IN THE SUPREME COURT OF FLORIDA
CASE NO. 93,344

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

Appellant,

vs.

THE STATE OF FLORIDA,
et al.

Appellee,

and

THE CITY OF GAINESVILLE;
THE UNIVERSITY OF FLORIDA;
SANTA FE COMMUNITY COLLEGE;
FLORIDA POWER & LIGHT CO.;
FLORIDA POWER CORP.; FLORIDA
ELECTRIC COOPERATIVES ASSOC.,
INC.; THE TOWN OF MICANOPY;
THE CITY OF ALACHUA; THE CITY
OF WALDO; HOWARD J. SCHARPS,

Intervenors.
_____/

INITIAL BRIEF OF APPELLANT ALACHUA COUNTY, FLORIDA

On Appeal From the Eighth Judicial Circuit,
In and For Alachua County, Florida
Case Nos. 97-3088-CA, 97-3518-CA, 97-4368-CA, 97-4715-CA

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JURISDICTIONAL STATEMENT

This case is an appeal under Rule 9.030(a)(1)(B)(i), Florida Rules of Appellate Procedure, from a final order issued pursuant to Chapter 75, Florida Statutes, that denied validation of the County's proposed issuance of not exceeding $20,000,000 Alachua County, Florida Capital Improvement Revenue Bonds, Series 1997.

STATEMENT OF THE CASE AND FACTS

nature of the case

This case arises out of a bond validation proceeding under Chapter 75, Florida Statutes, that was initiated by Alachua County, Florida ("the County"). The County filed a complaint, seeking the circuit court's validation of not exceeding $20,000,000 in aggregate principal amount of Alachua County, Florida Capital Improvement Revenue Bonds, Series 1997 (the "Bonds"). The salient issue to be determined was whether the Electric Utility Privilege Fee[1] was a valid home rule revenue source that could be pledged for payment of the Bonds. By entering final summary judgment against the County, the circuit court denied the validation. (Final Summary Judgment at 9, attached as Appendix A-1).

introduction of parties

The County is a charter county, operating under Article VIII, section 1(g), Florida Constitution. By virtue of its charter, the County possesses all powers of local self-government that are not inconsistent with general law or special act approved by the voters. Under this home rule authority, the Board of County Commissioners of the County ("the Board"), adopted the Electric Utility Privilege Fee Ordinance as Ordinance 97-12 on August 12,

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[1] All capitalized terms in this brief are references to actual defined terms in the Electric Utility Privilege Fee Ordinance, Ordinance 97-12, attached as Appendix C.

1997.[2] (Ord. 97-12, attached as Appendix C). In response to the adoption of Ordinance 97-12, the City of Gainesville, the University of Florida, and Florida Power & Light Company filed lawsuits seeking declaratory and injunctive relief against the Electric Utility Privilege Fee. These lawsuits were consolidated with the bond validation proceeding.[3] In addition to these three parties, Florida Power Corporation, Santa Fe Community College, the Florida Electric Cooperatives Association, the City of Alachua, the City of Waldo, the Town of Micanopy, and Howard J. Scharps, also intervened in the bond validation proceeding (collectively referred to as "the Intervenors"). The State Attorney appeared on behalf of all persons with an interest in or affected by the issuance of the Bonds.

the structure of the electric utility privilege fee

The Electric Utility Privilege Fee Ordinance grants privileges in public property to the Electric Utilities that operate in the County. For example, section 2.01 grants "[e]ach Electric Utility . . . an Electric Privilege to use and occupy the County Rights-of-Way in the unincorporated and incorporated areas of the County for the construction, location, and relocation of its Electric Facilities . . .." (App. C, Ord. 97-12, § 2.01(A)). In exchange

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[2] Ordinance 97-12 was amended by Ordinance 97-13 to change the collection date of the Electric Utility Privilege Fee from October 1, 1997 to October 1, 1998.

[3] The City of Gainesville, the University of Florida, and Florida Power & Light also formally intervened in the bond validation proceeding.

for this Electric Privilege, the Ordinance imposes an Electric Utility Privilege Fee ("Privilege Fee") on all Electric Utilities that provide electric service in the County and that use County Rights-of-Way in operating their utilities. (App. C, Ord. 97-12, § 2.05(A)). The Privilege Fee is charged at a rate of three percent of each Electric Utility's Gross Revenues[4] in the County. (App. C, Ord. 97-12, § 2.05(A)(1),(2)).

The Board, as a part of the Privilege Fee Ordinance, specifically concluded that the Privilege Fee "is imposed against each Electric Utility upon its privileged use of County Rights-of-Way . . .." (App. C, Ord. 97-12, § 2.05(D)). Reiterating the nature of the Privilege Fee, the Board further declared, "The Electric Utility Privilege Fee is imposed upon every Electric Utility for the privilege of conducting an electric business on the County Rights-of-Way . . .." (App. C, Ord. 97-12, § 2.05(E)). The Board further articulated that the Privilege Fee was imposed for the following purposes:

> (A) reasonable compensation for the privileges granted in this Ordinance to use and occupy the County Rights-of-Way for the construction, location or relocation of Electric Facilities; (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 and protecting the public

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[4] "Gross Revenues" is defined as "those revenues received by the Electric Utility from the retail sale of electricity to customers in the unincorporated and incorporated areas of the County." (App. C, Ord. 97-12, § 1.01).

> in the use and occupancy of such County Rights-of-Way.

(App. C, Ord. 97-12, § 1.01 (definition of "Electric Utility Privilege Fee")).

In addition to articulating the purposes of the Privilege Fee, the Board concluded that the rate of the Privilege Fee -- three percent of Gross Revenues -- was "not based on the extent and scope of the Electric Facilities . . . located in County Rights-of-Way." (App. C, Ord. 97-12, § 2.05(D)). Rather, the Privilege Fee calculation was "declared to be reasonable and consistent in amount and within the method of calculation historically bargained for by electric utilities in securing a franchise from local governments which granted a privileged use of rights-of-way and other public property." (App. C, Ord. 97-12, § 2.05(D)).

