

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES,

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

CASE NO. CE 49273

**RULING ON
MOTION TO DISMISS**

A contested hearing on the motion to dismiss filed by the defendant was held before the undersigned on November 15, 2004 as previously scheduled. Upon consideration of the materials offered by the parties, and having reviewed the court file and being otherwise duly advised in the premises, the court rules as follows:

This is an action for declaratory relief brought by the plaintiff on behalf of a purported class, seeking to invalidate a three percent franchise fee assessed to customers of MidAmerican Energy located within the limits of the city of Des Moines. It is claimed that the fee is in actuality a tax which was not passed in compliance with the applicable statutory requirements. The defendant seeks dismissal on a number of counts, as follows: 1) subject matter jurisdiction of this matter is vested with the Iowa Utilities Board, as the agency authorized to deal with rates charged by public utilities; 2) this action fails to state a claim as it represents an improper collateral attack on the prior actions of the aforementioned agency; 3) the plaintiff has failed to join two indispensable parties; namely, MidAmerican Energy and the Iowa Utilities Board; and 4) the plaintiff has no standing to bring this action.

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The standards when considering a motion to dismiss are well settled in this state. The sufficiency of a claim in the face of a motion to dismiss is measured by the allegations pled therein, all of which are deemed to be true for purposes of the motion. O'Hara v. State, 642 N.W.2d 303, 305 (Iowa 2002). Where the facts pertinent to the determinative issue in a motion to dismiss are disputed, the case usually cannot be resolved on such a motion. Pennsylvania Life Ins. Co. v. Simoni, 641 N.W.2d 807, 810 (Iowa 2002).

Whether the court may consider matter outside the pleadings depends on the focus of the motion. When the motion pertains to the adequacy of the petition to state a claim for relief, facts outside the pleadings are not to be considered. Carroll v. Martir, 610 N.W.2d 850, 856 (Iowa 2000). Such a motion should only be granted "when there exists no conceivable set of facts entitling the non-moving party to relief." Rees v. City of Shenandoah, 682 N.W.2d 77, 79 (Iowa 2004). "Under notice pleading, nearly every case will survive a motion to dismiss." Id. (citation omitted).

Facts outside the pleadings may be considered when they arose after the petition was filed, they are not disputed by the parties, and the issues in the motion to dismiss do not concern the adequacy of the petition to state a claim for relief. Wilson v. Ribbens, 678 N.W.2d 417, 418 (Iowa 2004). Affidavits and other evidentiary showings may be used in support of and in resistance to motions to dismiss based on lack of subject matter jurisdiction and standing. Citizens v. City of Shenandoah, 686 N.W.2d 470, 473 (Iowa 2004). An evidentiary hearing is not required when the motion is based on these grounds, however. Id. An evidentiary hearing was not requested in this case; the only items offered beyond the plaintiff's allegations are the two ordinances passed by the

defendant referencing the franchise fee which is the subject of the lawsuit, and MidAmerican Energy's acceptance of those ordinances. This is the record upon which the court will gauge the legal sufficiency of plaintiff's claims.

Exhaustion of administrative remedies/collateral attack. The defendant argues that the validity of the franchise fee in question has already been conclusively dealt with at the administrative level by the Iowa Utilities Board, the agency responsible for regulating public utilities such as MidAmerican Energy. It contends that the franchise fee became part of the tariff filed with the Iowa Utilities Board pursuant to Iowa Code §476.4 (2003), and that any challenges to the legality of the fee should have been addressed through the complaint procedure outlined in the regulatory scheme for the agency. Further, it contends that upon approval of the tariff by the Iowa Utilities Board, further legal action by means of the declaratory relief sought in this case is barred as an impermissible collateral attack on otherwise final agency action.

The plaintiff counters by arguing that the franchise fee is not part of the rates or charges otherwise contained in the tariff to be filed with the Iowa Utilities Board, but is in actuality an illegal tax passed in violation of Iowa Code §364.3(4) (2003). It relies primarily on the Iowa Supreme Court decision in City of Hawarden v. U.S. West Communication, Inc., 590 N.W.2d 504 (Iowa 1999), which distinguished between a valid fee, which is imposed to confer a benefit, and an invalid tax, which is a revenue-generating measure. Id. at 508-9. The plaintiff further argues that the entity she has chosen to sue, the city of Des Moines, is not subject to the regulatory authority of the Iowa Utilities Board and that the rules governing declaratory relief allow for this litigation to proceed to determine the legality of the ordinances in question.

