RECEIVED
OCT 13 2005
BRICK, GENTRY, BOWERS, SWARTZ, STOLTZE, SCHULING & LEVIS, P.C.

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

LISA KRAGNES, Plaintiff, vs. CITY OF DES MOINES, IOWA, Defendant.

Equity No. 49273

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

FILED POLK COUNTY IA 05 OCT 11 PM 2:21 CLERK DISTRICT COURT

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		2
FACTS		5
ARGUMENT		
	THE GAS AND ELECTRIC UTILITY FRANCHISE FEES IMPOSED BY THE CITY OF DES MOINES, ACCEPTED BY MIDAMERICAN ENERGY AND APPROVED BY THE IOWA UTILITIES BOARD ARE EXPRESSLY PERMITTED BY STATUTE	5
A.	STATE LAW SPECIFICALLY ALLOWS CITIES TO IMPOSE UTILITY FRANCHISE FEES SUCH AS THOSE IMPOSED BY DES MOINES	5
B.	THE DECISION IN CITY OF HAYWARDEN V. US WEST COMMUNICATIONS IS NOT HELPFUL AUTHORITY FOR THE PLAINTIFF	8
C.	THE FRANCHISE FEES IN QUESTION ARE NOT TAXES	10
CONCLUSION		17

TABLE OF AUTHORITIES

CASES **Page**

Alpert v. Boise Water Corp., 795 P.2d 298 (ID 1990). 13

AMFAC Resorts, L.L.C. v. U.S. Dep't of Interior, 282 F.3d 821 (D.C. Cir. 2002) 12

Arizona Public Service Co. v. City of Phoenix, 716 P.2d 430 (AZ 1986) 13

Berea College Utilities v. City of Berea, 691 S.W.2d 235 (KY 1985) 13

Bryan v. City of Des Moines, 261 N.W.2d 685 (IA 1978) 15

Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 234, 91 N.W. 1081 (1902). . 10,11

City of Calhoun v. North Georgia Electric Membership Corp., 443 S.E.2d 469 (GA 1994). 13

City of Chicago v. Illinois Commerce Comm., 666 N.E.2d 1212 (IL 1996) 13

City of Des Moines v. Iowa St. Commerce Comm., 285 N.W.2d 12 (IA 1979) 14,15

City of Haywarden v. US West Communications, 590 N.W.2d 504 (IA 1999). 8,9,10

City of Homewood v. City of Vestavia, 374 So.2d 271 (AL 1979) 13

City of Montrose v. P.V.C. of Colorado, 732 P.2d 1181 (CO 1987) 13

City of Norfolk v. Chesapeake and Potomac Telephone Co. of Virginia, 218 S.E.2d 531 (VA 1975) 13

City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750 (TX 2003). 13

City of St. Paul v. Northern States Power Co., 462 N.W.2d 379 (MN 1990) 13

Delaware Power & Light Co., v. City of Newark, 140 A.2d 258 (DE 1958) 13

Delta Elec. Power Assoc. v. Miss. Power & Light Co., 149 So.2d 504 (MS 1963) 13

Florida Power Corporation v. City of Winter Park, 827 So.2d 322 (FL 2002). 13

In Re Adjustments to Franchise Fees v. New Mexico Public Regulation Comm., 14 P.3d 525 (NM 2000) 13

CASES **Page**

In Re Application of Brooklyn Union Gas Co. v. City of New York, 428 N.Y.S.2d 564 (NY 1980) 13

In Re Trust of Shurtz, 242 Iowa 448, 454, 46 N.W.2d 559 (1951) 11

Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 439 (IA 1983) 15

McLaughlin v. City of Newton, 189 Iowa 556, 178 N.W. 540 (1920) 11

Newman v. City of Indianola, 232 N.W.2d 454 (IA 1975) 11

Nixon v. State, 2005 WL 2398232 (Iowa 9/30/05) 17

Northern Gas Co. v. Town of Sinclair, 592 P.2d 1138 (WY 1979) 13

South Carolina Electric & Gas Co. v. Town of Awenda, 596 S.E.2d 482, (SC 2004) 13