In further recognition of the nature of the Privilege Fee as functionally equivalent to a franchise fee, Ordinance 97-12 contemplates that each Electric Utility will collect the Privilege Fee, as a separate line item, on the Electric Utility customers' bills. (App. C, Ord. 97-12, § 2.06(A)); see also Rules 25-6.100(2)(c)(6), and 25-6.100(7), Fla. Admin. Code. Furthermore, the Privilege Fee Ordinance allows Electric Utilities to retain one percent of the Electric Utility Fee proceeds from their customers as "reimbursement for expenses incurred in collecting and transmitting" the Privilege Fee to the County. (App. C, Ord. 97-12, § 2.06(B)).

the pledge of the Privilege Fee proceeds to the bonds

In addition to granting privileges and imposing a fee, the Privilege Fee Ordinance authorized the Board to issue bonds for financing public improvements payable from Electric Utility Privilege Fee proceeds. (App. C, Ord. 97-12, §3.01). In an exercise of this authority, the Board adopted a bond resolution on August 12, 1997, as Resolution 97-79, so pledging the Electric Utility Privilege Fee proceeds. (Reso. 97-79, attached as Appendix D) ("the Bond Resolution"). In addition to the proceeds of the Electric Utility Privilege Fee, the Bonds were also payable from any Electric Utility Franchise Fees and any non-ad valorem revenue sources designated by subsequent resolution. (App. D, Reso. 97-79).

The Bond Resolution was later amended on October 13, 1997, by Resolution 97-116, to specifically enumerate the capital improvement projects for which the Privilege Fee could be pledged. (Reso. 97-116, attached as Appendix E). For example, Resolution 97-116 defined these public purpose projects as including the New Judicial Annex, the Eastgate Renovations (Sheriff), the New Human Services Facility, the Emergency Communications Center, the Administration Building Expansions, the Sheriff's Office Renovation, the Corrections Expansion, and the Fire Rescue Administration Building. (App. E, Reso. 97-116, § 3(A)).[5]

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[5] As a part of the Privilege Fee program, the Board also adopted a resolution of intent on August 12, 1997, as Resolution 97-80 (the "Resolution of Intent"). (Reso. 97-80, attached as

procedural history

On or about August 15, 1997, the County filed its complaint for validation in this case pursuant to Chapter 75, Florida Statutes. (Complaint for Validation, attached as Appendix B). The validation sought the approval of not exceeding $20,000,000 in aggregate principal amount of Alachua County, Florida Capital Improvement Revenue Bonds, Series 1997. The purpose of the lawsuit was to seek judicial validation of the Privilege Fee before the County issued the Bonds, payable from Privilege Fee revenue. (App. B, Complaint at 6). After the complaint was filed, the circuit court issued an Order to Show Cause on October 15, 1997, directing the State Attorney to appear and show why the Bonds should not be validated. The County's bond validation lawsuit sought a determination as to the public purpose of the projects and the authority of the County to pledge the revenue from its Privilege Fee to payment of the Bonds. Within that context, the suit additionally concerned the validity of the County's Privilege Fee which was imposed under Ordinance 97-12, as amended. In fact, the primary issue for the validation was whether the County had the authority to adopt an ordinance imposing the Privilege Fee.

A final hearing on the circuit court's Order to Show Cause was scheduled for April 1, 2, and 3, 1998. Prior to those dates,

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Appendix F). The Resolution of Intent was amended as Resolution 97-101 to reflect the change in the date of collection of the Privilege Fee from October 1, 1997 to October 1, 1998. The Resolution of Intent articulated the Board's direction to use the Privilege Fee proceeds for both the payment of the Bonds and for future ad valorem tax relief.

intervenors Florida Power & Light, Santa Fe Community College, Howard Scharps, Florida Power Corporation, and the City of Gainesville filed motions for summary judgment. After the hearing was held on these motions on April 1, 1998, the circuit court granted final summary judgment against the County, finding that the Privilege Fee was a tax, requiring general law authorization. (App. A-1, Final Summary Judgment at 6).[6] The County then timely filed this appeal (Notice of Appeal, attached as Appendix A).

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[6] The entry of a final summary judgment at the Order to Show Cause hearing was a procedural error. A bond validation proceeding under Chapter 75, Florida Statutes, is a statutory, summary proceeding which renders the disposition of actions pursuant to Rule 1.510, Florida Rules of Civil Procedure, inappropriate. However, the procedural error is harmless and does not impede this Court's review of this appeal for the following reasons: no additional intervenors, not joined in this appeal, appeared at the noticed show cause hearing; no genuine issue of a material fact exists within the scope of the bond validation proceeding that would have required testimony or evidence at the show cause hearing; and any matters of factual dispute are collateral issues not available for resolution under the limited scope of a bond validation proceeding. See Taylor v. Lee County, 498 So.2d 424 (Fla. 1986).

SUMMARY OF THE ARGUMENT

The County has the constitutional and statutory power to impose the Electric Utility Privilege Fee by ordinance. No inconsistent general law and no elector approved special act restricts the specific exercise of home rule authority at issue in this case. Local government charges imposed for the relinquishment of specific property rights are not taxes that require general law authorization. See City of Pensacola v. Southern Bell Telephone Company, 37 So. 820 (Fla. 1905); and Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 1 (Fla. 1992). The circuit court erred in failing to distinguish the proprietary power of a local government to impose rental charges for a privileged use of public property from the police and legislative powers to impose regulatory fees and fees to fund a governmental service.

The Privilege Fee is the functional equivalent of a franchise fee. Under Florida law, a fee charged pursuant to a franchise for the local government's relinquishment of specific property rights has been held to be a valid fee and not an unauthorized tax. See City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); and Santa Rosa County v. Gulf Power Company, 635 So. 2d 96 (Fla 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994). The only difference between a traditional franchise fee and the Privilege Fee is that the electric utility does not bargain for any vested rights in the County Rights-of-Way, in exchange for which it consents to pay the Privilege Fee. The presence of a bargaining

situation or the consent of the electric utility is constitutionally irrelevant to the validity of a rental charge imposed for a privileged use of public property.

In addition, the circuit court's conclusion that the Privilege Fee is an unauthorized tax because the amount of the Privilege Fee is calculated as a percentage of the Gross Revenues of the Electric Utility, rather than on the extent of actual use of County Rights-of-Way, is also fundamental error. The reliance on the Privilege Fee's calculation as a basis for finding the Privilege Fee to be invalid ignores the existing Florida Public Service Commission's ("FPSC's") electric utility regulatory scheme and the fundamental separation of power concepts embodied in the Florida Constitution.

All electric utility rental fees whether imposed unilaterally or pursuant to a franchise agreement are calculated as a percentage of gross revenues received from the retail sale of electricity within the local government's jurisdiction. This calculation of the fee is mandated by the FPSC through Rules 25-6.100(2)(c)(6), and 25-6.100(7), Florida Administrative Code. This mandate flows from the fact that there is no practical method to correlate physical placement of discrete electric poles or other electric facilities in County Rights-of-Way with individual electric utility customers. The gross revenue derived from the retail sale of electricity within the applicable jurisdiction is a reasonable measure of the extent of electric utility right-of-way use.

