IN THE SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Petitioner,

v.

CITY OF WINTER PARK,

Respondent.
_____/

Supreme Court Case No. SC02-2272

DCA Case Nos. 5D02-87; 5D01-2470
L.T. Case No. 01-CI-01-4558-39

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# AMICUS CURIAE BRIEF OF FLORIDA POWER & LIGHT COMPANY, IN SUPPORT OF PETITIONER, FLORIDA POWER CORPORATION, FILED BY LEAVE OF COURT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**FLORIDA STATUTES**

**OTHER AUTHORITIES**

## IDENTITY OF AMICUS CURIAE AND INTEREST IN THIS CASE

Amicus curiae, Florida Power & Light Company ("FPL"), supports the Petitioner, Florida Power Corporation ("FPC"), in this appeal. Like FPC, FPL is an investor owned public utility regulated by the Florida Public Service Commission ("FPSC") pursuant to Chapter 366, Florida Statutes. FPL provides electric service to nearly half of the population of Florida, including inhabitants of 35 Florida counties and over 180 municipalities. Like FPC, FPL utilizes public road rights-of-way in meeting its statutory obligation to provide reasonably sufficient, adequate and efficient electric service to the public. FPL has franchise agreements with over 165 cities and counties, some of which will expire soon.

Like FPC in this case, FPL has faced assertions that it must continue to pay franchise fees to a municipality despite expiration of FPL's written franchise agreement with the municipality, merely because FPL had facilities located within public road rights-of-way. FPL has successfully defended against such assertions based on the decisions of this Court and other Florida courts holding that franchise fees cannot be unilaterally imposed by local governments; that electric utilities like FPL have a right to use public roads with or without a franchise agreement; and that local governments cannot impose any fees for such use other than regulatory

charges to recover the costs of any actual regulation of such use. FPL has played an important role and invested significant resources in the development of this law -- including as a primary party in the controlling case of Alachua County v. State, 737 So. 2d 1065 (Fla. 1999) -- and has a vital stake in preserving it.

If the decisions of the trial court and Fifth District Court below are not quashed, FPL and its customers have much to lose. FPL pays tens of millions of dollars annually in franchise fees pursuant to 30-year franchise agreements. As constitutionally protected property rights, these long-term agreements are important in the provision of electric service to FPL customers, affecting matters such as planning, financing, rates and service. If local governments can unilaterally impose franchise fees on electric utilities based solely upon their unavoidable use of public roads, great harm will result.

Cities and counties with FPL franchise agreements will likely allow them to expire, then demand continued payment of the "franchise fees" despite disappearance of the consideration for which the fees were bargained for and agreed to in the first place. They may also attempt de facto unilateral amendments of existing franchise agreements by

imposing additional "fees" without the normal restrictions of regulatory charges, since the "fee" in the instant case bears no rational resemblance to a valid regulatory charge. Certainly, local governments would be disinclined to enter into new franchise agreements, arguing that they have been given authority to impose the same "fees" unilaterally without having to provide any consideration to the electric utility and its customers. As the State of Florida's largest electric utility, the adverse impact on FPL, its customers, its rates and services, and the FPSC's exclusive jurisdiction to regulate same, will be severe.

## SUMMARY OF ARGUMENT

The decision below holds that FPC must continue to pay the City of Winter Park ("City"), indefinitely, franchise fees calculated pursuant to a franchise agreement between FPC and the City that has expired. The court reaches this conclusion based solely on the existence of FPC facilities in public roads located within the City. This, the court states, makes FPC a "holdover franchisee subject to the previously agreed rental," like a holdover tenant in a landlord/tenant relationship. Florida Power Corp. v. City of Winter Park, 827 So. 2d 322, 324-25 (Fla. 5th DCA 2002). This decision conflicts with well esta-blished law concerning franchise

fees, electric utility use of public roads, legitimate local government regulation of such use, and valid regulatory charges that may be imposed for such regulation, as set forth in Alachua; City of Plant City v. Mayo, 337 So. 2d 966 (Fla. 1976); State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994); and other decisions of this Court and Florida District Courts of Appeal.

Electric utility franchise fees are consideration for the grant of the franchise as a constitutionally protected property right, not for the use of public roads in providing electric service to the public. They are lawful because they are paid pursuant to bargained for agreements. If unilaterally imposed, as here, such fees are unlawful taxes.

