way in any manner.[2/] The Ordinance reflects on its face that the fee is not based on the amount of a utility's use of County rights-of-way; instead, the full fee must be paid even if a utility serving County customers has only a single pole located in a County right-of-way. As the trial court noted, Section 2.05(D) of the Ordinance directly provides that "[t]he Electric Utility Privilege

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[1/] Florida Power Corporation ("FPC") was an intervenor in the trial court proceedings.

[2/] If the utility has a franchise agreement with a municipality within Alachua County, the fee is not charged for municipal customers, so long as the utility is not municipally owned. The effective date of the Ordinance was postponed until October 1, 1998, by County Ordinance No. 97-13. (App. 3).

Fee is not based on the extent and scope of the Electric Facilities that are located in County Rights-Of-Way." (App. 2 at 13).

Furthermore, the utility fee is imposed on both the electric utility and its customers who will actually pay the fee. Indeed, the Ordinance specifically provides that "[t]he Electric Utility Privilege Fee ... shall additionally be a debt of the Electric Utility customer to the Electric Utility." (Ordinance §2.05(E), App. 2 at 13). In addition, Section 2.06 of the Ordinance is entitled "Collection of Electric Utility Privilege Fees From Customers", and declares that "[t]he amount of the Electric Utility Privilege Fee directly billed and separately stated for each electric utility customer shall be uniform...." (Ordinance §2.06(A), App. 2 at 14). This Section expressly recognizes that utility customers will be directly billed for the utility fee, as does the Ordinance's general title summary: "Providing A Finding That The Electric Utility Privilege Fee Will Be Passed Through To The Electric Utility's Customers."

Section 2.06 of the Ordinance also declares that the utility fee is a "franchise fee" and recognizes that Fla. Public Serv. Comm'n Rule 25-6.100(7), Fla. Admin. Code,[3/] prohibits inclusion

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[3/] Fla. Public Serv. Comm'n Rule 25-6.100(7), Fla. Admin. Code (1997), provides:

> (7) Franchise Fees.
> (a) When a municipality charges a utility any franchise fee, the utility may collect that fee only from its customers receiving service within that municipality. When a county charges a utility any franchise fee, the utility may collect that fee only from its customers (continued...)

of a franchise fee in the utility's rates. This effectively results in the direct charging to particular utility customers of any franchise fees imposed by their local government. In fact, the Ordinance provides that the utility is permitted to retain a 1% expenses reimbursement for "expenses incurred in collecting and transmitting the Electric Utility Privilege Fee to the County...." (Ordinance §2.06(B), App. 2 at 14). As such, the utility is actually acting as a collection agent for the County with respect to the fee. Thus, as the trial court found, the effect of the County's Ordinance is to impose the actual payment of its new utility fee directly on electric utility customers in Alachua County. See Order, App. 1 at 3.

The record evidence is undisputed that the new utility fee will have a significant impact on utility customers in Alachua County, even though they will receive no additional electric services. For example, FPC estimates that its 4,400 customers will

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[3/](...continued)
receiving service within that county.

(b) A utility may not incorporate any franchise fee into its other rates for service.

(c) For the purposes of this subsection, the term "utility" shall mean any electric utility, rural electric cooperative, or municipal electric utility.

(d) This subsection shall not be construed as granting a municipality or county the authority to charge a franchise fee. This subsection only specifies the method of collection of a franchise fee, if a municipality or county, having authority to do so, charges a franchise fee.

pay an annual increase of approximately $730,000, and customers of all utilities in the County will pay an annual increase of approximately $4.5 million. See App. 4 (Affidavit to FPC's Motion For Summary Judgment). However, relocating FPC's transmission/ distribution facilities outside of County rights-of-way to avoid the fee is not realistic from either an economic or practical viewpoint. Id. It is physically impractical, if not impossible, for FPC to reach all of its customers without using a County right-of-way in some manner, since over 800 miles of County roads cross through Alachua County. Id. Therefore, as the trial court found, FPC's customers will unavoidably incur the entire utility fee because there is no reasonable method of relocating electric facilities outside of County rights-of-way. See App. 1 at 5.

The County's reason for adopting the Ordinance was explicit: to provide a means of raising general revenue for the County. To accomplish the County's purpose of replacing part of its general ad valorem tax revenue with the new utility fee, the County adopted Resolution 97-80 (App. 5), which expressly resolved to reduce ad valorem property taxes with the proceeds of the utility fee. In this Resolution, the County reiterated its rationale for the utility fee as a means to shift the tax burden from property owners to another revenue source:

> **Section 1. Findings.** The Board hereby finds and declares:
>
> (a) As a consequence of the large amount of governmental property located within the County that is exempt from ad valorem taxation under existing constitutional statutory provisions, the taxable property owner within the County bears disproportional ad valorem burden

> when compared to urban counties of similar size. Such disproportional ad valorem burden is an impediment to economic development and is an issue of equity in the funding of essential County-wide governmental services.

