



## AlaFile E-Notice

46-CV-2013-900123.00

Judge: HON. RAY D. MARTIN

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MACON COUNTY, ALABAMA

BENJAMIN FRANKLIN COX ET AL V. THE CITY OF TUSKEGEE ET AL  
46-CV-2013-900123.00

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IN THE CIRCUIT COURT OF MACON COUNTY, ALABAMA

BENJAMIN FRANKLIN COX, et al,  
*Plaintiffs,*

v.

THE CITY OF TUSKEGEE; THE UTILITIES  
 BOARD OF THE CITY OF TUSKEGEE, et al.

*Defendants,*

Case No. CV-13-900123

**ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND  
 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter came on for consideration on the Plaintiffs' Motion for Partial Summary Judgment as to liability in the above captioned matter and the Defendants' Motion for Summary Judgment as to all issues. The parties submitted their motions, responses, and corresponding briefs. The matter was argued orally before the Court on the 13<sup>th</sup> day of May, 2015. The parties have filed their Proposed Orders. All submissions of the parties have been considered by the Court.

In their Motion for Partial Summary Judgment, Plaintiffs contend:

1) That the 5% "franchise fee" imposed by the City of Tuskegee ("the City") on the Utilities Board of the City of Tuskegee (UBT) in City Ordinance 97-5 is a gross receipts tax on a utility and is forbidden by CODE OF ALABAMA § 11-50-322.

2) That the 5% "franchise fee" imposed by the City on UBT in City Ordinance 97-5 does not qualify as a valid license fee as

(a) it exceeds the 3% maximum allowed by Code of Alabama § 11-51-129; and

(b) the City does not collect the franchise fee as an annual fee based on gross receipts for the previous year, but monthly on gross receipts for the previous month.

3) That the City of Tuskegee cannot impose a 5% tax on the UBT for the gross receipts received for services provided outside the City.

In their Motion for Summary Judgment, the Defendants contend:

1) That plaintiffs lack standing to bring this action and that the court lacks jurisdiction under the Declaratory Judgment Act.

2) That the court has previously approved the franchise agreement and the 5% franchise fee.

3) That the franchise fee is not a tax and is therefore not subject to the statutory cap.

4) That even if the franchise fee is a tax, it is a fair and reasonable tax.

5) That gross receipts can be used to measure the amount of a license.

6) That the franchise fee of 5% gross revenue of UBT is authorized by § 11-49-1, CODE OF ALABAMA.

7) That the license fee imposed on UBT by the Town of Shorter is legal.

8) That UBT has authority to establish utility rates pursuant to Alabama law.

9) That the proposed purchase and subsequent lease of the municipal complex is authorized by Alabama law and that issue is now a moot question.

#### UNDISPUTED FACTS

In their respective motions, the parties set out the required narrative of undisputed facts. Plaintiffs and Defendants submitted many of the same documents and facts. Having carefully considered both Motions, the Court is clear that the following facts are not disputed:

1) The UBT is a Public Corporation organized under the laws of the State of Alabama whose principal place of business is located within the city limits of the City. UBT is a municipal corporation separate and distinct from the City itself, and is governed by its own board of directors, three of whom are elected by Tuskegee's City Council. UBT was incorporated as a separate corporation after the City of Tuskegee passed a resolution in support of incorporating a public utilities corporation in 1970, pursuant to Section 11-50-310, et seq., of the CODE OF ALABAMA. It sells electricity both within and outside the city limits of the City of Tuskegee.

2) In January 1997, the City passed Ordinance 97-5, granting UBT an exclusive franchise for the operation of electricity, water, and sewage.

3) Ordinance 97-5 imposes a 5% "franchise fee" on UBT, based on gross sales, to be paid monthly to the City.

4) The City and UBT entered into the franchise agreement in February, 1997.

5) After a period of time during which UBT was in receivership, during which the franchise fees were not paid, the City and UBT entered into a "Settlement Agreement" whereby UBT would resume payment of 5% of the gross receipts.

6) After entering into the Settlement Agreement, UBT resumed payment of the franchise fees on December 22, 2004, but only for services provided within the municipality.

7) After the Settlement Agreement, UBT added the franchise fees to the monthly statements of customers for services provided within the municipality.

