SUPREME COURT OF FLORIDA

FLORIDA POWER CORPORATION,

Petitioner,

vs.

Case No. SC02-2272
Lower Tribunal No.5D02-87

CITY OF WINTER PARK, FLORIDA,

Respondent.
_____/

AMICUS CURIAE BRIEF OF TAMPA ELECTRIC COMPANY

KENNETH R. HART
Florida Bar No. 0192580
J. JEFFRY WAHLEN
Florida Bar No. 0884316
Ausley & McMullen
Post Office Box 391
227 South Calhoun Street (32301)
Tallahassee, Florida 32302
850/224-9115

Attorneys for Amicus Curiae
Tampa Electric Company

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INTRODUCTION

Tampa Electric Company ("Tampa Electric" or the "Company") is an investor-owned public utility subject to the statutory jurisdiction of the Florida Public Service Commission providing service to customers in Hillsborough and portions of Polk, Pasco and Pinellas Counties. Tampa Electric serves customers within the municipal limits of Tampa, Plant City, Temple Terrace, Winter Haven, Auburndale, Lake Alfred, Eagle Lake, Mulberry, Dade City, San Antonio, Oldsmar, Polk City and St. Leo. Tampa Electric has placed its electric facilities within public road rights-of-way and has entered into franchise agreements with certain municipalities in which it provides electric service.

SUMMARY OF ARGUMENT

Consistent with Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), a local government may not unilaterally impose a charge on a public electric utility relating to the public rights-of-way that exceeds the cost of regulating the utility's use. The manner in which local governments obtain control over public rights-of-way, the nature of their powers over public rights-of-way and the statutory framework governing utilities, local governments and public rights-of-way all preclude a local government from unilaterally "renting" these unique public assets to utilities for amounts that exceed regulatory costs. Therefore, the holdover tenant analogy used below is inapposite and the decision below should be quashed.

ARGUMENT

Unilaterally Imposed Charges for Public Rights-of-Way Cannot Exceed the Cost of Regulating The Rights-of-Way.

Public rights-of-way are unique public assets unlike the buildings, parking garages, airports, and civic centers owned by local governments. A local government's interest in the public rights-of-way is governmental, not proprietary; therefore, the public rights-of-way cannot be "rented" and a local government cannot impose a charge on utilities relating to the public rights-of-way that exceeds the cost of regulating the rights-of-way.

The expired franchise agreement required Florida Power to pay an amount "which added to the amount of all taxes, licenses, and other impositions levied or imposed by the Grantor upon the Grantee's electric property, business or operations, for the preceding tax year, will equal to 6% of its revenues from the sale of electrical energy … within the corporate limits of the [city]…." [R:131-32] The courts below justified extending Florida Power's payment obligation under the franchise agreement by comparing this charge ("Holdover Charge") to "rent." Florida Power Corp. v. City of Winter Park, 827 So.2d 322, 325 (Fla. 5th DCA 2002). Judge Sawaya, however, rejected the rent analogy in his dissent, recognizing that Alachua County v. State, 737 So. 2d 1065 (Fla. 1999), prohibits local governments from unilaterally imposing a charge on a public utility relating to the public rights-of-way that exceeds the governmental cost of

regulating the use of public rights-of-way.

In Alachua County, this Court stated: "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." 737 So. 2d at 1068. As a result, in the absence of a franchise agreement, a unilaterally imposed charge for the use of the public rights-of-way cannot exceed the cost of regulating that use without the charge being classified as a tax. This language from Alachua County renders the Holdover Charge an unconstitutional tax because the franchise agreement in this case has expired.

A. Local Governments Have A Governmental Interest in Public Rights-of-Way.

A local government's interest in the use of public rights-of-way is governmental, not proprietary. For example, in Colen v. Sunhaven Homes, Inc., 98 So. 2d 501, 504 (Fla. 1954), the Court held that a county could not grant an exclusive right to use the public streets and rights-of-ways to a private company to install a water and wastewater system, because the county's interest in the use of public rights-of-way was governmental, not proprietary. There, the Court distinguished the power to permit use of public rights-of-way (governmental) from the power to operate the Miami International Airport (proprietary), citing Miami Beach Airline Serv., Inc. v. Crandon, 159 Fla. 504, 32 So. 2d 153 (Fla. 1947). In Crandon, the Court noted that

Capital City Light & Fuel Company v. City of Tallahassee, 42 Fla. 462, 28 So. 810 (Fla. 1900), stands for the proposition that granting a license to use the public streets is a governmental function. See Crandon, 32 So. 2d at 155.