The County also declared its intent to reduce ad valorem taxes in Resolution 97-101 (App. 6), which reflected the new effective date of October 1, 1998, for the utility fee:

> **Section 2. Use of Privilege/Franchise Fee Proceeds.** It is the intent of the Board of County Commissioners to apply electric utility privilege and franchise fee proceeds received after October 1, 1998, 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.

As further set forth in the ordinance, the bonds which the utility fee will support are designated to fund "capital improvements" including expansion of a corrections facility, renovation of the sheriff's office, construction of a fire administration building, and expansion of the County administration building. The County specifically amended the Bond Resolution to list these capital projects. See Alachua County Resolution No. 97-116 (App. 7). Of course, the County's general revenues, generated from ad valorem property taxes, are the customary source of funding for capital improvements such as these.

Thus, as the trial court accurately observed, "[T]he privilege fee was imposed by Alachua County for the purpose of raising general revenue to reduce the county-wide ad valorem tax millage rate." (App. 1 at 8). The trial court further found the "fee" was in reality a tax which could not be constitutionally imposed by the County.

SUMMARY OF ARGUMENT

The Florida Constitution has carefully circumscribed the taxing powers conferred on local governments, preempting general taxing authority to the State. Alachua County's new utility fee is an involuntary exaction from all electric utility customers, levied strictly for the purpose of raising general revenues. It is a "fee" that cannot be avoided by electric utility customers, and it likewise cannot practically be avoided by electric utilities. It is a "fee" that is not used to maintain County rights-of-way and has no relationship whatsoever to the relatively nominal cost of doing so. The County's efforts to disguise its utility tax as a supposed "fee" do not meet its heavy burden of proving its Ordinance does not impose a tax, and this exaction must be recognized for what it plainly is--an unauthorized, unconstitutional tax.

Moreover, under Florida law, the County possesses only regulatory authority--not proprietary authority to exact tolls--over public rights-of-way with respect to electric utilities' use to provide electric power to the County's citizens. As this Court has previously recognized, there is a statewide interest in assuring efficient electric services that cannot be thwarted by individualized county initiatives. The County's effort to charge for use of public rights-of-way to serve the public purpose of supplying electric service to the County's citizens is unconstitutionally inconsistent with general Florida law.

ARGUMENT

POINT I

THE UTILITY FEE VIOLATES ARTICLE VII, FLORIDA CONSTITUTION, BECAUSE IT IS AN UNAUTHORIZED TAX.

The Florida Constitution expressly limits the power of counties to impose taxes. Article VII, Section 1(a) of the Florida Constitution preempts to the State all general taxing power, other than ad valorem, providing that:

> All other forms of taxation [except ad valorem] shall be preempted to the state except as provided by general law.

Consistent with State preemption of taxing powers other than ad valorem, Article VII, Section 9(a) of the Florida Constitution requires general law to authorize county taxation:

> Counties...shall...be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes....

As the County concedes, no general law directly authorizes Alachua County's effort to impose a tax on electric utilities and their customers for use of County rights-of-way. Thus, as the County also concedes, if its new "utility fee" is a "tax," it is invalid.

The seminal decision which controls the determination of whether the County's new "utility fee" is in reality an impermissible tax is State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994). In that case, this Court considered whether a local ordinance imposing a "transportation utility fee" was invalid as being an unauthorized, unconstitutional tax in violation of Article VII of the Florida Constitution. Like this case, City of Port

Orange involved a bond validation proceeding, and the bonds were likewise being funded by the "utility fee." The "utility fee" related to use of the city roads, and was charged to the city property owners/occupants for funding bonds for improving transportation facilities.

This Court held that local government taxation must be expressly authorized by the Florida Constitution or by grant of the Legislature. Id. at 3. Then, refusing to accept the "label" of "utility fee," this Court found that the utility fee fit the traditional definition of a tax:

> In City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992), this court noted that a tax is an enforced burden imposed by sovereign right for the support of the government, the administration of law, and the exercise of various functions the sovereign is called on to perform. Klemm v. Davenport, 100 Fla. 627, 631, 129 So. 904, 907 (Fla. 1930). Funding for the maintenance and improvement of an existing municipal road system, even when limited to capital projects as the circuit court did here, is revenue for exercise of a sovereign function contemplated within this definition of a tax.

Id. The Court carefully distinguished a true "user fee:"

> 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 thereby avoiding the charge.

Id.

Based on that analytical framework, this Court concluded that the "utility fee" was actually an unauthorized tax, and hence the bonds funded by the "utility fee" were invalid. The Court noted that, while efforts by local governments to raise additional revenues are a natural response to growing economic pressures, Florida's Constitution expressly limits local governments' taxing authority. This Court warned that these limitations should not be circumvented by the "creativity" of local governments' schemes to generate new sources of revenue. Id. at 4.

