

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, et al

Equity No. 49273

Plaintiff,

CITY OF DES MOINES, IOWA,

Defendant.

**PLAINTIFFS' STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF PLAINTIFFS' FIRST AND
SECOND MOTIONS FOR PARTIAL
SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Lisa Kragnes, and pursuant to Rule 1.981 of the Iowa Rules of Civil Procedure and in support of the First and Second Motions for Partial Summary Judgment, states the following material facts are undisputed:

1. Lisa Kragnes, Plaintiff in this case, has been a resident of the City of Des Moines for a period of approximately 7 years. (Plaintiffs' App. p. 72; Kragnes Depo. P. 4-5).
2. Lisa Kragnes brings this action on behalf of herself and all others similarly situated. (Petition).
3. She rented her first home on Prospect Road in Des Moines, Iowa and acquired her second home on Rutland Avenue in Des Moines, Iowa during that 7-year period. (Plaintiffs' App. p. 72; Kragnes Depo. P. 4-5).
4. She paid gas and electric bills, which included the franchise fee imposed by the City of Des Moines by virtue of its Ordinances. (Plaintiffs' App. p. 72).
5. The applicable ordinances passed by the City of Des Moines were first enacted in 1987, amended in 2004 and again amended in 2005 (via resolution) going through the present time. (Plaintiffs' App. p. 2, 10, 17, 111, 118, 1, 9).

6. In 1987, the City, by franchise ordinance enacted pursuant to Iowa Code §364.2(4) Code of Iowa (2005) placed a 1 percent franchise fee to be charged to both gas and electric consumers within the city limits of the City of Des Moines. (Plaintiffs' App. p. 17).

7. The fee charged stayed at the 1 percent level until 2004, when the City of Des Moines passed an amended ordinance governing the gas and electric franchise in the City of Des Moines. (Plaintiffs' App. pp. 111, 118).

8. On July 12, 2004, the City enacted Ordinance Nos. 14,341 and 14,342, an extension/amendment to the existing electricity and natural gas franchise agreements respectively. (Plaintiffs' App. pp. 1, 9, 111, 118).

9. On July 13, 2004, MidAmerican accepted both extension/amendments. (Plaintiffs' App. pp. 127, 128).

10. That ordinance imposed a franchise fee on each Des Moines customer of MidAmerican effective September 1, 2004, in an amount equal to 3 percent of the gross receipts derived by MidAmerican Energy Company from the transmission or distribution of gas to customers within the corporate limits of the City excluding, however, the sale of gas to the City, and allowed for a franchise fee increase to an amount not greater than 6 percent. (Plaintiffs' App. pp. 4, 5, 113, 120; Section 6 City of Des Moines Ordinance 14, 341 and 14,342).

11. On March 28, 2005, the Des Moines City Council passed a resolution (corrected on April 11, 2005) increasing the franchise fee charged to gas and electric customers within the corporate limits of the City to 5 percent, which is its current level. (Plaintiffs' App. pp. 1, 9).

12. The City collects the franchise fee from consumers within the city limits of the City of Des Moines of electric and gas utility. (Plaintiffs' App. pp. 17, 111, 118, 1, 9).

13. The franchise fee being exacted is not computed or ascertained by the City based on any cost incurred by the City. (Plaintiffs' App. p. 95).

14. The franchise fee is collected as a revenue generating measure and was originally increased in 2004 for the purpose of funding the hiring of more police and fire fighters, increased library hours and street reconstruction. (Plaintiffs' App. p. 83).

15. The money is placed in the general fund of the City and spent in the manner the City Council sees appropriate. (Plaintiffs' App. p. 85).

16. At all times material hereto, MidAmerican acted to comply with the City imposed Ordinances and thereby collected from and passed the franchise fee on to its Des Moines customers, including the Plaintiff, and remitted the same to the City. (Plaintiffs' App. p. 87).

17. The new franchise agreements call for the imposing upon Des Moines city residents a franchise fee of 3% on the sales of electricity and natural gas in the City limits. (Plaintiffs' App. pp. 111, 118).

18. Effective June 1, 2005, the City of Des Moines increased the fee to 5% on the purchases of both gas and electric. (Plaintiffs' App. pp. 1, 9, 62).

19. At all times material hereto, MidAmerican has, pursuant to the dictates of the City ordinances, passed that fee on to its Des Moines customers, including the Plaintiff, collected the fee from its Des Moines customers, and remitted the same to the City. (Plaintiffs' App. p. 87).

20. The franchise fees imposed are not calculated upon the cost of administrative and/or regulatory expenses. (Plaintiffs' App. p. 95).

21. The franchise fee revenue is deposited into the general fund of the City and used for general purposes not related to the cost of administrative and/or regulatory costs and expenses. (Plaintiffs' App. p. 85).

22. The Iowa Utilities Board does not look at whether or not the franchise ordinance was adopted properly or not. (Plaintiffs' App. pp. 157, 192).

23. The Iowa Utilities Board does not see the franchise fee as a "rate" as it is revenue neutral and does not affect the utility. (Plaintiffs' App. pp. 161,215).

24. Indeed, the Iowa Utilities Board routinely excludes the franchise fee from consideration during rate cases. (See Plaintiffs' App. p. 219; Harvey Depo. p. 43).

25. The franchise fee imposed by city ordinance is considered similar to the state imposed sales tax, i.e. when the state says there is going to be a state imposed sales tax, the Board merely acknowledges that the utility is going to collect those taxes for the state and looks to see if the utility is causing the tariff to read properly to put that tax into the billing. (Plaintiffs' App. p. 158,168).