Electric utilities like FPC and FPL may use public roads with or without a franchise agreement, as local governments hold public roads in trust for the benefit of the public, and electric utility facilities are considered part of the transportation use of public roads. Local governments' authority over public roads is governmental, not proprietary. They may adopt reasonable, transportation-based rules and regulations regarding the placement of electric facilities within public road rights-of-way, and recover any actual costs of such regulation through valid regulatory charges, but they

do not have authority to charge rent for electric utility use of public roads.

Thus, the existence of FPC facilities in public roads after expiration of the franchise agreement provides no basis for the Fifth District Court's transformation of formerly agreed upon franchise fees into unlawful forced payments for the use of public roads. The decision below overextends the court's authority by rewriting the parties' written agreement for the express, unjustified and improper purpose of altering what it misperceived as an advantageous bargaining position for FPC in any negotiations over a new franchise agreement. In actuality, the decision produces an unlawful windfall for the City and other local governments, allowing them to extract huge sums of money from utilities and their customers without giving up anything in return. This decision must be quashed.

## I. ARGUMENT

### THE FORCED PAYMENTS DEMANDED BY THE CITY AND MANDATED BY THE COURTS BELOW CONSTITUTE UNLAWFUL TAXES

The monies FPC is being forced to pay to the City are not valid franchise fees, regulatory charges or rent. They are forced payments imposed by the City in its governmental capacity to raise general revenues that are not based upon or

earmarked to defray any costs of regulating FPC's use of public roads. In other words, the forced payments are unlawful taxes.

**A. No Franchise Agreement, No Franchise Fees**

Franchise fees are paid solely by agreement. Without a bargained for agreement, such fees would be unlawful taxes. No franchise agreement, no franchise fees. Alachua; Plant City; City of Hialeah Gardens v. Dade County, 348 So. 2d 1174, 1180 (Fla. 3d DCA 1977), cert. denied, 359 So. 2d 1212 (Fla. 1978); Rosalind Holding Co. v. Orlando Util. Comm'n, 402 So. 2d 1209, 1212 (Fla. 5th DCA 1981), rev. denied, 412 So. 2d 469 (Fla. 1982)(a fee "labeled a 'franchise-equivalent' fee" and based on 6% of revenues was not a "real franchise payment" because there was no franchise agreement).

Here, the franchise agreement between FPC and the City expired by its terms. Since there is no franchise agreement, the forced payments demanded by the City and mandated by the courts below are not franchise fees as a matter of law. The fees, once lawful because of FPC's agreement, became unlawful taxes when forced upon FPC after that agreement expired.

**B. Franchise Fees Are Paid For The Grant Of The Franchise, Not For The Use Of Public Roads**

A franchise fee is "consideration paid by the utility for the grant of the franchise." Hialeah Gardens, 348 So. 2d at 1180 (emphasis added). A franchise is an agreement for a term of years in which the local government, acting in its governmental capacity, decides not to provide a public service which it might otherwise provide and to contract with the franchisee to provide such service.[1] A franchise is an irrevocable contract entitled to constitutional protection as a property right. See Winter v. Mack, 142 Fla. 1, 194 So. 225, 229 (1940); Plant City, 337 So. 2d at 973 (franchise fees "are bargained for in exchange for specific property rights relinquished by the cities").

It is the decision of the local government to surrender its right to provide competitive electric service, as a constitu-tionally protected property right -- not the franchisee's use of rights-of-way to provide that service[2] -- that is the essence of a franchise agreement and the

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[1] See Buford v. Pinellas County Power Co., 87 Fla. 243, 100 So. 504 (Fla. 1924); see also City of Picayune v. Mississippi Power Co., 197 F.2d 444, 445 (5th Cir. 1952)(city acted in its governmental capacity in granting electric franchise).

[2] See 10 Eugene McQuillin, Law of Municipal Corporations, § 34.03 (3d rev. ed. 1990) [hereinafter "McQuillin"] (while a franchise is property, it is "separate and distinct from the property necessary in its use and exercise," and does not grant any proprietary interest in public roads).

consideration for a franchise fee. This is made clear by Florida Public Service Commission v. Florida Cities Water Company, 446 So. 2d 1111 (Fla. 2d DCA 1984). There, Lee County entered into franchise agreements which "authorized the utilities to use the county rights of way but did not obligate the county to perform any specific services for the utilities." Id. at 1112. Following relinquishment to the FPSC of the county's utility regulatory authority, a dispute arose as to the county's further entitlement to franchise payments. The county argued that, despite the loss of its ability to protect utilities from competition, it still provided services, and the utilities still received benefits under the agreements, for which the county should be paid. See id. at 1113-14. One such purported benefit was the utilities' use of county rights-of-way.