Straightforward application of the principles in City of Port Orange leads to only one possible conclusion here: like the "utility fee" there, the Alachua County "utility fee" is an unauthorized tax expressly designed to raise general revenues for replacing part of ad valorem tax revenues. The uses of the utility fee revenue are for the support of a variety of County government functions, including facilities for police, fire administration, and the courthouse. Revenue for "capital projects" is considered revenue for support of sovereign functions. See City of Port Orange, 650 So. 2d at 3. Manifestly, use of the utility fee to replace ad valorem tax revenue is nothing more than a means of raising general revenues for County government operations. All of these factors confirm the correctness of the trial court's conclusion that the utility fee is "a mandatory, unavoidable charge imposed by the county in its sovereign capacity for the purpose of providing general revenue for the use of Alachua County." (App. 1 at 9).

Significantly, this Court placed the burden of proof on local governments when it ruled in City of Port Orange that any "'[d]oubt as to the powers sought to be exercised must be resolved against the [local government] and in favor of the general public.'" 650 So.2d at 3, quoting City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1, 3 (Fla. 1972). Thus, Alachua County was required to prove that its "utility fee" is not a tax, and any doubts in this regard were required to be resolved in favor of finding that the County's "utility fee" is a disguised tax on the citizens. The County failed to carry this heavy burden of proof. To the contrary, it could hardly be clearer that this supposed "utility fee" is in actual intent and effect a "tax," however creatively the County seeks to label it in an effort to avoid the Constitution's limits on its taxing power.

In its recent decision in Alachua County v. Adams, 702 So. 2d 1253 (Fla. 1997), this Court reaffirmed the vitality and importance of Article VII, Section 1(a) and Section 9(a), reiterating that these limitations on local governments' taxing authority cannot be circumvented by Alachua County's "semantics." This Court outlined the purpose of these constitutional limitations:

> The overriding purpose of this article is to make a constitutional division of tax revenues between those available for state uses and those reserved for local government....This provision is designed to prevent the legislature from undermining non-ad valorem tax resources needed to support state government....

Id. at 1254. This Court refused to allow the Legislature's attempt through a special law to circumvent the requirement of a general law authorizing counties to impose a tax.

Given that this Court would not permit the Legislature to undermine the purpose of these constitutional protections, certainly a local government cannot be permitted to accomplish this same end through a local ordinance, simply by calling a tax a "fee." This Court's controlling precedents leave no doubt that the Florida Constitution does not permit such an end-run around its express proscriptions on the ability of counties to impose taxes.

A. The Trial Court Correctly Found That The Utility Fee Is Not A "User Fee" or "Privilege Fee."

In a self-serving effort to avoid the proscription on its taxing authority, the County labeled its "utility fee" a number of different things. First, the County characterized it as a "user fee" or "privilege fee," based on the supposed "privilege" for utilities' use of County rights-of-way to bring electric service to consumers. However, this ignores the limitation that this Court placed on "user fees" in City of Port Orange, which requires that:

> [T]he party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge.

Id. at 3. No such option exists here.

To begin with, the County Ordinance expressly incorporates the provisions of Rule 25-6.100(7), Fla. Admin. Code. As such, this fee will be billed directly to the utility customer of the local government imposing it. Consequently, Alachua County electric

utility customers will be the "party paying the fee", not the utility company.

Thus, under City of Port Orange, the determinative question is whether those electric utility customers have a realistic option of avoiding the fee by not using the service--electricity. They plainly do not. Indeed, it would be ludicrous to suggest that a utility customer in today's world could elect to live without electric power in order to avoid the fee. To the contrary, as the trial court correctly found, the utility fee cannot reasonably be avoided by the citizens of Alachua County. As a matter of law, then, the fee is not a "user fee."

Likewise, FPC itself (which is not the "party paying the fee") has no alternative but to continue using its existing transmission/ distribution facilities within County rights-of-way. Relocation would be economically unrealistic, as well as utterly wasteful. (App. 4). It would also be directly contrary to the long-standing policy of this State against uneconomic duplication of electric facilities. See Utilities Comm'n v. Florida Public Serv. Comm'n, 469 So. 2d 731, 732 (Fla. 1985) ("Territorial agreements by public utilities have been approved because they serve both the interests of the public and the utilities by minimizing unnecessary duplication of facilities and services."); Storey v. Mayo, 217 So. 2d 304, 306 (Fla. 1968) (discussing uneconomic and unsafe effects of duplication of electric utility distribution facilities), cert. denied, 395 U.S. 909 (1969); see also In re: Territorial Agreement, Fla.R.R. & Pub. Util. Comm'n, No. 6081 (July 5, 1960). (App. 15).

