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ORDINANCE NO. 97-03

LIBERTY COUNTY ELECTRIC UTILITY
PRIVILEGE FEE ORDINANCE

ADOPTED ON Aug. 14, 1997

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LIBERTY COUNTY ORDINANCE NO. 97-03

AN ORDINANCE PROVIDING FOR THE REGULATION OF THE COUNTY ROAD SYSTEM OF LIBERTY COUNTY IN THE UNINCORPORATED AREAS AND IMPOSING A FEE FOR A PRIVILEGED USE OF SUCH PUBLIC PROPERTY BY ELECTRIC UTILITIES; REGULATING THE OCCUPANCY OF THE COUNTY RIGHTS-OF-WAY AND OTHER REAL PROPERTY OF LIBERTY COUNTY BY, AND IMPOSING A FEE UPON, ELECTRIC UTILITIES THAT OPERATE WITHIN LIBERTY COUNTY FOR THE CONSTRUCTION, LOCATION OR RELOCATION OF THEIR UTILITY FACILITIES OR USE OF ELECTRIC FACILITIES OWNED BY OTHERS FOR THE DISTRIBUTION OR SALE OF ELECTRICITY TO AN END USE CUSTOMER BY THE EXISTENCE OF AN ELECTRIC UTILITY WHEELING EVENT; PROVIDING LEGISLATIVE FINDINGS; DEFINING CERTAIN TERMS; GRANTING TO THE ELECTRIC UTILITIES THAT OPERATE WITHIN LIBERTY COUNTY THE PRIVILEGE TO USE AND OCCUPY THE COUNTY RIGHTS-OF-WAY IN THE UNINCORPORATED AREAS OF THE COUNTY; IMPOSING AN ELECTRIC UTILITY PRIVILEGE FEE FOR THE OCCUPANCY AND USE OF ELECTRIC FACILITIES IN COUNTY RIGHTS-OF-WAY; PROVIDING FOR THE CALCULATION OF THE ELECTRIC UTILITY PRIVILEGE FEE; PROVIDING FOR MONTHLY PAYMENTS OF THE ELECTRIC UTILITY PRIVILEGE FEE; PROVIDING A FINDING THAT THE ELECTRIC UTILITY PRIVILEGE FEE WILL BE PASSED THROUGH TO THE ELECTRIC UTILITY'S CUSTOMERS; PROVIDING FOR INDEMNIFICATION OF THE COUNTY FOR THE ELECTRIC UTILITY'S OCCUPANCY OF THE COUNTY RIGHTS-OF-WAY; DECLARING THE COUNTY'S INTENT NOT TO COMPETE; RESERVING THE COUNTY'S RIGHT TO AUDIT AND EXAMINE THE BOOKS OF EACH ELECTRIC UTILITY; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF LIBERTY COUNTY, FLORIDA:

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ARTICLE I

INTRODUCTION

SECTION 1.01. DEFINITIONS. When used in this Ordinance, the following terms shall have the following meanings, unless the context clearly otherwise requires:

"Board" shall mean the Board of County Commissioners of the County.

"Clerk" shall mean the clerk to the Board.

"County" shall mean Liberty County, Florida.

"County Fiscal Year" shall mean the period beginning on October 1 and ending on the next ensuing September 30.

"County Rights-of-Way" shall mean those easements and rights-of-way used or obtained for use for a road, street, alley, utility, bridge, or other public way in connection with the provision and maintenance of the County Road System, and such other lands available for public use.

"County Road System" shall mean the road system of the County, as defined in Chapter 334, Florida Statutes, or its statutory successor in function.

"Electric Facilities" shall mean all structures or personal property used in generating, distributing or transmitting electricity placed on or within County Rights-of-Way, including but not limited to the following: transmission lines, poles, signs,

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wires, conduits, and fences, and electric power generation facilities or other structures.

"Electric Privilege" shall mean the privilege to use County Rights-of-Way in the unincorporated areas of the County for a proprietary purpose as granted to each Electric Utility in Section 2.01 of this Ordinance.

"Electric Utility or Utilities" shall mean any entity or person which owns, maintains, uses, or operates an electric generation, transmission, or distribution system within the County, and any New Electric Utility. An Electric Utility for the purpose of this Ordinance shall not include an entity that operates under a non-terminated, consented to County electric utility franchise agreement, as granted and adopted by separate County ordinance;

"Electric Utility Privilege Fee" shall mean the fee imposed on each Electric Utility in Section 2.05 of this Ordinance 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 in the use and occupancy of such County Rights-of-Way.