State v. Oklahoma Gas & Electric Co., 536 P.2d 887 (OK 1975) 13

Town of Hainesville, Inc. v. Entergy Corp., 840 So.2d 957 (LA 2003) 13

U.S. West Comm. V. City of Eugene, 81 P.3d 702 (OR 2003) 13

W.S. Dickey Clay Manufacturing Co. v. Star Corp. Comm., 740 P.2d 585 (KS 1987) 13

Willman v. Washington Utilities and Transportation Comm., 93 P.3d 909 (WA 2004) 13

Other Authorities:

Iowa Code § 364.2 5,6,7,8,9,15

Iowa Code § 384.3 12

Iowa Code § 423B.1 16

Iowa Code § 423B.5 7,16,17

Iowa Code § 423E.1(1) 16

Iowa Code § 423E.3(2) 7,16,17

CASES | **Page**

Iowa Code § 480A.3 5,6,7,9

Iowa Code § 480A.6 5,6,7,9

42 USCA § 542 12

FACTS

The City adopts its Statement of Material Facts Not in Dispute for the facts of this brief.

ARGUMENT

THE GAS AND ELECTRIC UTILITY FRANCHISE FEES IMPOSED BY THE CITY OF DES MOINES, ACCEPTED BY MIDAMERICAN ENERGY AND APPROVED BY THE IOWA UTILITIES BOARD ARE EXPRESSLY PERMITTED BY STATUTE.

A. STATE LAW SPECIFICALLY ALLOWS CITIES TO IMPOSE UTILITY FRANCHISE FEES SUCH AS THOSE IMPOSED BY DES MOINES.

A utility franchise fee is not a sales tax. Rather a utility franchise fee is the financial component of a municipal management tool, the utility franchise, which tool is expressly granted to Iowa cities by the Iowa Legislature. Iowa Code §§ 364.2, 408A.3, 480A.6.

Cities may grant franchises to gas and electric providers. Iowa Code § 364.2(4)(a). The franchises may be for periods of up to 25 years. Id. The franchises may be granted after public hearing. Id. The franchises are created by ordinance. Id.

The franchise may "regulate the conditions required and the manner of use of the streets and public grounds of the city." Iowa Code § 364.2(4)(e). Also, the franchise may "confer the power to appropriate and condemn private property upon the person franchised." Id.

And, "If a city franchise fee is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer." Iowa Code § 364.2(4)(f).

The import of the above is patent. In § 364.2 the legislature has given the City the right to assess franchise fees upon utilities without limitation as to the nature or the amount of the fee. The fee could be a flat fee or the fee could be based upon a percentage of sales. The fee could be $5 per

month or $500 per month. The fee could be 1% of sales, 3% of sales, 5% of sales or more or less.

The legislature has used the exact term, "franchise fee." And by using the exact term "franchise fee", the legislature has distinguished a franchise fee from another municipal financial vehicle, a public utility user fee. Iowa Code §§ 480A.3 and 480A.6.

A public utility right-of-way use fee is just what its name implies – a fee paid by a utility to offset the costs to the city necessarily caused by the utility's presence in the right-of-way. Iowa Code § 480A.3. The costs the city can recover are limited to management costs. Id. The fee must be imposed upon a competitively neutral basis. Id. If the costs cannot be attributed to only one entity, they must be allocated to all right-of-way users. Id. And most importantly:

> This section does not prohibit the collection of a franchise fee as permitted in section 480A.6.

Id.

The significance of § 480A.3 is this: By including direct references to both use fees and franchise fees in the same statute, the legislature leaves no doubt that they are two separate and distinct types of fees. And while a user fee must be related to management costs, and only management costs, a franchise fee is not tied to any such objective benchmark.