Colen, Crandon and Capital City Light were all more recently cited and discussed in Panama City v. Seven Seas Restaurant, Inc., 180 So. 2d 190 (Fla. 1st DCA 1965). There, the First District affirmed Panama City's right to grant an exclusive catering franchise in its civic center on grounds that operation of a civic center is a proprietary function. These authorities show that a local government's interest in the public rights-of-way is governmental, not proprietary; therefore, Winter Park is limited to imposing a charge sufficient to recovering the costs of regulating the use of the public rights-of-way.

Courts from other states have reached the same conclusion. In Chattanooga v. Bellsouth Telecom., Inc., 1 F. Supp. 2d 809, 812-814 (E.D. Tenn. 1998), the court found that an ordinance imposing a five percent (5%) of gross revenues "franchise fee" on telephone companies was not "rent" for the use of the rights-of-way, but was a tax because it was designed and imposed for the purpose of raising general revenue. Similarly, in American Tel. & Tel. Co. v. Village of Arlington Heights, 620 N.E.2d 1040, 156 Ill. 2d 399 (1993), a city attempted to impose a percentage of revenue and/or per foot charge for the use of

public rights-of-way on a telephone company. The court noted:

> **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. While numerous powers and rights regarding the streets have been granted to municipalities by the General Assembly, they are regulatory in character, and do not grant any authority to rent or lease parts, or all, of a public street.

620 N.E.2d at 1044, citing Village of Lombard v. Ill. Bell Tel. Co., 90 N.E.2d 105 (1950) (emphasis added). The court further observed:

> If the plaintiffs were carrying phone messages in trucks commuting between Glenview and Rockford (if such can be imagined), instead of carrying the messages on fiber optic cable, the municipalities would not be authorized to stop the plaintiffs' trucks and charge them tolls as they crossed municipal boundaries. The streets exist for the benefit of the entire public and are subject only to reasonable regulations regarding usage. **Streets do not exist and were not created as either obstructions or revenue producing property for municipalities.** 620 N.E.2d at 1047 (emphasis added).

The same logic applies here. The public rights-of-way are not like an airport, a civic center or an office building. Local governments do not have a proprietary interest in the use of public roads and rights-of-way; therefore, they cannot be "rented" to utilities for a charge that exceeds the regulatory cost.

B. The City cannot unilaterally impose the Holdover Charge because rent is preempted by the vast statutory framework that preempts rental charges for public roads.

The Holdover Charge is not authorized by law, but rather, is inconsistent with general law and therefore is preempted.[1] In Alachua County, this Court observed that the concept of rights-of-way fees as "rent" ignores "the vast statutes and regulatory schemes currently in place that affect the location and cost of providing utilities." 737 So. 2d at 1068 n.1. This Court recognized that the Legislature had enacted a comprehensive set of regulatory statutes governing public roads and electric utilities and that charging a "toll" or "rent" is inconsistent with these general laws. This vast statutory and regulatory scheme, as is explained below, gives local governments regulatory control over the rights-of-way and precludes the unilateral imposition of a right-of-way charge that exceeds regulatory cost.

As a beginning point, the State has plenary authority over public roads and rights-of-way, and it has not granted local governments a power to "rent" them to electric utilities. In State ex rel. City of Jacksonville v. Jacksonville Street R.R. Co., 29 Fla. 590, 592, 10 So. 590, 592 (Fla. 1892), the Court held that the State's dominant power over all of the highways in the state allowed it to authorize the construction of a railroad across or among the highways and streets within Jacksonville without the consent of "municipal authorities."[2]

Because the Legislature has plenary authority over public roads and rights-of-way in Florida, the

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[1] Preemption need not be expressed, but can be implied when the local ordinance is inconsistent with state statutes. Barragan v. City of Miami, 545 So. 2d 252, 254 (Fla. 1989).

