THE SUPREME COURT

STATE OF FLORIDA

DEPARTMENT OF REVENUE,

Appellant,

and

CITY OF GAINESVILLE,

Appellee.

CASE NO. SC03-2273

L.T. CASE NO. 1D02-1582

AMICUS CURIAE BRIEF OF THE FLORIDA TELECOMMUNICATIONS INDUSTRY ASSOCIATION SUPPORTING THE APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

PRELIMINARY STATEMENT

The Appellant, Florida Department of Revenue, Appellant below, will be referred to herein as "the Department." The City of Gainesville, Appellee below, will be referred to herein as "the City" or "the Appellee." Florida Telecommunications Industry Association will be referred to herein as "FTIA."

The case at issue is Department of Revenue v. City of Gainesville, 859 So. 2d 595 (Fla. 1st DCA 2003), and will be referred to herein as "City of Gainesville".

SUMMARY OF THE ARGUMENT

The City's property used in its telecommunications business must be used exclusively for "municipal or public purposes" within the meaning of Article VII, Section 3(a) of the Florida Constitution in order for the City to be entitled to an ad valorem tax exemption for the property. This Court has long held that only municipality-owned property used exclusively in a governmental-governmental function is exempt from ad valorem taxation under Article VII, Section 3(a). The City's profit-driven telecommunications business which operates in competition with private providers is a governmental-proprietary activity. Thus, the First District Court of Appeal erred in refusing to apply the governmental-governmental/governmental-proprietary standard established by this Court in the 1975 Williams decision and in holding that the City's property is being used to serve a municipal purpose under Article VII, Section 3(a).

Furthermore, if there is to be a determination of whether a given activity constitutes a municipal or public purpose under the governmental-proprietary standard, the legislature's declarations of public policy and determinations of fact must be given deference, and, in this case, the legislature's declarations and determinations are decisive. In enacting Chapter 97-197, the legislature properly exercised its discretion and authority to determine the conditions under which a municipality may sell telecommunications services in a new competitive market system created and mandated by state and

federal law after 1995. Chapter 97-197----4[1]

Subsequently, because of the Florida Legislature's growing concerns that the regulatory and tax advantages possessed by municipalities could actually hinder rather than promote competition, the legislature also enacted Chapter 97-197--S ("Section 166.047"), and declared that the provision of telecommunications services by a municipality is not an authorized "municipal purpose" under Article VIII, Section 2(b) of the Florida Constitution unless certain conditions, including the payment of taxes, are satisfied. -S ("Section 196.012(6)"), to clarify and codify that the provision of competitive telecommunications services by a municipality does not serve "municipal or public purposes" and, therefore, is not an exempt use of municipal property for ad valorem taxation purposes under Article VII, Section 3(a) of the Florida Constitution ("Article VII, Section 3(a)"). See Section 3, Chapter 97-197-based on three erroneous findings. First, the majority erred in holding that the terms "municipal or public purposes" in Article VII, Section 3(a) should be given the same meaning as the similar terms used in Article VIII, Section 2(b). City of Gainesville at 599. Second, the majority erroneously found that Appellee's use of telecommunications property to provide services in competition with private providers serves a municipal purpose under Article VII, Section 3(a). Id. at 596. Finally, the majority ignored the legislature's authority to regulate the telecommunications industry and to determine the public policy of Florida regarding how a competitive telecommunications market should operate.

The court reached its erroneous conclusions because it refused to follow long-standing precedent of this Court holding that property used by a municipality for proprietary purposes does not qualify for exemption from ad valorem taxation under Article VII, Section 3(a). See Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dismissed 429 U.S. 803 (1976) and Sebring Airport Authority v. McIntyre, 783 So. 2d 238 (Fla. 2001) (" Sebring IV").