8) In 2013, the City Council passed Resolution 2013-20 to "enforce" the Settlement Agreement of 2004.

9) UBT agreed to comply with the City's resolution to "enforce" the Settlement Agreement in 2013, and began paying five percent of its entire gross receipts, including receipts from customers receiving services outside the City.

10) The 5% "franchise fee" paid by UBT to the City goes into the general fund of the City.

### APPLICABLE LAW

The following principles of law are applicable:

1) Municipalities have no inherent power of taxation. The state, however, having the power to tax, may delegate this power to a municipality. Town of Hackleburg v. Northwest Alabama Gas District, 277 Ala. 355, 170 So. 2d 792 (1964); Alabama Farm Bureau Mut. Casualty Ins. Co. v. Hartselle, 460 So. 2d 1219, 1222 (Ala. 1984).

2) Statutes and ordinances imposing a tax are construed against the taxing authority. If there is any ambiguity or question as to power, then the tax is not allowed. State v. Seals Piano Co., 209 Ala. 93, 95 So. 451 (1923); Williams v. Pugh, 24 Ala. App. 57, 129 So. 792 (1930); Alabama Farm Bureau Mut. Casualty Ins. Co. v. Hartselle, 460 So. 2d 1219, 1223 (Ala. 1984).

3) A tax is generally a revenue-raising measure, imposed by a legislative body that allocates revenue to a **general fund**, and is spent for the benefit of the entire community. A user fee, by contrast, is a payment given in return for a government-provided benefit and is tied in some fashion to the payor's use of the service. (See Lightwave Techs., L.L.C. v. Escambia Cnty., 43 F. Supp. 2d 1311, 1314-15 (S.D. Ala. 1999); Lightwave Techs., LLC v. Escambia Cnty., 804 So. 2d 176, 180 (Ala. 2001); T-Mobile South, LLC v. Bonet, 85 So. 3d 963, 982-985 (Ala. 2011); Eclectic v. Mays, 547 So. 2d 96, 103 (Ala. 1989); Densmore v. Jefferson Cnty., 813 So. 2d 844, 853 (Ala. 2001); State v. Commercial Loan Co., 251 Ala. 672, 38 So. 2d 571 (1948))

4) Utility corporations are exempt from all gross receipt taxes levied by the state and any political subdivision thereof with respect to the purchase, sale, use, or consumption of property. [CODE OF ALA. §11-50-322].

5) A franchise fee granted by a city in exchange for the privilege of operating within the municipality is a license fee. Alabama Traction Co. v. Selma Trust & Sav. Bank, 213 Ala. 269, 104 So. 2<sup>nd</sup> 516; Boman v. Birmingham Transit Co., 280 F.2d 531(5<sup>th</sup> Cir. 1960); Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 (1937); Tillman v. Homewood, 374 So. 2d 271, 272-273 (Ala. 1979)

6) The maximum amount that a municipality may charge a utility company as a license tax or fee is 3% of the gross receipts in the municipality during the preceding 12 months. [CODE OF ALA. §11-51-129].

7) A city has no power to grant a franchise or impose a franchise fee for services rendered by a public utility outside the municipality. [CODE OF ALA. §11-51-129].

### DISCUSSION OF LEGAL PRINCIPLES

Unquestionably, the City has the absolute right to grant or deny to a utility company the right to use its streets, etc. [§11-49-1, CODE OF ALABAMA]. The granting of that right is usually called a franchise. The document granting that right is referred to as a franchise agreement. The franchise agreement usually provides for a franchise fee. A franchise fee that goes into the general fund of the City is a license tax. [Alabama Traction Co. v. Selma Trust & Sav. Bank, 213 Ala. 269, 104 So. 2<sup>nd</sup> 516; Boman v. Birmingham Transit Co., 280 F.2d 531(5<sup>th</sup> Cir. 1960); Nachman v. State Tax Commission, 233 Ala. 628, 173 So. 25 (1937); Tillman v. Homewood, 374 So. 2d 271, 272-273 (Ala. 1979)]. A license tax is regulated by state law as found in §11-51-129, CODE OF ALABAMA. The permitted license fee is an annual license fee and can be based

on gross receipts arising from the business done within the municipality during the preceding year. The amount of the license fee allowed by statute is limited to three percent (3%). The City has no authority to grant a franchise, or to receive franchise or license fees, for services rendered outside the municipality.

