IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE

Appellant,

v.

Appeal No. SC 03-2273
Lower Case No. 1D02-1582

THE CITY OF GAINESVILLE,

Appellee.

BRIEF OF *AMICUS CURIAE* FLORIDA MUNICIPAL ELECTRIC ASSOCIATION

James Baller
Sean A. Stokes
The Baller Herbst Law Group, P.C.
2014 P Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300

William J. Peebles
3010 West College Avenue
P.O. Box 10930
Tallahassee, FL 32302
(850) 681-7383
Florida Bar No. 282741

April 5, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Administrative Orders:

Federal Statutes:

Federal Legislative Materials:

State Statutes:

Other Materials:

Florida Public Service Commission, *Local Competition*, http://www.psc.state.fl.us/local-compet/local-compet.cfm 16

Florida Public Service Commission, Annual Report on Competition in Telecommunications Markets in Florida (2003), http://www.psc.state.fl.us/general/publications/reports/AnnualTelecomMarkets2003.pdf 3, 18

J. Ball, *Georgia Cities Face Battle to Enter Telecom Area*, Online Wall Street Journal (March 26, 1997) 11

C. Beard, *American City Government* (1912) 17 n.18

J. Fairlie, *Essays in Municipal Administration* (1908) 17 n.18

H. Frisby, Jr., and J. Windhausen, Jr., *Bell Companies Thwart Competition*, Charleston Gazette (September 25, 2002), http://www.wvgazette.com/display_story.php3?sid=200209246&format=prn 10 n.10

J. Glassman, *For Whom the Bells Still Toll*, Washington Times (April 25, 2001), http://www.aei.org/ra/raglas010425.htm 10 n.10

T. Hazlett and G. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of 'the Level Playing Field' in Cable TV Franchising Statutes*, 3 Business and Politics 21, 43 (2001), http://www.manhattan-institute.org/hazlett/the_fallacy_of_regulatory_symm.pdf 10

Moody's Magazine, Vol. II, No.5, *Symposium – Municipal Ownership and Operation* (October 1906) 17 n.18

MSB Energy Associates, *Major Federal Tax Breaks that Lower Investor-Owned Utility Costs and U.S. Treasury Revenues* (2001), http://www.appanet.org/pdfreq.cfm?PATH_INFO=/Newsroom/releases/MSBreport.pdf&VARACTION=GO 17 n.17, 18.n.19

R. Pepper, *Policy Changes Necessary to Meet Internet Development*, 2001 L. Rev. M.S.U.-D.C.L. 255 (2001) 13

BRIEF OF *AMICUS CURIAE* FLORIDA MUNICIPAL ELECTRIC ASSOCIATION

In this brief, the Florida Municipal Electric Association ("FMEA") responds to the policy arguments that the Florida Telecommunications Industry Association ("FTIA"), the Property Appraisers Association of Florida, Inc. ("PAAF"), and appraiser Ed Crapo have offered as *amici curiae* supporting the Florida Department of Revenue.[1] These policy arguments irrelevant to the purely legal issue that the Department and the City of Gainesville have briefed – whether the Florida Constitution prohibits *ad valorem* taxation of property that a municipality uses itself to provide telecommunications services – and they are also incorrect.

The *ad valorem* taxation at issue in this case does not promote "sound public policy," as *amici* claim.[2] To the contrary, it undermines the purposes of the federal Telecommunications Act of 1996 and tips the playing field even further in favor of the incumbent telephone companies whose monopolies Congress in local markets sought to end by enacting the Telecommunications Act.

---

[1] FMEA will concentrate upon the arguments of FTIA, which largely encompass those of PAAF and Mr. Crapo. FMEA will focus primarily on the relationship between incumbents and municipal telecommunications providers, as FTIA claims to represent the interests of "most of the major telecommunications companies doing business in Florida," FTIA Brief at 2, and it repeatedly refers to the impact of municipal entry on incumbent telecommunications companies. In the last section of this brief, FMEA will also address the relationship between municipal telecommunications providers and new private-sector entrants.

[2] FTIA Brief at 2, 14-15; *see also* PAAF Brief at 8-9; Crapo Brief at 8-9.

INTEREST OF *AMICUS CURIAE* FMEA

FMEA represents the interests of the 32 communities that operate municipal electric utilities throughout the State of Florida. These utilities currently serve 25 percent of Florida's population - more than one million electric customer meters.

