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January 19, 2016

Florida Power & Light Company
ATTN: Charles L. Schlumberger, Senior Litigation Counsel
700 Universe Boulevard
Juno Beach, FL 33408-0420

Re: City of Ft. Lauderdale, Florida Public Utility Service Tax Audit, Periods October 1, 2010 – September 30, 2013

Dear Mr. Schlumberger:

This written Notice represents the City of Ft. Lauderdale's final "Notice of Consideration" and determination from Florida Power & Light's ("FP&L") Petition for Reconsideration of audit assessments for underreported and delinquent Public Service Taxes as contemplated by FLA. STAT. § 166.234(9).[1] Over the last several months, the City attempted to engage in efforts to compromise or settle the amounts due from FP&L and to toll the statutory periods for appeal pursuant to FLA. STAT. § 166.234(14), however, FP&L recently elected to forego such efforts. Thus, following conclusion of the City's reconsideration of FP&L's petition, the City hereby issues this written Notice within thirty (30) days of the date within which those efforts have been decisively finalized, January 14, 2016.

It was previously determined through an examination and subsequent protest that FP&L underpaid taxes due to the City in the amount of $774,206, including penalties and interest, through improper exemption of certain customers and the exclusion of miscellaneous service revenues charged to customers intrinsic to the provision of electrical services. FP&L has acknowledged and accepts the audit finding of a $10,845 tax liability, $2,711 penalty, and $328 interest on the exempt customers issue and these amounts due have been resolved under appeal and are no longer in dispute. However, FP&L protests the remaining $593,669 tax liability, $148,417 penalty, and $18,236 interest for the failure to remit taxes on miscellaneous service revenues received from providing services to utility customers. RDS and the City maintain that the remaining tax, penalties, and interest are true and correct based upon the rebuttal of FP&L's arguments provided herein.

(1) Florida Statutes grant municipalities the broad authority to levy taxes on separately stated charges inherent to the provision of electrical services.

[1] FLA. STAT. §§ 166.234(9) & (10) provide that a municipality "must," "*following reconsideration of such a petition*," issue a written notice of reconsideration within 30 days, and that "[i]f a petition for reconsideration is timely filed, the determination becomes final upon issuance of a notice of reconsideration."

FLA. STAT. § 166.201 enables a municipality to collect and enforce taxes through local ordinances that are not inconsistent with general law.

> A municipality may raise, by taxation and licenses authorized by the constitution or general law, or by user charges or fees authorized by ordinance, amounts of money which are necessary for the conduct of municipal government *and may enforce their receipt and collection in the manner prescribed by ordinance not inconsistent with law.*

FP&L argues that the City does not have the statutory authority to levy a tax via ordinance on miscellaneous revenue attributed to supplying a customer's electrical service because FLA. STAT. ANN. § 166.231(1)(a) permits a municipality to levy a tax only upon the "purchase of electricity" consumed by a customer. However, an accurate reading of the enabling statutes in their entirety allows a tax on all steps necessary to purchase *electrical service*, not just raw current. Section 166.231(1)(a) provides in relevant part, "[t]he tax…shall not exceed 10 percent of the *payments received by the seller* of the taxable item from the purchaser for the *purchase of such service.*"

Florida rules of statutory construction mandate that statutes are required to be read as a whole to give effectiveness to the entire content, rather than in isolated phrases or clauses. *E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009); *TRA Farms, Inc. v. Sygenta Seeds, Inc.*, 932 F.Supp.2d 1251, 1253 (N.D. Fla. 2013). Courts must not be guided by a single sentence, but should look to the provisions of the whole law, and to its object and policy. *Richards v. United States*, 369 U.S. 1, 11 (1962). As noted above, Section 166.231(1)(a) enables the City to levy a public service tax that "shall not exceed 10 percent of the payments received by the seller of the taxable item from the purchaser for the *purchase of such service.*" While Section 166.231(1)(a) states the "[p]urchase of electricity means the purchase of electric power…," that sentence cannot be isolated within the statute to altogether limit the application of the public service tax to charges for kilowatt hour electric current. To give meaning to the entire section as a whole requires inclusion of the charges for the "purchase of such service." Statutorily limiting application of the tax to "electric power" is inconsistent with the overall legislative intent and impinges on the powers delegated to Florida municipalities to regulate and enforce the tax by local ordinance.