"Electric Utility Wheeling Event" shall mean any circumstances under which the Electric Facilities of any Electric Utility are used by another entity to generate, transmit, distribute, or

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otherwise sell electric energy directly to an end use customer located in the unincorporated areas of the County.

"Gross Revenues" shall mean those revenues received by the Electric Utility from the retail sale of electricity to customers in the unincorporated areas of the County. The term "Gross Revenues" shall not include any revenues derived from the sale of facilities, transmission rights, or other electrical services not constituting the sale of electricity to a utility customer. This term also shall not include amounts received due to an Electric Utility's collection of any taxes, fees, or charges imposed by any governmental unit.

"Monthly Certification Date" shall mean the date no later than the 15th day of each month as further described in Section 2.05 of this Ordinance.

"Monthly Payment Date" shall mean the date no later than the 30th day of each month as further described in Section 2.05 of this Ordinance.

"New Electric Utility" shall mean any person or entity that commences the sale, generation, transmission or distribution of electricity to customers within the unincorporated areas of the County after the effective date of this Ordinance by owning, operating, or maintaining Electric Facilities, or by using Electric Facilities owned, used or maintained by others, through an Electric Utility Wheeling Event, or by any other means.

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"Ordinance" shall mean this Electric Utility Privilege Fee Ordinance, as amended from time-to-time.

"Right-of-Way Permit" shall mean the permit issued under Section 2.02 of this Ordinance which documents permission for the construction, location or relocation of Electric Facilities on or within the County Rights-of-Way.

SECTION 1.02. FINDINGS. It is hereby ascertained, determined and declared:

(A) The Board has the statutory authority to provide, maintain and supervise the County Road System under the provisions of Chapter 336, Florida Statutes. Such statutory authority includes the power to establish new roads, change and discontinue old roads, and keep all roads in good repair.

(B) The Board has the further statutory authority to regulate the County Rights-of-Way under the provisions of Chapter 337, Florida Statutes. Such statutory authority includes the power to require Electric Utilities to obtain a permit for the location of Electric Facilities on the County Rights-of-Way.

(C) 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, held by the County as a public trust. The citizens of the County, through the past allocation of County revenues, have an economic investment in the acquisition,

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construction and maintenance of the County Rights-of-Way and the preservation and maintenance of this public investment in the County Rights-of-Way is in the public interest.

(D) The County's regulation of the use of the County Rights-of-Way by Electric Utilities among competing road and utility uses is essential to maximize the effective and efficient use of the County Rights-of-Way (1) to avoid conflicts with drainage and maintenance, (2) to avoid conflicts with the use of such public places for other public purposes, including but not limited to, other publicly and privately-owned utilities and communications facilities, and (3) to preserve the paramount use of County Rights-of-Way in supporting traffic circulation and control on the County Road System.

(E) The County's legislative declaration not to compete in the generation, transmission or distribution of electrical power to customers in the unincorporated areas of the County, made in Section 3.02 of this Ordinance, constitutes a valuable competitive advantage to the Electric Utilities.

(F) Improper construction, location or relocation of poles and other Electric Facilities is a potential safety hazard to the public and is inconsistent with the paramount use of the County Rights-of-Way to provide traffic circulation and control on the County Road System.

(G) The Electric Utility Privilege Fee imposed under this Ordinance is a reasonable rental charge for an Electric Utility's privileged use and occupancy of the County Rights-of-Way and for

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maximizing the effective and efficient use of County Rights-of-Way for their primary purposes of supporting traffic circulation and control on the County Road System.

(H) Nothing in this Ordinance shall be construed as a regulation of any Electric Utility in the provision of electric utility services or the rates and charges imposed for the sale of such utility services. This Ordinance is intended to be an exercise of the County's proprietary authority to control the use of its Rights-of-Way and any Electric Utility's privileged use of such public property.

ARTICLE II

USE OF COUNTY RIGHTS-OF-WAY

SECTION 2.01. ELECTRIC UTILITY PRIVILEGE GRANTED.

(A) Each Electric Utility is granted an Electric Privilege to use and occupy the County Rights-of-Way in the unincorporated areas of the County for the construction, location, and relocation of its Electric Facilities or for the use of Electric Facilities owned, used or maintained by others as a consequence of an Electric Utility Wheeling Event or under any other circumstance. The Electric Privilege shall be subject to the conditions and regulations provided in this Ordinance and conditioned upon payment by the Electric Utility of the Electric Utility Privilege Fee established in Section 2.05 of this Ordinance.