For over a century, municipal electric utilities have provided their customers low-cost, reliable electric service and have furnished an industry-wide yardstick for efficient operation and superior quality of service. Now, they are well-situated to help their communities obtain meaningful competition in the telecommunications area as well as prompt and affordable access to advanced telecommunications services and capabilities.

In their core business of providing electric power, municipal electric utilities have huge demands for sophisticated communications infrastructure and facilities. These publicly-owned assets can readily support the provision of competitive voice, video and data services. Municipal electric utilities have vast experience in providing high-technology services, billing customers of all kinds, furnishing technical support, and addressing customer-service needs. They have access to poles, ducts, conduits and rights of way. They also have a century-old tradition of universal service.

Despite the passage of more than seven years since the enactment of the Telecommunications Act, major incumbent telecommunications companies continue to dominate the telecommunications market in Florida, particularly the

residential market.[3] Competition is concentrated in the largest population centers, as new private-sector competitors have generally ignored smaller markets in the State. *Competition Report 2003* at 11. Thus, contrary to the suggestion of *amici* supporting the Department, municipal involvement in telecommunications continues to be vitally important for many communities in Florida.

FMEA believes that this case should turn on the legal issues that the Department of Revenue and the City of Gainesville have briefed to the Court. Should the Court wish to consider policy, however, this memorandum will give the Court a more complete understanding of the relevant issues than *amici* supporting the Department have provided.

SUMMARY OF ARGUMENT

1. As Congress was well aware when it enacted the Telecommunications Act, the "playing field" in the telecommunications industry tips nearly vertically in favor of incumbent providers. To promote robust competition, Congress adopted numerous potent measures to encourage and assist new providers, including municipal utilities, to enter local markets and become effective competitions. Congress most certainly did not intend that states enact new incumbent-promoted

[3] Florida Public Service Commission, Annual Report on Competition in Telecommunications Markets in Florida (2003), http://www.psc.state.fl.us/general/publications/reports/AnnualTelecomMarkets2003.pdf. ("*Competition Report 2003*").

barriers, such as the *ad valorem* taxes at issue in this case, that would make it all the more difficult for municipal utilities to succeed.

2. Assuming (without conceding) that establishing a "level playing field" is a legitimate state goal, treating new entities and incumbents exactly the same undermines that goal. In imposing *ad valorem* taxes on municipal telecommunications providers, the Florida legislature not only ignored the incumbents' vast advantages over municipal providers, but it exacerbated these advantages by revoking municipal immunity to *ad valorem* taxation while leaving intact the many regulatory and other burdens that apply only to municipalities.[4]

3. FTIA also *makes* several other policy arguments for which it offers neither factual support nor rational analysis. None of these arguments has merit.

ARGUMENT

I. *AD VALOREM* TAXATION OF MUNICIPAL PROVIDERS OF TELECOMMUNICATIONS SERVICES IS CONTRARY TO THE PURPOSES OF THE TELECOMMUNICATIONS ACT OF 1996

A. The Telecommunications Act Reflects Congress's Intent to Counteract the Incumbents' Overwhelming Advantages Over New Entrants

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et.*

[4] For the purposes of this brief, FMEA assumes that the *ad valorem* taxation in question became effective upon issuance. In fact, for the reasons set forth in the City of Gainesville's opening brief and District Court's opinion below, FMEA believes the Florida Legislature lacked authority under the Florida Constitution to impose such taxation.

seq. As the Supreme Court has observed, this was "an unusually important legislative enactment." *Reno v. Amer. Civil Liberties Union*, 884 U.S. 844, 857 (1997). After decades of federal and state encouragement of monopolies in local telecommunications markets, the Act sought to end such monopolies by, among other things, invalidating state measures that insulate incumbent carriers from competition. *GTE South, Inc. v. Morrison*, 199 F.3d 733, 737 (4th Cir. 1999).

