

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

FILED
POLK COUNTY, IA
2004 SEP 30 A 11:00
CLERK DISTRICT COURT

LISA KRAGNES,)	
)	
Plaintiff,)	Equity No. 49273
)	
vs.)	BRIEF IN SUPPORT
)	OF MOTION TO DISMISS
CITY OF DES MOINES, IOWA,)	BY DEFENDANT
)	CITY OF DES MOINES
Defendant.)	

FACTS

(NOTE - The following facts are taken from Plaintiff's Petition).

1. By way of ordinance, the City and MidAmerican Energy have entered into a franchise agreement for the provision of gas and electric utility service in Des Moines. (Petition, ¶s 5,6).

2. The Plaintiff does not claim to be a party to that agreement. (Petition).

3. The franchise agreement includes as one of its terms a franchise fee. (Petition, ¶s 4,5,6).

4. The franchise fee has been a part of the franchise agreement "since before July 1, 1999." (Petition, ¶ 4).

5. The Plaintiff did not file this suit until the franchise fee increased, although she has been a customer of MidAmerican "at all times material hereto." (Petition, ¶s 3,5).

6. The franchise fee is a percentage of a utility customers bill. (Petition, ¶ 4).

7. Plaintiff claims the franchise fee is an illegal tax. (Petition, ¶ 6).

BRIEF POINT I

BECAUSE PLAINTIFF HAS FAILED TO EXHAUST ADEQUATE ADMINISTRATIVE REMEDIES WITH THE IOWA UTILITIES BOARD, THIS COURT LACKS JURISDICTION TO HEAR HER CASE.

The Iowa Legislature has crafted an administrative utility regulatory scheme that is long in its reach and wide in its coverage. The Plaintiff has short-circuited that scheme, bypassing the administrative process, avoiding administrative procedures, and dodging adequate administrative remedies. Instead, she is attempting to plug directly into the district court.

A significant portion of that utility regulatory scheme deals with rates and charges of the utility. At least two distinct administrative remedies exist for those who would protest the rates and charges of a utility. Each remedy is adequate to the task of answering the question posed by Plaintiff's Petition - is a long-standing utility franchise fee, imposed by way of franchise agreement between a city and a utility, really an illegal tax?

For reasons unknown, the Plaintiff has chosen to eschew the administrative remedies available to her.¹ She is free to make that choice, but now she must live with the consequences. And the consequences are dismissal of her suit for lack of jurisdiction. And the reason this court lacks jurisdiction is because Plaintiff has failed to exhaust her administrative remedies.

¹ The City suspects, but certainly cannot prove, that the lure of attorney fees in a class action case might be enough to divert a plaintiff and her counsel from the administrative arena, where they are supposed to be, to the district court, where they (perhaps desperately) want to be.

A party must exhaust any available administrative remedies before seeking relief in the courts. To apply this doctrine, two conditions must be met: 1) an adequate administrative remedy must exist for the claimed wrong; and 2) the governing statute must expressly or impliedly require the remedy to be exhausted.

Johnson v. Dep't of Corrections, 635 N.W.2d 487, 488 (Iowa App. 2001); citing Riley v. Boxa, 542 N.W.2d 519, 521 (Iowa 1996).

The district court is deprived of jurisdiction over the case if administrative remedies are not exhausted.

Id., citing Keokuk County v. H.B., 593 N.W.2d 118, 122 (Iowa 1999).

The comprehensive utility regulatory scheme crafted by the legislature contains not one but two adequate administrative remedies for the claimed wrong. And the governing statute - Iowa Code Chapter 476 - both expressly and impliedly requires exhaustion of those remedies.

The Iowa Utilities Board is vested by law with the broad mission of regulating virtually all aspects of utility operation:

The utilities board within the utilities division of the department of commerce shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided.

Iowa Code § 476.1. See also: AT&T Communications v. Iowa Utilities Board, 2004 WL 2049658, *6 (Iowa 9/15/04) [IUB has been granted broad authority by the legislature to regulate the rates and services of public utilities]. The jurisdiction of the Board extends over both gas and electric utilities. Iowa Code

§ 476.1(1). Moreover:

The jurisdiction and powers of the board shall extend as hereinbefore provided to the utility business of public utilities operating within this state to the fullest extent permitted by the Constitution and the laws of the United States.