In Williams v. Jones, this Court delineated the test for determining whether a given activity constitutes a "municipal or public purpose" under Article VII, Section 3(a). In applying the "public purpose standard," Williams distinguished between exempt "governmental-governmental" activities that serve an Article VII municipal or public purpose, and non-exempt "governmental-proprietary" activities. Williams at 433. This Court later defined governmental-governmental activities as the functions that concern the administration of some phase of government, and governmental-proprietary activities

[1] The 1996 Act

as the functions that promote the comfort, convenience, safety and happiness of citizens. Sebring Airport Authority v. McIntyre, 642 So. 2d 1072, 1073-74 (Fla. 1994).

All municipal activities that meet the governmental-governmental standard are constitutionally exempt from ad valorem taxation.[2] Appellee's competitive profit-driven telecommunications business, however, does not concern "the administration of some phase of government" and is clearly a proprietary activity. See discussion of GRUCom's business activities at pages 15 to 17 herein. There is no dispute that the lease of governmentally-owned property to a private telecommunications provider for the same commercial activity would cause the property to be subjected to tax. See Sebring IV at 253. Thus, the First District's holding is based on the ownership of the property and not on its use. City of Gainesville at 599. This is clearly reversible error.

Florida Courts have consistently held that "the criterion for determining the taxable character of property is the nature of the use to which it is put and not the ownership." Park-N-Shop v. Sparkman, 99 So. 2d 571 (Fla. 1957)---O. Judge Ervin articulated this point in his dissenting opinion, finding that "the only real question pertinent to the issue of whether governmentally owned property should be exempt from taxation is the use made of it." City of Gainesville at 606.

The flawed analysis of the First District majority begins with its conclusion that the terms "municipal or public purposes" in Article VII have the same meaning as the term "municipal purpose" in Article VIII. Id. at 599. These similar terms in different Articles do not have the same meaning, as held by this Court in 2001 in Sebring IV and as argued extensively and correctly in the Department's Initial Brief herein.

The error in equating Articles VII and VIII is clearly demonstrated in footnote 3 of the opinion where the court "factually" distinguished Greater Orlando Aviation Authority v. Crotty, 775 So. 2d 978 (Fla. 5th DCA 2000). Crotty involved a challenge to an ad valorem tax on an airport hotel owned by the City of Orlando and managed by the Hyatt Corporation. Id. at 979. The Fifth District affirmed the trial court's holding that the tax on the hotel property was valid. Id. at 980. In this case, the First District failed to recognize that Crotty holds that proprietary activities such as ownership of a for-profit hotel, while

[2] In the instant case, no party argued that Appellee's use of the property in question is a governmental-governmental activity.

serving an Article VIII municipal purpose, do not serve a municipal or public purpose under Article VII, Section 3(a), and are therefore taxable. Thus, it is clear that, under Crotty, the terms in Article VII and Article VIII, while similar, simply do not have the same meaning.[3]

The issues before this Court are also strikingly similar to those before the court in City of Bartow v. Roden, 286 So. 2d 228 (Fla. 2nd DCA 1973). Roden provides another clear example of a proprietary activity that serves a "municipal purpose" under Article VIII, Section 2(b), yet does not serve "municipal or public purposes" for ad valorem tax exemption under Article VII, Section 3(a). Roden also demonstrates the deference a court should give to legislative determinations of public purpose for purposes of Article VII, Section 3(a).

The Roden court found that in enacting Chapter 332, Florida Statutes the legislature made a determination that property such as the City of Bartow's airport property acquired under Chapter 332, and used by a municipality for an airport, was being used for a "public purpose." Id. at 230.[4] Based on this finding, the court held that the property leased to a private commercial enterprise, while serving a "public purpose" under Article VIII, did not serve a municipal or public purpose under Article VII, Section 3(a). Id. This is precisely the issue before the Court in the instant case.

Moreover, if the scope of the term "municipal purpose" in Article VIII is to be coextensive with the terms "municipal or public purposes" as used in Article VII, there would be no need for the municipal or public purposes standard expressly included in Article VII, because everything authorized under Article VIII as serving a municipal purpose would be tax exempt under Article VII. Because it cannot be assumed that the drafters of the Constitution intended to include a meaningless provision, this reading is impermissible. See Chiles v. Phelps, 714 So. 2d 453, 459 (Fla. 1998).