In the Electric Utility Privilege Fee Ordinance, the County made specific legislative determinations that the method of

calculating the Privilege Fee and the rate at which it was imposed constituted reasonable consideration for the expansive relinquishment of property rights in all County Rights-of-Way of the entire County Road System. Furthermore, the Electric Utility Privilege Fee Ordinance contained legislative findings that the method of calculating the Privilege Fee was consistent with the fees historically bargained for by electric utilities in securing a franchise from local governments. Without a showing that these findings are arbitrary, the circuit court's failure to defer to such legislative findings is also reversible error.

ARGUMENT

I. THE COUNTY'S CONSTITUTIONAL AND STATUTORY HOME RULE AUTHORITY INCLUDES THE POWER TO IMPOSE THE ELECTRIC UTILITY PRIVILEGE FEE BY ORDINANCE.

The 1968 revision to the Florida Constitution vested charter counties with "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." Art. VIII, § 1(g), Fla. Const. The constitutional power of self-government for charter counties is embodied in Article VIII, section 1(g), Florida Constitution. This provision declares:

> Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

Id.[7]

This power of self-government to regulate, to fund and provide essential services, and to legislate by ordinance flows directly from the Florida Constitution to a county through the provisions of the county's charter. No legislative authorization is needed. Consequently, upon the approval of a charter by the county's

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[7] Alachua County is a charter county that governs under Article VIII, section 1(g), Florida Constitution.

citizens, the county's power of self-government, as embodied in its charter, is a direct constitutional grant.[8]

The 1968 revision to the Florida Constitution also allocated the taxing power between the state and local governments. Under this allocation, all forms of taxes, other than ad valorem taxes, require general law authorization. Article VII, section 1(a), Florida Constitution, states as follows:

> No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.

Id.; see also Art. VII, § 9(a), Fla. Const. (authorizing counties to impose ad valorem taxes). These provisions of the Constitution dictate that no county can levy any tax, other than ad valorem taxes, without general law authorization to do so. Thus, the constitutional inquiries for a charge that is imposed by county ordinance, in the absence of general law authorization, are: (1) is the charge a tax and, if not, (2) is the charge inconsistent with general law? If no inconsistent general law preempts the imposition of the charge and if the charge meets the applicable Florida case law requirements, it is within the constitutional and statutory power of home rule. See, e.g., City of Boca Raton v.

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[8] By contrast, the constitutional home rule authority of non-charter counties needed implementing legislation. "Counties not operating under county charters shall have such power of self-government as is provided by general or special law. . . ." Art. VIII, § 1(f), Fla. Const. The general law implementation of home rule power for non-charter counties is section 125.01, Florida Statutes. General law provisions also supplement or limit the constitutional home rule power for charter counties.

State, 595 So. 2d 25 (Fla. 1992) (tracing the evolution of local government home rule authority to impose special assessments without general law authorization).

Consequently, the issue in this appeal is very narrow and simply stated: does the Privilege Fee meet the case law requirements for a fee that is imposed in exchange for a privileged use of public property? The circuit court concluded that the Privilege Fee was not a reasonable rental charge, was not a valid user fee, and was not the constitutional equivalent of a franchise fee. Thus, according to the circuit court, the Privilege Fee was a tax that required general law authorization. Respectfully, but simply, the court was wrong.

A. Counties Possess The Home Rule Authority To Impose A Rental Charge For The Privileged Use Of Public Property.

No authority could be more inherent than the power of a local government to charge for the privileged use of property that it owns. Cases decided under both the 1885 and 1968 Florida Constitutions recognize this inherent authority to unilaterally impose rental charges for a privileged use of public property. See City of Pensacola v. Southern Bell Telephone Company, 37 So. 820 (Fla. 1905) (upholding a rental charge for utility use of municipal streets under the 1885 Florida Constitution); and Jacksonville Port Authority v. Alamo Rent-a-Car, Inc., 600 So. 2d 1159 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 1 (Fla. 1992)(upholding the unilateral imposition of a gross revenue percentage fee on

businesses using public facilities to generate customers under the 1968 Florida Constitution). In addition, the United States Supreme Court has also recognized the historical authority of local governments to charge fees in exchange for utilities' use of rights-of-way as being in the nature of a rental. See City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893). The imposition of such a rental fee need not be negotiated and may be imposed unilaterally by ordinance. See Jacksonville Port Authority v. Alamo Rent-a-Car, Inc., 600 So. 2d 1159 (Fla. 1st DCA 1992).[9]

Local government charges that are imposed for the relinquishment of specific property rights in public property are fees of a different lineage than fees imposed to regulate a private activity or to fund a governmental service. This fundamental distinction flows from the source of power that is exercised by the local government when imposing the fee and has resulted in differing judicial rules for the use of the fee proceeds. For example, fees such as franchise fees and privilege fees are charges in the nature of rent paid to the local government, in its proprietary capacity, as the owner of the public property right relinquished. In contrast, regulatory fees or fees imposed to fund a governmental service result from either an exercise of the police power or the legislative power to fund essential services.

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[9] See also Club Car Rentals of Gainesville v. The City of Gainesville, 1988 WL 294258 (N.D. Fla. 1988)(upholding City's unilateral imposition of a "privilege fee" on off-airport rental car companies at ten percent of their gross revenues).

Under the historical Florida case law, regulatory fees cannot exceed the cost of the regulation and must be used for the purpose for which they are imposed. See Tamiami Trail Tours, Inc., v. City of Orlando, 120 So. 2d 170 (Fla. 1960); and Broward County v. Janis Development Co., 311 So. 2d 371 (Fla. 4th DCA 1975). For example, a regulatory fee imposed on growth in the nature of an impact fee must meet the "dual rational nexus test." See Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th DCA 1983), rev. denied, 440 So. 2d 352 (Fla. 1983); and St. Johns County v. N.E. Fla. Builders Assoc., 583 So. 2d 635, 637 (Fla. 1991). The amount of the regulatory growth fee cannot exceed the impact that the feepayer causes on public facilities; hence, the fee proceeds must be dedicated to alleviating the growth impact of the particular feepayer. If the regulatory fee exceeds the cost of regulation, the fee is a tax, requiring general law authorization under the Florida Constitution. Likewise, fees imposed under the legislative power of local government to fund essential services cannot exceed the cost of providing the service. For example, fees imposed for stormwater services must be dedicated to providing such services and cannot exceed the cost of that governmental activity.