And if, after reading Iowa Code §§ 364.2 and 480A.3 there remains any doubt as to the independent existence of utility franchise fees, that doubt disappears after reading Iowa Code § 480A.6, which says:

> This chapter does not modify or supersede the rights and obligations of a local government and the public utility established by the terms of any existing or future franchise granted, approved, and accepted pursuant to section 364.2, subsection 4. A city which collects a city franchise fee from an entity pursuant to section 364.2, subsection 4, under an existing or future franchise, shall not also collect a fee from that entity under section 480A.3.

Thus, it is an either/or proposition facing cities when it comes to utility fees. A city can calculate its right-of-way management costs and collect a user fee that reflects the utility's share of the city's expense. Iowa Code § 480A.3. Or, the city can collect a franchise fee pursuant to ordinance, which ordinance can also cover the terms and conditions of the utility's presence in the right-of-way. Iowa Code § 364.2(4). But the City cannot collect both fees. Iowa Code § 480A.6.

The gas and electric franchise fees at issue in this case fit comfortably within the framework established for franchise fees in Iowa Code § 364.2(4).[1]

State law says the franchise agreements should be for not more than 25 years. Iowa Code § 364.2(4). The ordinances increasing the franchise fees in this case amended an existing franchise agreement that was for a term of 25 years. (App. Tabs B & C).

State law says that franchises may be granted to "erect, maintain and operate plants and systems" for electricity and gas. Iowa Code § 364.2(4). The ordinances increasing the franchise fees allow MidAmerican Energy the right "to acquire, construct, operate and maintain the necessary facilities" for the provision of electricity and natural gas. (App. Tab B & C).

State law says that franchise agreements are subject to election, unless the election is waived by the city council, and even then, a citizen petition can override the waiver and force an election. Iowa Code § 364.2(4)(b). The ordinances increasing the franchise fees provide for such an election if the appropriate petition is filed. (App. Tabs B & C, Sec. 15).

State law says the franchise agreement "may regulate the conditions required and the manner of use of the streets and public grounds of the city." Iowa Code § 364.2(4)(e). The

---

[1] Utility franchise fees are also mentioned by the Legislature in Iowa Code §§ 423B.5 and 423E.3(2). See pages 16-17 of this brief.

ordinances increasing the franchise fees set out the conditions required, including safe and adequate utility service (Tabs B & C, Sec. 2) at reasonable rates, (Tabs B & C, Sec. 3), with an annual report to the City (Tabs B & C, Sec. 4) and a map of the utility's distribution system, (Tabs B & C, Sec. 12). The ordinances increasing the franchise fees also set out the manner of use of the right-of-way by the utility by requiring compliance with the city's right-of-way management ordinance. (App. Tabs B & C, Sec. 5).

State law allows the City, by way of the franchise agreement, "to confer the power to appropriate and condemn private property upon the person franchised." Iowa Code § 364.2(4)(e). The ordinances increasing the franchise fees do just that; granting MidAmerican Energy "the power to condemn private property" for the purposes of providing gas and electric services to city residents. (App. Tabs B & C, Sec. 13).

Finally, state law allows that "If a city franchise fees is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer." Iowa Code § 364.2(4)(f). The ordinances increasing the franchise fees provides that the fee is 3% of gross receipts "excluding, however, the sale of [electric energy] [gas] to the city." (App. Tabs B & C, Sec. 6).

B. THE DECISION IN CITY OF HAYWARDEN V. US WEST COMMUNICATIONS IS NOT HELPFUL AUTHORITY FOR THE PLAINTIFF.

It is anticipated that the Plaintiff may attempt to rely upon City of Haywarden v. US West Communications, 590 N.W.2d 504 (Iowa 1999). If such reliance actually comes to pass, it will be in vain. City of Haywarden is distinguishable on multiple grounds and provides no support for Plaintiff.

