

**IN THE COUNTY COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

JAMES J. KONISH, et al.,

Plaintiffs,

v.

CITY OF GAINESVILLE and
GAINESVILLE REGIONAL UTILITIES (GRU),

Defendants.

CASE NO.: 2014-SC-4051, consolidated
with CASE NOS. 2014-SC-4234 and
2014-SC-4285

DIVISION: IV

CITY OF GAINESVILLE'S TRIAL MEMORANDUM

The City of Gainesville ("City") is a municipal corporation created by special act of the Florida Legislature. The City provides a wide range of municipal governmental services including police, fire, bus transportation, parks and recreation, and public works. Like many other municipalities, the City also provides utility services, including electric, gas, water, wastewater, and telecommunication services to those inside the City as well as certain areas outside the City limits. The City provides these utility services under two business names, Gainesville Regional Utilities (hereinafter "GRU") for electric, gas, water, and wastewater services, and GRUCom for telecommunication services. GRU is not a separate legal entity from the City, and therefore is not subject to suit or relief independent of the City.

Various government entities in the State, including the State of Florida, the counties, and the municipalities, impose taxes on the provision and sale of utility services to fund public services. The utility providers, whether municipally owned (like GRU), investor owned (like Florida Power & Light), or cooperatives (like Clay Electric) are subject to taxes charged by the

Although the tax imposed on the utility is allowed to be collected from the customer, the utility “remains fully and completely liable for the tax, even if the tax is separately stated as a line item or component of the total bill”. Sec. 203.01(5) Fla. Stat.

(2) The Municipal Service Tax

The authority for a municipality to impose a tax on certain utility services is set forth in Sec. 166.231, Fla. Stat., entitled “Municipalities; public service tax”. Sec. 166.231(1)(a) provides in relevant part

A municipality may levy a tax on the purchase of electricity,...gas,...and water service.... [T]he tax shall be levied only upon purchases within the municipality and shall not exceed 10 percent of the payments received by the seller of the taxable item [GRU] from the purchaser [GRU's customer] for the purchase of such service. (emphasis added)

Pursuant to this authority, the City levies a 10% municipal service tax on electric, gas and water service provided to GRU customers within the City limits (referred to as the “municipal service tax” or “public service tax”). See Sec. 25-17, City of Gainesville Code of Ordinances, “There is hereby levied by the city on each and every purchase in the city of electricity, metered or bottled gas...and water service, a tax of ten percent of the charge made by the seller of such service or commodity.” The municipal service tax is a tax that the City charges its customers for utility purchases within its geographic municipal boundaries. GRU collects this tax and remits it to the City.¹ The City exempts from its municipal service tax the fuel adjustment charges as required by 166.231(1)(b) Fla. Stat.²

¹ Alachua County, a charter county, also used this authority to adopt an ordinance imposing a County Utility Tax on GRU customers outside the City limits, but within the County. The Florida Supreme Court expressly recognized that “unless precluded by general or special law, a charter county may without more under authority of existing general law impose by ordinance

(3) Fuel Adjustment

The third component of the cost of supplying electric service is the electric fuel and purchased power adjustment, which is the pass through cost to the customer of GRU's cost of the fuel to produce the electricity. The fuel and purchased power adjustment charge is changed to reflect either increases or decreases in the cost of fuel and purchased power.

These three components comprise the cost GRU charges its customers for the purchase of electric service.

(4) Florida Gross Receipts Tax

The next charge appearing on the Electric fact sheet is the Florida Gross Receipts Tax. As stated earlier, the Gross Receipts Tax is a State imposed 2.5 percent tax on the gross receipts of the utility company for the privilege of selling electricity and natural gas to a retail customer in the State.³ Section 203.01(1)(a)1, Fla. Stat. Stated another way, paying the gross receipts tax is a cost the utility company incurs for doing business in the State – in this case, for providing electric service. The utility company then recovers its cost by apportioning its tax cost equitably amongst its customers, much in the same way as a corporation recovers its corporate income tax liability from its customers by factoring the tax into its pricing structure as a cost of doing business. The Department of Revenue rules implement the calculation and collection of the gross receipts tax and provide that

A distribution company may wholly or partially separately itemize the gross receipts tax on the customer's bill, invoice, statement, or other evidence of sale. However, *the gross receipts tax is imposed on the privilege of doing business, and it is an item of cost to the*

³ There are no gross receipts taxes imposed on the sale of water, therefore, there is no gross receipts cost recovery on the Water and Wastewater Fact Sheet, as reflected in Composite Exhibit 1.