FP&L charges customers fees for connection, disconnection, reconnection, suspension, or restoration of electrical services, equipment damage, delinquency charges, and other acts or events which are necessary and directly related to the delivery of electric power and provision of electrical services to the customer. Such charges, in as much as they represent acts and transactions which are mandatory and implicit to the "purchase of electrical service," are included in the total amount charged and billed to purchasers on account of the electrical service. Therefore, they are taxable within the purview of the City's public service tax, which broadly defines "purchase" to include "every act or transaction whereby possession of, utilization of, control over or title to electricity . . . and the duty and obligation to pay therefor become vested in the purchaser." *Ft. Lauderdale, FL, Code of Ordinances*, § 15-126 (the "Ordinance"). There is no ambiguity about the City's power to impose and collect a municipal public "service" tax on these service charges/fees, and they are clearly encompassed within the City's governing Ordinance.

Despite FP&L's misguiding assertion of a "clean statutory expression" to the contrary, FLA. STAT. § 166.232(1) clearly provides that "[a]t the *discretion and option* of the local tax authority, the [public service tax] *may* be levied on a physical unity basis. The tax on the purchase of electricity *may* be based upon the number of kilowatt hours purchased…." FLA. STAT. § 166.232(1). The

discretionary nature of the physical unit base option is abundantly manifest throughout the entire content of that statute, even to the extent of referencing the need for a municipality to affirmatively "convert" to unit-based rates. *Id.* at (3)(a). FP&L's argument disregards the discretionary nature and purpose of the physical unit-based option of taxable measure that a city *may* subject to a public service tax, and erroneously equates it to a statutory limitation on the charges for electrical services that a municipality may permissibly tax. FP&L's position here is clearly without merit.

FP&L also erroneously contends that it is not seeking an exemption from taxation, but rather a favorable interpretation of a taxing statute under FLA. STAT. § 166.231(1)(a). Taxpayer favored statutory constructions of taxing statutes are only employed when true ambiguity or doubtful language exists within the taxing statute, *State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973). Thus, it is only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction that favorable interpretations are appropriate. *Excelsior Ins. Co. v. Pomona Park Bar & Package Store*, 369 So. 2d 938, 942 (Fla. 1979); *Markham v. PPI, Inc.*, 846 So. 2d 922, 925 (Fla. 4th DCA 2003) ("the rule is inapplicable to construe language of a statute that is not doubtful"). Ordinary rules of construction, in this instance, merely require one to read the statute as whole and give meaning to the plain language of its entire content; and the mere fact that FP&L presses for another possible reading, particularly in such an isolated sense, does not make the statute ambiguous. *Dirico v. Redland Estates, Inc.*, 154 So. 3d 355, 357 (Fla. 3rd DCA 2014). Indeed, rules of statutory construction are intended to be used only to remove ambiguity, and never to create it. *State v. Egan*, 287 So. 2d at 4.

In actuality, an exemption from the City's public service tax levy for miscellaneous electrical service charges to customers is precisely what FP&L seeks. The term "service," as it relates to electric utilities, as used in FLA. STAT. § 166.231(1)(a), has been administratively defined as "[t]he supply by the utility of electricity to the customer, including the readiness to serve and availability of electrical energy at the customer's point of delivery at the standard available voltage and frequency whether or not utilized by the customer." FLA. ADMIN. CODE ANN. r. 25-6.003(2)(e). There is no ambiguity within the phrase "10 percent of the payment received by the seller of the taxable item (i.e. electricity) from the purchaser for the purchase of such service" within a public service tax levy. The City's Ordinance, *supra*, makes abundantly clear that every act or transaction that the seller charges for (i.e. service charges) in providing electrical services are includable in gross receipts subject to the public service tax, and the plain language of the enabling statutes provide the City with the authority to collect and enforce the public service tax in accordance with their Ordinance. FLA. STAT. §§ 166.201 & 166.231(7).