Even apart from that, there is no practical way for FPC to reach its customers without using at least one County right-of-way, which would result in imposition of the full utility fee. (App. 4).

Based upon this uncontradicted record evidence, the trial court correctly determined there is no reasonable way for utilities to relocate electric facilities outside of County rights-of-way. (App. 1 at 5). The County has conceded that there are no factual disputes in this case. See County's Initial Brief at 8 n. 6. As such, the County and its Amici must accept the factual findings made by the trial court, including its finding that electric utilities could not reasonably avoid the utility fee by removing their facilities from County rights-of-way. Thus, even if the utility were the "party paying the fee," it has no option of avoiding the fee. Under the teachings of City of Port Orange, the utility fee is therefore not a valid user fee.

The County also admitted that it would not provide any additional services under the utility fee ordinance. (County's Response to City's Req. For Admissions #11, App. 8). Under City of Port Orange, if there is no provision of a special service, there can be no valid user fee. Because utilities providing electric service to customers within Alachua County are already using County rights-of-way, there is no "special service" that these customers will now receive under the new utility fee ordinance. Hence, there is no legal basis for charging them an additional "user fee."

In a desperate effort to justify its "user fee" characterization, the County relies on Jacksonville Port Authority v. Alamo

Rent-A-Car, Inc., 600 So. 2d 1159 (Fla. 1st DCA), rev. denied, 613 So. 2d 1 (Fla. 1992). Its reliance on that decision is wholly misplaced. First, the First District's decision there was rendered before this Court's decision in City of Port Orange, which is now the controlling law of this State. Second, the fee in that case was materially different from the utility fee in this case.

The fee in Alamo Rent-A-Car was an airport fee charged to non-tenant car rental companies for access to airport roads and terminals. The First District held that the car rental company could avoid the fee by obtaining its customers from other sources. Id. at 1162. In addition, use of the fee was limited to defraying the costs of maintaining the airport system itself, not for general government purposes. Id. at 1164.

In contrast, Alachua County utility customers have no choice but to utilize electric service, and utility companies have no choice but to utilize their existing facilities located in County rights-of-way, built there based on full permission by the County. As a public utility, FPC cannot simply chose to stop serving its customers in Alachua County and seek customers elsewhere, as it has a statutory duty to provide electric service to those customers. See §366.03, Fla. Stat. (1997).

Moreover, the Alachua County "utility fee" will not be used solely to maintain County rights-of-ways on which electric utility facilities are located, but instead will be used for general capital expenditures and to replace general ad valorem taxes. This alone disposes of the County's argument that the utility fee is a

"user fee." That is clear from City of Daytona Beach Shores v. State, 483 So. 2d 405 (Fla. 1985), where this Court held that, in order to be a valid user fee for driving on the beach, the fee had to be used solely "for maintenance, operation and improvement" of the sovereign beach lands to which access was charged. Id. at 407, 408.

Contrary to the County's argument, then, the purpose for which a particular revenue is spent is an important indicia for determining whether the revenue is a tax or a user fee. In City of Port Orange, this Court defined a tax based on the purpose for which the governmental charge was spent, which was "for the support of the government, the administration of law, and the exercise of various functions the sovereign is call on to perform." Id. at 3. Although the County asserts that the purpose for which fee revenues are spent is not a factor in determining whether a governmental charge is a tax or a user fee, that argument is flatly contradicted by this Court's distinction between a tax and a user fee in City of Port Orange. See also City of Daytona Beach Shores v. State (user fee for driving on beach could only be spent for purpose of maintaining, operating, and improving beaches).

Finally, one of the central characteristics of a user fee is that the more a person uses a public facility, the more that person pays. For example, the more an individual uses a state park, the greater amount of fees he will pay. Conversely, the less a public facility is used, the less that will be paid. This was exactly the case with the user fee charged in Alamo Rent-A-Car: since that fee

was a percentage fee based entirely on revenues generated at the public facility, the more Alamo used the facility, the greater its revenue and the greater the fee.

In contrast, the Alachua County utility fee lacks this essential characteristic. A utility that has facilities covering hundreds of miles of County rights-of-way would pay exactly the same fee as another utility with only one pole in a County right-of-way, so long as their electric revenues were the same. On the other hand, if the second utility increased its electric revenues but used no more right-of-way in doing so, it would pay a higher fee, even though its use of County rights-of-way had not increased. As can be readily seen, the Alachua County utility fee lacks the requisite correlation between actual usage and the amount of the fee which is needed for a valid user fee.

However it is described by the County, this fee is not a "user fee." It does not have the legal characteristics of a "user fee" and calling it a "user fee" does not make it a "user fee." This Court has long made clear, in no uncertain terms, that local governments will not be allowed, through artful drafting, to do indirectly what they cannot do directly. Simply put, the constitutional limits on county taxation cannot be evaded by mere semantics, as the County attempts to do here.