166.231(1)(a), Fla. Stat. The municipal service tax is not applied to Step 5 – the Electric Fuel Adjustment, as the Legislature exempted that charge from the municipal service tax.⁴

The remainder of the charges on the Electric and other utility fact sheets – the surcharge, additional Florida Gross Receipts Tax and County Utility Tax have not been challenged by Plaintiffs in their filed claims and are not addressed in this memorandum.

Plaintiffs' Issues

Plaintiffs have three complaints about GRU's application of the City's municipal service tax on utility bills. First, citing to the first sentence of Sec. 166.231(1)(a) which authorizes levy of the tax on the "purchase of electricity", they appear to argue that "purchase of electricity" must be read to mean only the raw power that comes through an electric meter that month (the kilowatt hour charge). They argue the municipal service tax cannot be levied on the customer service portion of the bill because the customer service portion of the bill is not the "purchase of electricity". Plaintiffs cite no authority for their reading of "purchase of electricity" and in fact, ignore the next sentence of that section which states that the tax is calculated based on the payments received by the utility from its customer for the purchase of the utility service.⁵

Next, Plaintiffs have two separate disagreements with collecting the municipal service tax on an amount which includes recovery of the gross receipts tax. Again taking a very narrow and

⁴ During a review last summer of the application of the taxes on the bills as a result of the issues raised by Plaintiffs, GRU staff discovered that the GRU billing system was omitting the cost recovery charge for Florida Gross Receipts Tax from the calculation of the municipal service tax on natural gas bills. This error resulted in the under-collection of the municipal service tax, but was corrected as of August 8, 2014. The municipal service tax is now calculated uniformly on the electric, gas and water bill.

⁵ "[T]he tax shall be levied only upon purchases within the municipality and shall not exceed 10 percent of the *payments received by the [utility company] from the [customer] for the purchase of such service*" Sec. 166.231(1)(a), Fla. Stat.

license, but no power under the grant of authority to charge any more than was necessary to cover the cost of regulation. The Court rejected this argument stating

While a strict construction should be applied to the grant of powers to municipalities, and especially those which result in public burdens, yet, *if the power is clearly implied, it should not be impaired by a strict construction.* Jacksonville Electric Light Co. v. City of Jacksonville, 36 Fla. 229, 18 South. 677, 30 L.R.A. 540, 51 Am. St. Rep. 24. *A strict construction must yet be a sensible construction, and be based upon the entire context.* (emphasis added)

Further, as recognized by Plaintiffs, a municipality is not only given the express power to tax in a grant of taxing authority, but is also given that power conferred by *necessary implication* and *to effect all powers expressly granted.* See 2A McQuillin Mun. Corp. §10:13 (3rd Ed.); State v. Key West, 14 So.2d 707,708 (Fla. 1943) (“It is quite true that the powers of the City as expressed in its charter are general. It is authorized to establish, purchase, lease, condemn, or otherwise acquire an electric utility to supply the city and its inhabitants with light, power and heat and to do all things necessary to that end. Such a power would certainly imply the means to effect all powers expressly granted”).

The City of Gainesville, along with the other municipalities in the State, has been given clear authority from the State to impose the municipal service tax and along with that authority given the necessary power to establish procedures to collect the tax. There is no ambiguity about the City’s power to impose and collect a municipal service tax. The City is authorized by statute so long as 1) it is levied “only upon purchases within the municipality” and 2) it does not exceed 10% of the payments received by the seller ... from the purchaser for the purchase of such service”. Sec. 166.231(1)(a) Fla. Stat. (emphasis added) By the clear and unambiguous

ignore the sentence in the middle which establishes what it is that is subject to the 10% tax – the “payments received by the [utility company] from the [customer] for the purchase of such service”. When read in its entirety, the municipal service tax is based on the payments received from the customer for the purchase of electric *service*, not just the purchase of the kilowatt hours, but the purchase of the *service*. Service is more than the raw energy, it is everything that it takes to get the raw energy to a customer’s house, ready to be used at the flip of a switch. Without the fixed costs, there would be no electricity to purchase.