"While doubtful language in taxing statutes should be resolved in favor of the taxpayer, the reverse is applicable in the construction of exceptions and exemptions from taxation." *Markham v. PPI, Inc.*, *supra*. As stated in previous correspondence, the statutory laws pertaining to the City's public service tax contain many instances whereby the City may or shall exempt certain transactions and/or entities from its coverage, and had the City intended to exempt the miscellaneous service revenue relevant herein, it could have very easily done so within its Ordinance. The Florida Supreme Court has held that the court may not write into the law any other exception or create a reason for such if the Legislature specifically put forth one exception but did not mention another. *Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 342 (Fla. 1952) (citing the rule "Expressio unius est exclusio alterius"). "[W]here the Legislature made one exception clearly, if it had intended to establish other exceptions it would have done so clearly and unequivocally." *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n, Inc.*, 164 So. 3d 663, 666 (Fla. 2015). In this case, the Legislature clearly exempted certain charges and entities from the municipal service tax (i.e. fuel adjustment charge, churches, municipalities, and counties). If

there had been an intention on the part of the Legislature or the City to exempt miscellaneous service fees charged to and collected from customers for electrical service, they would have done likewise.

Because the enabling Florida statutes, when read in their entirety, compel a finding of multiple, optional methodologies available for the local collection and enforcement of a municipal public service tax, the City may in its home rule power provide for the specific methods of collection and enforcement of its local public service tax by Ordinance. The City has plainly done so within Sections 15-126 & 15-127 of its Ordinance, which clearly and unambiguously provides broad language levying the public service tax on "every act or transaction whereby" electricity is provided to and purchased by a customer within the City that triggers an obligation to pay. Accordingly, it is without question that the miscellaneous service charges assessed in the audit are within the statutory authority and taxable purview the City's public service tax.

(2) An agency interpretation of FLA. STAT. §§ 203.01 & 203.012 relating to the State's Gross Receipts Tax is not imputed upon the municipal public service tax, and does not preempt municipalities from collecting the tax on miscellaneous service revenue under a separate statute and levy.

FP&L further contends that the agency interpretation of FLA. STAT. § 203.01 by the Florida Department of Revenue precludes a municipal tax on miscellaneous revenue. According to the administrative regulations for this statute, the tax imposed does not apply to "[r]eceipts from customers for separately itemized charges for the connection, disconnection, suspension, or restoration of electricity...." FLA. ADMIN. CODE ANN. r. 12B-6.0015. This administrative construction by the agency charged with enforcement of state gross receipts tax on utilities is interpreting the levy of a 2.5% tax on "utility services," which are specifically defined within that chapter to exclude "separately stated charges for tangible personal property or services which are not charges for electricity." FLA. STAT. § 203.012(3). Thus, the agency determination is not merely an interpretation of the broadness of "a tax imposed on gross receipts from utility services that are delivered to a retail customer," as urged by FP&L, but is directly influenced by that chapter's definitions which parallel the limits on the scope of that levy. Such an interpretation finds no similar support or application within the statutory confines for the municipal public service tax or the City's Ordinance.

Rather, a municipality's home rule power to tax utilities by ordinance under Florida law is limited only where expressly preempted by the state. "[T]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:...[a]ny subject expressly preempted to state or county government by the constitution or by general law." FLA. STAT. § 166.021(3)(c).

> The provisions of this section *shall be so construed* as to secure for municipalities the *broad exercise of home rule powers* granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes *not expressly prohibited* by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers *other than those so expressly prohibited.*

FLA. STAT. § 166.021(4) (emphasis added).

Florida law recognizes two types of preemption: express and implied. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). "Express pre-emption requires a specific statement; the pre-emption cannot be made by implication nor by inference." *Bd. of Trustees of City of Dunedin Mun. Firefighters Ret. Sys. v. Dulje*, 453 So. 2d 177, 178 (Fla. 2nd DCA 1984). In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended. *Sarasota Alliance*, 28 So. 3d at 886. However, preemption can be implied if "the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Id.* at 886. Implied preemption should be found only "if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme." *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Florida*, 97 So. 3d 204, 211 (Fla. 2012). In general, it serves no useful public policy to prohibit local government from deciding local issues. 28 So. 3d at 886. Furthermore, Courts must not impute an intent of the Legislature to preclude a local elected governing body from exercising its home rule powers. *Id.*

The state statutory scheme on gross receipts tax for utility services is not extensive, and it contains no express language of preemption over municipal utility taxes. Consequently, express preemption does not apply in this case. Additionally, the legislature's grant of power to local authorities through Section 166.231 does not evince intent to impliedly preempt the field of utility taxation. When courts create preemption by implication, the preempted field is usually a narrowly defined field, "limited to the specific area where the Legislature has expressed their will to be the sole regulator." *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (Fla. 2nd DCA 2005). But in this case, Section 166.201 specifically enables a municipality to enforce and collect taxes through ordinances. The Florida legislature made clear in enacting the "Municipal Home Rule Powers Act" of 1973 that: "[i]t is...the legislative intent to recognize residual constitutional home rule powers in municipal government, and the Legislature finds that this can best be accomplished by the removal of legislative directions from the statutes." FLA. STAT. § 166.042(1). The stated legislative intent of the Act further provides that municipalities shall hereafter exercise home rule powers "at their own discretion, subject only to the terms and conditions which they choose to prescribe," *Id.*, "except when expressly prohibited by law. FLA. STAT. § 166.021(1).