If the First District majority had recognized the distinctions between the scope of the terms used in Articles VII and VIII, it would have engaged in a meaningful analysis of what serves a municipal or public

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[3] See Appellant Department of Revenue's Initial Brief, pp. 20-24.

[4] The finding of the Court that the legislature had authorized the acquisition and leasing of such property by a municipality is based on the legislature's authority to define and limit municipal powers under Article VIII of the Florida Constitution.

purpose under the facts of the case. As the court was required to do, it should have harmonized the statutory and constitutional provisions and avoided declaring Chapter 97-197-[5]

II. THE LEGISLATURE HAS PLENARY POWER TO DETERMINE THAT MUNICIPAL PROPERTY USED IN A COMPETITIVE TELECOMMUNICATIONS BUSINESS IS SUBJECT TO AD VALOREM TAXATION.

As set forth above, under the test Florida courts have applied, this Court should determine that the property at issue is being used in a governmental-proprietary function and is therefore subject to ad valorem taxation. However, should this Court determine that governmental-proprietary activities must be factually analyzed to determine if they serve "municipal or public purposes" under Article VII, Section 3(a), then this Court should recognize the authority of the legislature to make such determinations.

"The legislature's power in the field of taxation is plenary." Dominion Land & Title Corp. v. Department of Revenue, 320 So. 2d 815, 818 (Fla. 1975). This power is only subject to express limitations as may be provided in the Florida Constitution. See Smathers v. Smith, 338 So. 825, 827 (Fla. 1976) The First District's decision should be reversed because the majority's interpretation of Article VII, Section 3(a) places new judicial limitations on the legislature's authority that are not found in the Florida Constitution.

As discussed above, Article VIII, Section 2(b) establishes the scope of power and authority municipalities may exercise, except as provided by general law. The broad range of permissible municipal activities under Article VIII, Section 2(b) is divided by the municipal or public purpose standard in Article VII, Section 3(a) into two subsets for taxation. The first subset includes all activities that meet the governmental-governmental standard, which is the "public purpose" standard "applicable in tax exemption cases" under Article VII, Section 3(a). Sebring IV at 248. The second subset includes all governmental-proprietary functions. Id. at 433.

If there is to be a factual determination of whether a given activity constitutes a municipal or public purpose under the governmental-proprietary standard, the legislature's declarations of public policy and

[5] "Legislative provisions must be construed to operate in harmony with each other and it is a court's responsibility to harmonize statutory provisions and find them constitutional." City of Jacksonville v. Cook, 765 So. 2d 289, 292 (Fla. 1st DCA 2000), rev'd on other grounds, 823 So. 2d 86 (Fla. 2002

its determinations of facts must be given deference. See University of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993). The legislature has made a factual determination that a municipality's competitive profit-making telecommunications business activities in a competitive market do not serve an Article VII, Section 3(a) municipal or public purpose. In enacting Chapter 97-197,-, Section 2(b). These conditions are necessary to ensure that the newly created competitive market for telecommunications services operates in a manner that is in the best interests of the citizens of Florida. This determination requires complex factual determinations about how to change from a monopoly to a competitive market, as well as significant public policy determinations about how competitive markets should operate -- the legislature must make these choices.

In analyzing these complex policy issues, the First District majority failed to recognize the profound differences between the provision of telecommunications service in a government-sanctioned monopoly market as opposed to a competitive market, finding that the nature of the market is essentially irrelevant. City of Gainesville at 601. Furthermore, the majority made this incorrect finding without sufficient factual support in the record. The trial court granted summary judgment in this case on a facial challenge to the constitutionality of the relevant statutes. Vol. 3, R. 415-416. As a result, there is nothing to support the factual and public policy determinations made by the District Court regarding whether the commercial sale of telecommunications services in a competitive market serves a municipal or public purpose under Article VII, Section 3(a).