The Second District, through then-Judge Grimes, disagreed with the trial court's holding that the county was entitled to further payment. It held that the county's ability to grant the utilities the authority to do business without competition "was the essence of the franchise agreement." Id. at 1114.[3]

[3] In accordance with their purpose and legal nature, FPL franchise agreements contain a provision whereby the franchisor expressly agrees not to compete with FPL in the provision of electric service during the term of the agreement. In the case below, the City sold its electrical

Once this ability was relinquished, "there was nothing left upon which the franchise agreement could operate." Id. at 1113. "By itself, the right-of-way provision was not sufficient to keep the franchise agreement alive." Id. at 1114. This holding unequivocally dispels any notion that the franchise fee being paid by FPC prior to expiration of its franchise agreement was being paid merely for the use of public rights-of-way, the cornerstone of the City's position and the decisions below.

### C. Public Electric Utilities Like FPC and FPL Have A Right To Use Public Road Rights-Of-Way Without A Franchise Agreement As Part Of The Transportation Use of Public Roads

In holding that a franchise is not a right-of-way use agreement, the Second District Court in Florida Cities noted (as Lee County had conceded), that "under section 338.17, Florida Statutes (1981) [now section 337.401(1)], [the county] could not deny a utility the nonexclusive use of county rights of way regardless of the existence of a franchise agreement." Id. In stark contrast to its decision below, the Fifth District Court recently made the exact same holding in City of Oviedo v. Alafaya Util., Inc., 704 So. 2d 206 (Fla. 5th DCA

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system to, and entered into a franchise agreement with, FPC's predecessor, to provide electric service that the City was previously providing, reserving the right to buy the system back when the agreement expired. Winter Park at 323.

1998). In that case, the trial court enjoined the city from withholding approval of utility improvements in public roads based on the utility's refusal to sign a franchise agreement. The Fifth District Court affirmed this injunction, holding that while the city could adopt reasonable rules and regulations "regarding the installation of utility lines and structures in a right of way" and "grant the use of a right of way to a utility in accordance with such rules or regulations" under sections 337.401(1) and (2), Florida Statutes, it could not prohibit utility use of its rights-of-way "because [the utility] would not submit to the franchise terms unilaterally imposed." Id. at 207-08.

Thus, electric utilities like FPC and FPL do not need franchise agreements to place their facilities within public roads. To the contrary, they have a right to use public roads in providing their public service as part of the transportation use of the roads. Dickson v. St. Lucie County, 67 So. 2d 662, 665 (Fla. 1953)(Road rights-of-way include "public utilities which do not interfere with the use of the right of way for highway purposes"); Nerbonne, N.V. v. Florida Power Corp., 692 So. 2d 928, 929-30 (Fla. 5th DCA 1997)("grant of right-of-way for public road purposes [includes] public utilities"; "a power line ... is a proper use of a highway

easement"; power lines are "adaptations of traditional highway uses").

### D. Local Governments May Adopt Reasonable, Transportation-Related Rules Regarding Electric Utility Use Of Public Roads And Recover Any Actual Costs Of Such Regulation Through Valid Regulatory Charges, But They Have No Authority To "Rent" Public Roads For Such Use

Local governments hold public roads in trust for the benefit of the public[4] in their governmental capacity, and the only powers they possess regarding electric utility use of public roads are regulatory.[5] "The power to regulate does not

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[4] Loeffler v. Roe, 69 So. 2d 331, 339 (Fla. 1954); Roney Inv. Co. v. City of Miami Beach, 127 Fla. 773, 174 So. 26, 29 (1937); Sun Oil Co. v. Gerstein, 206 So. 2d 439, 441 (Fla. 1968).