That “electric service” refers to much more than kilowatt hours is also borne out by reading Section 166.231(1)(a) in *pari materia* with two others, Sections 166.231(b) and 166.232(1). First, Section 166.231(1)(b) exempts one component of the electric service charge, the fuel adjustment charge from the levy of the municipal service tax. See Sec. 166.231(1)(b), Fla. Stat. “The tax imposed by paragraph (a) shall not be applied against any fuel adjustment charge, and such charge shall be separately stated on each bill”. There is no such exemption for the customer charge portion of the cost of supplying electric service.

As the Supreme Court recognized as recently as last week, another fundamental rule of statutory construction is that “where the Legislature made one exception clearly, if it had intended to establish other exceptions it would have done so clearly and unequivocally”. Citizens Property Insurance Corp., et al. v. Perdido Sun Condominium Association, Inc., et al., No. SC14-185, page 6 [May 14, 2015] citing to Dobbs v. Sea Isle Hotel, 56 So.2d 341, 342 (Fla. 1952). As the Court went on to state “[a]ccordingly, where the Legislature articulates clear exceptions to a statute, “no other exceptions may be implied”. Id. at page 7. In this case, the Legislature clearly exempted the fuel adjustment portion of the bill from the municipal service

In the Industry, Service Means More than Kilowatt Hours

The City's laws, codified through its ordinances, provide that electric

[s]ervices shall include, in addition to all electric energy required by the customer, the readiness and ability on the part of the City to furnish electric energy to the customer; thus, the maintenance by the City at the point of delivery of approximately the agreed voltage and frequency shall constitute the rendering of service irrespective of whether consumer make any use thereof.

Gainesville Code of Ordinances Sec. 27-21 – Definitions – *Service*. Municipal ordinances are subject to the same rules of construction as are state statutes. Rinker Materials Corp. v. City of N. Miami, 286 So.2d 552, 553-54 (Fla. 1973). This includes the presumption that municipal ordinances are presumed to be valid and constitutional. Kuvin v. City of Coral Gables, 62 So.3d 625, 632 (Fla. 3d DCA 2010).

The City's definition of "service" is not unique. That "service" includes much more than just the kilowatt hours is recognized throughout the rules governing the electric utility industry and in the usage and custom in the industry, as well as the rules governing gas and water service. "Utility service" is defined in the gross receipts tax chapter, as "electricity for light, heat, or power; and natural or manufactured gas for light, heat, or power, including transportation, delivery, transmission, and distribution of the electricity or natural or manufactured gas". Section 203.012(3), Fla. Stat. The rules enacted by the Department of Revenue under its rulemaking authority define "service" as [t]he supply by the utility of electricity to the customer, including the readiness to serve and availability of electric energy at the customer's point of delivery at the standard available voltage and frequency whether or not utilized by the customer. Rule 25-6.003(2)(e) F.A.C. Rule 25-6.100(2)(c), F.A.C. recognizes that customer billings include the "total electric cost which is the sum of the customer charge, total fuel cost, total

not aware of a single utility provider that does not apply the municipal service tax to the customer charge portion of the bill.

The Gross Receipt Cost Recovery Portion of a Customer's Bill is Properly Subject to the Municipal Service Tax

For the same reasons as set forth above, Plaintiffs' second argument that the gross receipts tax is not the "purchase of electricity", and not subject to the municipal service tax fails. Plaintiffs cite no authority to define the terms so narrowly and the statutory scheme is to the contrary.

The statute specifically provides that the gross receipts tax may be "separately stated as Florida gross receipts tax on the total amount of any bill ... and *may be added as a component part of the total charge*" and if a utility chooses to do so, the amount is a "*part of the total bill*". (emphasis added) Sec. 203.01(4) Fla. Stat. As discussed above, Section 166.231(1)(a) authorizes the placement of the municipal service tax on the payments received by the utility from its customer for the purchase of electric service – which under 203.01(4) includes the gross receipts tax.

