

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

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

ARGUMENT

Recently the City made a motion to dismiss which was denied by the Court.

The City contended that this Court lacked jurisdiction, that the Petition failed to state a claim for which relief could be granted and failed to join an indispensable party.

All three grounds for relief were premised on the fact - not stated in the Petition - that the Iowa Utilities Board had approved the franchise fee about which Plaintiff complains.

In its ruling denying the motion to dismiss, this Court said it was "premature" to decide the motion because "defendant has merely referred to this event" in its 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." (Ruling, P.4).

Even though the fact of Utilities Board approval of the franchise fee was not stated in the Petition, the same was shown by reference in the City's brief to the statutory scheme by which utilities seek approval for their rates and charges.

The City did not specifically request the Court to take

judicial notice of the statutory fact of Board approval of the fee. For that oversight the City apologizes. And in order to correct that oversight the City now requests the Court to take judicial notice of those statutes which require the Utilities Board to approve all fees and rates and charges that a utility charges to its customers.

In Iowa, courts do "take judicial notice of Iowa statutes without reference to them in pleadings." State Ex Rel Le Buhn v. White, 133 N.W.2d 903, 904 (Iowa 1965); Coleman v. Hall, 161 N.W.2d 329, 332 (Iowa 1968); State v. Proulx, 252 N.W.2d 426, 431 (Iowa 1977). The courts of Iowa also take judicial notice of the purpose for which a statute was designed and its background. State v. Wehde, 258 N.W.2d 347, 352 (Iowa 1977); Burke v. Bd. of Trustees of Police Retirement System of Sioux City, 308 N.W.2d 21, 24 (Iowa 1981).

Specifically, the City directs the Court's attention to Iowa Code § 476.6(1) which reads:

Filing With Board. A public utility subject to rate regulation shall not make effective a new or changed rate, charge, schedule or regulation until the rate, charge, schedule, or regulation has been approved by the board, except as provided in subsections 11 and 13.¹ (Italics original, underline added).

Further, in approving rates and charges, the Utilities board is bound to consider the lawfulness of the rate or charge as "every unjust or unreasonable charge for such service is

¹Subsections 11 and 13 are not applicable here as they deal with automatic adjustments and temporary authority respectively.

prohibited and declared unlawful." Iowa Code § 476.8.

Taking into account the facts plead by Plaintiff that she has been charged a utility franchise fee and that she has paid a utility franchise fee, and taking into account by way of judicial notice of Iowa Code § 476.6(1) that the franchise fee can not be effective unless and until it is approved by the Utilities Board, one is left with the inescapable conclusion that the Utilities Board necessarily approved the franchise fee about which the Plaintiff complains.

That being so, the City's Motion to Dismiss should be granted for all the reasons stated in the motion and supported in the City's initial brief, including:

- A. Because the Board approved the fee, complaints about the fee must be directed to the Board. A failure to do so is a failure to exhaust an adequate administrative remedy.
- B. Because the Board approved the fee, any attack upon the fee in this action would be an impermissible collateral attack upon final agency action.
- C. Because the Board approved the fee, the Board is an indispensable party to his action. If the Board is not made a party the very real possibility exists for inconsistent rulings on the viability of franchise fees, as the Board would not be bound by this Court's determination of the legality of the franchise fee if the Board is not made a party.

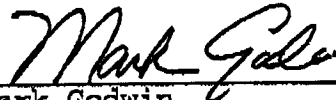
We know that the Utilities Board has jurisdiction over franchise fees because the Board and its predecessor have regulated the same for decades. City of Des Moines v. Iowa State

Commerce Commission, 285 N.W.2d 12, 15-16 (Iowa 1979). And, if the franchise fee is found by the Board to be an illegal tax as alleged by Plaintiff, then the Board is compelled to order a refund of all illegally collected revenues. Mid-Iowa Community Action, Inc. v. Iowa State Commerce Com., 421 N.W.2d 899, 901.

The Iowa Supreme Court has said that a challenge to the legality of rate or change under the jurisdiction of the Board should be made to the Board. A challenge to such a rate or change brought in district court will be dismissed for lack of jurisdiction for failure to exhaust administrative remedies. State Ex. Rel. Turner v. Iowa Electric Light & Power Co., 240 N.W.2d 912.

CONCLUSION

The well plead facts of Plaintiff's Petition allege that she has been charged and has paid a utility franchise fee. Judicial notice of applicable statutes in Iowa Code Chapter 476 establish that the franchise fee had to be approved by the Iowa Utilities Board before it became effective. Jurisdiction of this case therefore rests with the Board and the City's Motion to Dismiss should be granted.



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Judge, 5th Judicial District

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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 1-19-05

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

Signature Diane Roode