In contrast, fees imposed by local government for the relinquishment of specific property rights are not restricted as to use. Absent a legislative restriction, such fee proceeds, like the proceeds received from the sale or rental of public property, can be used for general governmental purposes.

The circuit court focused on the use of the Privilege Fee proceeds as its underlying rationale for concluding that the Privilege Fee was a tax. For example, the circuit court stated, "The Privilege Fee is a mandatory, unavoidable charge imposed by the county in its sovereign capacity for the purpose of providing general revenue. . . . As such, it is a tax." (App. A-1, Final Summary Judgment at 9).[10] The County agrees that the Privilege Fee proceeds are pledged for the payment of the Bonds issued to provide general governmental facilities and to provide countywide property tax relief. However, the circuit court fundamentally erred in focusing on the use of the Privilege Fee to determine whether it was a valid home rule revenue charge. No use restriction of the Privilege Fee exists in the law. In the absence of a restriction imposed by the Florida Legislature, local government charges that are imposed for the relinquishment of specific property rights, are unrestricted as to use. Consequently, the fact that the Privilege Fee proceeds are to be used for governmental purposes is irrelevant to determining its validity as a home rule fee.

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[10] This Court in State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994), articulated a two-prong test for user fees imposed for the use of public facilities, "[User fees] 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 thereby avoiding the charge." Id. at 3. The Privilege Fee satisfies both prongs of the City of Port Orange requirements for a valid user fee. First, the Electric Utility is exercising a privileged use of public property not shared by other members of society. Second, the use of the County Rights-of-Way for the placement of its electric utilities is a business choice of the Electric Utility.

The purpose and function of local government is to provide essential services and enact legislation to protect the public interest. Not surprisingly then, most Florida cases on local government charges analyze the requirements of valid regulatory fees or charges imposed to fund governmental services. In contrast, Florida cases construing the validity of a charge imposed as compensation for local government's relinquishment of property rights, in their proprietary capacity, are few in number. The reason for the scarcity of such decisions is that, in most cases, these rental charges are consented to by the feepayer and are thus never the subject of judicial review.

For example, this Court's decision in City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976), upholding the constitutionality of franchise fees, arose in the context of a challenge to the Florida Public Service Commission's requirement that rental charges be directly billed to the electric customer. The franchise fees and their method of calculation were consented to by the electric utility and not challenged. Fortunately, clear Florida precedent -- the City of Pensacola case[11] and the Alamo Rent-a-Car case[12] -- recognizes this fundamental distinction in the requirements for a valid home rule fee charged for the relinquishment or transfer of property rights from the requirements for a valid home rule fee

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[11] City of Pensacola v. Southern Bell Telephone Co., 37 So. 820 (Fla. 1905).

[12] Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992).

imposed under the police power or pursuant to the exercise of legislative power to fund essential services.

This case law, confirming the unilateral power of a local government to charge a rental for the relinquishment of property interests, guided the County in its imposition of the Privilege Fee and provides clear direction to this Court to uphold its validity. The circuit court, in overlooking the significance of such precedent, was misled by the Intervenors' argument that blurred the distinction between a regulatory fee or a fee imposed to fund a governmental activity, and a rental charge imposed for the relinquishment of specific local government property rights.

For example, notwithstanding that the City of Pensacola acted in a time of limited municipal power, this Court in City of Pensacola v. Southern Bell Telephone Co., 37 So. 820 (Fla. 1905), upheld the city's unilateral imposition of a rental charge for the occupation of its streets by utility companies:

> [M]unicipalities which have the power and are charged with the duty of regulating the use of their streets may impose a reasonable charge, in the nature of a rental, for the occupation of certain portions of their streets by telegraph and telephone companies, and may also impose a reasonable charge in the enforcement of local government supervision, the latter being a police regulation.

Id. at 823 (emphasis added).[13] See also City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893), rehearing denied,

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[13] This analysis in City of Pensacola recognized the different lineage of local government power in the imposition of rental fees and regulatory fees -- the police power and the proprietary power of local government as the owner of public property.

149 U.S. 465, 485 (1893)(recognizing that a charge on all telephone and telegraph companies for their using the streets, alleys, and public places was "for the use of property belonging to the city, -- that which may properly be called rental.").[14] In City of Pensacola, the city had adopted an ordinance that imposed a charge on all telegraph, telephone, and electric light and power companies to "rent" space in the city streets for their utility poles. This Court concluded that the ordinance was reasonable.

Similarly, in this case, the County imposed the Privilege Fee on Electric Utilities that actually use County Rights-of-Way as "reasonable compensation for the privileges granted in th[e] Ordinance to use and occupy the County Rights-of-Way for the construction, location or relocation of Electric Facilities[.]" (App. C, Ord. 97-12, § 1.01, definition of "Electric Utility Privilege Fee"). In addition, the County imposed the Privilege Fee as "fair rental return on the privileged use of public property for a proprietary purpose[.]" Id. Finally, the Board found that "[t]he Electric Utility Privilege Fee imposed under th[e] Ordinance is a reasonable rental charge for an Electric Utility's privileged use and occupancy of the County Rights-of-Way. . .." (App. C, Ord. 97-12, § 1.02(G)).

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[14] Other jurisdictions also recognize that franchise fees are imposed as rent for using public rights-of-way. See, e.g., City of Dallas v. Federal Communications Comm'n, 118 F.3d 393, 397 (5th Cir. 1997)("Franchise fees are . . . essentially a form of rent: the price paid to rent use of public rights-of-way."); City of Little Rock v. AT&T, 888 S.W. 2d 290, 292 (Ark. 1994)("In common parlance, such franchise fees are, in form, rental payments for a public utility's use of the municipality's right-of-way[.]").

These purposes have been upheld even more recently than the City of Pensacola case. For example, in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), the First District Court upheld the Jacksonville Port Authority's ("the JPA's") unilateral imposition of a six percent fee on the gross receipts of Alamo Rent-a-Car ("Alamo"). The JPA began constructing a $101 million expansion program at the Jacksonville International Airport ("the Airport") and adopted a resolution that unilaterally imposed the six percent user fee on non-tenant rental car companies. These non-tenant companies, including Alamo, did not maintain rental car facilities on the JPA's property but used the JPA's roads, bridges, and other improvements to transport customers to and from the Airport.