First of all, City of Haywarden is concerned with a telephone utility. And as the Supreme

Court said, there are statutory schemes governing telephone utilities and there are "distinctly different statutory schemes governing utilities other than telephone systems." City of Haywarden, 590 N.W.2d at 508. One statutory consideration affecting telephone utilities which does not affect gas or electric utilities is the Telecommunications Act of 1996. Id. at 506-10.

Second, City of Haywarden is concerned with a right-of-way user fee, not a franchise fee.[2] Indeed, since the City of Haywarden decision Iowa Code § 364.2(4)(a) has been amended "to omit "telephone" from the list of utilities for which a city franchise may be granted." Id. at 506, n.2.

Third, and perhaps most importantly, not only was Iowa Code § 364.2(4)(a) amended subsequent to the Haywarden litigation, but all of Chapter 480A, including Iowa Code §§ 480A.3 and 480A.6 were added at the same time – after the commencement of Haywarden. Id. at 506, n.2.

Thus, if there was confusion before about the separate existence of franchise fees from right-of-way use fees, there is confusion no longer. Iowa Code §§ 480A.3, 480A.6 and 364.2(4), when read together, could not be clearer as to the distinction and difference between a franchise fee and a right-of-way use fee.

The former is the grant of a right to conduct a utility business within the city for a term of years. Iowa Code § 364.2(4)(a). The latter is the recovery of a city's management costs related to regulating the presence of a utility on public ground. Iowa Code § 480A.3.

---

[2] Some unfortunately imprecise language at the outset of the Haywarden opinion could confuse the casual reader if he or she were not careful. In reciting the factual history of the case, the Court says that Haywarden terminated its franchise agreement with US West and then passed an ordinance assessing a "user fee." Id. at 506. But then the Court turns around and calls the user fee a franchise fee, both in that paragraph and the next paragraph. Id. Later, the Court returns to calling the user fee a "user fee." Id. at 509.

The City of Haywarden decision stands for the proposition that a utility user fee cannot be "imposed without regard to administrative costs." City of Haywarden, 590 N.W.2d at 510. It does not address gas and electric franchise fees. Indeed, it could not address the fees at issue in this case in any relevant sense as the state law controlling the franchise fees at issue here were adopted *after* the Haywarden litigation.

C. THE FRANCHISE FEES IN QUESTION ARE NOT TAXES.

Plaintiff may also argue that the franchise fee is a tax because it is calculated like a sales tax and because it is revenue to the City, deposited in the general fund. But once we have a clear understanding of what is a franchise and what is a franchise fee, that argument falls by the wayside.

In order to understand a franchise fee, it is first necessary to understand the nature of a franchise.

A franchise may be defined in several ways. A franchise can be "a special privilege conferred by governmental authority" which does not belong to the citizenry "as a matter of common right." Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Iowa 234, ____, 91 N.W. 1081, 1083 (1902). Generically, franchise is a term "covering all rights granted to a corporation by legislative act or statute." Id. And specifically, the term 'franchise' is "often used with special reference to a privilege granted . . . by some . . . municipality acting under the authority of the state, to conduct a business of public utility." Id.

The legal status of this grant of privilege is contractual.

> A franchise constitutes a contract. The most that the city could do would be to propose the contract, and formulate the terms and conditions upon which it was willing to enter into the contract. The proposition was to grant a franchise which involved, when granted and accepted, mutual contractual duties and obligations, duties and obligations to be assumed by the city for and in behalf of the citizen,

> and duties and obligation to be assumed and performed by the grantee in the franchise.

McLaughlin v. City of Newton, 189 Iowa 556, ____, 178 N.W. 540, 543 (1920); See also: Cedar Rapids Water Co., 91 N.W. at 1083 [Franchise is a contract having same incidents and subject to same interpretations as other contracts].

The franchise agreement between the City and MidAmerican Energy certainly contains material duties and obligations running both ways, some of which already have been detailed in this brief.