[5] See §125.01 (1) (m), Fla. Stat. (counties have power to regulate roads and placement of structures therein); § 337.401 (1), Fla. Stat. (local governments "are authorized to prescribe and enforce reasonable rules and regulations with reference to the placing and maintaining" of electric lines and structures); Port Orange (city-imposed fee for use of public roads was an unlawful tax and not a valid user fee, in part because maintenance and improvement of public roads is a governmental, not proprietary, function); AT&T v. Village of Arlington Heights, 620 N.E.2d 1040, 1044 (Ill. 1993)("Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public."); McQuillin § 30.40 ("whatever the nature of the title of the municipality in streets and alleys, ... it is such as to enable the public authorities to devote them to public purposes. The power to maintain and regulate the use of the streets is a trust for the benefit of the general public, of which the city cannot divest itself, nor can it so exercise its power over the streets as to defeat or seriously interfere with the enjoyment of the streets by the public.").

encompass the power to prohibit." Moore v. Thompson, 126 So. 2d 543, 550 (Fla. 1960). Moreover, as discussed above, Florida case law expressly holds that electric utilities such as FPC and FPL -- which have a statutory duty to provide electric service to the public upon terms required by the FPSC pursuant to its exclusive jurisdiction to regulate their rates and services -- are entitled to place their electric facilities within public road rights-of-way as part of their public transportation use.

Under section 337.401(1) and (2), local governments may adopt reasonable, transportation-related rules and regulations relating to such use and issue permits in accordance with same. However, they do not have authority to prohibit electric utilities from placing their facilities within public road rights-of-way, nor may they condition such use on matters outside of their limited regulatory authority for transportation purposes, or in any manner that invades the FPSC's exclusive jurisdiction over rates and services. See Florida Power Corp. v. Seminole County, 579 So. 2d 105 (Fla. 1991).

Because they hold public roads in trust for the public in their governmental and not proprietary capacity, local governments may grant licenses/permits for their use, but

cannot relinquish specific property rights in public roads to private persons, nor may they charge "rent" for their use.[6] The only fees local governments can unilaterally impose for utility use of public roads are regulatory fees based on, not exceeding, and earmarked to defray, any actual costs of regulating such use.[7]

### E. The Decision Below Conflicts With Alachua And Other Decisions Of This Court And Other District Courts Of Appeal

The District Court decision below conflicts with Alachua and the other decisions of this Court and the District Courts of Appeal discussed above. Indeed, this Court need look no further than Alachua to decide this case.

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[6] See Roney, supra at 29 ("it is recognized that a city has no power to sell or barter the streets and alleys which it holds in trust for the benefit of the public"); Lodestar Tower N. Palm Bch., Inc. v. Palm Bch. Television Broadcasting, Inc., 665 So. 2d 368, 370 (Fla. 4th DCA 1996)(licenses do not convey property rights); Lloyd Enters., Inc. v. Department of Revenue, 651 So. 2d 735 (Fla. 5th DCA 1995)(regulatory fee for public beach concessions created no rental, lease or license for use of real property); McQuillin § 30.40 ("[T]he estate of the city in its streets ... is essentially public and not private property, and the city in holding it is considered the agent and trustee of the public and not a private owner for profit or emolument."); id. § 30.39 (power "relating to the control of highways and streets, is a sovereign governmental power."); id. § 30.43 ("Power to control and regulate a street does not include power to lease [it] for a private use ....").

[7] See Part I C. 1. through 3. of FPC's Initial Brief herein.

In Alachua, the County tried to impose a "Privilege Fee" -- calculated as a percentage of revenues from the sale of electricity -- predicated solely upon electric utility use of County-controlled public roads. The County argued every conceivable basis for its "Privilege Fee" in the trial court, including that it was the functional equivalent of a franchise fee, a user fee, a regulatory fee, and rent for use of public roads. FPL, FPC and others argued that the "Privilege Fee" was an unlawful tax in that, inter alia, it did not meet the requirements of a valid franchise fee, user fee or regulatory fee, that the County had no proprietary authority to rent public roads, and that, in any event, no property rights, or any rights, were relinquished by the County upon which any rent could be predicated. The trial court rejected all of the County's arguments, and entered a summary judgment declaring the "Privilege Fee" to be an unlawful tax.

On appeal to this Court, the County restricted its arguments to contending that the "Privilege Fee" was either a franchise fee or reasonable rent. This Court rejected both arguments for reasons directly applicable to the instant case. It held that the "fee" was not a franchise fee because, just like here, the utilities did not agree to it, the County did not give up any property rights in exchange for it, and "the

utilities were already operating with the property rights they need to provide electricity ...." Alachua at 1068-69.