Alamo challenged the privilege fee as an unauthorized tax, arguing that "the fee was not authorized by the [JPA] Charter, and was 'therefore an illegal tax prohibited by Article VII, section 1(a), of the Constitution of the State of Florida (1968).'" 600 So. 2d at 1161 (quoting circuit court). On appeal, the First District Court rejected Alamo's argument and declared that "a tax . . . provid[es] revenue for the general support of the government, while . . . a user fee . . . impos[es] a specific charge for the use of publicly-owned or publicly-provided facilities or services." Id. at 1162 (emphasis added)(citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-22 (1981), rehearing denied, 453 U.S. 927 (1981)).

The First District Court of Appeal in Jacksonville Port Authority v. Alamo then approvingly noted the arguments of the JPA and amici that "the fee is for Alamo's use of all of the JPA's facilities which benefit Alamo by generating its business." 600 So. 2d at 1162. Furthermore, the court explained, "The subject charge is tied exclusively to Alamo's use of the airport facilities to conduct its business." Id. (emphasis added).

Finally, the First District Court concluded that in resolving the tax issue, the crucial point was "to recognize that the JPA does not purport to regulate its airport system under the auspices of the general police power, but rather to do so as a function of its proprietary status." 600 So. 2d at 1164 (emphasis added). In pursuing this proprietary line of analysis, the court determined that "in assessing and collecting the user fee, the JPA is acting in a proprietary capacity requiring those who benefit from its airports to pay their fair share of costs incurred in providing the benefits." Id. (emphasis added). Thus, the court reasoned that

> the [JPA's] fee is not a general revenue source for the support of a sovereign government. Instead, it is governed by entirely different principles based on Alamo's receipt of a special benefit from the JPA -- the generation of its customers.

600 So. 2d at 1164 (emphasis added).

The County maintains a proprietary interest in its own rights-of-way[15] and the Privilege Fee is based on the Electric Utilities'

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[15] See § 334.03(22), Fla. Stat. ("'Right-of-way' means land in which . . . a county . . . owns the fee . . .") (emphasis added).

use of the County Rights-of-Way in the operation of their businesses. If an Electric Utility does not use County Rights-of-Way, it is not charged. For example, the Board declared, "If an Electric Utility conducts its business or proprietary activity within the County by the use of property other than the County Rights-of-Way, no Electric Utility Privilege Fee will be imposed under this Ordinance." (App. C, Ord. 97-12, § 2.01(B)).

Furthermore, the Privilege Fee is charged in exchange for using the County Rights-of-Way in a manner not shared by other members of society. Other citizens, and clearly society at large, do not financially benefit from the Rights-of-Way in the same manner as the Electric Utilities. In recognizing this fact, the Board declared that "[t]he Electric Utility Privilege Fee is imposed upon every Electric Utility for the privilege of conducting an electric business on the County Rights-of-Way. . . ." (App. C, Ord. 97-12, § 2.05(E)). And the Board also declared that "Electric Utility use and occupancy of the County Rights-of-Way pursuant to an Electric Privilege provides a benefit to such Electric Utilities which is not available to the general public and which inevitably results in the relinquishment of property rights in the County Rights-of-Way[.]" (App. C, Ord. 97-12, § 1.02(C)).

The United States Supreme Court has identified this same use of public rights-of-way by utility businesses as "privileged" in nature. For example, in City of St. Louis v. Western Union Telegraph Company, 485 U.S. 92 (1893), the United States Supreme Court noted, "[T]his use is an absolute, permanent, and exclusive

appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public." Id. at 99. Furthermore, this Court in Jarrell v. Orlando Transit Co., 167 So. 664 (Fla. 1936), defined the privileged use as the following:

> There is . . . no such thing as a natural right to use the public highways for commercial purposes. Such limited right as the public may grant to use them for private business is merely a privilege that may be restricted or withdrawn at the discretion of the granting power. Whether the grant is by license, permit, or franchise is immaterial; the power to do so is plenary and may extend to absolute prohibition.

Id. at 666.

Finally, the Electric Utilities are not required to use County property to operate their business. As stated by the Supreme Court of the United States, "If, instead of occupying the streets and public places with its telegraph poles, the company [c]ould do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section [imposing the fee] would no longer have any application to it." St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 97 (1893); see also Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159, 1162 (Fla. 1st DCA 1992)("If Alamo wished to avoid the fee, it could obtain its customers from another source. The subject charge is tied exclusively to Alamo's use of the airport facilities to conduct its business.").

Despite these cases and legislative findings in the Ordinance, the circuit court below attempted to distinguish the "rental"

charge in the City of Pensacola case from the Privilege Fee.[16] But the court did so in a manner that does not resolve the constitutional issue. In fact, the circuit court concluded that the City of Pensacola case "arguably stands for the proposition that a county may impose a reasonable rental charge for public property used by an electric utility . . .." (App. A-1, Final Summary Judgment at 7). However, the circuit court asserted that the City of Pensacola's rental charge was calculated on a "per pole" basis instead of on a percentage basis. (App. A-1, Final Summary Judgement at 6).[17] This ground, relied on by the circuit court, does not weaken the applicability of the City of Pensacola case to the County's Privilege Fee here. The issue of whether the Privilege Fee is reasonable in its amount is different from the

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[16] The circuit court did not mention nor apparently consider a prior decision in the Eighth Judicial Circuit Court for Baker County which upheld an almost identical privilege fee as a valid fee and not an unauthorized tax. See Order on Defendant Baker County's Motion for Summary Judgment, Case No. 94-S44-CA (8th Jud. Cir., June 20, 1995) (attached as Appendix G). This circuit court decision upheld the Baker County privilege fee as a valid home rule fee and was appealed by Florida Power & Light Company to the First District Court of Appeal. Florida Power & Light Company subsequently dismissed the appeal after oral argument. FP&L then entered into a franchise agreement with Baker County, consenting to a franchise fee of five percent based upon the gross revenue received from the retail sale of electricity within the unincorporated areas of Baker County.

[17] The Florida Public Service Commission in Rule 25-6.100(7), Florida Administrative Code, declared that franchise fees (or, here privilege fees) are to be directly charged only within the boundaries of the jurisdiction which imposed the charge. A "per pole" calculation is not feasible under such rate regulation scheme. As a consequence, a franchise fee (or the Privilege Fee here) is paid for the relinquishment of specific property rights and is calculated as a percentage of the gross receipts collected within the applicable jurisdiction.

issue of whether the County has the authority to impose a right-of-way charge.[18]

Furthermore, the fact that the County concedes that the amount of the Privilege Fee is not based on the extent of the use of the Rights-of-Way does not alter the reasonableness of the Privilege Fee amount. In this case, such precision is not required. For example, when the First District Court in Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1994), upheld the county's authority to impose franchise fees on electric utilities, the court commented on the trial court's ruling there with the following:

> Because the counties presented no evidence showing that the fees were based upon a reasonable rental value for the utilities' use of the counties' rights-of-way, the court concluded that the fees, as structured, constituted impermissible taxes. We reverse.