B. The Trial Court Correctly Found That The Utility Fee Is Not the "Equivalent Of A Franchise Fee" or "Reasonable Rental" For Right-of-Way Use.

The County alternatively attempts to characterize the fee as the "equivalent of a franchise fee" or a "reasonable rental charge"

for the utility's use of County rights-of-way. But this self-serving characterization likewise cannot alter the utility fee's true nature as a tax.

A true franchise confers a special privilege which becomes a legally recognized property right of the utility. See, e.g., City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 223-24 (Fla. 5th DCA 1991). Unlike a true franchise agreement, the County's Ordinance on its face specifically refuses to grant any vested rights. Indeed, Section 4.03 is entitled, "No Vested Rights Granted", and it expressly provides:

> No Electric Utility shall acquire any vested rights hereunder which would limit in any manner the County's right to amend, modify, or revoke this Ordinance.

App. 2 at 19. Thus, the three percent (3%) rate could be raised at any time, without cause, a fact the County has admitted. (County's Response to City Req. For Admissions 21-23, App. 8).

Likewise, there is no set term for the length of the purported "franchise," but it is instead revocable utterly at the County's will. In contrast, FPC's franchise agreements are typically for a fixed period of thirty (30) years. (App. 9, TR 41, April 1, 1998; County's App. 9-13). Further, as the trial court recognized, the Ordinance unilaterally imposes a charge which was not negotiated. (App. 1 at 5). In sharp contrast, a true franchise agreement is "bargained for in exchange for specific property rights relinquished by the [local government]." City of Plant City v. Mayo, 337 So. 2d 966, 973 (Fla. 1976).

In sum, the County's Ordinance is not a grant of a franchise. To the contrary, it involuntarily exacts a charge and conveys no vested or enforceable rights in return--exactly like a tax.

Nor can this fee be justified by the County as "rent." There is no additional burden imposed on the right-of-way by utility lines which supports a charge of "rent." As the Fifth District recently held, power lines constructed along roads which do not interfere with travel do not "impos[e] an additional burden." See Nerbonne, N.V. v. Florida Power Corp., 692 So. 2d 928, 929 (Fla. 5th DCA 1997). Further, the utility fee is not connected to the amount of actual use of rights-of-way, as "rent" or a "user fee" would be. If a utility passes a power line across a single County right-of-way, the full amount of "rent" is due, exactly as if the utility used all of the County's rights-of-way.

The County's effort to characterize and justify its utility fee as "rent" is nothing more than a semantic artifice to avoid the constitutional limits on its taxing power. Under the County's view of the law, the City of Port Orange could have avoided the constitutional limits on its taxing power by merely characterizing its utility fee as "rent" for the use of the roads. But, as the user fee/tax test set forth in City of Port Orange makes clear, the constitutional requirements are not satisfied by simply looking to see what the fee is called -- they are only satisfied by looking to see whether its actual characteristics are those of an impermissible tax or a permissible user fee for special services or benefits.

In urging its "franchise fee/rent" characterization of its utility fee, the County relies on Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994). But, once again, that is a decision of the First District rendered before this Court's decision in City of Port Orange. And, once again, Santa Rosa County involved a "fee" with entirely different characteristics than the "fee" sought to be imposed by Alachua County.

When considering whether the "franchise fee" there was a tax, the First District relied directly on and quoted City of Plant City v. Mayo, 337 So. 2d 966, 973 (Fla. 1976), which specifically held that franchise fees were not "taxes" because they were "bargained for:"

> The cities would lack lawful authority to impose taxes of this type [under the Constitution] and, unlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities.

Id. at 973 (footnotes omitted). As in City of Plant City, the franchise agreements in Santa Rosa County were "bargained for" since, under the terms of those agreements the participating utilities could terminate the agreements, if all other utilities did not join in the agreements. Since all utilities did not agree to join, the ultimate holding of this case was that the franchise agreements terminated by their own terms, so that no franchise fees could be collected by Santa Rosa County. 635 So. 2d at 103.

Given these facts and the First District's direct reliance on this Court's precedent in City of Plant City, the First District

was plainly not dealing with a unilaterally imposed exaction to raise general revenues for a local government. Regardless of dicta in the First District's opinion, the question of State preemption of taxation under Article VII of the Florida Constitution was never actually reached by the First District because it was addressing only "bargained for" franchise agreements.

In contrast, there is no dispute that the Alachua County Ordinance unilaterally imposes a utility fee which was, in no manner, "bargained for" by any utility or its customers. Indeed, the County admits that the amount and conditions of the utility fee ordinance were not negotiated with any utility. (County's Response To Scharp's Req. For Admissions 2-3, App. 10). Consistent with that admission, the trial court specifically found that these fees were not bargained for, but were unilaterally imposed. (App. 1 at 5). Since there is no "bargained for" agreement here, Santa Rosa County simply has no application.