1. The Legislature Has The Authority To Determine The Conditions Under Which A Municipality's Sale Of Telecommunications Services In A Competitive Market Serves Municipal Or Public Purposes.

"The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts. Further, legislative determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." University of Miami v. Echarte, 618 So. 2d 189, 196 (Fla. 1993) (citations omitted). The legislature's enactment of Chapter 97-197- redefined the regulatory environment in which telecommunications providers operate. Today, providers operate in a fully competitive and thus entirely different market than those that existed prior to

the 1995 Act.

The issue presented in this case is not whether providing telecommunications service, without more, serves a public purpose. Rather, the issue is whether a governmental entity serves a public purpose when it uses its regulatory and tax advantages to compete in the telecommunications market for the purpose of making a profit. The services offered by the City were already being provided by private companies before 1996 and have been provided by various companies other than the City's since that time. The residents of the City already had access to telecommunications services when the City obtained a certificate from the Public Service Commission authorizing it to compete with existing companies. See Vol. 3, R-374.

The legislature's interest in ensuring that new entrants to the telecommunications market compete on an equal footing with incumbent telecommunications companies is based on sound public policy. First, the benefits flowing from fair competition include the avoidance of monopoly pricing, more rapid technological advancements, and superior customer service and responsiveness. Second, as municipal property used for the provision of competitive telecommunications services is used for profit-making purposes, it is only equitable that such property share the same tax burden as other property that is being used for such purposes. Third, as municipal providers grow, private providers lose market share, which diminishes and erodes state and local tax revenues and thus endangers the public interest.

Allowing a municipality by virtue of its tax advantaged status to obtain a cost advantage over its private competitors is not only unfair and inequitable, it also endangers the public interest. Because incumbent telephone companies have the legal obligation to provide universal service and to serve as the carrier of last resort for underserved and remote locations, profitable customers subsidize the provision of telecommunications services to less-profitable or unprofitable customers. See generally Section 364.025, Florida Statutes. Significantly, municipalities entering the competitive telecommunications market do not have these same service obligations. This enables a municipality to offer services only to the most profitable customers, such as large businesses. By taking these customers, a municipality that competes with private providers necessarily harms its own more needy citizens whose phone service is subsidized by more profitable customers — hardly a municipal or public purpose.

A review of the City's business plan (the "Plan") demonstrates that the legislature's concerns are well-founded. The City, through its utility provider "Gainesville Regional Utilities" ("GRU"), established GRUCom, a business unit for communication services that was heralded to become "the Information Infrastructure Provider in Gainesville." See Vol. 3, R-326 (May 19, 1995 "Volume II- Start-Up GRUCom Business Plan")(emphasis in original). The Plan is replete with references to the profit-making potential of GRUCom and the overall tenor of the Plan is consistent with a view of GRUCom being a business enterprise, albeit one established by a governmental entity with significant tax and regulatory advantages, rather than being a way to provide services to the general public. The Plan generously uses the terms "market potential," "market penetration," "revenue," "profits," "profit-center," "profit-margin", "return on investment," "opportunity cost," "reinvestment of cash flow," and "hurdle rate," none of which are terms associated with the governmental provision of a public service. See Vol. 3, R-326 - 346.

The City has been clear in identifying its initial customer base: local large and medium sized businesses and governmental entities. See Vol. 3, R-330, 332, 334. Not coincidentally, these customers are among the most profitable for telecommunications providers and the City makes no secret of its intention to "entice" these customers with discounts, potentially in the range of 20% from market rates, and by emphasizing the "significant savings" GRUCom could offer. See Vol. 3, R-343, 331. Indeed, the Plan acknowledges that the City has no intention of offering GRUCom services to the general public or residential consumers until a later, undisclosed date, and further acknowledges that "the start-up business activities [of GRUCom] may only marginally benefit the general population of Gainesville." See Vol. 3, R-330, 332-34, 346.