[2] Other cases recognizing the "plenary" power of the State over public streets and rights-of-way include State ex rel. Parker v. Frick, 7 So. 2d 152 (Fla. 1942)(Legislature has plenary power to regulate use of highways in Florida); Roney Inv. Co. v. City of Miami Beach, 174 So. 26 (Fla. 1937)("That the Legislature exercises plenary control over public highways, whether they be public state or county roads or streets in municipalities, is established beyond question in this State"); Stewart v. Deland-Lake Helen Special Road & Bridge Dis., 71 Fla. 158, 71 So. 42 (Fla. 1916)(The Legislature exercises plenary control over public highways, whether they be public county roads or streets in cities and towns); and County Comm'rs of Duval County v. City of Jacksonville, 36 Fla. 196, 18 So. 339 (Fla. 1895)(Streets are public highways under the control of cities and towns, subject to the paramount authority of the commonwealth).

issue is not whether the Legislature has specifically precluded the ability of local governments to "rent" rights-of-way to utilities. Rather, the issue is whether that power has been expressly granted. The need for an express grant of authority to "rent" public rights-of-way is clear from the Introduction to the Florida Transportation Code [3] ("Transportation Code"). Section 1 of the bill establishing the Transportation Code, which contains the Legislature's Declaration of Intent, states, in pertinent part:

> (1) An integrated system of roads and connecting urban streets is essential to the general welfare of the state.
>
> (2) Providing of such a system of facilities, its efficient management, operation and control, is recognized as an urgent problem, and as the proper objective of highway legislation.
>
> * * *
>
> (7) *It is the further intent of the legislature to* ***bestow upon*** *local officials adequate authority with respect to the roads under their jurisdiction*. The efficient management, operation and control of our county roads, city streets and other public thoroughfares are likewise a matter of vital public interest. Ch. 29965, 1955 Laws of Fla. at 995-996 (emphasis added).

The emphasized language -- "bestow upon local officials adequate authority" -- confirms the State's plenary authority over public rights-of-way. It also demonstrates that whatever power local governments have over public roads and rights-of-way must be expressly given by the Legislature in general law, and is not latent in the penumbra of so-called "home rule authority."

Here, the Legislature has not authorized a charge like the Holdover Charge. While Section 337.401(6), Florida Statutes (2001), and its predecessor [Section 337.401(4), F.S.], empowered cities to impose a $500 per mile charge on communication companies for the use of certain public rights-of-way, no such similar authority has ever existed in general law for a charge on electric utilities. The existence of Section 337.401(6), Florida Statutes, shows that the Legislature has authorized a charge for the use of public rights-of-way when it found that doing so was in the public interest. However, the absence of such

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[3] The Transportation Code consists of Chapters 334-339, 341, 348 and 349 and Sections 332.003-332.007, 351.35, 351.36, 351.37 and 861.011, Florida Statutes. See §334.01, Fla. Stat. (2000). The Transportation Code was adopted in 1955 and contains multiple provisions delegating regulatory authority over public rights-of-way to local governments.

general law authority for cities confirms the fact that the imposition of the Holdover Charge is not authorized. Expressio unius est exclusio alterius. Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996).

Other portions of the Transportation Code are relevant. Under Section 336.02(1)(a), Florida Statutes (2002), county commissioners are "invested with the superintendence and control of the county roads and structures within their respective counties." Section 337.401(1), Florida Statutes (2002), authorizes local governmental entities with control of public roads to "prescribe and enforce **reasonable rules and regulations**" governing the placement of utility facilities within public road rights-of-way (emphasis added). Section 337.401(2), Florida Statutes (2002), provides authority for local governmental permitting, and states: "[Local Governments] may grant to ... any corporation which is organized under the laws of this state ... the use of a right-of-way for the utility in accordance with such **rules and regulations** as the [county] may adopt." (emphasis added) Winter Park regulates electric utility structures in the rights-of-way by requiring permits. [See § 90-31, et seq., Winter Park Code of Ordinances, Appendix E]