MidAmerican received a 10-year extension on its franchise, allowing it to plan for the future knowing that it will be supplying gas and electricity to city residents until 2022. (App. Tabs B & C, Section 1). MidAmerican also received the right of eminent domain in the city, a huge benefit when the alternative – negotiating with each and every property owner – is considered. (App. Tabs B & C, Section 13).

The City received consideration also, including assurances that its citizens would receive a continuous supply of gas and electricity, at reasonable rates (which the City can regulate if the state stops doing so), from a company that will comply with all city ordinances and pay a franchise fee and supply maps of its distribution system. (App. Tab B & C, Secs. 2, 3, 5, 6 and 7).

There is a fundamental difference between a tax and a fee. A fee is associated with a special benefit or privilege while a tax is not. "A tax is a charge to pay the cost of government without regard to special benefits conferred. Newman v. City of Indianola, 232 N.W.2d 454, 573 (Iowa 1975); In Re Trust of Shurtz, 242 Iowa 448, 454, 46 N.W.2d 559, 562 (1951).

A close analogy to a franchise fee is a concessionaire agreement. Cities and other

governmental bodies regularly enter into such agreements at parks, airports and the like. And, similar to franchise agreements, concessionaire agreements often call for a payment based upon a percentage of sales. Nobody would seriously argue that the fee paid by a concessionaire is a tax. Such a fee is obviously in return for the privilege of operating a business on public property. AMFAC Resorts, L.L.C. v. U.S. Dep't of Interior, 282 F.3d 821, 822 (D.C. Cir. 2002) [Concessionaires pay U.S. Park Service a franchise fee "typically less than five percent of gross revenue, for the privilege of operating on federal land."][3]

And if the Plaintiff should claim the franchise fees are a tax because they go into the City's general fund, the City would say this: Lots of different 'kinds' of money besides tax money goes into the general fund. Iowa Code § 384.3 establishes municipal funds and says in pertinent part:

> All moneys received for city government purposes from taxes *and other sources* must be credited to the general fund of the city except that moneys received for the purposes of the debt service fund, the trust and agency funds, the capitol improvements reserve funds, the emergency fund and other funds established by state law must be deposited as otherwise required or authorized by state law.

(italics added).

There are numerous reasons for a franchise fee to be a percentage of gross revenue. A flat fee would be insensitive to the utility's revenue stream. Also, a percentage fee automatically adjusts to inflationary and deflationary facts. And, of course, the percentage fee is easily calculated.

[3] It is interesting to note that when the Congress of the United States took control of most of the cable television industry, it specifically reserved to local governments the right to charge a franchise fee not to exceed 5% of gross revenues. 42 U.S.C.A. § 542.

Indeed, nearly half of the states in the country allow franchise fees to be based upon a percentage of gross receipts without the fees being thereby transformed into an illegal tax. City of Homewood v. City of Vestavia, 374 So.2d 271, 272 (AL 1979); Arizona Public Service Co. v. City of Phoenix, 716 P.2d 430, 432 (AZ 1986); City of Montrose v. P.V.C. of Colorado, 732 P.2d 1181, 1184 (CO 1987); Delaware Power & Light Co., v. City of Newark, 140 A.2d 258, 262 (DE 1958); Florida Power Corporation v. City of Winter Park, 827 So.2d 322, 323 (FL 2002); City of Calhoun v. North Georgia Electric Membership Corp., 443 S.E.2d 469, 470-71 (GA 1994); Alpert v. Boise Water Corp., 795 P.2d 298, 306-07 (ID 1990); City of Chicago v. Illinois Commerce Comm., 666 N.E.2d 1212, 1217 (IL 1996); W.S. Dickey Clay Manufacturing Co. v. Star Corp. Comm., 740 P.2d 585, 587 (KS 1987); Berea College Utilities v. City of Berea, 691 S.W.2d 235, 237 (KY 1985); Town of Hainesville, Inc. v. Entergy Corp., 840 So.2d 957, 598-99 (LA 2003); City of St. Paul v. Northern States Power Co., 462 N.W.2d 379, 385 (MN 1990); Delta Elec. Power Assoc. v. Miss. Power & Light Co., 149 So.2d 504, 507 (MS 1963); In Re Adjustments to Franchise Fees v. New Mexico Public Regulation Comm., 14 P.3d 525, 527 (NM 2000); In Re Application of Brooklyn Union Gas Co. v. City of New York, 428 N.Y.S.2d 564, 567 (NY 1980); State v. Oklahoma Gas & Electric Co., 536 P.2d 887, 893 (OK 1975); U.S. West Comm. V. City of Eugene, 81 P.3d 702, 702-03 (OR 2003); South Carolina Electric & Gas Co. v. Town of Awenda, 596 S.E.2d 482, 485-89 (SC 2004); City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750, 753 (TX 2003); City of Norfolk v. Chesapeake and Potomac Telephone Co. of Virginia, 218 S.E.2d 531, 532-33 (VA 1975); Willman v. Washington Utilities and Transportation Comm., 93 P.3d 909, 910-11 (WA 2004); Northern Gas Co. v. Town of Sinclair, 592 P.2d 1138, 1140-41 (WY 1979).