According to the Federal Communications *Commission* ("FCC"), the agency responsible for administering the federal communications laws, has summarized the pro-competitive purposes of the Act as follows:

> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in all telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.[5]

In enacting the Telecommunications Act, Congress flatly rejected the view that *amici* supporting the Department are espousing here – that "sound public policy" requires that "new entrants to the telecommunications market compete on an equal footing with incumbent telephone companies." FTIA Brief at 14. To the

---

[5] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C.R. 15499, 1996 WL 452885, ¶ 4 (1996) ("*Local Competition Order*").

contrary, as the Supreme Court has noted, the Telecommunications Act "proceeds on the assumption that incumbent monopolists and contending competitors are unequal." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 532 (2002). That is so because an incumbent's "existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers." *Local Competition Order at* ¶ 10. "Because an incumbent currently serves virtually all subscribers in its local serving area, an incumbent has little economic incentive to assist new entrants in their efforts to secure a greater share of that market." *Id*. Incumbents also have "economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly." *Id*. at ¶ 11.

To counteract the incumbents' overwhelming advantages, Congress armed new entrants, the FCC and state regulators with "powerful tools to dismantle the legal, operational and economic barriers" that new entrants face.[6] Indeed, "[t]he 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) 'most promiscuous rights'…to competing carriers vis-à-vis the incumbents." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999).

Furthermore, in Section 253 of the Telecommunications Act, "Congress sought to ensure that its national competition policy for the telecommunications

---

[6] *Public Utility Commission of Texas*, 13 F.C.C.R. 3460, 1997 WL 603179, ¶ 2 (October 1, 1997) ("*Texas Order*").

industry would indeed be the law of the land and could not be frustrated by the isolated actions of *individual* … states, including … the actions of state legislatures." *Texas Order* at ¶ 4 (emphasis added).[7]

Thus, far from intending to create a "level playing field" for the benefit of incumbents, Congress enacted the Telecommunications Act to do precisely the opposite, and it required the states to and refrain from acting in ways that would thwart the national goals reflected in the Act.

B. Impediments to Municipal Entry, Including the *Ad Valorem* Taxation at Issue, Are Contrary to the Purposes of the Telecommunications Act

In *In re Missouri Municipal League*, 16 F.C.C.R 1157, 2001 WL 28068 (2001), the FCC determined that a Missouri statute that bars municipalities from providing telecommunications services was unwise, unnecessary and contrary to the purposes of the Telecommunications Act. *Id*. at ¶ 10. The FCC declined to preempt the statute under Section 253(a), however, finding that Congress had not spoken clearly enough in that provision to meet the Supreme Court's elevated standards for federal preemption in such matters. *Id*. at 9.

In *Nixon v. Missouri Municipal League*, No. 02-1238, *2004 U.S. LEXIS 2377* (U.S., March 24, 2004), the Supreme Court upheld the FCC's Missouri

---

[7] Section 253(a) states that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

decision, agreeing that, as a matter of law, Congress had not made it intent regarding the scope of Section 253(a) sufficiently clear. The Court stressed, however, that its decision "[did] not turn on the merits of municipal telecommunications services," *id.* at *3, and that, as a matter of public policy, municipalities have "a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest." *Id*. at *12.

The Court also noted that the FCC had "denounced the policy behind the Missouri statute;" that Chairman William Kennard and Commissioner Gloria Tristani had "minced no words in saying that participation of municipal entities in the telecommunications business would 'further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small and rural communities in which municipally-owned electric utilities have great competitive potential'"; that Commissioner Susan Ness had underscored that "barring municipalities from providing telecommunications substantially disserved the policy behind the Telecommunications Act;" and that "a number of *amicus* briefs in this litigation argue[d] the competitive advantages of letting municipalities furnish telecommunications services, drawing on the role of government operators in extending the electric power lines early in the last century."[8] *Id*. at *11-14.

[8] Among the ten *amici* supporting the Missouri municipalities were the High Tech Broadband Coalition and the Fiber to the Home Council (representing

Furthermore, as Justice Stevens pointed out, the legislative history reflects that Congress received testimony on the "unique potential" of municipal utilities "to promote competition, particularly in small cities, towns, and rural communities underserved by private companies," and that a Senate manager of the Telecommunications Act responded to this testimony by stating that, "I think the rural electric associations, the *municipalities*, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[9]

In this case, the City of Gainesville has relied solely upon the Florida Constitution and has not sought federal preemption under Section 253(a). Thus, the Supreme Court's holding that Section 253(a) did not, as a matter of law,

---

more than 15,000 corporations spanning all industrial sectors in all areas of the United States); Consumers Federation of America (representing more than 55 million consumers); Educause (representing more than 1,900 colleges, universities, and other institutions of higher education); United Telecom Council (representing public and private utilities of all kinds); and the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, National League of Cities, the National Association of Counties and the United States Conference of Mayors (representing thousands of local governments across the United States) All ten of the *amicus* briefs are available at http://www.appanet.org/legislativeregulatory/broadband/legreg/broadbandlegreg.cfm.