The County's additional reliance on the 1905 decision in City of Pensacola v. Southern Bell Telephone Co., 37 So. 820 (Fla. 1905), is equally misplaced. The controlling provision in Article VII, Section 1(a) preempting taxes to the State was first added over 60 years later in the 1968 revision to the Constitution. As noted in the Florida Statutes Annotated Commentary on that provision:

> The last sentence, establishing a general rule which preempts all forms of taxation other than ad valorem taxes on real estate and tangible personal property to the state except where otherwise by general law, was not covered in any previous Florida Constitution.

> It was included in the Revision Commission proposal however.

26 West's F.S.A. Const. Art. VII, §1 at 359 (1995). Thus, City of Pensacola has no bearing whatsoever on whether Alachua County's utility fee is an invalid tax under Article VII, Section 1(a), which was added to the Florida Constitution long after this 1905 decision.

Moreover, in City of Pensacola, this Court specifically found the city's power to charge a fee for the use of its roads, although called "rental," was based entirely on the city's statutory authority "to regulate. . . streets." Id. at 823. In this Court's words, the power to charge the fee was "derived [from] the power of the city to 'regulate' the use of the streets." Id.

In contrast, Alachua County concedes that its utility fee is designed to raise general revenues and is not a regulatory fee which could be justified under its power to regulate the rights-of-way. This concession is not surprising since the County's cost of regulating its rights-of-way may, at most, approach some $70,000 per year, hardly justifying the $4.5 million annual utility fee. (Service Cost Evaluation For Alachua County, App. 11). Of course, regulatory fees must solely offset the necessary expenses of regulation. See Broward County v. Janis Dev. Corp., 311 So. 2d 371, 375 (Fla. 4th DCA 1975) ($6 million fee, on its face, could not be regulatory but was a revenue-raising fee).

It bears noting that, in yet another attempt to disguise the nature of this tax, the County's Ordinance facially states that the utility fee is designed to cover the cost of regulating the

County's rights-of-way. After its enactment, however, the County conceded that the cost of regulating its rights-of-way cannot justify the utility fee. In fact, when FPC asked the County what it cost to regulate County rights-of-way, the County admitted it had no knowledge of the actual cost to regulate its rights-of-way. (County's Response to FPC Interrog. 3, App. 12). More importantly, the County ultimately admitted at the summary judgment hearing that its utility fee was "not a regulatory fee." (App. 9, TR 83, April 1, 1998). Thus, the County's $4.5 million annual utility fee cannot be upheld as a regulatory fee.

Finally, the County's reliance on City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893), does not advance its position at all. That case concerned the federal definition of "tax" for purposes of the Commerce Clause. That is completely irrelevant to the definition of "tax" which this Court adopted in City of Port Orange for purposes of Article VII of the Florida Constitution.[4/]

[4/] The County's reliance on a circuit court summary judgment order in Florida Power & Light Co. v. Baker County, Case No. 95-544CA (June 20, 1995), is misplaced. This order was appealed, and the parties ultimately dismissed the appeal, on reaching settlement, before any appellate review of the lower court's order was had. Significantly, another circuit court judge found in Florida Power & Light Co. v. City of Hawthorne, Case No. 85-863CA (July 15, 1986), aff'd w/o opinion, 509 So. 2d 933 (Fla. 1st DCA 1987), that a city ordinance unilaterally imposing franchise fees on an electric utility was not a user fee but rather an unauthorized, unconstitutional "tax," and that decision was affirmed by the First District. See App. 13. City of Hawthorne is, of course, completely consistent with this Court's controlling decision in City of Port Orange.

The central purposes of Article VII, Section 1(a) and 9(a) of the Florida Constitution are to ensure the Legislature's control over local taxes and statewide consistency when local taxes are authorized. If Alachua County can circumvent this important restriction by simply calling its utility tax something else, this fundamental constitutional protection will be rendered meaningless. See Alachua County v. Lewis, 554 So. 2d 1210, 1211 (Fla. 1st DCA 1989) (Alachua County, once again, adopts an Ordinance which improperly attempts "to indirectly do what [the County] is prohibited from doing directly.") But this constitutional requirement that the County obtain the Legislature's approval in a general law before imposing local taxes is vital to a statewide system of coherent taxation, and it cannot be so easily negated.

The trial court correctly rejected each of the County's characterizations of the utility fee as being inconsistent with the facts or with Florida law in general. The County wholly failed to carry its heavy burden of demonstrating that this fee was not a tax prohibited by the Florida Constitution. The judgment below holding the utility fee is an unconstitutional tax should be affirmed on this basis alone.