The parties impliedly concede that MidAmerican Energy is in fact a public utility and therefore subject to the regulatory authority of the Iowa Utilities Board. In addition, it would appear at first glance that to the degree MidAmerican's tariff has been approved by final agency action by the Iowa Utilities Board, there may be limitations placed upon subsequent requests for declaratory relief regarding the substance of the tariff. See, e.g., State v. Clark, 608 N.W.2d 5, 7, 9 (Iowa 2000) (action for declaratory relief is not appropriate where a complete exclusive remedy is otherwise provided by law; declaratory judgment action which was indistinguishable from a petition for judicial review was dismissed as a collateral attack on agency action); Teleconnect v. U.S. West Communications, 508 N.W.2d 644, 647-48 (Iowa 1993) (application of "filed tariff doctrine" prohibits litigation pertaining to utility rates outside of administrative procedures and judicial review of agency action).

However, the underlying premise of the defendant's entire argument in this regard; namely, that the franchise fee was part of the tariff filed with the Iowa Utilities Board, has not been conclusively established for purposes of this record. Counsel for the defendant has merely referred to this event in his briefs, but has by no means established what exactly took place in terms of agency action regarding the tariff filed by MidAmerican Energy it claims is now preclusive of plaintiff's efforts in this case. It is premature for the court to decide the legal sufficiency of plaintiff's claim on such an incomplete record.

On the face of the petition alone, the allegations contained therein clearly state a claim upon which relief may be granted. Plaintiff, as a resident of Des Moines, challenges on behalf of other affected taxpayers the legality of the franchise fee in

question as an alleged illegal tax. The ability of the plaintiff to make such a challenge, outside of the argument on the "collateral attack" issue, will be addressed in the next section pertaining to standing. The defendant's motion to dismiss based upon the claimed final agency action by the Iowa Utilities Board is denied.

Standing. The defendant contends that the plaintiff does not have standing to bring this action for several reasons, including: 1) such standing is not achieved by virtue of claiming to be a third-party beneficiary of the agreement between the defendant and MidAmerican; 2) she has not been harmed by the passage of the franchise fee; and 3) because the fee is not collected by the city, but rather by MidAmerican Energy.

The issue of what constitutes proper standing has recently been restated by the Iowa Supreme Court in Citizens of City of Shenandoah, 686 N.W.2d 470 (Iowa 2004):

'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.' Our cases have determined that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected....

Whether litigants have standing does not depend on the legal merit of their claims, but rather whether, if the wrong alleged produces a legally cognizable injury, they are among those who have sustained it.

Id. at 475. Plaintiff concedes she is not pursuing this action as a claimed third-party beneficiary of the contract. She claims her standing is by virtue as a taxpayer of the defendant, a position that is apparently agreed to by the parties for purposes of this motion.

A taxpayer has standing to challenge the legality of a contract entered into by the taxing authority. Elview Const. v. North Scott Community School District, 373 N.W.2d

138, 142 (Iowa 1985) (citing Poor v. Incorporated Town of Duncombe, 231 Iowa 907, 911, 2 N.W.2d 294, 297 (1942)). A resident taxpayer likewise has standing to challenge the legality of a tax imposed upon her. Pierce v. Green, 229 Iowa 22, 294 N.W. 237, 248 (1940). Plaintiff's position as both a resident and taxpayer within the city of Des Moines satisfies the "specific legal or personal interest" prong of the test to determine standing. Cf. Citizens, 686 N.W.2d at 475 (plaintiff group lacked standing to challenge issuance of revenue bonds; none of its members were taxpayers or utility customers of cities).

The defendant goes on to argue that at best the plaintiff has been benefited by the passage of the franchise fee, and at worst any harm has come from the collection efforts of MidAmerican and not the city. Its position that the plaintiff has in fact received a benefit from the passage of the franchise fee comes from a single sentence in a 25-year old Iowa Supreme Court decision arising out of a challenge to the manner in which the franchise fees were collected. See City of Des Moines v. Iowa State Commerce Commission, 285 N.W.2d 12, 13 (Iowa 1979). The court is not inclined to dispose of any litigation based upon such questionable authority.