Id. at 103 (emphasis added). See also Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159, 1161 (Fla. 1st DCA 1992) (upholding six percent gross revenue privilege fee when "[i]t was stipulated . . . that the six percent fee did not directly correlate with any cost analysis performed. . . .").

The Intervenors did not challenge the Privilege Fee rate of three percent of Gross Revenues as unreasonable.[19] Rather, the Intervenors' challenge, as upheld by the circuit court, was that

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[18] The issue of whether the Privilege Fee is reasonable in its amount is discussed in Argument II.

[19] Such a challenge would have been difficult because virtually all consented to franchise agreements are calculated on a gross revenue basis and at a higher percentage than here. See Affidavit of Virginia Saunders Delegal, Appendix H, attachments 1-34.

the Privilege Fee amount should be based on the actual use by the electric utility companies and not the gross revenue method of calculation. As discussed subsequently, the adoption of such argument by the circuit court, in the absence of a showing of arbitrariness, is an improper judicial invasion of a legislative decision by the County.

B. The Electric Utility Privilege Fee Is The Functional Equivalent Of A Franchise Fee.

The Electric Utility Privilege Fee and a fee imposed pursuant to an express franchise agreement are functionally equivalent charges under any constitutional analysis. A county utility franchise is an agreement for a privileged use of county rights-of-way and other public property for a specified term of years. See City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), rev. denied, 645 So. 2d 452 (Fla. 1994); and City of Hialeah Gardens v. Dade County, 348 So. 2d 1174 (Fla. 3d DCA 1977), cert. denied, 359 So. 2d 1212 (Fla. 1978). A franchise fee, then, is charged in exchange for that privilege. See, e.g., Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 98 (Fla. 1st DCA 1994)(upholding county authority to impose "franchise fees . . . for using the counties' rights-of-way to construct or maintain the utilities' poles and lines.")(emphasis added).

In addition, the court in City of Hialeah Gardens, 348 So. 2d 1174, stated that the "franchise fees are . . . consideration paid by the utility for the grant of the franchise." 348 So. 2d at

1180. Furthermore, the First District Court in Santa Rosa County, 635 So. 2d 96, described the decision in City of Plant City, 337 So. 2d 966, as the case in which "the supreme court approved a franchise fee of six percent of the gross receipts Tampa Electric Company obtained in return for using the municipal rights-of-way . . .." 635 So. 2d at 103 (emphasis added). Finally, the court in Santa Rosa County said of the franchise fee at issue there that "the trial court erred in characterizing the franchise fees at bar, which constituted consideration for the contractual grant of the rights to use county rights-of-way, as taxes." 635 So. 2d at 103 (emphasis added).

The circuit court below believed that these franchise fee cases require that any fee imposed by local governments in the same manner and for the same purposes as a franchise fee must be formally bargained for and expressly consented to under a franchise agreement. Specifically, the circuit court concluded that the County's Privilege Fee is an unauthorized tax on the premise that the difference between a franchise fee and the Privilege Fee is such bargain or consent. The circuit court stated, "In contrast, the Privilege Fee is a forced charge which was not bargained for or agreed to[.]" (App. A-1, Final Summary Judgment at 8-9). This conclusion ignores the proper constitutional analysis of the Privilege Fee.

The lack of consent by the Electric Utilities cannot transform an otherwise valid fee into a tax, requiring general law authorization to impose. See Jacksonville Port Authority v. Alamo

Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992)(upholding a six percent privilege fee imposed, by unilateral resolution and without consent, on rental car agencies that use airport facilities to generate customers). If consent was constitutionally required for a fee to be valid, then no challenged rental fee could ever withstand judicial scrutiny because the existence of a challenge necessarily implies the lack of consent.

The only difference between a traditional franchise fee and the Privilege Fee is that the electric utility does not bargain for any vested rights in the County Rights-of-Way, in exchange for which it consents to pay a fee. This difference is the one that the circuit court used to distinguish settled Florida case law upholding the validity of a franchise fee, thus concluding that the Privilege Fee was an unauthorized tax. The circuit court stated, "However, the county overlooks the defining characteristic of a franchise fee, which the Privilege Fee does not share: 'unlike other governmental levies, [franchise fees] are bargained for in exchange for specific property rights. . . . City of Plant City, 337 So. 2d at 973 (emphasis added)." (App. A-1, Final Summary Judgement at 8).[20]

In City of Plant City, the charge for the "specific property rights" relinquished by the city was consented to pursuant to a franchise agreement. The language used by this Court in the City

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[20] The circuit court then reasoned that the Ordinance granted "no vested, constitutionally protected and enforceable property rights to electric utilities for any definite term of years." (App. A-1, Final Summary Judgment at 9).

of Plant City opinion was based upon the fact pattern reviewed; this Court did not thereby create a universal definition of right-of-way rental charges. Under the facts of City of Plant City, the charge for the specific property rights relinquished by the city was consented to or "bargained for" by the electric utilities. The nature of the "bargained for" charge that is of constitutional significance is that it represents a reasonable rental for the public property rights relinquished. As noted by this Court in 1905, a local government "may impose a reasonable charge, in the nature of a rental, for the occupation of certain portions of the streets by telephone and telegraph companies . . .." City of Pensacola v. Southern Bell Telephone Co., 37 So. 820, 823 (Fla. 1905). Additionally, a local government "may also impose a reasonable charge in the enforcement of local government supervision, the latter being a police regulation." Id. at 823. Consequently, the correct constitutional analysis for this case focuses on the type of local government power being exercised and the nature of the charge, not whether a bargained for exchange is present.

The presence of a bargaining situation or the consent of the electric utility is constitutionally irrelevant to the validity of a fee. Hinging the constitutionality of local government fees, imposed for the relinquishment of property rights, on the consent of the electric utility distorts the City of Plant City holding and ignores the reasoning in both City of Pensacola and Alamo Rent-a-Car. If the consent of electric utilities is required for the

lawful exercise of local government's proprietary powers, a revision to the last sentence of Article VII, section 1(a), Florida Constitution, is also necessary:

> All other forms of taxation shall be preempted to the state except as provided by general law [and consented to by electric utility companies].