[9] *Id*. at *34 (Stevens, J., dissenting), quoting Statement of Senator Trent Lott, Hearings on S. 1822 before the Senate Committee on Commerce, Science, and Transportation, 103d Cong., 2d Sess. 379 (1994) (emphasis added).

require preemption of the Missouri barrier to entry does not apply here. FMEA submits, however, that the FCC's findings with regard to the policy issues involved in the Missouri case do apply here, and they forcefully undermine the policy arguments of *amici* supporting the Department of Revenue.

C. The *Ad Valorem* Taxation at Issue In This Case Was Intended to Thwart Entry By Municipal Utilities

To appreciate the anti-competitive purposes of the *ad valorem* taxation at issue in this case, it is useful to put the Florida Legislature's action into its historical context. Soon after the Telecommunications Act became law, incumbent monopolists acted vigorously to thwart competition from both private and public providers.[10] In particular, the incumbents pushed bills through several state legislatures to stop or significantly delay municipalities from entering and competing effectively in local telecommunications markets.

For their part, Southwestern Bell and Verizon focused on obtaining outright prohibitions on municipal entry. Through massive lobbying efforts, they persuaded the legislatures of Texas, Arkansas, Missouri and Virginia to enact such

---

[10] H. Frisby, Jr., and J. Windhausen, Jr., *Bell Companies Thwart Competition*, Charleston Gazette (September. 25, 2002), http://www.wvgazette.com/display_story.php3?sid=200209246&format=prn; J. Glassman, *For Whom the Bells Still Toll*, Washington Times (April 25, 2001), http://www.aei.org/ra/raglas010425.htm; AT&T News Release, *AT&T Files Petition For Structural Separation of BellSouth*, (March 21, 2001), http://www.att.com/news/item/0,1847,3720,00.html.

bans.[11] BellSouth preferred a more subtle strategy – it pursued what Thomas Hazlett, former chief economist of the FCC, has called "a faux symmetry in regulation [to] divert policymaker and administrative processes from promoting competitive entry."[12]

Specifically, BellSouth's approach was to ignore its vast advantages of incumbency and pretend that it was at a severe *disadvantage* because of the tax and other regulatory benefits that municipal utilities supposedly enjoy. In Florida, BellSouth insisted that removing municipal immunity to *ad valorem* taxation was necessary to create a "level playing field."

As the Florida legislature was deliberating the measure at issue in this case, the *Wall Street Journal* ran a lengthy article that exposed the true purposes of the legislation that BellSouth and its allies were promoting in Florida and other states –"The companies figure that, stripped of their financial perks, cities would be less

---

[11] Texas Utilities Code, § 54.201 *et seq*. barred municipalities and municipal electric utilities from providing telecommunications services either directly or indirectly through a private provider; Ark. Code § 23-17-409 prohibited municipalities from providing local exchange service; Rev. Stat. of Missouri § 392.410(7) barred municipalities and municipal electric utilities from selling or leasing all but certain exempted telecommunications services and facilities; Virginia Code § 15.2-1500 barred municipalities (except all localities located adjacent to exit 17 on Interstate 81 (the home of a prominent member of Congress) from providing telecommunications services or facilities to the public.

[12] T. W. Hazlett and G.S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of 'the Level Playing Field' in Cable TV Franchising Statutes*, 3 Business and Politics 21, 43 (2001), http://www.manhattan-institute.org/hazlett/the_fallacy_of_regulatory_symm.pdf.

likely to enter the telecommunications market." J. Ball, *Georgia Cities Face Battle to Enter Telecom Area*, Online Wall Street Journal (March 26, 1997). Steven Langford, a Georgia state senator who was sponsoring a BellSouth-promoted bill similar to the one at issue here, flatly acknowledged that the bill was intended to stop municipal entry in its tracks: "We will see that [cities] can't compete if they don't have these unfair advantages." *Id*.