Judicial decisions discussing the Transportation Code confirm that a local government cannot force an electric utility to pay "rent" for the use of public rights-of-way. In City of Ovedio v. Alafaya Utilities, Inc., 704 So. 2d 206, 207 (Fla. 5th DCA 1998), the City attempted to force a water and sewer utility to sign a franchise agreement charging six percent (6%) of revenues on the utility as consideration for the use of the City's rights-of-way. When the utility refused, the City withheld approval of utility improvements planned by the utility. See id. On appeal from an order enjoining the City from withholding approval of the planned improvements, the Fifth DCA observed that Sections 337.401(1) and (2), Florida Statutes, allowed the City to adopt *rules and regulations* governing the use of rights-of-way, but that the City could not withhold development on grounds that the utility refused to agree to the requested 6% franchise fee. 704 So. 2d at 208. Oviedo demonstrates that the Legislature has bestowed exclusively **regulatory** (not revenue raising) powers over public roads and rights-of-way to local governments by the Legislature.

Other portions of this "vast statutory scheme" referred to in Alachua County are located in Chapter 125, Florida Statutes, which defines the powers of counties. Section 125.01(1)(m), Florida Statutes

(2001), states that counties have the authority to "**regulate** ... structures within the rights-of-way." (emphasis added) Chapter 125.42, Florida Statutes (2001), authorizes a county to implement a licensing system to regulate persons who place equipment in the rights-of-way.

The statutes that subject Florida Power and other electric utilities to extensive regulation by the Florida Public Service Commission ("FPSC") are a very important part of the statutory scheme, and they show that public utilities, like Florida Power and Tampa Electric, are not ordinary corporations. The poles and lines of all of the electric utilities in the state are part of an integrated, statewide electric grid that is regulated by the FPSC. Sections 366.04(5) and 366.05(7) and (8) give the FPSC statewide jurisdiction to ensure an adequate and reliable electric energy grid and to order improvements to the electric grid if there are inadequacies therein. For example, Section 366.04(2)(e) gives the FPSC statewide jurisdiction to prevent two electric utilities from serving the same territory and to determine which electric utility has the right to serve a particular territory when there is a dispute. As a result, a local government has nothing to say about which utility provides electric service within its jurisdictional limits.

Further proof that public utilities are not ordinary corporations, but another part of the vast statutory scheme referred to in Alachua, can be seen in Section 361.01, Florida Statutes, which authorizes public utilities to condemn "any lands, **public** or private…, upon making due compensation according to law to **private** owners," (emphasis added) and Section 380.04(3)(b), which exempts construction of public electric utility facilities in the public rights-of-way from local control under the Florida Environmental Land and Water Management Act. The fact that public utilities can condemn **public** or **private** lands, but are only required by statute to compensate *private* owners, is strong proof that the Legislature does not intend public electric utilities to pay a fair market value "rent" for the mere use of public rights-of-way. Section 380.04(3)(b) reflects the plenary powers of the State over the public roads and rights-of-way and the limited nature of the local government control over the same.

Public electric utilities are not ordinary entities, and public road rights-of-way are not ordinary public property. The FPSC statutes cited above demonstrate that the delivery of electric energy and the construction of electric facilities is a matter of public interest and statewide concern. The numerous statutes

addressing road rights-of-way in the Transportation Code, Chapters 125 and 425, and Sections 361.01 and 380.04, reveal the Legislature's intent to allow electric utilities to use the public rights-of-way subject only to reasonable rules and regulations adopted by the local governments with jurisdictions over the roads and that as such, the Holdover Charge is unlawful.

C. The Holdover Charge cannot be defended as a "Reasonable Regulation."

While the City may claim that a charge like the Holdover Charge is a lawful "rule or regulation" authorized by the foregoing statutes, that argument fails. The franchise agreement did not impose any rights-of-way rules or regulations on Florida Power. The City has a separate permit ordinance governing the placement of facilities in the rights-of-way. While the City's permitting ordinance is an exercise of "police powers," the expired Franchise Agreement served no regulatory or police power purpose.