Iowa Code § 476.15.

Utility rates are governed by tariffs. A tariff is:

. . . the entire body of rates, tolls, rentals, charges, classifications, rules, procedures, policies, etc., adopted and filed with the board by a . . . utility . . .

IAC 199-19.1(3) and 20.1(3). Every utility must develop a tariff, and:

Every public utility shall file with the board tariffs showing the rates and charges for its public utility services. . . which rates and charges shall be subject to investigation by the board as provided in Section 476.3, and upon such investigation the burden of establishing the reasonableness of such rates and charges shall be upon the public utility filing the same.

Iowa Code § 476.4.

The first administrative remedy available to the Plaintiff is straightforward, easy to access, and doesn't result in the huge commitment of judicial resources required by a class action. In fact, its as easy as writing a letter. Any person who believes that a rate or charge in a tariff filed with the Board by a public utility is unlawful may file:

. . . a written complaint requesting the board to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter. . .

Iowa Code § 476.3(1). The complainant can also request the Board to initiate a formal proceeding to look into the matter. Id. A formal proceeding means the Board gives notice, sets the case for hearing and:

When the board, after a hearing held after reasonable notice, finds a public utility's rates, charges, schedules, service or regulations are unjust, unreasonable, discriminatory or otherwise in violation of any provision of law, the board shall determine just, reasonable and non-discriminatory rates, charges, schedules, service, or regulations to be observed and enforced.

Id. (emphasis added). Among the many powers the Board has is to order a refund of unlawfully charged rates. Mid-Iowa Community Action, Inc. v. Iowa State Commerce Commission, 421 N.W.2d 899, 901 (Iowa 1988).

All the complainant has to do to start the process is:

Submit within 20 days after the filing date a written objection to the filing and a written request that the board docket the filing. . .

IAC 199-7.4(4).

There is a second administration avenue that a utility customer can travel in exploring the legality of utility action. That avenue is one of declaratory order.

Any person can petition the board for a declaratory order:

. . . as to the applicability to specified circumstances of a statute, rule or order within the primary jurisdiction of the utilities board.

IAC 199-4.1.

Those are the statutes which expressly mandate administrative exhaustion. The same is also implied by Iowa Code § 476.13, entitled "Judicial Review." There, provision is made for appeal to the district court AFTER the administrative remedy is exhausted, thereby implying it must be exhausted before proceeding to court.² Further, the administrative code says that issuance of a declaratory order is "final agency action", IAC 199-4.12. It also says that if formal complaint proceedings are denied by the board, appeal may be had to the district court. IAC 199-6.5(3). The code also describes certain administrative actions relative to the complaint process as "the board's final decision on the merits on appeal." IAC 199-7.8(2)(d). Similar language has been interpreted by Iowa's appellate courts to imply the need to exhaust the administrative remedy before proceeding to district court. Johnson, 635 N.W.2d at 489, citing Riley, 542 N.W.2d at 522-3.

The broad powers given the Board by the Legislature, coupled with the two adequate administrative remedies provided to customers who question rates and charges, provide the Board with jurisdiction in this case. And once the Board has jurisdiction, that jurisdiction is "primary and exclusive unless a contrary

² The statute does more than just imply the administrative remedy be exhausted. The statute also provides that upon an appeal to district court, after exhaustion of the administrative remedy, the Chief Justice of the Iowa Supreme Court shall appoint a judge to hear the case pursuant to Iowa Code § 602.1212. Iowa Code § 476.13(2). The plaintiff has successfully avoided and nullified that mandate, and arguably engaged in a form of judge shopping, by failing to exhaust her administrative remedy.

intent is clearly manifested by the legislature." Elk Run Telephone Company v. General Telephone Company of Iowa, 160 N.W.2d 311, 315 (Iowa 1968); State v. Iowa Electric Light & Power Co., 240 N.W.2d 912, 914 (Iowa 1976); Iowa Electric Light & Power Co. v. Lagle, 430 N.W.2d 393, 398 (Iowa 1988).