Not all of the above cases are directly on point. Some deal with issues different that those

posed in the instant case. Still, more than a score of states routinely allow cities to assess utility franchise fees, expressed as a percentage of gross sales, without the franchise fees being considered an illegal tax.

And indeed, so does Iowa. In fact, Iowa has allowed the same for more than 45 years.

Two and a half decades ago, MidAmerican's predecessor, Iowa Power and Light Co., had a franchise agreement with the City. The agreement was entered into *circa* 1960. It called for the payment of a franchise fee expressed as a percentage of gross revenue. City of Des Moines v. IA. St. Commerce Comm., 285 N.W.2d 12, 13 (IA 1979).

And while the issues in that case are dissimilar to the issues here, significant legal principles carry through to today. Chief among them is the fact that the Iowa Supreme Court placed its stamp of approval upon a Commerce Commission allowance of a 'percentage-of-gross-revenue' franchise fee.[4] The Court said that the Iowa Code "did not prohibit the Commission from determining that the rates charged City residents should include the costs of the franchise fees. The Commission has the delegated responsibility to fix rates that are "reasonable and just."" Id., 285 N.W.2d at 15.

Of course, if a franchise fee was an illegal tax it could not be a part of a 'reasonable and just' utility rate. Indeed, if a franchise fee was an illegal tax, the Commission could not approve it at all. But the Commissioner did approve the franchise fee then and the Supreme Court bestowed its blessing upon that approval.

The approval of the franchise fee in this case is no less significant. The Iowa Utilities Board has approved the franchise fee increase (App. Tabs F & G). Regarding IUB approval the Court said:

---

[4] The present day Iowa Utilities Board succeeded to the powers of the Commerce Commission.

> A rate fixed by the Commissioner for a public utility is presumed to be valid and reasonable. The one challenging the validity of a rate has the burden of proving that it is unreasonable, confiscatory, excessive or violative of constitutional immunities.

Id., 285 N.W.2d at 16.

Moreover, the Court made the finding that not only was the franchise fee approval by the Commerce Commission not unreasonable, the franchise fee was in reality a tax relief measure:

> 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.

Id., 285 N.W.2d at 13. The affidavit of Assistant City Manager Matthes makes the same point today. (Tab J, p. 63).

Also, it must never be forgotten that any limitation on a city's home rule power has to be expressly imposed. Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978); See also: Iowa Code § 364.2(2):

> The enumeration of a specific power of a city does not limit or restrict the general grant of home rule power conferred by the Constitution. A city may exercise its general powers subject only to limitations expressly imposed by a state or city law.