Plaintiffs' argument that the municipal service tax on a bill amount that includes recovery of the gross receipts tax is a tax upon a tax is not accurate. The gross receipts tax is a tax on the utility, not its customers. A corporate income tax imposed on XYZ Corporation that makes and sells widgets is not a tax on its customers. However, companies pass the taxes they pay on to their customers as part of the cost of doing business. In the XYZ Corporation that sells widgets example, the purchase price the customers pay for the widgets include much more than the cost of materials and labor to make the widgets. The purchase price includes such costs as taxes and regulatory fees the company pays to government agencies, administrative costs, research and

cost of doing business. FP&L sells electricity to many cities, all of which are not subject to income taxes. However, the cities pay a portion of FP&L's income taxes when they buy electricity.

In the case at hand, GRU is subject to gross receipts tax, just like XYZ Corporation and FP&L are subject to federal income tax; and just like XYZ Corporation and FP&L, GRU recovers the amount of its tax liability in the purchase price of its goods and services. Just because the calculation of the municipal service tax includes GRU's recovery of its gross receipts tax liability does not mean that Plaintiffs are being improperly taxed.

CONCLUSION

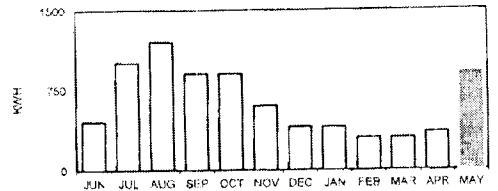
In summary, the City and GRU have reasonably interpreted and applied the law relating to the Gross Receipts Tax and the Municipal Tax. GRU pays the State the Gross Receipts Tax on its total revenues for electricity and natural gas. To recover its costs, GRU elects to separately state this cost on the utility bill. By doing so, GRU customers in the city, including those who are themselves tax-exempt, pay the amount of the cost recovery to GRU.

The Municipal Service Tax is properly applied as 10% of the payment GRU receives from its customers for providing electric, natural gas and water service. The fuel adjustment charge, as the only exemption authorized by state law, is removed from the payment received by GRU before the Municipal Service Tax is applied.

Simply put, there is no legal authority for the assertions made by Plaintiffs.



Electric Service Details					Meter	Electric	Peak	Next Meter Read		
Meter Number	METER READING DATES		Meter Read Type	Days of Service	METER READINGS	Multiplier	Consumption	Demand	on or About	
E112233	Previous	Present	ACTUAL	31	Previous	Present	903 kWh	N/A	6/30/2015	
Description					Usage	Rate	Amount Billed			
ELECTRIC CUSTOMER CHARGE						PER MONTH	\$ 12.75			
ENERGY USE, TIER 1 (1 - 250 kWh)					250	\$ 0.0310	\$ 7.75			
ENERGY USE, TIER 2 (251 - 750 kWh)					500	\$ 0.0420	\$ 21.00			
ENERGY USE, TIER 3 (OVER 750 kWh)					153	\$ 0.0940	\$ 12.85			
ELECTRIC FUEL ADJUSTMENT					903	\$ 0.0780	\$ 70.43			
FLORIDA GROSS RECEIPTS TAX							\$ 3.20			
GAINESVILLE ELEC UTIL TAX							\$ 5.76			
Total for Electric Services							\$ 133.74			



ELECTRIC RATES

(Effective October 1, 2014)

Customer Charge	\$12.75/month
Energy Use, first 250 kWh	\$0.031/kWh
Energy Use, from 251-750 kWh	\$0.042/kWh
Energy Use, over 750 kWh	\$0.084/kWh
Fuel Adjustment, per kWh	\$(varies)

Rates are subject to a 2.5% Florida Gross Receipts Tax and either a 10% Utility Tax for customers inside Gainesville or both a 10% Electric Surcharge and a 10% County Utility Tax for customers outside the city.

Determining Your Consumption

GRU reads your electric meter monthly. The reading is in kilowatt-hours (kWh) and is listed in the Electric Service Details section on the back of your bill. Subtract last month's reading (Previous) from this month's reading (Present), then multiply the difference by the

Meter Multiplier (for most residential meters, this will be a 1 or 10). This result is then multiplied by the Calculation Factor (for most residential customers, this will be 1) to get the usage.

