

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

201 East University Avenue
Gainesville, Florida 32601
(352) 374-3636

James J. Konish

Case No.:01-2014-SC-004051

Individually, and

James J. Konish

Division: Small Claims

As Personal Guarantor,

President and Manager

of 625 Northeast First

Street LLC, 619 Northeast

First Street LLC, and

120 Southeast 7th Street LLC

PLAINTIFF

v.

City of Gainesville and

Gainesville Regional Utilities (GRU)

DEFENDANTS

STATEMENT OF CLAIM

Plaintiff, sues Defendants, City of Gainesville and Gainesville Regional Utilities (hereinafter referred to as GRU), and alleges:

A. Factual Matters:

1. This is an action for monetary damages in an amount less than \$5,000.
2. Defendants provide electric, natural gas (hereinafter referred to as gas) and water utility services to Plaintiff at the following addresses located within City of Gainesville boundaries:
 - a) 616/618 Northeast 2nd Street, Gainesville, Florida 32601 (Residential Service – Two (2) Accounts).

- b) 622 Northeast 2nd Street, Gainesville, Florida 32601 (Residential Service – One (1) Account).
- c) 120 Southeast 7th Street, Gainesville, Florida 32601 (Residential Service – Four (4) Accounts).
- d) 625 Northeast 1st Street, Gainesville, Florida 32601 (Residential Service – Three (3) Accounts).
- e) 619 Northeast 1st Street, Gainesville, Florida 32601 (Nonresidential Service – One (1) Account).

3. The City of Gainesville, by and through its municipally – owned regional utility GRU imposed a municipal utility tax on Plaintiff’s electric, gas and water services pursuant to §166.231, Fla. Stat and Section 25-17 (a) of the Gainesville, Florida Code of Ordinances.

4. GRU prepared and provided Plaintiff upon request handouts explaining the calculation of Plaintiff’s GRU electric, gas and water bills (See Exhibit 1).

5. The City of Gainesville, by and through GRU, imposed its §166.231 municipal utility tax as follows:

- a) 10% on the “Customer Charges” for electric, gas and water, and
- b) 10% on the State of Florida §203.01 Gross Receipts Tax on GRU electric but not gas service.

6. On June 5, 2014, Plaintiff hand delivered to Defendants a §166.235 (1), Fla. Stat Request For “Refund of or Credit” assailing the legality of the Defendant’s municipal utility tax scheme at a regular City Commission meeting (See Exhibit 2). This request was handed to the Gainesville City Commission Clerk in the presence of the City Attorney and General Manager for GRU. A video of this notice delivery is to be found on the City of Gainesville website during the evening Citizen Comment session. The Plaintiff’s June 5, 2014 request covered all of Plaintiff’s accounts except the nonresidential account at 619 Northeast 1st Street, Gainesville, Florida 32601.

7. Additionally, on June 5, 2014, an identical copy of the same Request For “Refund of or Credit” was e-mailed to the Gainesville City Attorney (See Exhibit 3).

8. On June 12, 2014, Plaintiff additionally hand-delivered the same aforementioned Request to the GRU attorney at 301 S.E. 4th Avenue, Gainesville, Florida

32601, but also included an additional Request For “Refund of or Credit” on Plaintiff’s nonresidential account at 619 Northeast 1st Street, Gainesville, Florida 32601 (See Exhibit 4).

9. On September 8, 2014, 95 days after the June 5, 2014 Request, and 88 days after the redundant courtesy June 12 Request to GRU, Defendant GRU denied Plaintiff’s Request For “Refund of or Credit” in writing via e-mail and US mail on all accounts except the Plaintiff’s nonresidential account at 619 Northeast 1st Street, Gainesville, Florida (See Exhibit 5).

10. To date, Plaintiff has not received any response to the Request For “Refund of or Credit” on the nonresidential account at 619 Northeast 1st Street, Gainesville, Florida 32601.

11. Moreover, Defendants’ denial letter referenced as Exhibit 5 provides no reason, justification or response to the Plaintiff’s Request for “Refund of or Credit” as required by §166.231 (1)(d) Fla. Stat., and merely ascertains that the Plaintiff’s accounts are located within the City of Gainesville municipal boundaries.

12. Accordingly, Plaintiff has exhausted all available administrative remedies as required by §166.235 (2), Fla. Stat.

B. Legal Conclusions

13. Procedurally, Plaintiff disputes the timeliness and sufficiency of Defendants’ September 8, 2014 denial letter as follows:

- a) The Defendants’ denial of Plaintiff’s Request For “Refund of or Credit” was provided by Defendants to Plaintiff 95 days after their initial receipt of the appurtenant Request, therefore was untimely pursuant to §166.235 (1)(d), Fla. Stat.
- b) The Defendants’ denial letter moreover fails to state reasons for such denial in violation of §166.235 (1)(d), Fla. Stat.
- c) No response has yet to be received for the Plaintiff’s Request For “Refund or Credit” on the nonresidential account located at 619 Northeast First Street, Gainesville, Florida 32601.

14. Substantively, Plaintiff disputes the amount of §166.231 utility tax imposed on his aforementioned GRU accounts as not owed on the following grounds.

- a) §166.231 (1)(a), Fla. Stat. expressly limits the municipal utility tax to “purchases” of electric, gas and water, and the “purchase” of electricity is expressly defined.
- b) The GRU “Customer Charge” does not constitute a “purchase”.
- c) Likewise, the State of Florida §203.01 Gross Receipts Tax is not a “purchase”.
- d) Therefore, the Defendants’ application of the §166.231 (1)(a) municipal utility tax to the Plaintiff’s “Customer Charges” for its electric, gas and water service is unlawful.
- e) Likewise, the Defendant’s application of the §166.231 (1)(a) municipal utility tax to the State Gross Receipts Tax on its electric but not gas service is also unlawful.
- f) Additionally, §166.231 (1)(a), Fla. Stat. expressly prohibits application of the municipal utility tax to the electric “fuel adjustment charge”, which is expressly and broadly defined.
- g) Since that State §203.01 Gross Receipt Tax expressly applies to the Defendants’ electric fuel adjustment charge, the Defendants’ assailed municipal utility tax scheme additionally and impermissibly taxes 2.5641% of Plaintiff’s electric fuel adjustment charge – but not for gas despite identical taxing provisions.
- h) Since the Defendants’ apply the §166.231 municipal utility tax at the statutory maximum “shall not exceed” rate of 10%, the effective rate after the aforementioned misapplications and pyramiding yields a nonlinear effective municipal utility tax rate well in excess of 10%, and variable according to the amount of underlying charges.

WHEREFORE, Plaintiff demands judgment for damages against Defendants in the amount of \$1078.42, court costs and other such relief that this court deems just and proper.

By: _____
James J Konish, Attorney
Florida Bar No. 0296287
Post Office Box 6020
Gainesville, FL 32627
(352) 871-4747 (voice)
(352) 371-9061 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above STATEMENT CLAIM has been furnished by U.S. Certified Mail to the defendant, CITY OF GAINESVILLE, c/o City Attorney, 200 East University Ave, Room 425, Gainesville, FL 32601 and GAINESVILLE REGIONAL UTILITIES, c/o Utilities Attorney, 301 S.E. 4th Avenue, Gainesville, Florida 32601 on the 3rd day of December, 2014.

By: _____
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