POINT II

THE ISSUE OF WHETHER THE UTILITY FEE IS EXCESSIVE WAS NOT DETERMINED BY THE TRIAL COURT AND IS IRRELEVANT TO DECIDING WHETHER THE UTILITY FEE IS ACTUALLY A TAX.

There was no contention below, and the circuit court did not rule, that the amount of the utility fee was unlawful as being excessive. Nevertheless, the County argues in Point II of its Initial Brief that the amount of the fee is not excessive, because its amount is consistent with several existing franchise agreements. Since this was not an issue presented below or ruled on by the trial court, it is not an issue on appeal. Morales v. Sperry Rand Corp., 601 So. 2d 538, 540 (Fla. 1992).

In any event, the issue of whether the amount of the utility fee is excessive is completely irrelevant to deciding whether the utility fee is actually a disguised tax. Even a "non-excessive" tax is prohibited under Article VII of the Florida Constitution. Thus, this Court should ignore the County's effort to distract the Court by raising this "non-issue," which cannot save the County's unconstitutional tax.

POINT III

THE UTILITY FEE ALSO VIOLATES ARTICLE VIII, SECTION 1(g), FLORIDA CONSTITUTION, BECAUSE IT IS INCONSISTENT WITH FLORIDA LAW LIMITING A COUNTY'S AUTHORITY OVER AN ELECTRIC UTILITY'S USE OF RIGHTS-OF-WAY.

As just demonstrated, the trial court correctly found the County's utility fee to be an impermissible tax in violation of Article VII of the Constitution. In addition to this constitutional infirmity, the utility fee also violates Article VIII, Section 1(g) of the Florida Constitution because it is inconsistent with Florida general law.[5/] Specifically, the fee upends the delicate statutory balance struck between electric utilities and local governments. Indeed, it impermissibly expands a county's authority over an electric utility's use of county rights-of-way.

Public rights-of-way exist for the benefit of the entire public, and are effectively held in trust by local governments for the benefit of all citizens. See Jarrell v. Orlando Transit Co., 167 So. 664, 666 (Fla. 1936). Although a "strictly private business" has no inherent right to use public rights-of-way, see id., Florida case law and statutes have developed a different rule for public electric utilities. Public utilities, and particularly

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[5/] Because the trial court found that the utility fee was an unconstitutional tax, it did not reach this alternative constitutional argument which FPC raised in its Motion For Summary Judgment. (App. 14). It is fundamental that a trial court's judgment must be affirmed if it is supported on any ground. See In re Estate of Yohn, 238 So. 2d 290, 295 (Fla. 1970) (trial court's reasons for ruling are not controlling, and reviewing court will affirm if result is correct as supported by some other reason or basis).

electric utilities, serve the general public welfare by supplying electric services at state-controlled prices. Electric utilities have a statutory duty to efficiently supply power to the public. See § 366.03, Fla. Stat. (1997).

Traditionally, the use of public rights-of-way by electric utilities has served the public interest by avoiding unnecessary condemnation of private property and assuring easier access for electric utilities to maintain facilities located in public rights-of-way. Indeed, this Court has long recognized the benefit in avoiding waste in the provision of electric service to Floridians. See, e.g., Utilities Comm'n v. Florida Public Serv. Comm'n, 469 So. 2d 731, 732 (Fla. 1985) (affirming the benefits of "minimizing unnecessary duplication of facilities and services"); Storey v. Mayo, 217 So. 2d 304, 306 (Fla. 1968) (same).

The Alachua County Ordinance flies in the face of this long-standing State policy. The Ordinance discourages the use of public rights-of-way by utilities since their customers will be charged for this use. But it always has been to the public's benefit to have public rights-of-way utilized for the efficient provision of electric service. Given this generally recognized public benefit, Alachua County cannot hold the public rights-of way hostage as a means of raising general revenue.

Consistent with this principle, the construction of a power line in a road right-of-way which does not interfere with road travel has been held to be an implied use of a public right-of-way and "is not regarded as imposing an additional burden." Nerbonne,

N.V. v. Florida Power Corp., 692 So. 2d 928, 929 (Fla. 5th DCA 1997). Although Nerbonne confirms Florida's longstanding commitment to the efficient delivery of electricity to its citizens, the specific relationship between electric utilities and counties is set forth in general law. Significantly, in crafting this delicate balance, the Legislature has carefully defined the county's role as being regulatory in nature.

Section 125.42(1), Florida Statutes (1997), authorizes a county to license an electric utility's construction, operation, repair, or removal of power lines along county roads. The license must include a requirement that the utility repair damages to the roads caused by the utility. Likewise, Section 337.401, Florida Statutes (1997), authorizes a county to "prescribe and enforce reasonable rules or regulations" controlling placement of electric facilities along county roads, and authorizes a county to grant a utility the use of rights-of-way "in accordance with such rules or regulations as the authority may adopt." In a similar manner, Section 125.01(1)(m), Florida Statutes (1997), provides counties with power to "regulate...structures within the right-of-way."