It would be exceedingly difficult, to say the least, for a court to imply preemption of the entire field of municipal public service taxes when the Legislature *affirmatively allows* local government to act in this area. *Sarasota Alliance*, 28 So. 3d at 887. Chapter 203, "Gross Receipts Taxes," of Title XIV can hardly be described as pervasive, as it consists of only ten subsections, with only one of them representing taxation of gross receipts for utilities. Section 166.201, read in conjunction with Sections 166.021(3-4) & 166.042(1) expresses clearly that the Legislature intended municipalities, in their home rule powers granted by the Florida Constitution, to craft local ordinances regarding utility taxation, as they are deemed more astute to govern local matters.

Therefore, municipal taxation should be guided according to Title XII of the Florida Statutes. The power of a municipality to levy taxes on service fees for connection, reconnection, late fees, and the like on utility services is evident from the Legislature's express exclusion of exceptions to such in FLA. STAT. § 166.231. Because a municipality may enforce its administration of taxes in the chosen manner prescribed by ordinance not inconsistent with law, the City is authorized to collect taxes on the miscellaneous service fees relevant herein. Statutory and Constitutional law in Florida do not preempt or prohibit the City's taxing of these revenues, and further prohibits any alleged exemption

or preemption of taxing these revenues by implication or by inference from the regulations interpreting the state's gross receipts tax statutes, which contain convenient exempting language not present in the municipal tax statues. *Bd. of Trustees of City of Dunedin Mun. Firefighters Ret. Sys.*, 453 So. 2d at 178.

Florida law gives broad home rule authority to municipalities to levy municipal public service taxes and to administer and enforce them by local ordinance. The City of Ft. Lauderdale's municipal Ordinance clearly provides for such a levy within its defining purviews and levy on utility services. §§ 15-126 & 15-127. Accordingly, the final amounts lawfully due from FP&L for the examination period of October 1, 2010 to September 30, 2013 are accurately stated at $593,669, including penalties and interest of $148,417 & $18,236, respectively, for the omission of miscellaneous service fee revenue from gross receipts subject to the City's public service tax.

We would also recommend that FP&L take notice of a recent decision rendered in the County Court of the Eight Judicial Circuit in and for Alachua County, Florida wherein it was unequivocally held that the precise miscellaneous service charges relevant herein for the sale of electrical services, even including the state gross receipts tax amounts passed onto customers as part of the bill, constituted "gross receipts" subject to the municipal public service tax pursuant to FLA. STAT. § 166.231(1)(a). The expert witness relied upon in that case, Amanda Swindle, J.D. LL.M, employed by the Florida Municipal Power Agency in Tallahassee, testified that it was "industry custom" that the term "service," as used in that statute, is not meant to refer only to actual kilowatt consumption for taxing electrical services. *Konish v. City of Gainesville, et al*, Case No. 01-2014-SC-4051, Alachua County Circuit Court, July 24, 2015 at 4. Additionally, the court stated that "a connection fee, late fee, and disconnection fee are all *payments for purchase of services* and are subject to the municipal utility tax." *Id.* Finally, the court noted that "all 34 of the State's utility companies uniformly add in the customer charge(s) when calculating the amount of Municipal Service Tax."

As stated initially in this letter, this written Notice constitutes the City's "Notice of Reconsideration" rendering the determinations of the audit "final" pursuant to FLA. STAT. 166.234(9) & (10).

Very best regards,

Jonathan V. Gerth, Esq.
PRA Government Services, LLC /
MuniServices / RDS

cc: Tom Flowers, FP&L
John Herbst, City Auditor
Paul Bangel, Assistant City Attorney
Cole Copertino, Assistant City Attorney
Laura Reece, Budget Manager

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Florida Power & Light Company
ATTN: Charles Schlumberger
700 Universe Boulevard
Juno Beach, FL 33408-0420

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