If the Plaintiff was truly concerned about the effect of the franchise fee increase on the class of utility customers she hopes to represent, she would have proceeded in the administrative arena in the first place.³ This is so because she could have halted the franchise fee increase simply by filing an individual complaint with the Utilities Board. The increase would have been stayed pending resolution of her complaint:

The docketing of a case as a formal proceeding suspends the effective date of the new or changed rates, charges, schedules or regulations until the rates, charges, schedules or regulations are approved by the board. . .

Iowa Code § 476.6(7).

That Plaintiff intentionally ignored the administrative process (arguably better for the purported class) in favor of the class action process (arguably better for her and her attorney fees) speaks loudly as to both her motives and the strength of her case.

If Plaintiff claims she was unaware of the administrative

³ Of course, if the Plaintiff was truly concerned about the illegality of the franchise fee, she could have filed the complaint when she first became a MidAmerican customer. After all, a franchise fee has been in effect since at least 1960. City of Des Moines v. Iowa State Commerce Comm., 285 N.W.2d 12, 13 (Iowa 1979).

remedies available to her, then her claim here is simply frivolous.

Should the Plaintiff argue that it would be more effective to present a class action case in district court than seek individual refunds in the administration arena, that argument will fail. For one reason, the supreme court rejected a similar argument not long ago. Barnes v. State, 611 N.W. 2d 290, 293 (Iowa 2000). For another reason, we already have seen that the Utilities Board can order refunds of unlawful rates and charges without the cost and expense of class litigation.

Moreover, because only the Board can set rates and charges, it is evident that the Board would have to set new rates and charges if the franchise fee was disallowed. AT&T Communications, 2004 WL 2049658 at *3. [Supreme Court affirms district decision which reversed Board rate decision, but remanded case to district court with order for further remand to Board to set rate].

Because the Board has exclusive jurisdiction over Plaintiff's claim and because the Plaintiff failed to exhaust the adequate administrative remedies afforded by the Board, this Court lacks jurisdiction over Plaintiff's claim and the same must be dismissed.

BRIEF POINT II

PLAINTIFF'S PETITION FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED BECAUSE IT IS AN IMPERMISSIBLE COLLATERAL ATTACK UPON AN AGENCY ACTION.

Plaintiff claims the franchise fee agreed to between the City

and MidAmerican Energy is an illegal tax which she has been paying for at least five years. But an analysis of the viability of Plaintiff's claim must start not with the nature of the franchise fee but rather with the reason Plaintiff has been paying the fee at all.

And the reason that Plaintiff has been paying the franchise fee is because it was part of a tariff filed by MidAmerican with the Utilities Board. Once the tariff was filed with the Board then the Board had to approve the tariff. Once the Board approves the tariff, two things happen. One is the utility can begin collecting the rates and charges in the approved tariff. The other is that final agency action occurs. Because the franchise fee is a part of the tariff and because the tariff was the subject of final agency action, Plaintiff's attack upon the fee is really an impermissible collateral attack upon final agency action. As such, her complaint fails to state a claim for which relief can be granted and must be dismissed.

Every utility must file a tariff with the Board showing the rates and charges the utility will make for its services. Iowa Code § 476.4. Changes to rates and charges also must be filed with the Board. Iowa Code § 476.6(1). Objections to utility rates and charges must be made within 20 days of the filing of the tariff or tariff charges with the Board. IAC 199-7.4(4). If an objection is made, a contested case hearing will be held. Iowa Code § 476.6(7); IAC 199-7.4(4). If no objection is filed, the tariff will be approved or disapproved by the Board within 30 days

of the filing of the tariff. Id.

Of course, Plaintiff and all other utility customers received notice of the initial franchise fee in the tariff that contained the fee. We know this because Iowa Code § 476.6(5) requires such notice. Plaintiff's Petition is silent as to whether she contested the fee initially, but we know the Board approved it.