II. THE *AD VALOREM* TAXATION IN QUESTION DID NOT CREATE A "LEVEL PLAYING FIELD" BUT MERELY EXACERBATED THE ADVANTAGES OF PRIVATE SECTOR PROVIDERS

Assuming (without conceding) that establishing a "level playing field" was a legitimate state goal, the Florida legislature did not achieve that goal by subjecting municipal telecommunications providers to *ad valorem* taxation. In fact, the Legislature did precisely the opposite.

First, as the FCC has found, "it is not necessary for a state to treat all entities in the same way for a requirement to be competitively neutral. In fact, treating differently situated entities the same can contravene the requirement for competitive neutrality."[13] Robert Pepper, Chief of the FCC's Office of Planning and Policy, has further explained that,

> [W]e hear all the time, the argument by incumbents, that ... "Well, we are regulated, but these new entrants, providing new services, are not

[13] *In the Matter of The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, ¶ 52, *14 FCC Rcd 21697, 1999 FCC LEXIS 6558 (1999).*

> regulated, and we need to have a level playing field. We need to make sure that everybody is treated the same." This is the argument about asymmetric regulation. There are two kinds of asymmetric regulation. One is where you have firms that are similarly situated and treated differently. That is a bad thing; it leads to all kinds of distortions. *Likewise, if you have two firms that are not similarly situated and are radically different in their circumstances, but you treat them the same, that also leads to all kinds of distortions*.[14]

Similarly, courts applying level playing field provisions in state statutes and local cable ordinances have frequently held that, given the significant advantages of incumbency, it is neither necessary nor appropriate to impose exactly the same requirements on new entrants and incumbents. *See*, *e.g.*, *Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC*, 1996 WL 6611805 at *4 (Conn. Super. Ct. 1996) ("Plaintiff's argument that the advantage of incumbency is not supported ignores undisputed evidence in the record."); *New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276, 1292 n.27 (1998) ("there are certain benefits that inherently inure to the plaintiffs' status as incumbents"); *Insight Communications, L.P. v. City of Louisville, KY*, No. 2002-CA-000701-MR (Ky. App., June 25, 2003), *appeal pending*, No. 2003-SC-000557 (Ky.) ("There will never be an apple-to-apple comparison for Insight and another franchisee simply because Insight is the incumbent which in its own right and through its predecessors has been the exclusive provider of cable television

---

[14] R. Pepper, *Policy Changes Necessary to Meet Internet Development*, 2001 L. Rev. M.S.U.-D.C.L. 255, 257 (2001)(emphasis added).

services in the City of Louisville for almost thirty years. No new cable television franchises can ever be in the same position as a thirty-year veteran.")[15]

Second, by subjecting municipal telecommunications providers to *ad valorem* taxation while leaving intact the many regulatory and other burdens that apply only to municipalities, the Legislature exacerbated the advantages over municipal providers that both incumbents and new private-sector providers enjoy.

Specifically, in its *Local Competition Order*, ¶¶ 10-11, the FCC listed the following advantages that incumbents have over new entrants:

- "An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers."
- "[A]n incumbent LEC currently serves virtually all subscribers in its local serving area."
- "An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers."
- "The incumbent LECs have economies of density, connectivity, and scale."

Similarly, the Florida Public Service Commission's website outlines the following barriers that new entrants face vis-à-vis incumbents:

- Name recognition of incumbent local exchange companies

[15] The decision of the Kentucky Court of Appeals from which this text is quoted is online at http://www.kycourts.net/Appeals/COA_Opinions.shtm, under case number 2002-CA-000701-MR.

- Building awareness of entrants and their services
- Lack of a network infrastructure for facilities-based providers
- Development of resale and operational arrangements
- Start-up costs
- Interconnection arrangements
- Unbundling
- Number Portability
- Operations and maintenance
- Customers service (including billing systems)[16]

Furthermore, both incumbent and new private-sector providers have some or all of the following advantages over municipal providers:

- **Economies of Scale** – Incumbents and other major communications companies operate in large multi-state markets. This allows them to achieve economies of scale in finance, management, workforce, R&D, administration, etc. They can purchase plant, equipment and supplies, advertising and other requirements in sufficient amounts to support regional or national operations and at substantial quantity discounts. In the absence of effective competition, they can also control the price, quality and content of the services they provide. Municipal providers must live within the constraints posed by their relatively small size and can succeed only if they can offer advantages in price and quality of service.

