

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

POLK COUNTY IA

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LISA KRAGNES, et al

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

Equity No. 49273

POLK DISTRICT COURT

**PLAINTIFFS' REPLY BRIEF IN  
SUPPORT OF PLAINTIFFS' SECOND  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

**COMES NOW** the Plaintiff, Lisa Kragnes, on behalf of herself and all others similarly situated, and respectfully submits this Reply Brief in support of Plaintiffs' Second Motion for Partial Summary Judgment.

1. The Defendant, in its response to the Plaintiffs' Second Motion for Partial Summary Judgment, first asserts that the Plaintiff did not address in detail certain provisions of the Iowa Code as set forth in Iowa Code §480A.3, §480A.6, §423B.5 and §423E.3. The Defendant asserts that this is a serious and glaring error.<sup>1</sup> Plaintiff contends otherwise:

A. The Defendant City continues to fail to recognize the limits of its franchise authority granted by Iowa Code §364.2(4) as specifically set out in subsection (e) thereof, to-wit:

“e. The franchise ordinance may regulate the conditions required and the

<sup>1</sup> Referring to law sections not addressed, the Defendant fails to explain to the Court why it has consistently attempted to assert that it alone grants MidAmerican the right to provide electric utilities to the residents of Des Moines. Actually, it is the Iowa Utility Board that has been designated to allow and provide for that regulatory authority. See Iowa Code §476.1 *et seq* and the rules promulgated thereunder. Indeed, under Iowa Code §476.25, the Iowa Utility Board determines who (in this case MidAmerican) has the **exclusive** right and obligation to provide electric service. As a practical matter, when it comes to providing utility franchises, the City is limited, as noted in Iowa Code §364.2(4) only to the ability to “regulate the conditions required and the manner of use”, a general police power. (emphasis added).

manner of use of the streets and public grounds of the city, and it may, for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised.” (emphasis added).

The importance of this section and the word “regulate” is that the **only** power given to the city by the legislature under this section, as it relates to this case, is a power to “regulate”. The franchise agreement can only “regulate” the conditions of use and the manner of use. No matter how the City tries to divert attention by citing to other statutes or other matters, it has been only been granted, in this statute, the power to “regulate” and that is all it can do under this franchise authority. It cannot, therefore, “assess franchise fees upon utilities without limitation as to the nature or amount of the fee” (See Defendant’s assertion in its Brief, page 5). Rather, Iowa law defines that the right to collect a fee as to regulation is limited to “the reasonable cost of inspecting, licensing, supervising, or otherwise regulating an activity may be imposed on those engaging in the activity in the form of a license fee, permit fee, or franchise fee.” *Home Builders Association of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 347 (2002). The Defendant City’s insistence that it has charged the fee in this case for the general raising of revenue demonstrates, beyond dispute of fact and law, that it has violated the law in exacting these fees/taxes from the residents of Des Moines.

B. Iowa Code §364.2(4) relating to the granting of a franchise, was passed by the Iowa legislature in the year 1975. Iowa Code §480A.3 and §480A.6 were not enacted until 1998. The cited portions of Iowa Code §423B.5 and §423E.3 were enacted in the year 1999. Accordingly, none of these statutes were enacted at the same time as Iowa Code §364.2(4). Iowa Code §364.2(4), which is the subject of the franchise authority in this case, was passed and enacted by the legislature long before the other sections were

enacted. As it relates to the issues in this case, those later enacted sections do not modify in any way or amend in any way the provisions set forth in Iowa Code §364.2(4), and the provisions of Iowa Code §364.2(4) were not amended at the time of the passage of either Iowa Code §423B.5 or Iowa Code §423E.3. Accordingly, those cited sections of law do not dictate or demonstrate the correct interpretation of Iowa Code §362.2(4).

C. In response to the Defendant's incorrect citation and reliance, the Plaintiff has addressed each of these sections in the Plaintiffs' Resistance to the Defendant's Motion for Summary Judgment. Plaintiff would refer the Court to that Brief discussion filed November 7, 2005.<sup>2</sup>

2. The Defendant refers to the Plaintiffs' citation to *City of Hawarden v. US West Communications*, 590 N.W.2d 504 (Iowa 1999). Again, Plaintiff asserts that the relevance of the *City of Hawarden* case relates to the fact of the historical and case law definition of "franchise fee". That has also been addressed in the Plaintiffs' Resistance to the Defendant's Motion for Summary Judgment. Plaintiff would refer the Court to that Brief discussion filed November 7, 2005.