The Board cannot approve rates or charges which are "unjust, unreasonable, discriminatory or otherwise in violation of any provision of law." Iowa Code § 476.3. Therefore, any tariff approved by the Board necessarily carries with that approval an implicit finding by the Board that no part of the tariff is in violation of any provision of law. Plaintiff's claim, then, that the franchise fee is a tax in violation of the law, is a collateral attack upon a final agency decision.

Such collateral attacks are not permitted because:

We have held that, because of the doctrine of claim preclusion, a final decision of an agency is not subject to collateral attack in a subsequent matter.

Walker v. Ia. Dep't of Job Service, 351 N.W.2d 802, 805 (Iowa 1984). See also: State v. Thompson, 357 N.W.2d 591, 594 (Iowa 1984); Toomer v. Ia. Dep't of Job Service, 340 N.W.2d 594, 598 (Iowa 1983).

Once an agency action becomes final it is not subject to collateral attack from any angle. The attack cannot come in court. Thompson, supra; State v. Clark, 608 N.W.2d 5, 8 (Iowa 2000). The attack cannot come in the administrative arena. Kash

v. Ia. Dep't of Emp. Services, 476 N.W.2d 82, 83 (Iowa 1991).

If the agency decision did not at least implicitly embrace the issue at bar, the attack is not then collateral and is then permitted. Berger v. Amana Society, 95 N.W.2d 909, 916 (Iowa 1959). But if the agency decision bears strong relation to the agency's statutory mandate and is within its area of expertise, then collateral attack is prohibited. Jew v. Univ. of Iowa, 398 N.W.2d 861, 864 (Iowa 1987).

A primary concern underlying the policy preventing collateral attack upon final agency decisions is remedy shopping:

We find no attempt in the present case to avoid a statutorily prescribed mandate for resolution of the type of controversy presented.

Jew, 398 N.W.2d at 865. Sadly, the same cannot be said of the Plaintiff in this case, who does appear to be trying to avoid a statutorily prescribed administrative remedy.

In her petition, Plaintiff seeks a refund of five years worth of franchise fees preceding the date of the filing of her petition. But if she proceeded in the administrative arena where she belongs, she would be limited to a refund of amounts unlawfully collected "after the date of the filing of the petition." Iowa Code § 476.3(2).

The City does not know if Plaintiff did nor did not personally contest the original tariff, or any amended tariff, which contained the franchise fee. The City anticipates that Plaintiff may say she did not personally request a hearing on the

tariff and for that reason she should be allowed to collaterally attack the Board decision approving the franchise fee.

If the Plaintiff makes that argument it will fail for two reasons.

First, this is a motion to dismiss. Allegations or facts outside the Petition cannot be considered. Wilson v. Ribbens, 678 N.W.2d 417, 418 (Iowa 2004).

Second, just because she didn't request a hearing when she had the chance to do so doesn't mean she can challenge the non-hearing decision of the agency. In fact, it means just the opposite. Having eschewed her administrative hearing, she cannot challenge the agency decision in court. State v. Clark, 608 N.W.2d 5, 9 (Iowa 2000), citing State v. Bettenhausen, 460 N.W.2d 394, 395 (N.D. 1990).

A utility company must get the approval of the Utilities Board for the rates and charges it seeks to impose. The Board can only approve rates and charges which are lawful. Thus, any tariff approved by the Board necessarily contains a finding that the rates and charges contained therein are lawful. Plaintiff claims that the franchise fee portion of the rates and charges is an unlawful tax. This is a collateral attack on a final agency decision and is impermissible. Her petition fails to state a claim for which relief can be granted, and should therefore be dismissed.

BRIEF POINT III**PLAINTIFF LACKS STANDING TO BRING THIS
LAWSUIT.**

Standing is "the right of a person to seek judicial relief from an alleged injury." Bushby v. Washington County Conservation Board, 654 N.W.2d 494, 496 (Iowa 2003), citing Clark v. Ia. St. Commerce Comm., 286 N.W.2d 208, 210 (Iowa 1979).

When a defendant asserts an objection to standing, the :

. . . burden is on the plaintiff "to show (1) a specific, personal, and legal interest in the litigation, and (2) injury."

Id., quoting Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001).

Put another way:

Standing to sue has been defined to mean that a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.