The franchise fee can be collected only as a license fee pursuant to §11-51-129, CODE OF ALABAMA. As a license fee, it would be owed by UBT and not by UBT's customers. UBT has no authority to add a valid license fee to the monthly statements of customers, based on current usage.

The franchise fee that was imposed by the City on UBT was no doubt intended as a license fee. Unfortunately, the ordinance is worded as a gross receipts tax. Nothing contained in this Order, should be construed as prohibiting the City from enacting a license, to be incorporated into a franchise agreement, that complies with § 11-51-129, CODE OF ALABAMA. This Court has no authority to re-write Ordinance 97-5 so as to bring it into compliance with §11-51-129, CODE OF ALABAMA.

#### **ANALYSIS OF DEFENDANTS' CONTENTIONS**

The following numbered paragraphs will correspond with the contentions of the Defendant as numbered previously in this Order:

1) The Plaintiffs have standing. They clearly alleged injury in that they are paying, directly or indirectly, taxes that are not authorized by state law. Based on those allegations and the undisputed facts, Plaintiffs have standing. Hinson v. HealthSouth Med. Ctr., Inc., 891 So. 2d 863 (Ala. 2004); Marshall Durbin and Co. v. Jasper Utility Board, 437 So. 2d 1014 (Ala. 1983). The Court has jurisdiction. Jurisdiction over this type of litigation is specifically conferred by the Alabama Declaratory Judgment Act, §§ 6-6-222 and 6-6-223, CODE OF ALABAMA. Scott v.

Alabama State Bridge Corp., 233 Ala. 12 (Ala. 1936); Mobile v. Wooley, 278 (Ala. 1965).

Concerning the Plaintiffs' request for injunctive relief, the Alabama Supreme Court has held that injunctive relief is the appropriate way to deal with an unauthorized tax imposed by a city. See Davis v. Petrinovich, 112 Ala. 654 (Ala. 1896).

2) Contrary to the Defendants' contentions, the Court has not previously dealt with the issue of legality of the taxes imposed by the City on UBT. The issues raised by the Plaintiffs concerning the illegality of the franchise fee have not been litigated in any of the previous litigation. The recognition of the *existence* of the franchise fee is not the litigation of its legality.

3) The Defendants' contention that the franchise fee is not a tax is without merit. The authorities clearly show that a fee that flows into the general fund of the municipality is a tax. (See Lightwave Techs., L.L.C. v. Escambia Cnty., 43 F. Supp. 2d 1311, 1314-15 (S.D. Ala. 1999); Lightwave Techs., LLC v. Escambia Cnty., 804 So. 2d 176, 180 (Ala. 2001); T-Mobile South, LLC v. Bonet, 85 So. 3d 963, 982-985 (Ala. 2011); Eclectic v. Mays, 547 So. 2d 96, 103 (Ala. 1989); Densmore v. Jefferson Cnty., 813 So. 2d 844, 853 (Ala. 2001); State v. Commercial Loan Co., 251 Ala. 672, 38 So. 2d 571 (1948)).

4) The Defendants' contention that as a tax the 5% is "fair and reasonable" is not an issue. The tax is not authorized by state law and in fact violates both §11-50-322 and §11-51-129 CODE OF ALA.

5) The fact that gross receipts can be used as a measure of an appropriate license fee does not authorize the 5% franchise fee that the City charges UBT. Section 11-51-129 CODE OF ALA limits the amount of the license for a public utility to 3% of the gross receipts during the previous year. The 5% charged by the city exceeds the 3% limit. Moreover, Ordinance 97-5 is not worded as an annual license tax. It requires a monthly payment based on gross receipts for



the previous month. It is not a license fee based on gross receipts for the previous year. It is a gross-receipts tax forbidden by § 11-50-322, CODE OF ALABAMA.