The Court's rejection of Alachua County's rental charge argument also applies here. Like the City and the courts below in this case, Alachua County asserted that franchise fees under electric utility franchise agreements established market rent for electric utility use of public roads,[8] and that it had authority to extract such "rent" separate and apart from its governmental police power authority to impose regulatory fees, citing City of Pensacola v. Southern Bell

[8] Alachua County, the City and the courts below all mistakenly described the franchise fee in the various franchise agreements under discussion as six percent of gross revenues from the sale of electricity. Close scrutiny of the franchise fee provisions in these agreements, including the FPC agreement at issue here, shows that the franchise fee is not six percent of gross revenues. Rather, it is an amount which added to certain taxes, licenses and other impositions levied by the franchisor will equal six percent of certain specified revenues. See FPC Initial Brief herein at n. 2. Thus, the fees paid under such franchise agreements are not uniform, but vary greatly from city to city and county to county depending upon the amount of taxes, licenses and other impositions used in calculating the fee. Where the amount of such taxes, licenses and other impositions is high, the franchise fee is well below six percent of the specified revenues. Where that amount is low, the fee is higher. Thus, it is grossly inaccurate to describe the franchise fee in FPC's franchise agreement, and franchise fees under similarly worded franchise agreements, as six percent of revenues, and it is also inaccurate to say that the amount of the fee under such agreements is the same.

Tel. Co., 49 Fla. 161, 37 So. 820 (1905).[9] FPL and others maintained that the only charge for utility use of public roads permitted in Pensacola was a regulatory charge to recover the cost of regulation, which, while described as being "in the nature of a rental," provided no authority for local governments to rent public roads or impose any charge other than a regulatory one with all of the attendant restrictions on regulatory fees.[10]

Alachua rejected the County's argument that Pensacola recognized some form of non-regulatory authority for local governments to rent public roads, holding instead that Pensacola and the authorities cited therein "stand for the

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[9] See, e.g., Alachua County's Initial Brief at 9, 11, 14-15, 18-20, 36-38; Alachua County's Reply Brief at 13-14, 16, 21-22.

[10] See FPL Answer Brief in Alachua at 40-41, 46-51. As a predicate for the Pensacola language quoted on page 324 of the Fifth District Court's decision below, the Pensacola Court rejected an argument that a similar per pole charge in another case was sustained by the U.S. Supreme Court "on the ground that the city ... exercised ownership and sovereign power over its streets." Pensacola at 823. Rejecting that excessive view, the Court determined that "[i]n our construction of this opinion, ... the court derived the power of the city to enact the ordinance from the power to 'regulate' the use of the streets." Id. And in succeeding language, the Pensacola Court reiterated that "[t]he construction given ... to the ordinance ... will align it under the power to impose a charge for the use and occupation of the streets ... embraced in the power given the city to regulate its streets." Id. at 824. Thus, Pensacola rejected the flawed rationale for the court decisions below.

proposition that local governments have the authority to require that utilities be licensed pursuant to their police power, and that governments may require a reasonable fee to cover the cost of regulation ...." Alachua at 1067-68. Indeed, in footnote one of its opinion, the Court expressly rejected the County's rent argument, stating that the "concept of such fees being 'rent' ... has recently been criticized as an outdated view that arose over a century ago before the development of modern infrastructures," and "absent the vast statutes and regulatory schemes currently in place that affect both the location and cost of providing utilities." This Court concluded that the "Privilege Fee" unilaterally imposed for electric utility use of public roads was neither rent nor a franchise fee, but a forced charge on the utilities constituting an unlawful tax.

The Fifth District Court's attempt to distinguish the clear application of Alachua to the facts of this case ignores or misapprehends the differences between electric utility franchise fees and regulatory charges for utility use of public roads. The Fifth District Court views both as being something they are not, namely, rent for the use of public roads. However, as discussed above, franchise fees are paid by agreement for the grant of the franchise (which is a

property right in itself), not for the use of public roads, which electric utilities have an independent right to use, and which local governments have no authority to lease in the first place. Regulatory fees are police power charges which may be imposed unilaterally to defray actual costs of regulating utility use of public roads.[11]

Moreover, neither franchise fees nor regulatory fees result in the relinquishment of any property rights in the public roads on which rent could be predicated, either factually or legally.[12]

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[11] These differences are ignored in the District Court's statement that "[t]o interpret Alachua as Florida Power suggests would mean that any franchise fee negotiated by the parties which is not directly related to the cost of providing maintenance to the franchise property is invalid and unenforceable." Winter Park at 324. Nothing in Alachua or FPC's arguments below requires that negotiated franchise fees be directly related to the cost of maintaining electric facilities in public roads.