Alachua County's utility fee cannot possibly be authorized under this purely regulatory scheme. Otherwise, the sole statutory exception to this purely regulatory scheme (a specific authorization in Section 337.401(3), (4), Florida Statutes (1997), for municipalities to charge telephone and telecommunications companies limited fees for use of rights-of-way) would be superfluous. The Florida Legislature knows how to authorize fees, and it simply has

not authorized the utility fee which Alachua County seeks to impose.

Thus, under Florida's general law, counties have only a regulatory interest in public rights-of-way with respect to electric utilities' use of those public rights-of-way.[6/] A county has no proprietary interest in those circumstances. See City of Oviedo v. Alafaya Utilities, Inc., 704 So. 2d 206 (Fla. 5th DCA 1998) (authority of local government under Section 337.401 to regulate its road rights-of-way did not authorize its compelling a utility to enter a franchise agreement). This principle, as recognized in Florida law, is based on a utility's implied right to utilize public rights-of-way to reach its customers in order to provide electric service. See Nerbonne. Alachua County's effort to charge tolls for use of county rights-of-way is plainly inconsistent with Florida's general law limiting a county's authority to regulation, and is accordingly invalid. See Article VIII, §1(g), Fla. Const. (ordinance adopted by county must be consistent with general law).

The Illinois Supreme Court has expressly so held when presented with a similar issue. It concluded there was no

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[6/] Amicus City of Altamonte Springs improperly attempts to raise a new issue never before raised in these proceedings by claiming that Alachua County has no authority over County rights-of-way within city limits. An Amicus is not permitted to inject new issues, but is limited to addressing issues raised by the parties in the proceeding. See Acton v. Ft. Lauderdale Hospital, 418 So. 2d 1099, 1100-01 (Fla. 1st DCA 1982), approved, 440 So. 2d 1282 (Fla. 1983). No party having raised this issue below, this Amicus essentially seeks an improper advisory opinion on the issue. See Sarasota-Fruitville Drainage Dist. v. Certain Lands, 80 So. 2d 335, 336 (Fla. 1955).

proprietary interest in public rights-of-way that could be used to coerce payment by utilities as a means of raising general revenues for the City. See AT&T v. Village of Arlington Heights, 620 N.E. 2d 1040 (Ill. 1993). The court noted that, if local governments were each permitted to levy a toll for a utility's use of public rights-of-way, such "extortion" could effectively cripple communication and commerce. Id. at 1044. As a result, the court held that cities had only regulatory power over public rights-of-way, and the public rights-of-way could not be used as a type of revenue producing property. Id. at 1045-47. The court bluntly held that cities "do not have the authority to hold the public streets hostage as a means of raising revenue." Id. at 1044. This is equally true under Florida law.

Florida general law recognizes that a utility performs a vital public service in using public rights-of-way to provide its customers with cost-efficient electric service. Consistent with this statutory framework, this Court held in Florida Power Corp. v. Seminole County, 579 So. 2d 105 (Fla. 1991), that counties cannot rely on their general home rule powers to impose inconsistent and individualized requirements on electric utilities' use of rights-of-way, which could result in disparate and regionalized demands on an electric utility system that requires statewide uniformity in order to serve the public effectively.

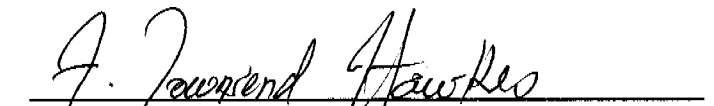
Without a specific statutory authorization, a county possesses only regulatory power over an electric utility's use of public rights-of-way, and it has no proprietary authority to exact a toll

for use of those public rights-of-way. See City of Oviedo. Alachua County's Ordinance, which attempts to exercise proprietary authority by extorting tolls for use of County rights-of-way, is inconsistent with Florida's general statutory scheme limiting counties to regulatory authority. Hence, this Ordinance is unconstitutional for this independent reason as well.

CONCLUSION

This Court should affirm the trial court's denial of validation of the County's bonds supported by this unconstitutional utility tax.

Respectfully submitted,



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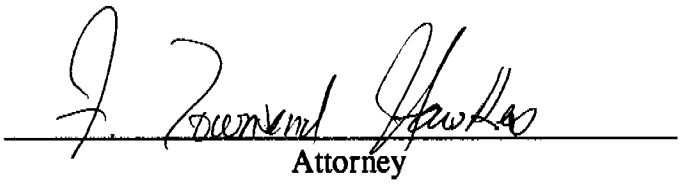

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