The defendant's position that no harm has come to the plaintiff at its hands is equally disingenuous. The fact that the fee is to be collected by MidAmerican and in turn paid over by MidAmerican to the defendant does not lead to the conclusion that the plaintiff and those in her position are not harmed by its ultimate collection, if in fact represents an illegal tax. It cannot reasonably be argued that the collection of an illegal tax over a period of over five years (as alleged on the face of plaintiff's petition) does not result in some form of "legally cognizable injury" for purposes of standing. The plaintiff, as a resident taxpayer of the defendant, has sufficient standing to maintain this action.

Indispensable parties. The defendant contends that both MidAmerican Energy and the Iowa Utilities Board are indispensable parties to this litigation, and their absence requires the dismissal of this action. The second prong of defendant's argument can easily be disposed of. The plain remedy when indispensable parties have not been joined to a pending action is to order that joinder, not dismissal. IowaR.Civ.P. 1.234(3). This court will, however, address the issue of whether MidAmerican Energy and the Iowa Utilities Board are in fact "indispensable" for purposes of this rule.

A party is indispensable to pending litigation if its 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.

IowaR.Civ.P. 1.234(2). It is claimed that MidAmerican is required to be a part of this litigation because only it has the information necessary to identify the remaining members of the purported class, as well as to calculate the fees actually collected. The plaintiff accurately points out that such information is available through traditional discovery methods directed to non-parties, and does not require the joinder of MidAmerican.

The defendant's secondary argument that MidAmerican is required to be joined as a party to the franchise fee agreement is equally non-persuasive. It is clear from the ordinances in question (which the defendant has provided in its reply brief and concedes represent the agreement between it and MidAmerican) that the prospect for judicial review of the franchise fee was contemplated, and MidAmerican has already contractually obligated itself to discontinue the collection of the fee should it be

determined to be unlawful "by the Supreme Court of Iowa in a final non-appealable decision." Ordinance No. 14, 341 and 13, 342, §7; see also letters from MidAmerican Energy Company dated July 14, 2004 approving of said ordinances, attached to reply brief of defendant. MidAmerican remains free to intervene on its own or be joined by means of a third-party petition initiated by the defendant; at this point, however, its position does not render it indispensable so as to mandate its joinder now by the court.

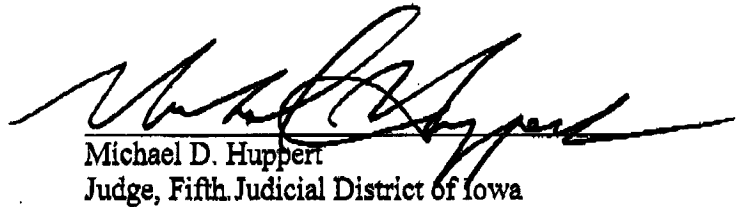
The status of the Iowa Utilities Board presents a potentially more intriguing question. The defendant argues that to allow this litigation to proceed in the absence of the Board creates the real possibility of inconsistent rulings, as it would not be bound by the court's determination of the legality of the franchise fee. This argument is premised on the contention that the Board has already conclusively dealt with the franchise fee as part of the tariff procedure called for under Iowa Code chapter 476. As this court has already concluded on the issue of exhaustion and collateral attack, there is nothing in the record presently before it that allows it to leap to the conclusion that this has in fact occurred. The determination of this issue on a more complete record may require a re-examination of whether the Iowa Utilities Board is in fact a indispensable party as "inequitably affected" by a final decision between the present parties, assuming dismissal is not the more appropriate remedy.

For now, on the record before it, this court is not inclined to label either MidAmerican Energy or the Iowa Utilities Board as indispensable parties, and require their joinder pursuant to IowaR.Civ.P. 1.234(3).

The court believes it has addressed all of the arguments raised by the defendant in its motion to dismiss, and found them to be lacking at this time, for the reasons more specifically set forth in this ruling.

IT IS THEREFORE ORDERED that the motion to dismiss of the defendant is denied.

Dated this 10th day of January, 2005.



Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:

~~Brad Schroeder~~
~~Mark Godwin~~