- **Confidential Operations** – All private-sector providers are largely free to operate behind closed doors, subject only to general corporate record-keeping and reporting requirements. They need not disclose their marketing strategies, prospective partners or customers or even the details of their ongoing business arrangements. Their leaders are appointed rather than elected and therefore are not subject to constant public scrutiny and criticism. Municipal providers, as custodians of the public interest, must

[16] Florida Public Service Commission, *Local Competition* (last updated February 13, 2004), http://www.psc.state.fl.us/local-compet/local-compet.cfm.

comply with all relevant sunshine and open public records requirements, and they must inform the public fully about all major decisions and win approval before proceeding.

- **Flexibility in Employment** -- Subject only to routine labor laws, private-sector providers are free to hire and promote whomever they wish, to offer competitive salaries and benefits, and, with relative ease, to remove persons who are not performing up to expectations. Municipal providers are typically constrained by civil service requirements, relatively inflexible compensation programs and budgetary limitations.

- **Advantages in Obtaining Financing** – Incumbents and other large communications companies can usually arrange for financing more quickly and privately, and, because of their size and market power, can often secure preferred rates and flexible terms. While opponents of municipal involvement in telecommunications often complain that municipalities have a substantial advantage because they have access to tax-exempt financing, obtaining such financing is a complex, time-consuming and burdensome process requiring public disclosure, extensive debate and prior public approval. Such financing also typically is accomplished through bond agreements that impose substantial limitations on the uses of the funds in question.

- **Flexibility in Contracting** – Private-sector providers are free to enter into any lawful contracts that they believe to be in their best interests. Municipal providers are typically subject to cumbersome competitive bidding requirements; restrictions in bond agreements; conditions on wages imposed by the requirements such as the Davis-Bacon Act; obligations under "Buy American" and similar programs; and restrictions on the kinds of relationships that publicly-owned utilities can enter with private entities.

- **Tax Advantages** – Incumbents and other major communications companies have access to billions of dollars of tax credits, deductions and other incentives, and these benefits will increase even more with the enactment of the Economic Security and

> Recovery Act of 2001.[17] Claims that municipal providers have a significant competitive advantage because they are not subject to federal, state and local taxation do not account for the transfers to the general fund in lieu of taxes that municipal utilities typically pay. Municipal providers do not pay income taxes because they do not earn profits.

The Florida Legislature not only ignored these disadvantages of municipal providers, but it added to their burdens by also subjecting them to *ad valorem* taxation. By no means did the Legislature establish a level playing field for all telecommunications providers in Florida.

III. NONE OF FTIA'S OTHER POLICY ARGUMENTS HAS MERIT

FTIA makes a number of other policy statements in support of the *ad valorem* taxes at issue, but it has offered neither factual evidence nor reasoned argument to sustain these contentions.[18]

---

[17] A report by MSB Energy Associates, *Major Federal Tax Breaks that Lower Investor-Owned Utility Costs and U.S. Treasury Revenues* (2001) http://www.appanet.org/pdfreq.cfm?PATH_INFO=/Newsroom/releases/MSBreport.pdf&VARACTION=GO, finds that investor-owned electric utility costs and revenue requirements would have been $7.5 billion higher in 1998 had it not been for the benefits that these utilities received from the three major tax incentives analyzed and that the cumulative loss to the U.S. Treasury from 1954-1996 was more than $300 billion.

[18] For more than a century, Congress has repeatedly heard – and rejected – similar complaints from investor-owned electric utilities about the unfair advantages that municipal electric utilities supposedly have. *See*, *e.g.*, R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity*, at 48-49 (1986); C. Beard, *American City Government* at 218-24 (1912); J. Fairlie, *Essays in Municipal Administration*, at 262-270 (1908); Moody's Magazine, Vol. II, No.5, *Symposium – Municipal Ownership and Operation*, at 500-544 (October 1906).