Birkhofer Ex. Rel. Johansen v. Brammer, 610 N.W.2d 844, 847 (Iowa 2000) (citing Black's Law Dictionary, 1405 (6th Ed. 1990)).

The Plaintiff does not achieve standing in this case as a third party beneficiary to the franchise agreement between the City and MidAmerican Energy. One of the elements necessary to achieve third party beneficiary standing is whether the contract manifests an intent to benefit the party. Walters v. Kautzky, 680 N.W.2d 1, 4 (Iowa 2004). The Plaintiff does not make that claim in her Petition. Indeed, rather than alleging the franchise agreement is for her benefit, she claims to be a victim of the contract. (Petition, ¶ 6).

Plaintiff does not achieve standing as a taxpayer, either.

A taxpayer typically has a right to challenge the legality of a contract entered into by the local government to whom she pays taxes. Elview Cons't, Co., Inc. v. North Scott Community School Dist., 373 N.W.2d 138, 142 (Iowa 1985). But that standing is not automatic and the lessons of Bushby cannot be forgotten. Bushby requires the taxpayer suffer an injury. Bushby, supra.

The City understands that in a motion to dismiss setting, the well pleaded facts of the petition stand as admitted. O'Hara v. State, 642 N.W.2d 303, 305 (Iowa 2002). The City further understands that Plaintiff has alleged that as a customer of MidAmerican Energy she has been made to pay an illegal tax in the guise of a franchise fee. (Petition, ¶ 8). Unfortunately for Plaintiff, her claimed injury is not a well pleaded fact for two reasons.

The first reason Plaintiff's allegation of harm at the hands of the franchise fee is not a well pleaded fact is because it has been held by the Iowa Supreme Court, as a matter of law that the franchise fee agreed to by Des Moines and MidAmerica's predecessor is a benefit to taxpayers, not a burden, and that franchise fees actually reduce taxes.

Testimony before the Commission established that the franchise fees were an identifiable cost that benefited the City by relieving City residents of taxes they would otherwise have to pay.

City of Des Moines v. Ia. St. Commerce Comm., 285 N.W.2d 12, 13 (Iowa 1979).

A franchise fee then, according to City of Des Moines, is an alternate to a tax. It is a tax saving device. As such, a franchise fee doesn't injure taxpayers. And as an uninjured taxpayer, Plaintiff has no standing to sue.

The second reason ¶ 8 does not contain well pleaded facts is because the City has collected nothing from Plaintiff in the way of utility franchise fees. As Plaintiff alleges in her Petition, and as Chapter 476 of The Code makes clear, franchise fees are approved by the Utilities Board and collected by the utility, not the City. The agreement for franchise fees is between the City and MidAmerican energy. MidAmerican, not the Plaintiff, is required to pay the franchise fee to the City.

Plaintiff's Petition is silent as to how MidAmerican chooses to treat the franchise fee vis-à-vis its customers. Plaintiff chose not to attach the franchise fee agreement to her Petition, so it is not before the Court. All we have to go on are the facts that are well pleaded in the Petition. And those well pleaded facts establish an agreement between the City and MidAmerican. Because Plaintiff doesn't pay the City anything, she cannot satisfy the "injury" requirement necessary to pass standing muster.

Plaintiff has no benefit in the contract between the City and MidAmerican, and hence no standing to challenge it. Likewise, as a taxpayer she has no standing because the franchise fee imposes no obligation burdening her as a taxpayer. Indeed, as a taxpayer her burden is lessened because the fee offsets or replaces what

otherwise might be charged as taxes.

Very recently, the Iowa Supreme Court visited a similar factual scenario. There, citizens challenged certain bonds for a recreation project. The Court said there was no standing because the project, not the bonds, would cause the injury. Citizens For Responsible Choice v. City of Shenandoah, 2004 WL 1935395 (Iowa 9/1/04). Here there is no standing because the mere agreement between the City and MidAmerican causes no injury to Plaintiff. Injury will occur, if at all, only when MidAmerican (not the City) acts upon the agreement.