26. Likewise is true, a local option tax. (See Plaintiffs' App. p. 158, 221; Harvey Depo. 45).

27. It is all according to whatever statute allows the other governmental authorities to impose or allow, which are statutes different from the authorizing statute of the Iowa Utilities Board. (See Plaintiffs' App. pp. 222-223 Harvey Depo. 46-47).

28. Likewise, when the city says there is going to be a franchise fee/tax, all the Iowa Utilities Board does is acknowledge that the utility has the obligation to collect that franchise fee/tax and assure that the tariff and billings are correct to the legal obligation imposed upon the utility by the city governmental authority. (Plaintiffs' App. pp.161).

29. The Iowa Utilities Board merely looks to see if a franchise fee is enacted and the tariff is changed in accordance to what the charges imposed by the franchise fee, and to make sure that those are in sync. (See Plaintiffs' App. pp. 192, 193, 208-209; Harvey Depo. 66).

30. As part of this, the Iowa Utilities Board simply sees this matter as something that “is political”, is “a non issue because of the city ordinance” and that “there is nothing the Board can address”, i.e. the Board has no jurisdiction. (See Plaintiffs’ App. pp. 209-210, 219, 39; Harvey Depo. 33 and TF-04-234).

31. The Plaintiff asserts the same in this case, i.e. the Iowa Utilities Board has no jurisdiction to determine the legality or illegality of the franchise fee/tax imposed upon MidAmerican customers by the City of Des Moines. (Plaintiffs’ App. pp. 209-210, 219, 39).

32. No notice to customers as contemplated by Iowa Code §476.6(2) was given by MidAmerican or its predecessors as to any franchise fee involved in this case. (Plaintiffs’ App. pp.213-214; 216).

33. No notice to customers as contemplated by 199 IAC §7.4 was given by MidAmerican or its predecessors as to any franchise fee involved in this case. (Plaintiffs’ App. pp. 213-214).

34. No formal Iowa Utilities Board or its predecessors’ Order has been issued as to any franchise fee involved in this case. (Plaintiffs’ App. P. 21-21, 23).

35. The purpose of the fee imposed pursuant to the franchise ordinance was solely related to the generation of revenue. (Plaintiffs’ App. p. 19-20).

36. The City has never undertaken to identify the costs associated with the City’s regulation, licensing, permitting, supervision or inspection of MidAmerican Energy’s activities in the City of Des Moines. (Plaintiffs’ App. p. 20-21).

37. The City has indicated that it has no cost relative to the provision of the commodity to the consuming public of the City of Des Moines for electric or gas. (Plaintiffs’ App. p. 95).

38. The City Staff speculates that there are some costs but they have not identified the same and were not the basis for the imposition of the franchise fee. (Plaintiffs' App. p. 94-95).

39. Likewise, the City has not identified any cost associated with the user (consumer) obtaining gas or electric service from MidAmerican Energy. (Plaintiffs' App. p. 95).

40. Included in the Plaintiffs' appendix are true and correct copies of the following documents:

- a. The City of Des Moines 1987 Ordinance granting MidAmerican's predecessor a franchise for electric service to Des Moines residents and imposing a franchise fee upon the Des Moines residents. (Plaintiffs' App. pp. 17-21).
- b. The City of Des Moines 2004 Ordinance granting MidAmerican an extension to the franchise for electric service to Des Moines residents and imposing a franchise fee upon the Des Moines residents. (Plaintiffs' App. pp. 2, 111-117).
- c. The City of Des Moines 2004 Ordinance granting MidAmerican an extension to the franchise for gas service to Des Moines residents and imposing a franchise fee upon the Des Moines residents. (Plaintiffs' App. pp. 10, 118-124).
- d. The City of Des Moines 2005 Resolution granting MidAmerican an extension to the franchise for electric service to Des Moines residents and imposing a franchise fee upon the Des Moines residents. (Plaintiffs' App. pp. 9-16).
- e. The City of Des Moines 2005 Resolution granting MidAmerican an extension to the franchise for gas service to Des Moines residents and imposing a franchise fee upon the Des Moines residents. (Plaintiffs' App. pp. 1-8).

- f. Documentation from the Iowa Utility Board as to its actions relating to the 2004 ordinances for gas and electric franchises in Des Moines. (Plaintiffs' App. pp. 22-51).
- g. Documentation from the Iowa Utility Board as to its actions relating to the 2005 resolutions for gas and electric franchise fee increases in Des Moines. (Plaintiffs' App. pp. 52-70).
- h. The Deposition of Wesley Bridgeman, employed with the Iowa Utilities Board. (Plaintiffs' App. pp. 152-176).
- i. The Deposition of John Harvey, employed with the Iowa Utilities Board. (Plaintiffs' App. pp. 177-240).
- j. The Deposition of Lisa Kragnes, Plaintiff herein. (Plaintiffs' App. pp. 71-78).
- k. The Deposition of Mike Matthes, employed with the City of Des Moines, with exhibits attached. (Plaintiffs' App. pp. 79-151)

Respectfully Submitted,

By: 

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ATTORNEY FOR PLAINTIFF

ORIGINAL FILED.

Copies of the foregoing
have been hand-delivered
this 11th day of October, 2005
to the following:

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ATTORNEY FOR DEFENDANT

Judge Michael D. Huppert
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By:  _____