

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, et al

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

Equity No. 49273

PLAINTIFFS' RESPONSE TO
DEFENDANT'S STATEMENT OF
MATERIAL FACTS ALLEGEDLY
NOT IN DISPUTE

FILED
POLK COUNTY IOWA
05 NOV -7 28
CLERK DISTRICT COURT

COMES NOW the Plaintiff, on behalf of herself and all others similarly situated, and in Response to the Statement of Material Facts alleged by the Defendant not to be in dispute and respectfully states as follows:

1. The statement of Paragraph 1 is denied as a mischaracterization of the record. As noted by the 1960 ordinance, there was a "franchise, occupation or privilege tax" imposed by the ordinance upon MidAmerican itself, not the taxpayers/customers of the City of Des Moines. (Plaintiff's Supplemental Appendix, Pg 4-9).
2. The statement in Paragraph 2 is agreed.
3. The statement in Paragraph 3 is agreed as true, in part. However, it should be further stated, that MidAmerican accepted the ordinances' requirements that MidAmerican collect for the City of Des Moines the franchise fee/tax from its customers within the City of Des Moines and remit those sums to the City of Des Moines. (See Ordinances at Plaintiff's App, Pg. 2, 10 and 17).
4. The statement in Paragraph 4 is denied as a mischaracterization. Rather, the only evidence of Iowa Utility Board action is a staff letter, there is no formal board action, minutes or any other consideration shown by the Board in the record. (Plaintiff's App. Pg. 25).

5. The statements in Paragraph 5 are denied as a mischaracterization. Plaintiff has alleged the franchise fees as imposed by the Defendant City of Des Moines are an illegal tax.

6. The statement in Paragraph 6 is agreed, in part. No formal protest was filed until this lawsuit.

7. The statement in Paragraph 7 is agreed.

8. The statement in Paragraph 8 is agreed.

9. The statement in Paragraph 9 is denied. It is agreed that Matthes said this. But Matthes' testimony differs from the ordinances in question which provide: "In consideration of right to construct and maintain such facilities and equipment along, upon, across and under the streets, highways, avenues, alleys, bridges and public places of the city, ..." the franchise fee is imposed. (See Plaintiff's App., Pg. 4 and 12). To the extent that "right-of-way user fee" is intended by the City of Des Moines to refer to the "maintenance fee" charged under Iowa Code Chapter 480A, the statement would be agreed.

10. The statement in Paragraph 10 is agreed. However, it should be noted the Mr. Matthes is only a assistant City Manager and it is unclear how he would have known how the elected city officials would have dealt with this political issue.

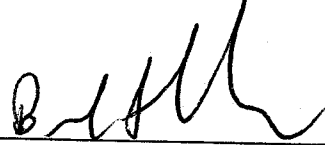
11. The statement in Paragraph 11 is agreed.

12. The statement in Paragraph 12 is denied as a mischaracterization. It is agreed Mr. Matthes makes that statement. However, no showing is made that Mr. Matthes has personal knowledge of these facts nor that those cities have not acted to "impose" a franchise fee as opposed to "negotiating" that fee.

13. The Plaintiff here sets forth all statements set forth by the Plaintiff in her Statement of Material Facts filed in Support of her First and Second Motions for Partial Summary Judgment filed October 11, 2005.

Respectfully Submitted,

By:



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ATTORNEY FOR PLAINTIFF

ORIGINAL FILED.

CERTIFICATE OF SERVICE:

A COPY of the foregoing have been mailed this 7th day of November, 2005, to the following;

Mark Godwin
Deputy City Attorney
City Hall
400 East First Street
Des Moines, Iowa 50309-1891
ATTORNEY FOR DEFENDANT

Judge Michael D. Huppert
Polk County Courthouse
500 Mulberry
Des Moines, Iowa 50309

By:

