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.
_____/

REPLY 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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INTRODUCTION

The County will resist the temptation to respond to all legal arguments raised by each Appellee. To so respond would sink this appeal into a morass of complexity that is not warranted by the issues before the Court. As stated in the County's Initial Brief, the issue in this appeal is narrow and simple: 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 number of Appellees and the complexity of their arguments confuse and muddle the factual and legal issues before the Court; the facts are not complicated nor are they in dispute and the law is neither novel nor complex.

Each Electric Utility in this appeal acknowledges that a fee paid pursuant to a right-of-way franchise[1], is a valid fee that can be imposed by a local government ordinance without general law authorization. The asserted distinction between the two fees is that the right-of-way franchise fee is constitutionally valid because the electric utility consents to the franchise fee and its amount.[2] The Appellees argue that the Privilege Fee's unilateral imposition is the factor that renders the Privilege Fee an

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[1] Because of the broad use of the term "franchise" in several of the answer briefs, the County in this Reply Brief adds the qualifier "right-of-way" to the term franchise to conform to the language used in the utility franchise at issue in this appeal.

[2] As discussed later in this brief some, but not all, of the Appellees also argue as a distinction that the electric utility obtains an agreement not to compete by the local government granting the franchise.

unconstitutional tax in the absence of general law authorization. Because, in this case, the Electric Utilities did not consent to the Privilege Fee and received only a legislative declaration of no competition, the Electric Utilities conclude that the Privilege Fee is a tax while a right-of-way franchise fee is a valid fee. Lost in Appellees' argument is any recognition that it is the utility customer that pays the fee, whether the charge is a right-of-way franchise fee or a unilaterally imposed rental charge. Thus, the only constitutional distinction under the Appellees' puzzling constitutional analysis is the corporate consent of the Electric Utility.

This corporate consent argument conveniently ignores the power of local governments to charge rental fees for the relinquishment of property rights in public property and distorts the constitutional provision that all forms of taxation are preempted to the state except as provided by general law. The law in Florida is clear. Local governments have the power to charge reasonable rental fees for the privileged use of public property. The constitutionality of such rental fees, regardless of their form, does not require the consent of those who are granted the privileged use.

ARGUMENT

I. PRIVILEGE FEES AND RIGHT-OF-WAY FRANCHISE FEES ARE LOCAL GOVERNMENT CHARGES OF THE SAME CLASSIFICATION AND THE HOME RULE POWER TO IMPOSE SUCH RENTAL FEES IS INGRAINED IN FLORIDA LAW.

Whether the term "functionally equivalent" or some other descriptive phrase is used, the inescapable conclusion is that the Privilege Fee and right-of-way franchise fees are local government charges of the same classification -- rental fees received for the relinquishment of property rights that results from the use or occupancy of public property. The Appellees, through various theories, attempt to draw a constitutional distinction between the Privilege Fee and traditional right-of-way franchise fees.[3]

For example, Appellee Florida Power & Light Company ("FP&L") asserts that local government's surrender of its right to compete is the "essence" of a franchise agreement. That "essence" according to FP&L is missing from the County's Privilege Fee Ordinance. FP&L states:

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[3] Several of the Appellees contend that the purpose of a franchise is to grant to an electric utility "the right to do business within a certain geographic area." See, e.g., Appellee Brief of City of Gainesville at 9. The right-of-way franchises entered into by electric utility companies seek permission to use public rights-of-way. Additionally, some franchises seek an agreement from the local government not to compete. The argument that such utility franchises grant the license to do business within a geographic area distorts the agreements and the statutory framework of electric utility regulation in Florida. The fact that an electric utility must pay franchise fees in exchange for local government's relinquishment of property rights does not convert such right-of-way franchise into one under which the license to engage in a particular business is granted.

> It is this surrender of the local government's right to provide competitive service, as a constitutionally protected property right -- not the franchisee's use of rights-of-way to provide that service -- that is the essence of a franchise agreement and the consideration for a franchise fee.

Appellee FP&L Answer Brief at 24 (footnote omitted).[4]

FP&L then cites to Fla. Public Service Commission v. Florida Cities Water Co., 446 So. 2d 1111 (Fla. 2d DCA 1984), for its assertion that the "surrender" of the right to provide competitive services is the essence of a franchise agreement. This case does not, however, support FP&L's contention. The Second District Court of Appeal in the Florida Cities Water Co. case held only that when Lee County relinquished its regulation of water and sewer utilities to the Florida Public Service Commission, its franchise agreement assigning service areas because ineffective; thus, Lee County lost the ability to provide utilities with the right to do business by granting a franchise. The Issuance of the certificate to operate

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[4] Section 4.02 of the Privilege Fee Ordinance contains a legislative declaration that the County will not engage in generating, distributing or transmitting electricity in competition with any Electric Utility. Furthermore, the County legislatively found that the declaration not to compete is a valuable competitive advantage to the Electric Utilities. See Ord. 97-12, § 1.02(E), (App. C). If the contractual vesting of such legislative non-competition is so essential to FP&L's argument that the Privilege Fee is a tax, then its concern is alleviated by the Ordinance itself. Additionally, the Privilege Fee Ordinance does not apply to any Electric Utility that has separately entered into a right-of-way franchise agreement with the County. See Ord. 97-12, § 1.01, definition of "Electric Utility." Thus, FP&L can obtain a "surrender of the local government's right to provide competitive service" under a vested contract by entering into the same right-of-way franchise agreement that it has entered into with hundreds of local governments throughout Florida, including eight local governments within the Eighth Judicial Circuit. See Franchise Agreements in App. H-1 through H-8.

was then under the jurisdiction of the Florida Public Service Commission, not Lee County. The Second District Court did not conclude that outside the specific franchise contract at issue, the county could not charge for right-of-way use. In fact, the Second District Court specifically stated, "We do not, however, pass on whether Lee County is entitled to charge Florida Cities for the use of the rights-of-way independent of the franchise agreement." 446 So. 2d at 1114. Furthermore, FP&L misunderstands the court's language in Florida Cities Water Co. with respect to competition. The court did not indicate that the "essence" of a franchise agreement was a covenant not to compete. Rather, the essence of the franchise in that case was the former authority of the county to prohibit all competition through regulation. But, once the county relinquished its regulation of the utilities to the Public Service Commission, the county "lost its ability to provide or continue the license to do business without competition. . . ." Id. at 1114.

In addition, it is disingenuous for the Appellees to attempt to avoid the reality that electric franchise agreements provide a grant of and fee for the privileged use of public right-of-way use. Whether the term "functionally equivalent" or some other descriptive phrase is used, the inescapable conclusion is that the Privilege Fee and right-of-way franchise fees are local government charges of the same classification -- rental fees received for the relinquishment of property rights that results from the use or occupancy of public property.

No County argument could illustrate as clearly the purpose of a right-of-way franchise fee as a reading of the Franchise Agreement granted to FP&L in Baker County Ordinance No. 96-13:

> Section 1. There is hereby granted to Florida Power & Light Company, . . . the non-exclusive right, privilege and franchise (herein called "Franchise") to construct, operate and maintain in, . . . the present and future roads, streets, alleys, bridges, easements, rights-of-way and other public places (herein called "public rights-of-way") throughout all of the unincorporated areas . . . for the purpose of supplying electricity.

Ord. 96-13, § 1 (App. H-1) (emphasis added). The agreement not to compete appears "[a]s a further consideration" for the franchise but not until section 7. This "surrender of the local government's right to provide competitive service," is in addition to the primary consideration -- the "privilege" to use Baker County's "public rights-of-way" to sell electricity.

An electric utility's motivation to secure a privileged use of public property by consenting to a right-of-way franchise is clearly recognized in Florida law. For example, this Court in the City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1966), held that franchise fees were paid "in exchange for specific property rights relinquished by the cities." Id. at 973. See also City of Pensacola v. Southern Bell Telephone Co., 37 So. 820, 823 (1905) ("[M]unicipalities . . . may impose a reasonable charge, in the nature of a rental, for the occupation . . . of their streets by telegraph and telephone companies[.]"); and Santa Rosa County v. Gulf Power Co., 635 So. 2d 96, 98 (Fla. 1st DCA 1994) (upholding

county authority to impose "franchise fees upon utilities for use of [county] rights-of-way[.]"). Similarly, the First District Court noted in Santa Rosa County that the "franchise fees at bar . . . constituted consideration for the contractual grant of the rights to use county rights-of-way . . .." 635 So. 2d at 103.

The argument that the essence of a franchise agreement is a local government's surrender of the right to compete misleads and ignores the clearly stated primary purpose of the utility franchise -- to grant a privileged use of public rights-of-way.[5] All eight franchises granted to FP&L by local governments within the Eighth Judicial Circuit have virtually identical language as that quoted above. See App. H-1 - H-8. Consistently, all 12 of Florida Power Corporation's franchise agreements with local governments in the Eighth Judicial Circuit contain similar language, highlighting the nature of the franchise granted -- a privileged use of public rights-of-way. See App. H-9 - H-13; H-15 - H-19. For example, the City of Alachua Ordinance 0-96-20 states:

> The Grantor [the city] deems it necessary, desirable, and in the interest of its citizens to establish by ordinance a franchise granting to the Grantee the permission to occupy Rights-of-Way in the City of Alachua, Florida,

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[5] Significantly, FP&L agreed to pay Baker County a fee equal to five and a half percent of the gross revenues received from the unincorporated area "as consideration for the franchise" granting a privileged use of the public rights-of-way. See Ord. 96-13, § 5(a) (App. H-1). In contrast, the Privilege Fee at issue here is imposed at three percent of gross revenues.

> for the purpose of providing electric services.

City of Alachua Ord. 0-96-20, § 1 (App. H-9) (emphasis added). Furthermore, none of the franchise agreements granted to Appellee, Florida Power Corporation contain an agreement by the local government not to compete.[6]

Because a franchise grants the same privileges as the County's Privilege Fee here, the only difference between the two fees is the electric utilities consent to pay a franchise fee inherent in a franchise agreement, historically imposed as a percentage of gross revenues. All of the arguments and the case law analysis in the Appellees' answer briefs concerning regulatory fees or charges imposed to fund a specific governmental service simply do not apply to the proprietary power of a local government to impose a rental fee for a privileged use of its public property.[7] The fee, whether

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[6] See also, e.g., Central Florida Electric Cooperative, Inc. Franchise Agreement with the City of Cedar Key. Ord. No. 155, § 2 (App. H-22) ("Grantee shall have . . . the right, privilege, franchise, power and authority to use the streets, avenues, alleys, easements, wharves, bridges, public thoroughfares, public grounds and/or other public places of Grantor . . .."); and Clay Electric Cooperative, Inc. Franchise Agreement with the Town of Worthington Springs. Ord. 92-5, § 1 (App. H-34) ("CLAY ELECTRIC COOPERATIVE, INC. . . . is hereby granted the non-exclusive right, privilege or franchise to construct, maintain and operate in, under, over, upon and across the present and future streets, alleys, bridges, easements and other public places of the TOWN OF WORTHINGTON SPRINGS, FLORIDA . . . electric facilities . . ..").

[7] The Appellees emphasize the definition of "Electric Utility Privilege Fee" in the Privilege Fee Ordinance as support for their regulatory fee argument. One of the purposes of the Privilege Fee is to pay the cost of regulating the County Rights-of-Way and protecting the public in the use and occupancy of such public property. Accordingly, Section 2.02(C) of the Ordinance provides that any Electric Utility paying the Electric Utility Privilege Fee shall not be required to pay an additional regulatory

unilaterally imposed or imposed pursuant to a franchise agreement is for the relinquishment of property rights.

One of the Appellees' linchpin arguments that the Privilege Fee is a tax focuses on the use of the Fee proceeds to fund general governmental services. While their theory is consistent, each has a somewhat different view of which use restrictions should apply to the Privilege Fee. For example, FP&L argues that the Privilege Fee proceeds must be "earmarked for the regulation of utility use of County rights-of-way" or "restricted to the County's road system." See Appellee FP&L Answer Brief at 17, 28. The Appellee Florida Electric Cooperatives Association, Inc. asserts, in bold print, that the proceeds must "relate to County rights-of-way or the County road system." See Appellee Florida Electric Cooperatives Association, Inc. Answer Brief at 3. The Appellee City of Gainesville argues that to be a valid fee the proceeds must be "designated to regulate or maintain the right-of-way or the road system in Alachua County." See Appellee City of Gainesville Answer Brief at 21. Apparently, then, if the Privilege Fee proceeds or the proceeds of the Bonds were limited to the construction of capital improvements to the County Road System, Appellees FP&L and Florida Electric Cooperatives Association, Inc. would be satisfied and the Privilege Fee would survive their test of constitutional

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fee for the public right-of-way use. See Ord. 97-12, § 2.02(C) (App. C). Traditionally, the terms of right-of-way franchise agreements have provisions that reconcile the competing uses of the public rights-of-way. The Privilege Fee Ordinance contains such consistent provisions and includes any cost of such regulation within the amount of Privilege Fee.

validity. However, Appellee City of Gainesville would not be satisfied because the fee was not used to "regulate or maintain the road system." To be constitutionally consistent, each Appellee would presumably also argue that right-of-way franchise fee proceeds are similarly restricted and that proceeds of other rental charges must be used to fund the activity or structure for which the rent was imposed.

In various ways, the Appellees arrive at this constitutional argument through an analysis of the "use and amount" rules that are gleaned from case law discussing regulatory fees or fees imposed to fund essential services. These "use and amount" rules simply do not apply when determinating the validity of rental fees, whether unilaterally imposed like the Privilege Fee or paid pursuant to a right-of-way franchise.

FP&L critically comments that the County did not mention the State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994), decision in its trial memorandum and referred to it only in a footnote in the Initial Brief. The reason for the County's brief discussion of the State v. City of Port Orange decision is not because of any disagreement with the Court's decision or the analysis. Rather, the consistent position of the County is that the two prong test[8] in that case does not present the correct analysis for the

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[8] First, user fees "are charged in exchange for a particular governmental service which benefits the party in a manner not shared by other members of society." Second, the fee must be "paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." State v. City of Port Orange, 650 So. 2d 1, 3 (Fla. 1994).

Privilege Fee. The user fee designated as a transportation utility fee before this Court in the State v. City of Port Orange case was a fee imposed to fund an essential and specific governmental service -- the cost of capital improvements to the municipal road system. The transportation utility fee was imposed on all developed properties within the city. It was a charge imposed pursuant to an exercise of the legislative power of the local government to fund essential services -- the same classification of fees or charges as those imposed to pay the cost of solid waste collection and disposal or fees imposed to provide stormwater management programs. In analyzing the transportation utility fee, this Court in the City of Port Orange case recognized that the fee imposition was the result of a sovereign legislative decision to fund an essential service. This Court stated:

> Funding for the maintenance and improvement of an existing municipal road system . . . is revenue for the exercise of a sovereign function contemplated within this definition of a tax.

650 So. 2d at 3. This Court then phrased the issue faced in terms of the validity of the fees imposed to fund specific governmental services -- at issue were fees imposed "in exchange for a particular governmental service" to be paid by the feepayer who has the option of "not utilizing the governmental service." These rules of construction on the validity of user fees to fund an essential governmental service have no applicability to rental fees imposed for the County's relinquishment of specific property rights such as right-of-way franchise fees or the Privilege Fee before

this Court. Rather, the validity of rental or user fees hinge upon whether the fees are arbitrary in consideration of the public property rights relinquished.[9]

The County concedes that regulatory fees must be used to fund the contemplated regulation and cannot exceed the budgetary amount of the regulatory activity. Likewise, the County concedes that fees imposed to fund an essential governmental service must be dedicated to providing the governmental service. See, e.g., State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994). However, such "rules" do not apply to the classification of fees at issue in this case -- rental fees imposed for the County's relinquishment of property rights pursuant to a privileged use of public property pursuant to a privileged use of public property.[10] The validity of

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[9] The argument of Appellee Florida Power Corporation that the County's analysis would have permitted the city to avoid the Port Orange two-prong test by characterizing the transportation utility fee as rent misses the point. See Appellee Florida Power Corporation Answer Brief at 18. The local roads within the municipality are provided to all residents and their improvement is an essential city service in the exercise of a sovereign function. No city residents or developed residential property received a privileged use of the roads. This privileged use is the underlying justification for all rental fees, whether unilaterally imposed such as a privilege fee or imposed pursuant to a right-of-way franchise. Under the reasoning of Appellee Florida Power Corporation, if the user fee rules of City of Port Orange apply to the Privilege Fee, then the two-prong Port Orange test is subverted routinely by all Electric Utilities merely by their consent to a right-of-way franchise and labeling the "franchise user fee" as a franchise fee.

[10] Similarly, the First District Court of Appeal in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), recognized that the privilege fee construed was not imposed pursuant to an exercise of the sovereign capacity to fund essential services. "[W]e accept the position . . . that the fee is not a general revenue for the support of a sovereign government." 600 So. 2d at 1164. It is undisputed in Alamo Rent-

this classification of fees hinges on whether such fees are arbitrary in consideration of the public right relinquished. To extract or borrow use restriction rules from unrelated classifications of fees and limit the use of rental fees or right-of-way franchise fees will strike terror in the hearts and minds of all local government finance offices and thousands of local government bond holders. Routinely and universally the income from right-of-way franchise fees and other rental fees imposed by local government are budgeted in the general fund, appropriated for a general governmental activity and pledged for the security of numerous bonds issued to provide general governmental facilities and improvements.

The power of a local government to charge a rental fee in its proprietary capacity as the owner of public property has been ingrained in Florida case law since 1905. For example, in City of Pensacola v. Southern Bell Telephone Co., 37 So. 820 (Fla. 1905), the Supreme Court expressly recognized the ability of local governments -- even before home rule -- to impose rental fees and regulatory fees, as two different types of charges. The court stated, "[M]unicipalities . . . 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

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a-Car that the "fee is for Alamo's use of all of the JPA's facilities which benefit Alamo by generating its business." 600 So. at 1162. Consequently, in Alamo Rent-a-Car, the fee proceeds were not limited to the maintenance and construction of the roads and ramps used by Alamo but were used for the entire general governmental purposes of the JPA -- the operation of an airport.

impose a reasonable charge in the enforcement of local government supervision, the latter being a police regulation." Id. at 822. The Appellees, particularly FP&L completely disregard, and misrepresent, this language and its impact on the decision upholding Pensacola's fee.

The Appellees unsuccessfully attempt to distinguish the percentage privilege fee imposed and upheld in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), from the percentage Privilege Fee in this case because, according to the Appellees, the County is not imposing the Fee as a function of its proprietary powers. Rather, Appellees assert that the County is exercising its sovereign and regulatory powers.[11] If that premise is correct, then the amount of the County's Privilege Fee

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[11] Before the 1968 revision to the Florida Constitution, all powers exercised by counties and municipalities required a specific delegation of authority from the Legislature in a general law or special act. Special districts and authorities were not granted home rule power under the 1968 revision; thus, the pre-1968 constitutional rules applicable to counties and municipalities remains for special distinction -- they possess only the powers expressly delegated or reasonably implied under the authority provided in their charter. Often, this power is described as the power to regulate a specific essential governmental service. For example, in City of Pensacola the city was exercising its delegated power to regulate the use of streets. However, the charge imposed was expressly held not to be a regulatory fee imposed under its police power but a "reasonable charge in the nature of a rental." 37 So. at 822. Similarly, in Alamo Rent-a-Car, the delegated power exercised was the power to regulate. "[T]he JPA unquestionably possesses the authority under the Charter to regulate the use of commercial ramps and drives under its control." 600 So. 2d at 1164. The "privileged" use fee in Alamo Rent-a-Car was imposed in JPA's proprietary capacity for "access . . . to public airport roads and terminals." The fact that the imposition of a privileged use or rental fee was pursuant to the power to regulate specifically delegated to governments of limited power does not alter the clear language in such cases or the classification of fee imposed as an obvious privilege use or rental fee.

should closely relate to some cost relating to the County's Rights-of-Way. However, this argument simply demonstrates the Appellees continued failure to understand the nature of the County's powers in imposing the Fee at issue.

The First District Court of Appeal quite clearly noted that the fee imposed by the Jacksonville Port Authority, a local government entity, as a percentage of the gross revenues of the off-site car rental companies, which was used to fund services and improvements at all three of the Port Authority's airports, was a proprietary function of the Port Authority. For example, the court stated, "[T]he 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. In pursuing this analysis, the First District 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. Consequently, the court rationalized that:

> the 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.

Id.

Similarly, in this case, the County owns its Rights-of-Way which the Electric Utilities are using to generate their customers. In this circumstance, the County may, in the words of the First District Court, "regulate" the Rights-of-Way "as a function of its

proprietary status." See 600 So. 2d at 1164; see also City of Pensacola v. Southern Bell Telephone Co., 37 So. 820, 822 (Fla. 1905)(recognizing the power of a local government to impose both rental charges as proprietary functions and regulatory charges as police power functions on utility use of the municipal street system).

The absurdity of hinging the constitutionality of rental fees like the Privilege Fee on utility consent is vividly illustrated by the trials and tribulations of Baker County. Baker County adopted a home rule ordinance substantially similar to the Alachua County Privilege Fee Ordinance. See Order on the Defendant Baker County's Motion for Summary Judgment (App. G). The Baker County Privilege Fee Ordinance imposed a five percent privilege fee for the precise purpose as the Privilege Fee imposed by the County in this appeal. FP&L sought a declaratory judgment that the privilege fee was an unconstitutional tax and raised the same arguments of invalidity urged in this appeal. The circuit court decision upholding the Baker County Privilege Fee as a valid home rule fee was appealed by FP&L to the First District Court of Appeal. After oral argument, the Appellee FP&L dismissed the appeal before the final decision and entered into a franchise agreement with Baker County. See Baker County Ordinance 96-13 (App. H-1). Under the provisions of the Baker County Franchise, FP&L then agreed to pay a franchise fee of five and a half percent, calculated on the identical basis as the Alachua County Privilege Fee. As is apparent in its clear language, the Baker County Franchise Agreement granted FP&L the

right and privilege to use the public rights-of-way to maintain its electric facilities and to conduct is business.

The end result to the electric customers in Baker County is the same regardless of whether FP&L consented to the fee or not. That a corporate objective is advanced by the certainty of a vested contractual right for the use of public rights-of-way is not the determinative constitutional factor of the validity of a rental fee. Corporate interest may drive the utility to seek a vested right to pay a stated rental fee for a privileged use of public rights-of-way for a term of years.[12] However, such a corporate objective cannot form the constitutional distinction between a valid fee and an impermissive tax. Such corporate interest cannot empower the utility as the gatekeeper that decides which local government can impose a rental charge for the use of its public rights-of-way and consequently which electric customers will be directly billed for the payment of such fee.

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[12] If the objective of the Electric Utilities is to obtain vested rights in exchange for their right-of-way use fee payments, they can do so. The Privilege Fee Ordinance expressly states that any "entity that operates under a non-terminated, consented to County electric utility franchise agreement," is not subject to regulation under the Privilege Fee Ordinance nor is it required to pay the Privilege Fee. See Ord. 97-12, § 1.01, definition of "Electric Utility." (App. C).

II. THE CALCULATION OF A FEE FOR THE USE OF PUBLIC RIGHTS-OF-WAY AS A PERCENTAGE OF GROSS REVENUES IS REASONABLE AND ENTITLED TO JUDICIAL DEFERENCE UNLESS PROVEN TO BE ARBITRARY.

The Appellee City of Gainesville argues that electric customers have no more choice about payment of the Privilege Fee than the citizens in the City of Port Orange case had about paying the transportation utility fee. The City of Gainesville ignores the fact that electric customers similarly have no choice in the payment of a franchise fee when an electric utility consents to a franchise. Under the reasoning of the Appellees, the consent rests with the Electric Utility, not with the ultimate electric utility customers.

The Appellees also argue that the Privilege Fee is a tax because it will be separately billed to the electric utility customer in a manner similar to the public service tax authorized in section 166.231, Florida Statutes. Thus, the argument runs, the Privilege Fee is a tax because it is imposed on the electric utility customer. This argument becomes obviously transparent upon recognizing that the same argument can be made against the method of collection of right-of-way franchise fees as required by the Florida Public Service Commission. See Rule 25-6.100(7), Fla. Admin. Code. Again, the direct billing of rental fees paid for the privileged use of public property is required under Florida Legislature's mandated rate regulatory scheme; such billing does

not bear upon the nature of the rental fee nor its validity under constitutional principles.[13]

The Appellees' argument that the County is not restrained as to the amount of rental fees that may be unilaterally imposed creates a parade of horribles that is unrelated to the issues in this appeal. Ultimately, the Florida Legislature has the power to preempt or restrict local government power to impose rental fees. For example, section 337.401, Florida Statutes, limits the percent of gross revenues that municipalities may charge for the recurring local telephone services as follows:

> (3) If any municipal authority requires any telephone company to pay a fee or other consideration as a condition for granting permission to occupy municipal streets and rights-of-way for poles, wires, and other fixtures, such fee under consideration may not exceed 1 percent of the gross receipts on

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[13] The Appellees' argument that the Privilege Fee Ordinance makes the Fee a debt of the customer does not transform the fee into a tax. First, the Ordinance is clear and specific that the Privilege Fee is imposed on the electric utility, not the customer. See, e.g., Ord. 97-12, § 1.01, definition of "Electric Utility Privilege Fee" (App. C) ("Electric Utility Privilege Fee shall mean the fee imposed on each Electric Utility . . . ."). See also Ord. 97-12, § 2.05(D) (App. C) ("The Electric Utility Privilege Fee is imposed against each Electric Utility upon its privileged use of County Rights-of-Way . . . ."). Second, the customer debt provision was inserted into the Ordinance merely as an accommodation to the current Electric Utilities in the event they face future competition from out-of-state utilities. The County wanted to assure the Electric Utilities that payment of the Privilege Fee could be enforced, thereby not placing them in a competitively disadvantaged situation. Furthermore, even if this provision creates constitutional problems for the Privilege Fee, the provision can be severed from the Ordinance under Section 4.05. See State v. Champe, 373 So. 2d 874 (Fla. 1978) (upholding validity of severability clauses and merely striking the void provisions of legislation when a preference for severability is stated).

> recurring local service revenues for services provided within the limits of the municipality by such telephone company. . . .

§ 337.401(3), Fla. Stat. When the Florida Legislature has placed limits on the home rule authority of municipalities to impose fees for the use by telephone companies of municipal rights-of-way, it has done so with language that recognized such fees can be unilaterally imposed. Additionally, the legislative language recognizes the reality, ignored by the Appellees, that all such rental fees are expressed as a percentage of gross revenues.[14]

The Appellees continually assert that because the amount of the Privilege Fee is not based on the cost to provide the County Rights-of-Way, the Fee is invalid. Such a connection, as may, for example, be supported by a cost analysis, is not necessary for a rental charge. In Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), the First District Court upheld the privilege fee imposed on rental car companies, despite the fact that no cost analysis was conducted. Just as the Appellees here, Alamo argued that any fee imposed on it by the JPA "must be based on a 'cost analysis' of its use of roads and ramps

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[14] The federal government similarly recognized this method of right-of-way fee calculation in placing limits on the amount of right-of-way fees that can be paid by cable operators:

> For any twelve-month period the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's gross revenues derived under such period from the operation of cable systems to provide cable services.

47 U.S.C.A § 542(b).

at the JIA terminal as the only just and reasonable method of charging it 'something' to use the facilities. . .." Id. at 1164. The First District Court also rejected this same argument as determining the validity of the fee in Santa Rosa County v. Gulf Power Corp., 635 So. 2d 96 (Fla. 1st DCA 1994). Specifically, the First District Court reversed the trial court's conclusion that the "franchise fee was an impermissible tax because the amount charged bore no discernible relationship to the cost to the counties for the use of their rights-of-way . . .." Id. at 99.

Interestingly, the one argument that the Appellees never address with respect to the amount of the fee is that like rental charges in the private sector, the amount of the Privilege Fee was based on an examination of the market. In fact, the Appellee City of Gainesville even recognizes that the market rates for right-of-way franchise fees are established by the electric utilities. See Appellee City of Gainesville Answer Brief at 41 ("The seeker of the franchise is able to determine the value of the special privileges it may acquire."). The Ordinance provides evidence of establishing the rate of the Privilege Fee on the market value. For example, the Privilege Fee Ordinance reads:

> . . . Th[e] fee calculation is hereby declared to be reasonable and consistent in amount and within the method of collection 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.

Ord. 97-12, § 2.05(D) (App. C). The standard electric right-of-way franchise fee that is paid to local governments by Electric

Utilities is six percent of gross revenues. The County's Privilege Fee is only three percent of gross revenues. Furthermore, the courts have recognized that a six percent rate is reasonable. See, e.g., Rosalind Holding Co. v. Orlando Utilities Comm'n, 402 So. 2d 1209, 1212, n. 18 (Fla. 5th DCA 1981) ("The amount of the [franchise] fee is based roughly on 6% of the revenues earned in Orlando. Six percent for a true franchise fee is fairly standard in Florida.").

The appellees assert that the three percent rate of the Privilege Fee is not reasonable when the rate stays the same even if only one electric pole is placed in County Rights-of-Way. Such an assertion has been rejected by the courts in Florida. For example, in Jacksonville Port Authority v. Alamo Rent-a-Car, 600 So. 2d 1159 (Fla. 1st DCA 1992), the First District Court recognized that once Alamo used any facilities at the airport to generate business, its "company benefits from, and therefore 'uses,' the entire airport facility at which it operates." Id. at 1163. In the same manner, the Electric Utilities here benefit from all of the County's Rights-of-Way once it places one Electric Facility in or on the County's property. In addition, the Appellees appear to conveniently forget that a right-of-way franchise fee does not change based on the utility's extent of use of public property under the franchise agreement. See App. H-1 - H-34.

A fact pattern where the sole intended use, by an electric utility, of the County Rights-of-Way is for the placement of one

pole or where the electric utility merely crosses the County Rights-of-Way is not before this Court. Application of the Privilege Fee Ordinance under such tortured facts likewise is not before this Court. In their Answer Briefs and at trial all the Appellees argue that the privileged use of County Rights-of-Way is an integral part of their electric utility business conducted within Alachua County. Such fictional factual patterns used in argument are collateral to the issues on this appeal.

CONCLUSION

The Privilege Fee and Right-of-Way franchise fees are classification of fees whose validity is subject to fundamentally different rules of construction than those applicable to regulatory fees or charges imposed to fund an essential governmental service. Such rental fees are imposed for the relinquishment of property rights inherent in a grant of a privileged use of public property. The amount of such rental fees established by local governments is entitled to judicial deference absent a showing of arbitrariness or abuse of discretion. 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 should 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 by U.S. Mail to the individuals listed on the attached service list, this 5th day of October, 1998.

ROBERT L. NABORS