The Plan also discusses how GRUCom will be operated on a "cross-functional basis," at least until it becomes profitable. See Vol. 3, R-336-341. In practical terms, this means that GRU will provide employees and equipment, paid for by citizens of Gainesville through taxes and utility payments, to GRUCom to assist it in commencing operations. The Plan states that GRUCom intends to rely heavily on the "natural advantages" arising from GRU's utility organization, including reliance upon personnel and expertise from certain departments within GRU, such as electrical engineering, electric system control, and

information systems. In addition to using GRU's personnel to its advantage, the Plan further states that GRUCom plans to use GRU's existing utility network, such as utility poles (without having to pay attachment fees), equipment, and personnel to minimize start up costs. See Vol. 3, R-336-342.

A review of the City's business plan clearly demonstrates that the legislature has properly concluded that the entry of municipalities into the market for telecommunications services on an "unlevel playing field" could have a detrimental impact on the level of competition achieved statewide and could undercut its efforts to develop a competitive market for telecommunications services.

The legislature has been given the authority to make appropriate declarations on public policy, in part, because it is better equipped than the courts to make such determinations. In overruling the legislature's determinations and declarations of public policy, the lower court demonstrated that it is ill-equipped to deal with these complex legislative policy matters. Specifically, the lower court found that telecommunications providers like utilities provide "essential public services," and therefore, the Appellee's property should be exempt. City of Gainesville at 600. This oversimplified analysis is wrong in several respects. Assuming the court's analysis was correct, the court ignored a relevant question that follows from the analysis, -- whether Appellee is an "essential provider," and thereby serves a municipal or public purpose under Article VII, Section 3(a). In the instant case, Appellee clearly is not an essential provider of telecommunications services. Such services were already available in the Gainesville market from other providers. Vol. 3, R-374.

In any event, the courts are not to second-guess the wisdom of the legislature's policy decisions. See University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993). For these reasons, the legislature's declaration of public policy and its determination of how to structure and regulate a competitive telecommunications market should not have been disturbed.

2. Chapter 97-197-, Section 3(a) is self-executing, it does not specifically identify each and every activity that does or does not serve a municipal or public purpose. Such classification of property or activities is not a traditional matter of organic law, but rather, it is a legislative function.

In assessing whether Chapter 97-197-, Section 3(a) and is thus unconstitutional, it is important to keep in mind the legal framework for ad valorem taxation, of which Article VII, Section 3(a) is just one part. First, Article VII, Section 2 provides that "all ad valorem taxation shall be at a uniform rate

within each taxing unit." Article VII, Section 4 provides that "by general law, regulation shall be prescribed which shall secure a just valuation of all property for ad valorem taxation." Finally, Article VII, Section 10 provides that no municipality shall use its taxing power to aid any corporation, association, partnership or person.

Construing these constitutional provisions together with the mandate that "the Florida Constitution requires that all property used for private purposes bear its just share of tax burden for the support of local government and education," see Am Fi Inv. Corp. v. Kinney, 360 So. 2d 415 (Fla. 1978), Florida courts have said that "the legislature clearly has the power to classify so that all property devoted to private use is treated on a parity, and therefore, there is an equitable distribution of the tax burden." Williams, 326 So. 2d at 432. Furthermore, the courts have recognized that the legislature has "broad powers of classification for taxation purposes so as to bring about a fair contribution by all property interests to the tax burden necessary to provide the revenues for the functioning of government." Id. at 432. Indeed, the state "has inherent legislative power to determine subjects of taxation for general or for particular public purposes, and to make appropriate changes in selections and classifications of properties made subject to or exempted from taxation for particular public purposes subject to controlling constitutional limitations." Long v. St. John, 170 So. 317 (Fla. 1936).

Chapter 97-197-, Section 3(a), Florida Constitution.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the First District Court of Appeal and hold that Chapter 97-197-, 330 South Orange Avenue, P. O. Box 3259, Sarasota, Florida 24230; Larry E. Levy and Loren E. Levy, The Levy Law Firm, 1828 Riggins Road, Tallahassee, FL 32308; and Nicholas Bykowsky and Mark T. Aliff, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Plaza Level, Tallahassee, FL 32399-1050.

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