The bottom line is, Plaintiff has no standing to sue the City. Her beef is with MidAmerican and the Utilities Board. She should have timely appealed the original franchise fee and the franchise fee increase to the Board. Because she has no standing to bring this action, it must be dismissed.

BRIEF POINT IV

MIDAMERICAN ENERGY AND THE IOWA UTILITIES BOARD ARE INDISPENSABLE PARTIES TO THIS ACTION AND PLAINTIFF'S PETITION MUST BE DISMISSED BECAUSE OF A FAILURE TO JOIN THEM.

If the Plaintiff is allowed to proceed past the administrative off-ramp and continue on the district court highway, her claim still must be dismissed because she has failed to join indispensable parties, MidAmerican Energy and the Utilities Board.

A party is indispensable if:

. . . the party's interest is not severable, and the party's absence will prevent the court from rendering any judgment between the

parties before it or if notwithstanding the party's absence the party's interest would necessarily be inequitably affected by a judgment rendered between those before the court.

I.R.Civ.P. 1.234(2).

If an indispensable party is not a part of the lawsuit the court:

. . . shall order the party brought in. When persons are not before the court who, although not indispensable, ought to be parties if complete relief is to be accorded between those already parties, and when necessary jurisdiction can be obtained by service of original notice in any manner provided by the rules in this chapter or by statute the court shall order their names added as parties and original notice served upon them.

I.R.Civ.P. 1.234(3).

MidAmerican Energy is an indispensable party because only it knows:

- (a) The names and addresses of its tens of thousands of customers in the putative class; and
- (b) The amounts of the franchise fee paid by each individual customer and the dates of those payments.

Without MidAmerican in the case any number of undesirable results are almost certain to happen.

To begin with, Plaintiff won't be able to personally notify those class members who stand to gain \$100 or more from the suit as required by I.R.Civ.P. 1.266(4). In the middle are the merits.

It is MidAmerican, after all, which agreed to pay the fee and which passed it through to its customers and collected it from its

customers. To end with, should the Plaintiff prevail, the Court will not be able to identify the amounts due the class members.

In a situation where an administrative agency issued a permit and was then sued for its actions, the court ordered the permit holder brought in as an indispensable party. Vogelaar v. Polk Co. Zoning Bd. of Adjustment, 188 N.W.2d 860, 861 (Iowa 1971). MidAmerican stands in the same position as that permit holder and is an indispensable party.

The Utilities Board also is an indispensable party because it approves other franchise fee agreements between other cities and other utilities. Fencl v. City of Harpers Ferry, 620 N.W.2d 808, 816-17 (Iowa 2001); City of Monticello v. Adams, 200 N.W.2d 522, 523 (Iowa 1972). If the Board is not a party, then any ruling of this Court will not be binding on the Board and inconsistent application if the law could result. This will be prejudicial to those concerned. It will foster an undesirable climate of judicial unpredictability.

The Board also approved this franchise fee. And any court order in this case may have no binding effect upon the board unless the Board is a party.

Without MidAmerican as a party, the Court will be prevented from rendering any sort of meaningful judgment. Without the Utilities Board as a party, its interests will be inequitably affected. Moreover, as this is a case brought in equity by the Plaintiff, and:

The equity practice governing joinder of parties defendant has always been more

liberal than the common law practice. . . The general principle of equity practice is that all persons materially interested, either legally or beneficially, in the suit or proceeding, or possessing a community of interest therein, should be joined as either plaintiffs or defendants thereto, irrespective of the relative importance or degree of interest of their relationship, in order that a complete decree may be made between them.

Wright v. Standard Oil Co., 15 N.W.2d 275, 276-77 (Iowa 1944), quoting 39 Am.Jur. 903, 904, § 36, 'Parties.'

Both MidAmerican Energy and the Utilities Board are indispensable parties. Because Plaintiff has failed to join them, her Petition must be dismissed.

CONCLUSION

Plaintiff has failed to exhaust her adequate administrative remedies, launched an impermissible collateral attack upon final agency action, lacks standing and has failed to join two indispensable parties. For all of the reasons briefed, her Petition should be dismissed and costs assessed against her.



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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses

disclosed on the pleadings on 9/30/04

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other

Signature C. Tillinghast