(B) If an Electric Utility conducts its business or proprietary activity within the County exclusively on property other than the County Rights-of-Way, no Electric Utility Privilege Fee will be imposed under this Ordinance on the revenues received by such Electric Utility from the sale of electricity within the County. Any such utility, generating, transmitting and distributing electricity for sale on property other than County Rights-of-Way, would not be exercising a privileged use of public property in its business or proprietary activity and would thus be beyond the scope of this Ordinance.

SECTION 2.02. RIGHT-OF-WAY PERMITS.

(A) Each Electric Utility shall secure a Right-of-Way Permit prior to the construction, location or relocation of Electric Facilities within the County Rights-of-Way.

(B) If any portion of a street or road is excavated or disturbed by an Electric Utility in the construction, location or relocation of Electric Facilities pursuant to a Right-of-Way Permit, that portion of the street or road so excavated or disturbed shall be repaired and replaced by the Electric Utility at its expense to as good a condition as existed prior to the time of such disturbance, excavation or repair.

(C) Any Electric Utility subject to and currently paying the Electric Utility Privilege Fee shall not be required to pay a fee in exchange for receiving a Right-of-Way Permit or filing an application therefor.

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SECTION 2.03. NO COUNTY LIABILITY. The County shall not be liable to any Electric Utility for any cost or expense in connection with the construction, reconstruction, repair or relocation of the Electric Facilities made necessary by the widening, grading, paving or otherwise improving by the County of any road, street, alleyway or other public improvement within the County Rights-of-Way.

SECTION 2.04. INDEMNIFICATION. The County shall not be liable or responsible for any accident or damage that may occur in the construction, location or relocation or operation and maintenance by any Electric Utility of its Electric Facilities on or within the County Rights-of-Way and the Electric Utility as a condition of the privilege granted pursuant to Section 2.01 of this Ordinance, shall be deemed to have agreed to indemnify and hold harmless the County from any and all liability, loss, cost damage or expense which may accrue to the County by reason of the neglect, default or misconduct of the Electric Utility in the construction, location or relocation or operation and maintenance of its Electric Facilities within the County Rights-of-Way.

SECTION 2.05. ELECTRIC UTILITY PRIVILEGE FEE.

(A) Each Electric Utility that exercises an Electric Privilege granted pursuant to Section 2.01 of this Ordinance shall pay the County an Electric Utility Privilege Fee each month. Each Electric Utility shall certify to the Clerk the amount of the Electric Utility Privilege Fee to be paid by the Monthly

Certification Date for the monthly billing cycle that begins two months prior to that Monthly Certification Date. Each Electric Utility shall pay that certified amount to the Clerk no later than the Monthly Payment Date. Each Electric Utility shall calculate its Electric Utility Privilege Fee certification and payment at the following rate: five and one-half percent (5.5%) of the Gross Revenues received from customers in the unincorporated areas of the County at the close of the monthly billing cycle beginning two months prior to the Monthly Certification Date.

(B) Nothing contained herein shall be construed to be a limitation on the assessment and collection of valid taxes, special assessments, licenses, fees, charges or other impositions by the County or other public or governmental body on the Electric Utilities regardless of the payment of the Electric Utility Privilege Fee imposed by this Section of this Ordinance, unless otherwise expressly provided by this Ordinance.

(C) The Electric Utility Privilege Fee is imposed against each Electric Utility upon its privileged use of County Rights-of-Way and is calculated as a percentage of the Gross Revenues received by the Electric Utilities from the sale of electricity to their customers within the unincorporated areas of 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

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franchise from local governments which granted a privileged use of rights-of-way and other public property.

SECTION 2.06. COLLECTION OF ELECTRIC UTILITY PRIVILEGE FEES FROM CUSTOMERS. It is hereby legislatively declared 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, as amended from time-to-time, and it is contemplated that the Electric Utility Privilege Fee shall be collected in a manner which is consistent with such established administrative procedures.

SECTION 2.07. RIGHTS TO CURE.

(A) If the County grants a privilege or franchise to any other Electric Utility or otherwise enables any other person to construct, operate or maintain Electric Facilities in the unincorporated areas of the County or compete on terms and conditions which any Electric Utility considers more favorable than the privileges and conditions contained in this Ordinance, the Electric Utility shall deliver to the Clerk written notice of the terms and conditions that it considers more favorable. Upon such delivery, the County shall then have 120 days in which to correct or otherwise remedy the terms and conditions identified by the Electric Utility. If such terms or conditions are not remedied by the County within said 120 days, the Electric Utility may withhold payment of the Electric Utility Privilege Fee by delivering written notice to the Clerk until such time as a court of competent

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jurisdiction has resolved the dispute or other adjudicatory body, as mutually agreed to by the parties, has resolved the dispute.