6) Section 11-49-1 CODE OF ALABAMA does not authenticate the improper franchise fee imposed by the city on UBT. The 2009 amendment to that Code which requires permission from the City for a public utility to use streets, made certain changes and included subsection (c), which provided that "*nothing herein*" shall "*invalidate*" certain charges, including franchise fees that were being collected at the time it was enacted. The plaintiffs have not asserted that anything contained in the 2009 amendment "*invalidates*" the City's franchise fee. The 2009 amendment does not purport to *validate* or *authenticate* franchise fees that violate §11-50-322 and §11-51-129 CODE OF ALA. Moreover, the city was not collecting the franchise fee from UBT for services rendered outside the municipality on April 28, 2009.

7) The court agrees with Defendants' contention that the license fee imposed by the Town of Shorter is legal. Plaintiffs do not contend that it is illegal. The Plaintiffs contend that UBT is not authorized *to add that license fee to the monthly bill of customers*, but must pay it from its own funds from revenue derived from within the Town of Shorter. That issue remains to be determined in this litigation. The Defendant UBT is not entitled to Summary Judgment on that issue.

8) While it is true, as the Defendants contend, that UBT has initial authority to establish rates pursuant to Alabama law, this court has jurisdiction to determine the reasonableness of those rates. Marshall Durbin and Co. v. Jasper Utility Board, 437 So. 2d 1014 (Ala. 1983). The evidence is in conflict as to the reasonableness of the rates, and Defendants are not entitled to summary judgment on that issue.

9) The Plaintiffs alleged that the pending purchase of Tuskegee's Municipal Complex by UBT was an illegal attempt to have UBT pay the taxes of the City. The Defendant has not presented undisputed evidence justifying the granting of a Summary Judgment as to that issue.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DENIED**

Based on the foregoing analysis, the court finds that the Defendants' Motion for Summary Judgment is due to be, and its same is, hereby DENIED.

**ENTRY OF PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFFS**

The Court finds that there is no genuine issue of material fact with regard to issues presented by Plaintiffs in their Motion for Partial Summary Judgment, and that Plaintiffs are entitled to judgment as a matter of law as to those issues. Accordingly, the Court hereby enters partial summary judgment for the plaintiffs and against the defendants, including the following declarations and Orders:

1) The 5% franchise fee that the City of Tuskegee ("the City") charges the Utilities Board of the City of Tuskegee (UBT) is a tax that is not authorized by Alabama law.

2) The 5% franchise fee is, on its face, a gross receipts tax on a utility company, and is prohibited CODE OF ALA. §11-50-322.

3) Construed as a license fee, the 5% franchise fee (1) exceeds the statutory maximum of 3% that CODE OF ALABAMA § 11-51-129 allows a city to charge a public utility for a license fee, and (2) is calculated on receipts for the preceding month—not the preceding year. It is not an annual license fee of 3% of gross receipts for the preceding year as permitted by CODE OF ALABAMA § 11-51-129.

4) The City has no authority to impose any franchise fee on receipts for services provided by UBT outside the corporate limits and/or police jurisdiction of the City. CODE OF ALABAMA § 11-51-129.

5) UBT has no authority to add any franchise fee onto the monthly statements of any of its customers. As a proper license fee, UBT would be required to pay the fee and not pass it on to customers on their monthly bills.

**SCHEDULING CONFERENCE AND HEARING ON ANCILLARY MATTERS**

The Court hereby schedules a hearing on the 24<sup>th</sup> day of February, 2016, at 9:00 a.m. At that hearing, the Court will deal with the following matters:

1) A scheduling order for completion of discovery and the disposition of all remaining issues in this case.

2) Entry of appropriate orders, including the possibilities of injunctive relief, the impoundment of funds, and other measures necessary to implement this Order pending complete resolution of the case.

3) Conditions which may be necessary to prevent any further accumulation of damages pending any appeal that may be allowed pursuant to Rule 54(b), *Alabama Rules of Civil Procedure*.

4) Any other matter that may be necessary for the property adjudication of all remaining issues and the implementation of this Order.

The Court will consider a request by any party for Ordering this cause to mediation, and may further consider such an Order on its own motion. Last, counsel for the parties should submit, in the event mediation is not either ordered or successful, any potential avenue for appeal of this Order to the appropriate appellate court prior to further proceedings in this Court.

DONE this 8<sup>th</sup> day of December, 2015.

/s/Ray D. Martin  
RAY D. MARTIN  
CIRCUIT JUDGE