Present reading:	74573 kWh
Previous reading:	73670 kWh
difference:	903 kWh
Meter multiplier:	$\times 1.0$
	903 kWh
Calculation factor:	$\times 1.0$
Consumption:	903 kWh

On the back of the bill, the electric use is shown in kWh and is listed for each tier in the Description section.

Calculating the Charges

The following example shows how charges are calculated for electric usage.

Steps 1 through 6 apply to all customers

1 — ELECTRIC CUSTOMER CHARGE

This is a fixed charge to recover those costs that GRU must incur to provide service whether or not any electricity is used.

Monthly **\$ 12.75**

2 — ENERGY USE, TIER 1 (1 - 250 kWh)

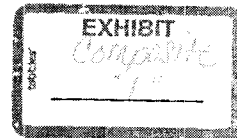
The charge for the first 250 kWh is \$0.031/kWh.

250 kWh x \$0.031/kWh = **\$ 7.75**

3 — ENERGY USE, TIER 2 (251 - 750 kWh)

The charge for all electricity used between 251 and 750 kWh is \$0.042/kWh

750 kWh - 250 kWh = 500 kWh
500 kWh x \$0.042/kWh = **\$ 21.00**





Gas Services		METER READING DATES		Meter Read	Days of	METER READINGS		Meter	BTU	Gas	Next Meter Read
Meter Number	Previous	Present	Type	Service	Previous	Present	Multiplier	Factor	Consumption	on or About	
G223311	4/29/2015	5/30/2015	ACTUAL	31	3204	3221	1.01700	1.020	18 THM	6/30/2015	

Description	Usage	Rate	Amount Billed
NATURAL GAS CUSTOMER CHARGE		PER MONTH	\$ 9.75
NATURAL GAS USE	18	\$ 0.5020	\$ 9.04
MANUFACTURED GAS PLANT REC	18	\$ 0.0556	\$ 1.00
PURCHASED GAS ADJUSTMENT	18	\$ 0.4600	\$ 8.28
FLORIDA GROSS RECEIPTS TAX			\$ 0.82
GAINESVILLE GAS UTIL TAX			\$ 2.06
Total for Gas Services			\$ 30.95

NATURAL GAS RATES

(Effective October 1, 2014)

Customer Charge	\$ 9.75/month
Energy Charge, per therm	\$ 0.5020/therm
MGPCRF Charge	\$ 0.0556/therm
Purchased Gas Adjustment	\$ (varies)

Rates are subject to the 2.5% Florida Gross Receipts Tax, and either a 10% City Utility Tax for customers inside Gainesville, or both a 10% Surcharge and a 10% County Utility Tax for customers outside the city

Determining Your Consumption

GRU reads your natural gas meter monthly. The reading is in hundreds of cubic feet (Ccf) and is listed in the **Gas Services** section on the back of your bill. Subtract last month's reading (Previous) from this month's reading (Present), then multiply the difference by the Meter Multiplier (for most residential gas meters this will be 1.017) and then multiply this result by the BTU Factor (monthly variable

that converts cubic feet to therms - a typical value is used in this example) to get the usage.

Present reading: 3221 Ccf
 Previous reading: 3204 Ccf
 difference: 17 Ccf
 Meter multiplier: $\times 1.017$
 17.289 Ccf
 BTU factor: $\times 1.020$
 17.635

or 18 therms

On the back of the bill, the natural gas use is shown in therms (THM) and is listed as Gas Consumption in the **Gas Services** section and as NATURAL GAS USE in the **Description** section.

Calculating the Charges

The following example shows how charges are calculated for natural gas usage.

Steps 1 through 5 apply to all customers

- **NATURAL GAS CUSTOMER CHARGE**
This is a fixed charge to recover those costs that GRU must incur to provide service whether or not any gas is used.