So, when the legislature enumerates a specific power to a city – such as the power to grant franchises and collect franchise fees in Iowa Code §§ 364.2, 408A.3 and 408A.6 – and does not limit that power, that power is not restricted in any way. Possessed of that unrestricted power, the City may structure its franchise fee in any way that is not otherwise illegal. And structuring the fee as a percentage of gross sales is not otherwise illegal. The Supreme Court will not read into a statute an intent or meaning not expressed in the statute. Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 439, 443 (Iowa 1983). This Court should follow that rule.

Finally, we know that the franchise fees in this case are not sales taxes because the Iowa Legislature has specifically mentioned gas and electric franchise fees in statutes dealing explicitly with sales taxes.

Chapter 423B of The Code is entitled "Local Option Taxes." The chapter permits counties to impose by way of ordinance "local option taxes authorized by this chapter." Iowa Code § 423B.1. One kind of tax permitted by the chapter is a local sales and service tax. Indeed, that is the title of Iowa Code § 423B.5.

That section allows the imposition of a local sales tax of not more than one percent subject to certain conditions, except that:

> . . . the tax shall not be imposed on the sales price from the sale or use of natural gas, natural gas service, electricity, or electricity service in a city or county where the sales price from the sale of natural gas or electric energy are subject to a franchise fee or user fee during the period the franchise or user fee is imposed.

Iowa Code § 423B.5.

Similar language is found in Chapter 423E of The Code. That chapter is entitled "School Infrastructure Funding." It allows that "a local sales and service tax for school infrastructure purposes may be imposed by a county on behalf of school districts as provided in this chapter." Iowa Code § 423E.1(1).

Like the county sales tax in § 423B.5, the school infrastructure funding sales tax:

> . . . shall not be imposed on the sales price from the sale or use of natural gas, natural gas service, electricity, or electrical service in a city or county where the sales price from the sale of natural gas or electric energy are subject to a franchise fee or user fee during the period the franchise fee or user fee is imposed.

Iowa Code § 423E.3(2).

Recently, the Iowa Supreme Court was faced with a statute that contained the words "accruing" and "occurred." Nixon v. State, 2005 WL 2398232, *7, (Iowa 9/30/05). The Court said that because the legislature used the two different words closely together then necessarily the words meant different things. Id.

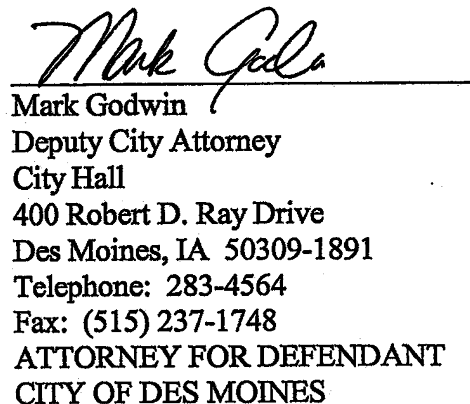
The same is true here.

The legislature has used "sales and service tax" and "franchise fee" in the same statute. Iowa Code §§ 423B.5; 423E.3(2). Necessarily, they mean different things. Nixon at 7. And that means a franchise fee is not a sales tax.

CONCLUSION

There are no factual disputes in this suit. The sole legal issue requiring decision is whether the City's utility franchise fees are illegal taxes. Because franchise fees are specifically allowed by statute, and because no other restriction is placed upon that allowance, and because the Iowa Utilities Board has specifically approved the fees, they are not an illegal tax.

The City of Des Moines is entitled to summary judgment as a matter of law.



Mark Godwin
Deputy City Attorney
City Hall
400 Robert D. Ray Drive
Des Moines, IA 50309-1891
Telephone: 283-4564
Fax: (515) 237-1748
ATTORNEY FOR DEFENDANT
CITY OF DES MOINES

Original Filed.

Copy to:

Honorable Michael D. Huppert
Judge, Fifth Judicial District

Mr. Brad Schroeder
Hartung & Schroeder LLP
Equitable Building, Suite 100
608 Locust Street
Des Moines, IA 50309
ATTORNEY FOR PLAINTIFF

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 10-11-05

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

Signature Diane Roscoe