[12] The District Court's description of Pensacola as having "analogized the obligations between a franchiser and franchisee as similar to those in a landlord/tenant relationship" is inaccurate. Pensacola dealt solely with a regulatory charge unilaterally imposed by ordinance. The court "noted that the word 'rent' does not occur in the ordinance," Pensacola at 823, and neither the existence nor terms of a franchise agreement are even mentioned in that case. To the contrary, the court rejected an argument that the city was estopped from imposing the regulatory charge based on a contract, finding that there "was not a contract between the city and the company...." Id. at 824.

Here, FPC receives no rights of any kind -- nothing -- in exchange for the forced payments mandated below. Therefore, the lynchpin of the Fifth District Court's decision, likening FPC to a holdover tenant in a landlord/tenant relationship and describing the formerly agreed upon franchise fees as rent for the use of public roads, has no basis in law or fact.

Even assuming arguendo that the City is granting FPC some type of right to use the public roads, that right, be it permit or license, is regulatory in nature. However, the "holdover franchise fees" imposed on FPC are not based upon FPC's use of public roads or any actual costs of the City in regulating such use. They are not earmarked for any such regulation, but placed in general revenues for the support of City government. Such "fees" are not valid regulatory charges. They are taxes. Alachua; Port Orange; Tamiami Trail Tours, Inc. v. City of Orlando, 120 So. 2d 170 (Fla. 1960).

**F. The Fifth District Court Overextended Its Authority By Rewriting The Parties' Written Contract For The Express Purpose Of Affecting Contract Negotiations Between FPC And The City**

The decision below contravenes the parties' written agree- ment calling for franchise payments to cease when the agreement expired. The court has no authority to rewrite the parties' agreement in this fashion. Florida Power Corp. v.

Town of Belleair, 830 So. 2d 852, 854 (Fla. 2d DCA 2002); FPC Initial Brief at 25. Further, the court plainly states that it held as it did for a reason that should play no role in its decision: to affect negotiations between FPC and the City for a possible new franchise agreement, based on its unfounded and inaccurate perception that, otherwise, FPC would be "in a position to extort favorable terms from the city." Winter Park at 325. It is not the role of a court to alter the playing field in contract negotiations, yet that is precisely what the court did. Moreover, the court's reasoning is flawed and its decision produces the opposite result of placing the City in a position to extort FPC by demanding payment of "franchise fees" without giving up anything in return in a bargained for franchise agreement. The parties' bargaining positions after expiration of the franchise agreement were no different than if there was no prior agreement. Both parties were free to negotiate and agree or disagree to whatever terms they wanted. The fact that FPC facilities were located in public roads, as they were entitled to be independent of any franchise agreement, is of no significance to those negotiations.

Again, the court's reasoning manifests a misunderstanding of the legal nature, purposes and attributes of franchise

agree-ments, franchise fees and regulatory charges. Its concern that the "city's expenses for maintaining its property and regulating the utility continue unabated while the payments of the franchise fee are being withheld", id., is completely unfounded. As a matter of fact and law, the franchise fee was being paid for the grant of the franchise, not maintenance expenses, and nothing prevents the City from recovering any such expenses pursuant to valid regulatory charges.

Electric utilities' right to be free from unlawful taxes imposed for the use of public roads (as opposed to legitimate regulatory charges) does not mean they will never enter into franchise agreements or be able to extort favorable terms in franchise negotiations because they do not need franchise agreements to use public roads. Indeed, this is self-evident, as franchise agreements between electric utilities and local governments have existed, and continue to be entered into, despite the fact that electric utilities have always had the right to use public roads subject only to valid regulatory charges. This is why Alachua -- which merely applied existing law to prohibit a purported rental fee unilaterally imposed for the use of public roads -- did not stop electric utilities from entering into new franchise agreements, as predicted by

the dissent in that case. Indeed, FPL advised Alachua County it was willing to enter into a franchise agreement immediately after the Alachua decision was released, has entered into at least nine franchise agreements in the short period of time since then, and is currently negotiating about twelve more.

## II. CONCLUSION

The decision below must be quashed, not just to correct the injustice inflicted on FPC and its customers in this case, but to prevent costly, protracted litigation that will otherwise surely occur if local governments are led to believe they can unilaterally impose multi-million dollar franchise fees on utilities and their customers without a franchise agreement and without giving up anything whatsoever in return.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

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## CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief has been prepared using Courier New 12-point font.

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