This flawed constitutional analysis not only requires such consent language to be added to the Florida Constitution but also requires the Florida case law, approving the unilateral imposition of fees for the use of public property by utilities to be ignored. See, e.g., Rosalind Holding Co. v. Orlando Utilities Comm'n, 402 So. 2d 1209, 1212 (Fla. 5th DCA 1981), rev. denied, 412 So. 2d 469 (Fla. 1982) ("[S]ince 1970, the OUC has been paying to the City of Orlando substantial . . . 'franchise-equivalent' fee[s] . . . . However, there is no franchise agreement between the City and the OUC.") (emphasis added).

In addition, Intervenors' argument, as accepted by the circuit court, ignores the undisputed reality that the fee obligation of electric utility companies for a privileged use of public property, whether unilaterally imposed or bargained for, is paid by the electric utility customer, not the electric utility. The FPSC's current regulatory scheme places the burden of such payment on the electric customer, not the electric utility. The rate regulatory consequence of the direct method of franchise fee collection does not change the constitutional analysis. The authority of local governments to impose a fee for the relinquishment of property rights is an exercise of their proprietary powers. Unless

demonstrated to be arbitrary, the amount and method of calculation of the value of such property rights is within the legislative prerogative of the local government. The exercise of this legislative prerogative is entitled to judicial deference under fundamental separation of power concepts embodied in the Florida Constitution.

II. THE AMOUNT OF THE ELECTRIC UTILITY PRIVILEGE FEE IS REASONABLE.

A. A Legislative Determination Of The Amount Of The Electric Utility Fee Is To Be Upheld Unless It Is Proven To Be Arbitrary.

The Privilege Fee may, like a franchise fee, be imposed as a percentage of the utility's gross revenues derived from a specific geographic area. In establishing reasonable fees, governing bodies, as a part of their legislative functions, determine what rate is reasonable. See New Smyrna Beach v. Int'l Improvement Trust Fund, 543 So. 2d 824, 830 (Fla. 5th DCA 1989) ("The burden to show that such disparate charges were unreasonable under the circumstances here was with the challenging party."); see also Rosche v. City of Hollywood, 55 So. 2d 909, 913 (Fla. 1952) ("The apportionment of [special] assessments is a legislative function and if reasonable men may differ . . . the determination . . . of the city officials must be sustained."). In the franchise fee context, Florida courts have implied that a six percent fee is reasonable. See Rosalind Holding Co. v. Orlando Utilities Comm'n, 402 So. 2d 1209, 1212, n. 18 (Fla. 5th DCA 1981) ("The amount of

the fee is based roughly on 6% of the revenues earned in Orlando. Six percent for a true franchise fee is fairly standard in Florida."). Furthermore, in none of the decisions approving consistent franchise fee amounts do the courts require a nexus between the amount of the fee and the extent of public property use.

Significantly, in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), the parties stipulated that "the six percent fee did not directly correlate with any cost analysis performed" and that the fees were "used to generate revenue for support of all three airports" even though Alamo only used one. Id. at 1161. The trial court held that the fees were "unreasonable" and "not related to or commensurate with Alamo's use of the facilities furnished." Id. The First District Court rejected the trial court's conclusions and recognized, "If Alamo wished to avoid the fee, it could obtain its customers from another source. The subject charge is tied exclusively to Alamo's use of the airport facilities to conduct its business." 600 So. 2d at 1162. Furthermore, the court dismissed the necessity of determining the extent and scope of the public property use because:

> Alamo uses and benefits from all of the JPA's airport facilities, and since the fee is charged to Alamo as a percentage of the revenues from customers it picks up at JIA, and since Alamo pays the fee only if it uses the benefits from the facilities the fee

> supports, the fee is based on the furnishing of a specific benefit to Alamo and is thus not a tax but an authorized user fee . . ..

600 So. 2d at 1164-65 (emphasis in original).

As discussed previously, the circuit court "arguably" recognized that the City of Pensacola case "stands for the proposition that a county may impose a reasonable charge for property used by an electric utility." (App. A-1, Final Summary Judgment at 7). The circuit court then held that the Privilege Fee was a tax and distinguished the City of Pensacola case on the basis that the rental fee imposed unilaterally in the City of Pensacola case was calculated on the basis of $2 per pole and thus "was based upon the actual occupation of municipal rights-of-way by the telephone company." (App. A-1, Final Summary Judgment at 6).

The amount of the Privilege Fee, like the amount of virtually all franchise fees consented to by electric utilities, is calculated as a percentage of the gross revenues derived from the retail sale of electrical power within the local government jurisdiction. Because of this method of rental fee calculation, the circuit court held that the City of Pensacola decision "does not support the incorporation of a fee that bears no discernable relationship to the value of the property actually occupied by the electric utility's poles and other facilities." (App. A-1, Final Summary Judgment at 7).

Regardless of the source of the power exercised or the judicial requirements for the valid exercise of that power, the amount of the fee and its method of calculation must still be able

to sustain a challenge that the fee is arbitrary and thus beyond the legislative discretion of the local government. The analysis involved in determining whether a fee amount or method of calculation is arbitrary is different than an analysis of whether a home rule fee is consistent with judicial requirements for the imposition of a valid fee. The circuit court's failure to recognize this difference in the analysis was fundamental error.

The circuit court's first issue of concern was that the amount of the Privilege Fee did not depend on the "amount of property actually occupied by the electric utility's poles and other facilities." (App. A-1, Final Summary Judgment at 7). If the Privilege Fee had been calculated on a per pole basis, apparently the circuit court would have been satisfied and the City of Pensacola case would have dictated a conclusion that the Privilege Fee was a valid fee.[21]

The property rights relinquished to an Electric Utility is a comprehensive grant of a privileged right to use all County Rights-of-Way within the entire County Road System -- not a "metes and bounds" parcel description of specific pole locations. The Electric Utilities that elect to use the County Rights-of-Way in conducting their businesses are granted a privilege to use all the

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[21] The Intervenors consistently argued below that because the amount of the Privilege Fee does not vary if one or one thousand poles are placed in the County's Rights-of-Way, it is an invalid tax. This argument of the Intervenors supplied the reasoning of the circuit court that the Privilege Fee was a tax because the amount of the Privilege Fee was not based on the actual right-of-way usage. The Intervenors asserted that the fee should be calculated on the number of actual poles or other electric facilities placed within the County Rights-of-Way.

public property associated with the County Road System. The extent of the use is a business decision of the Electric Utility. As discussed previously, if an Electric Utility elects to conduct its business on its own property no fee is charged; there would exist no privileged use of public property and no relinquishment of rights by the County for which compensation was due.