First, FTIA claims that requiring municipal providers to compete on an "equal footing" will prevent monopoly pricing and produce more rapid technological advancements and superior customer service and responsiveness. FTIA Brief at 14. But more than seven years have passed since the enactment of the Telecommunications Act, and incumbents still control 91 percent of Florida's residential market and 84 percent of the total Florida market. *Competition Report (2003)* at 7. Furthermore, the competition that exists is largely concentrated in the major population centers, as private-sector competitors have all but ignored smaller localities. *Id*. at 11. Obviously, it is the incumbents' monopoly practices, not those of municipalities, about which the State should be concerned.

Second, FTIA asserts that, if municipal property supporting competitive communications services is being used "for profit-making purposes," it is "only equitable that such property share in the same tax burden as other property that is being used for such purposes." FTIA Brief at 14. The short answer is that municipal providers do not make profits; they cover their costs and then make sizable payments to their local governments to support other essential municipal functions. Furthermore, both large and small private-sector communications providers have access to significant tax credits, tax deductions and other tax benefits that are not available to municipal providers.[19]

---

[19] *See* Energy Associates Report cited in footnote 16, *supra*.

Third, according to FTIA, "as municipal providers grow, private providers lose market share, which diminishes and erodes state and local tax revenues and thus endangers the public interest." FTIA Brief at 14. FTIA's contention ignores the fact that, as municipal providers grow, so will the payments they make to local governments. For example, in the electric power area, nationwide data indicate that the median contribution by publicly owned electric utilities is 14 percent higher than investor-owned utilities.[20]

Fourth, FTIA claims that incumbents have universal service obligations and must use profits from their most lucrative customers to subsidize service to less-profitable or unprofitable customers. If municipalities are allowed to use their tax advantaged status to gain a cost advantage that, in turn, enables them to "cherry pick" the incumbents' more lucrative customers, the incumbents will have no choice but to raise prices to the majority of citizens. FTIA Brief at 15. FTIA overlooks Section 254 of the Telecommunications Act, 47 U.S.C. § 254, which established a massive, multi-billion dollar universal service program that, among other things, subsidizes entities that provide universal service. Indeed, some of these subsidies are available only to incumbents that offer service throughout their marketing territories. Thus, even if incumbents lost some of their most lucrative

[20] APPA, *Straight Answers to False Charges About Public Power*, at 31, http://www.appanet.org/about/why/answers/straightanswers.pdf.

customers to municipalities – or, for that matter, to other competitors – the rest of the incumbents' customers would not suffer.

Finally, FTIA suggests that it was somehow inappropriate for municipalities to become telecommunications providers because residents already had access to at least some telecommunications services. FTIA Brief at 14. This argument ignores the fundamental pro-competitive purpose of the Telecommunications Act. As one of the Senate managers of the Act succinctly noted, the "primary objective" of the Act was to establish a "framework where everybody can compete everywhere in everything."[21] The Act sought to encourage more competition, not less.

CONCLUSION

For the reasons set forth above, FMEA urges the Court not to accept the policy arguments that *amici* supporting the Department of Revenue have offered, as these arguments are irrelevant to the legal issues before the Court and invalid on the merits.

[21] Statement of Senator Trent Lott (R-MS), 141 Cong. Rec. at S.7906 (June 7, 1995).

Respectfully submitted,

_____

William J. Peebles
Florida Bar No. 282741
3010 West College Avenue
P.O. Box 10930
Tallahassee, FL 32302
(850) 681-7383
BPeebles@nettally.com

James Baller
Sean A. Stokes
The Baller Herbst Law Group, P.C.
2014 P Street, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300
Jim@Baller.com

April 5, 2004

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by United States Mail this __ day of April, 2004, to Nicholas Bykowsky, Esquire, Office of the Attorney General, Tax Section, the Capitol, Tallahassee, Florida 32399-1050; and by United States Mail to Michele Santi and John C. Dent, Jr., Dent & Cook, 330 S. Orange Avenue, Sarasota, Florida 34236; Kenneth R Hart and Sean E. Fennelly, Ausley & McMullen, Post Office Box 391, Tallahassee, Florida 32302, and Robert Pass and E. Kelly Bittick, Jr., Carlton Fields, P.A., 215 S. Monroe Street, Suite 500, Tallahassee, Florida 32301-1866.

_____

Attorney

CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that this brief is typed using Times New Roman 14 point, a font that is proportionately spaced.

_____

Attorney