The "police powers" are the sovereign right of the state to enact laws for the protection of the life, health, morals, comfort and general welfare. Carroll v. State, 361 So.2d 144, 146 (Fla. 1978). While the boundary line between the police powers and other powers of the state may sometimes be blurry, there is a distinction between the power to regulate via police powers and the power to raise revenue. See Dep't of Banking & Finance v. Credicorp, Inc., 684 So.2d 746, 750-752 (Fla. 1996); Iowa Motor Vehicle Ass'n v. Board of R.R. Comm'rs, 207 Iowa 461, 221 N.W. 364, 366 (1928), aff'd 280 U.S. 529 (1930). If the primary purpose of a statute or ordinance exacting an imposition of money is to raise revenue, it represents an exercise of the taxing power. Village of Lemont v. Jenks, 197 Ill. 363, 64 N.E. 362, 364 (1902); State v. Anderson, 144 Tenn. 564, 234 S.W. 768, 771 (1920). Here, the clear purpose of the Holdover Charge is to raise revenue, which is an exercise of the sovereign taxing power, not an exercise of the police powers. Therefore, the Holdover Charge cannot be defended under the police powers as a "reasonable rule or regulation."

D. Public Roads are Unique Public Assets that the City Does Not Necessarily "Own."

If there is any remaining question, the fact that local governments do not actually own the public

rights-of-way in the same manner that they "own" buildings, parking garages and other public assets, is further reason that charges for the use of the rights-of-way are limited to regulatory cost. Local governments hold the public roads and rights-of-way in trust for the benefit of the public, and have no power to sell or barter the streets and alleys so held. Roney Inv. Co. v. City of Miami Beach, 127 Fla. 773, 780, 174 So. 26 (1937).

A local government's exercise of power over the public rights-of-way is a function of the regulatory powers given to them by statute, not the powers they enjoy as the "owner" of the roads. Many roads arise under a prescriptive easement theory, under which the government cannot claim fee simple ownership of the road or right-of-way, only an easement. Downing v. Bird, 100 So. 2d 57 (Fla. 1958). While an easement grants the dominant estate an interest in the land, it does not grant the dominant estate a right to enjoy profits from that land. Burdines v. Sewell, 109 So 648, 652 (Fla. 1926).

The public rights-of-way in dedicated subdivisions are similar to roads that arise by prescription, in that they are not "owned" by a local government. As the developer in a dedicated subdivision conveys individual lots to purchasers, the purchasers' title extends to the centerline of a dedicated road. Smith v. Horn, 70 So. 435 (Fla. 1915). The purchasers of individual parcels retain fee title to the dedicated right-of-way, subject to the right of the passage common to all citizens. See id.

The public rights-of-way are clearly unlike an office building, sports stadium or other assets owned by local governments. That local governments do not hold fee simple title to all of the public rights-of-way being used by utilities, but hold them in trust for public use, is but one more reason that the amount charged by the local governments relating to public rights-of-way cannot exceed the cost of regulation.

II. The Majority's Interpretation of Alachua County v. State is Inconsistent with the Interpretations of Other Courts and Local Governments.

Dissenting Judge Sawaya's interpretation of Alachua County is consistent with interpretations of all other courts that have addressed this issue and the actions of some local governments. In April 2000, Leon County Circuit Judge Terry P. Lewis ruled that the seven percent (7%) of revenue charge imposed

on Talquin by Leon County's then-existing Ordinance No. 83-38 was an unconstitutional tax. (Appendix A, "April Order") The court found that Leon Ordinance No. 83-38 was remarkably similar to the ordinance declared unconstitutional in Alachua County. April Order at 1. Judge Lewis rejected Leon County's argument that the 7% charge was a lawful "rental" and stated:

> There is language in the Supreme Court's decision in Alachua County that suggests that the whole concept of receiving rent for the use of rights-of-way is an outdated concept. A good argument can be made as well that, regardless of a county's general right to charge reasonable rental for its property, utilities using the rights-of-way should be treated differently. The law contemplates that bona fide utilities should be able to use the rights-of-way of counties, subject to their reasonable rules and regulations concerning placement and maintenance. See Section 337.401, Florida Statutes. **A reasonable inference is that if any fee is to be charged by the County, it should be based on what is reasonably necessary in order to properly monitor and enforce compliance with its rules and regulations concerning placement and maintenance of utility facilities in its right-of-way, not what a buyer might be willing to pay based upon supply and demand in the marketplace.** April Order at 5. (emphasis added)

The First District Court of Appeal per curiam affirmed the final judgment eighteen (18) days after oral argument was held. Leon County v. Talquin Elec. Co-op, Inc., 795 So. 2d 1142 (Fla. 1st DCA 2001).