The second issue of concern to the circuit court was the County's method of calculating the Privilege Fee. All electric franchise fees are calculated as a percentage of gross revenues received from the retail sale of electricity within the local government's jurisdiction. For example, the franchises that are attached to the Affidavit of Virginia Saunders Delegal (Appendix H) are electric franchises with municipalities and counties in the Eighth Judicial Circuit. All of them calculate the franchise fee as a percentage of gross revenues received from the retail sale of electricity within the affected jurisdiction. And, of the 34 franchises, 24 of them calculate the fee at a six percent rate. Not one of the franchises bases the franchise fee on the extent of actual physical use (e.g., number of poles) or any other incident or criteria of physical location at any point in time. The underlying assumption is that once an electric utility engages in the retail sale of electricity within a jurisdiction by exercising a privileged use of public property, the amount of gross revenue from the retail sale of electricity is an appropriate measure of the extent of right-of-way usage or its value as a business expense of the electric utility.

That this method of calculating franchise fees is almost universally applied is not accidental. It is the method contemplated by the Florida Public Service Commission in the rate and billing structure required in Rules 25-6.100(2)(c)(6) and 25-6.100(7), Florida Administrative Code. When the fees paid by an electric utility for the rental of public property were required to be separately stated on the electric customer bill, the gross revenue fee calculation was predestined. There is no practical method to equate the number of discrete electric poles or other electric facilities with individual electric customer bills.

In 1905, public utilities were unregulated and the per pole charge upheld in the City of Pensacola case was simply another business expense of the utility. While fees paid as a reasonable rental for electric utility use of public rights-of-way are still a utility business expense, modern concepts of rate regulation and direct customer billing dictate a percentage of gross revenues as the method of calculating the fee.

Based on the comments in the Florida franchise fee cases and the fact that many franchise fees are imposed at six percent of gross receipts,[22] the Board legislatively declared that the Privilege Fee, at three percent of Gross Revenues was reasonable. The Board found as follows:

> The Electric Utility Privilege Fee is imposed against each Electric Utility upon its privileged use of County Rights-of-Way and is

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[22] See Affidavit of Virginia Saunders Delegal, at Appendix H, to which electric franchise agreements of counties and municipalities in the Eighth Judicial Circuit are attached.

> calculated as a percentage of the Gross Revenues received by the Electric Utilities from the retail sale of electricity to their customers within the County. The Electric Utility Privilege Fee is not based on the extent and scope of the Electric Facilities that are located in County Rights-of-Way. This fee calculation is hereby declared to be reasonable and consistent in amount and within the method of calculation historically bargained for by electric utilities in securing a franchise from local governments which granted a privileged use of rights-of-way and other public property.

(App. C, Ord. 97-12, § 2.05(D)). This finding is entitled to deference from this Court and should be upheld, absent a showing of arbitrariness. In light of the fact that the courts in Florida have specifically commented that a unilateral, percentage fee for an electric utility's use of public rights-of-way is an acceptable manner of establishing the amount of such a charge, the County's finding is reasonable.

B. The Decision To Separately State A Right-Of-Way Use Fee On A Customer's Bill Has Been Preempted To The Florida Public Service Commission By General Law.

Throughout this case, the Intervenors have argued that the Privilege Fee is a tax because it passes directly through the Electric Utilities to the customer as a separate line item on the monthly utility bill. Thus, according to the Intervenors, the County is directly imposing the Privilege Fee on the utility customers for Right-of-Way use. This argument ignores the plain language of the Ordinance, as well as the fact that the decision to

pass through the Privilege Fee has been preempted to the Florida Public Service Commission.

Because the manner in which Electric Utilities pay traditional franchise fees has been preempted to the Public Service Commission, the County was compelled to treat its Privilege Fee in a manner similar to a franchise fee. For example, in Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), the First District Court noted that "the prevailing theme of Chapter 366 involves the regulation of rates charged by the electric utilities within the state; whereas the franchise fees in issue have no impact upon the rates of the respective utilities, in that the fees assessed are passed onto the customer, pursuant to Florida Administrative Code Rule 25-6.100(7)." Id. at 100. See also Rule 25-6.100(2)(c)(6), Fla. Admin. Code. This pass through, separately stated, franchise fee line item is a result of the Public Service Commission's decision to require that electric utilities collect a franchise fee only from customers within the applicable franchised jurisdiction. See City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976) and City of Plant City v. Hawkins, 375 So. 2d 1072 (Fla. 1979) (recognizing the historical practice of utilities to spread the cost of franchise fees among customers throughout their entire, state-wide system and upholding the PSC's decision to narrow the collection base for franchise fees).[23]

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[23] This same separately stated line item requirement for franchise fees applies similarly to municipally-owned utilities even though their rate of return is not regulated by the Public Service Commission. See Polk Co. v. Fla. Public Service Comm'n, 460 So. 2d 370, 372 (Fla. 1984) (recognizing that a municipal

The County recognized this preemption and the Board stated in the Ordinance, "Each Electric Utility that exercises an Electric Privilege granted pursuant to . . . this Ordinance shall pay the County an Electric Utility Privilege Fee each month." (App. C, Ord. 97-12, § 2.01(A)). Then the Ordinance declares that

> The Electric Utility Privilege Fee imposed by this Ordinance is the functional equivalent of a franchise fee within the meaning of Rule 25-6.100(7), Florida Administrative Code, . . ., and it is contemplated that the Electric Utility Privilege Fee shall be collected in a manner which is consistent with such established administrative procedures.

(App. C, Ord. 97-12, § 2.06(A)).

Clearly, then, the County's treatment of the Privilege Fee in a manner similar to franchise fees was not a decision made as an exercise of home rule. Rather, the Public Service Commission has mandated how the Privilege Fee is to be collected. Consequently, such a requirement cannot alter the constitutional analysis of the Privilege Fee.

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utility's surcharge on a customer's utility bill was not a part of the rate but involved rate structure which the PSC can control as though the utility were investor-owned); see also § 366.04(2)(b), Fla. Stat. ("In the exercise of its jurisdiction, the commission shall have power over electric utilities for the following purposes; . . . to provide a rate structure for all electric utilities."). "Electric utility" includes "municipal electric utilities]" and "rural electric cooperative[s]." See § 336.02(2).

CONCLUSION

Because the County has the constitutional and statutory power to impose the Electric Utility Privilege Fee by ordinance as compensation for the specific property rights relinquished, this Court should reverse the Final Summary Judgment of the circuit court and instruct the court that the Alachua County Capital Improvement Revenue Bonds, Series 1997 in the principal amount not exceeding $20,000,000 are to be validated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to U.S. Mail to the people listed on the attached service list, this 20th day of July, 1998.

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