(B) If, as a direct or indirect consequence of a legislative, regulatory or other action of the United States of America or the State of Florida, or any department, agency, authority instrumentality, or political subdivision of either of them, any New Electric Utility is permitted to operate within the unincorporated areas of the County and provide electricity to a customer then being served by any existing Electric Utility in a manner that avoids the obligation to pay the Privilege Fee imposed pursuant to the Ordinance or a substantially equivalent franchise fee, and any Electric Utility, not a New Electric Utility, determines that its obligations under this Ordinance, in respect to rates and service, place it at a competitive disadvantage with respect to such other person, the Electric Utility shall deliver to the Clerk written notice identifying such actions which resulted in the competitive disadvantage. The County shall then have 180 days in which to correct or otherwise remedy the competitive disadvantage. If such competitive disadvantage is not remedied by the County within said 180 days, the said Electric Utility may withhold payment of the Electric Utility Privilege Fee by delivering written notice to the Clerk until such time as a court of competent jurisdiction has resolved the dispute or other adjudicatory body, as mutually agreed to by the parties, has resolved the dispute. Said right to withhold payment under this

subsection shall not be effective until the close of the County Fiscal Year in which the 180 day right to cure period ends.

(C) The obligation to make payment of the Electric Utility Privilege Fee is not waived for any period of withholding as described in subsections (A) and (B) of this Section 2.07 if any dispute as described therein is resolved in favor of the County.

ARTICLE III

GENERAL PROVISIONS

SECTION 3.01. AUTHORITY. This Ordinance is adopted under the power of self-government of counties authorized under Article VIII, section (1)(f), Florida Constitution, and section 125.01(1), Florida Statutes. The privilege awarded to the Electric Utilities under Section 2.01 of this Ordinance is pursuant to the grant of the power of self-government to counties and not pursuant to the additional statutory authority of section 125.42, Florida Statutes.

SECTION 3.02. DECLARATION NOT TO COMPETE. The County hereby declares that it will not engage in the business of the generation, distribution, or transmission of electricity or the sale thereof to any customers in the County in competition with any Electric Utility.

SECTION 3.03. NO VESTED RIGHTS GRANTED. No Electric Utility shall acquire any vested rights hereunder which would limit in any manner the County's right to amend, modify, or revoke this Ordinance.

SECTION 3.04. EXAMINATION OF BOOKS AND RECORDS. The County may at its option and its expense and upon reasonable notice to each Electric Utility, at any time within ninety (90) days after each anniversary date of the effective date of this Ordinance examine the records of operation and accounting files, books, and records, as such records relate to the calculation of the Electric Utility Privilege Fee payments to the County, as provided herein. The examination of such books, accounts, or records, or other materials necessary for the determination of compliance with the terms, provisions, or requirements of this Ordinance shall be during regular hours of business of the Electric Utility and at the corporate offices of the Electric Utility. The County specifically reserves the right to conduct such audit by any third party employed by the County, whose fee for conducting such audit may be contingent on the findings of the audit.

SECTION 3.05. SEVERABILITY. If any clause, section, or provision of this Ordinance shall be declared unconstitutional or invalid for any reason or cause other than the imposition of the Electric Utility Privilege Fee imposed under this Ordinance, the remaining portion of said Ordinance shall be in full force and effect and be valid as if such invalid portion thereof had not been incorporated herein.

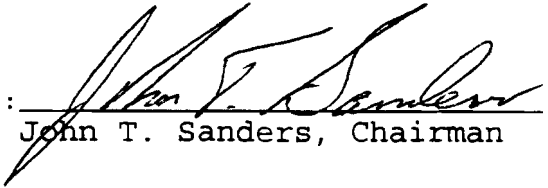
SECTION 3.06. EFFECTIVE DATE. A certified copy of this Ordinance shall be filed with the Florida Department of State by the Board within ten (10) days after enactment. This Ordinance

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shall not be effective upon any Electric Utility operating in the County that has entered into a mutually-agreed upon franchise agreement between the County and said Electric Utility or upon any New Electric Utility that enters into a mutually-agreed upon franchise agreement between the County and said New Electric Utility. This Ordinance shall take effect immediately upon its filing with the Secretary of State.

DULY ENACTED in regular session, this 14th day of August, 1997.

**BOARD OF COUNTY COMMISSIONERS
OF LIBERTY COUNTY, FLORIDA**

By: 
John T. Sanders, Chairman

ATTEST:

By: 
Vernon Ross, Clerk