A more recent example is Florida Power Corp. v. Town of Belleair, 830 So. 2d 852 (Fla. 2d DCA 2002), the jurisdictional predicate for this case, wherein Florida Power Corp. discontinued paying the six percent (6%) franchise fee after the franchise agreement expired. The Second District Court of Appeal relied on Alachua County and ruled that the charge was an unconstitutional tax because it bore no relationship to the actual cost of regulation of the public rights-of-way. The Court, however, emphasized that a local government could impose a reasonable regulatory fee. Id. at 854.

A similar result was reached in Talquin Electric Co-op., Inc. v. Wakulla County, 2d Cir., Wakulla County, Case No. 2000CA-078. [Appendix B] There, Wakulla County Ordinance No. 95-20 had unilaterally imposed on the utility a charge equal to four percent (4%) of revenue collected from customers. The circuit court held that the 4% charge was an unconstitutional tax, and this decision was not appealed.

[Appendix B]

The cities of Midway and Gretna also repealed their ordinances unilaterally imposing a seven percent (7%) of revenue charge on the local utility after Alachua County, without any litigation. [Appendix C and D]

With the sole exception of this case, the trial and appellate courts that have considered charges expressed as a percentage of revenue imposed on electric utilities have ruled those charges unconstitutional under Alachua County. These decisions and the actions of certain local governments clearly demonstrate that Alachua County has been properly interpreted in most cases and that the majority below has erred.

CONCLUSION

A tax is a forced charge or imposition by government that does not depend on the will or contract of the one on whom it is imposed. State ex rel. Gulfstream Park Racing Ass'n v. Florida State Racing Comm'n, 70 So. 2d 375, 379 (Fla. 1953). The Florida Constitution preempts to the state all forms of taxation except ad valorem taxes and those authorized by general law. See Art. VII, § 1(a), Fla. Const. The Holdover Charge has no relationship to the extent of the utilities' use of the right-of-way or the associated regulatory costs.

Judge Sawaya's dissent below was correct. A local government cannot unilaterally impose a right-of-way charge that exceeds the cost of regulation on a utility, because doing so is an unconstitutional tax. The manner in which local governments obtain control over public rights-of-way, the nature of their powers over public rights-of-way and the statutory framework governing utilities, local governments and public rights-of-way all preclude a local government from unilaterally "renting" these unique public assets to utilities for amounts that exceed regulatory costs. For these reasons, the landlord-tenant analogy used by the court below is inapposite. Absent a franchise agreement, this Court should hold that a unilaterally imposed charge for the use of public rights-of-way cannot exceed regulatory cost, and quash the decision below.

DATED this 16th day of January, 2003.

KENNETH R. HART
Florida Bar No. 0192580
J. JEFFRY WAHLEN
Florida Bar No. 0884316
AUSLEY & McMULLEN
P. O. Box 391
TALLAHASSEE, FL 32302
TELEPHONE: 850/224-9115
FAX: 850/222-7560

ATTORNEYS FOR AMICUS CURIAE
TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 16th day of January, 2003 to:

Sylvia Walbolt, Esquire Robert W. Pass, Esquire James Michael Walls, Esquire Joseph H. Lang, Jr., Esquire Carlton, Fields, P.A. 777 South Harbor Island Blvd. Tampa, FL 33602 Attorneys for Florida Power Corporation	R. Alexander Glenn, Esquire Associate General Counsel One Progress Plaza, Suite 1500 St. Petersburg, FL 33701 Counsel for Florida Power Corporation
Gordon H. Harris, Esquire Thomas A. Cloud, Esquire Tracy A. Marshall, Esquire Gray, Harris & Robinson, P.A. Post Office Box 3068 Orlando, FL 32802 Counsel for Appellee City of Winter Park, Florida	

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.210, Florida Rules of Appellate Procedure (1978), this brief is typed using

Courier New 12 point, a font which is not proportionately spaced.

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Attorney