Monthly **\$9.75**

- **NATURAL GAS USE**
The charge for all therms used is \$0.5020/therm

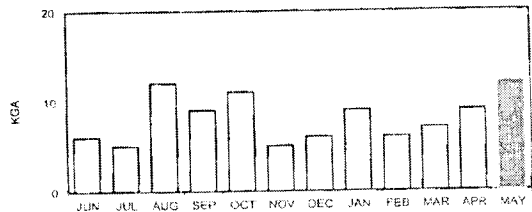
18 therms x \$0.5020/therm = **\$9.04**

- **MANUFACTURED GAS PLANT COST RECOVERY FACTOR (MGPCRF)**
The charge for all therms used is \$0.0556/therm

18 therms x \$0.0556/therm = **\$1.00**



Water and Wastewater Services				METER READINGS		Meter Multiplier	Water Consumption	Wastewater Consumption	Next Meter Read on or About	
Meter Number	METER READING DATES Previous	METER READING DATES Present	Meter Read Type	Days of Service	Previous	Present				
W331122	4/29/2015	5/30/2015	ACTUAL	31	1101	1113	1.00000	12 KGA	8 KGA	6/30/2015
Description	Usage	Rate	Amount Billed							
WATER CUSTOMER CHARGE		PER MONTH	\$ 9.20							
WATER USE, TIER 1 (1 - 6 KGALS)	0	\$ 2.35	\$ 14.10							
WATER USE, TIER 2 (7 - 20 KGALS)	6	\$ 3.75	\$ 22.50							
WATER USE, TIER 3 (OVER 20 KGALS)	0	\$ 6.00	\$ 0.00							
GAINESVILLE WATER UTIL TAX			\$ 4.58							
WASTEWATER CUSTOMER CHARGE		PER MONTH	\$ 8.40							
WASTEWATER BILLING	8	\$ 6.05	\$ 48.40							
Winter max is 8 kGals										
Total for Water Service Details			\$ 107.18							



WATER RATES

(Effective October 1, 2014)

Customer Charge	\$9.20/month
Water Charge, first 6 KGA	\$2.35/KGA
Water Charge, from 7-20 KGA	\$3.75/KGA
Water Charge, over 20 KGA	\$6.00/KGA

Rates are subject to either a 10% Utility Tax for customers inside Gainesville or both a 25% Water Surcharge and a 10% County Water Utility Tax for customers outside the city

Determining Your Water Consumption

GRU reads your water meter monthly. The reading is in whole thousands of gallons (KGA) and is listed in the **Water and Wastewater Services** section on the back of your bill. Even though the meter accurately records usage as small as 1/10-gallon, dials recording usage in amounts less than a thousand are ignored. Subtract last month's reading (Previous) from this month's reading (Present), then multiply

the difference by the Meter Multiplier (for most residential meters, this will be a 1) and then multiply this result by the Calculation Factor (for most residential meters, this will be 1) to get the usage.

Present reading: 1113 KGA
 Previous reading: 1101 KGA
 Difference: 12 KGA
 Meter multiplier: $\times \frac{1.0}{12}$ KGA
 Calculation factor: $\times \frac{1.0}{12}$ KGA
 Water consumption: 12 KGA

On the back of the bill, the water use is shown in KGA and is listed for each tier in the **Description** section.

Calculating the Charges

The following example shows how charges are calculated for water usage.

Steps 1 through 4 apply to all customers

— WATER CUSTOMER CHARGE

This is a fixed charge to recover those costs that GRU must incur to provide service whether or not any water is used.

Monthly **\$ 9.20**

— WATER USE, TIER 1 (1 - 6 KGA)

The charge for the first 6,000 gallons (or 6 KGA) is \$ 2.35/KGA

6 KGA x \$ 2.35 = **\$ 14.10**

— WATER USE, TIER 2 (7 - 20 KGA)

The charge is \$ 3.75/KGA

12 KGA - 6 KGA = 6 KGA
 6 KGA x \$ 3.75/KGA = **\$ 22.50**

— WATER USE, TIER 3 (OVER 20 KGA)

The charge is \$ 6.00/KGA

(In this example, no charges) = **\$ 0.00**

FALR, Inc.

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To: <falr@falr.com>; <falr@bellsouth.net>; <accts@falr.com>
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Sent: Thursday, May 21, 2015 3:37 PM
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Subject: SERVICE OF COURT DOCUMENT - CASE NO. 2014-SC-4051
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