3. The Defendant refers to the presumption of validity attaching to an ordinance. The Defendant cites to the cases of *State v. City of Iowa City*, 490 N.W.2d 825, 829 (Iowa 1992)

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<sup>2</sup> Yet, the Defendant itself fails to address several major issues of the Plaintiff's Second Motion for Partial Summary Judgment. For example: the Defendant has not yet addressed the common law difference in Iowa as to "tax" and as to "fee"; nor as to the issue of Iowa Code §364.3(4) which provides a city cannot tax unless specifically authorized to do so; nor that this section of law was passed simultaneously with the passage of the home rule of cities; nor that home rule was passed simultaneously with the passage of Iowa Code §364.2(4) wherein franchise authority was allowed but no authorization was allowed for "taxation" in relation thereto; nor that Iowa Code Chapter 384 sets out a series of provisions as to a city's right to tax, with no mention being made as to authority to tax relating to franchises; and finally, that it is undisputed the City of Des Moines has used its franchise authority to generally raise revenues, not in reference to the regulation and manner of use of the public streets and right of ways.

and *Dilley v. City of Des Moines*, 247 N.W.2d 187, 190 (Iowa 1976). Plaintiff contends that the Plaintiff has in her briefs filed previously in this case correctly, succinctly and clearly analyzed the appropriate statutory and case law references demonstrating the invalidity of the franchise fee portion of the City of Des Moines' electric and gas ordinances.

4. Finally, the Defendant refers to the Plaintiff's use of the words "implied" and "indirectly" as to the authorization for the franchise fees. This language is appropriate and proper under the circumstances of the statutes involved.

A. Iowa Code §364.3(4) does not specifically or directly state that "franchise fees" can be charged by a city. Accordingly "direct" authorization does not exist.

B. However, because of the existence of the regulatory police power and home rule in the State of Iowa, and because the legislature authorized a city to "regulate" the utilities in regard to their use of the right-of-way, the charging of a "franchise fee" is "implied" because, without direct restriction or the withdrawing of that regulatory police power or home rule authority, the cities have that authority. This was discussed and analyzed in Plaintiff's brief submitted in support of Plaintiff's Resistance to Defendant's Motion for Summary Judgment. In other words, the Legislature has "impliedly" authorized the charging of regulatory franchise fees in regard to the franchise ordinance regulation by not restricting or prohibiting that charging for that regulatory fee. Police power and home rule supplies the "indirect" or "inherent" authority. *Home Builders Association of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 347 (2002). The passing of Iowa Code §364.2(4)(f) eight years later indicating that franchise fees can not be charged to the city as a customer, demonstrates legislative restriction of that otherwise inherent authority.

5. Plaintiff believes it would be advantageous to again address the Defendant's attempt to ignore the language used in the ordinances as to the "franchise fee" that is imposed in this case. In regard to the Response to the Plaintiff's Statement of Material Facts, the Defendant has repeatedly asserted that the franchise fee in this case is not imposed and further that it is charged to MidAmerican and not to the customer. Indeed, it appears that the City is even contending that MidAmerican is not obligated under the ordinance to pass the franchise fee on to the customer. That is not the ordinance that has been passed by the City. Specifically the language of the electric and gas ordinances as they actually exist at the present time are as follows:

As to electric:

Section 6. Franchise fee. In consideration of the 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 *there is hereby imposed* upon the Company and, by its acceptance of this franchise, it agrees *that there shall be collected from Company's customers within the corporate limits of the city and remitted by the Company to the city, a franchise fee in an amount equal to three percent (3%)<sup>3</sup> of the gross receipts derived by the Company from the transmission or distribution of electric energy to customers within the corporate limits of the city* (excluding, however, the sale of electric energy to the city) commencing with gross receipts received on or after September 1, 2004, and that the franchise fee may increase to an amount not greater than six percent (6%) upon an additional majority vote of the Des Moines City Council at a duly scheduled City Council meeting after fourteen (14) days advance public notice.

As to gas:

Section 6. Franchise fee. In consideration of the right to construct and maintain such facilities and equipment along, upon, across and under the streets, highways, avenues, alleys, bridges and public

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<sup>3</sup> This is now 5% by resolution. See Plaintiff's Appendix Pg. 9.

places of the city there is hereby imposed upon the Company and, by its acceptance of this franchise, it agrees that there shall be collected from Company's customers within the corporate limits of the city and remitted by the Company to the city, a franchise fee in an amount equal to three percent (3%)<sup>4</sup> of the gross receipts derived by the 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) commencing with gross receipts received on or after September 1, 2004, and that the franchise fee may increase to an amount not greater than six percent (6%) upon an additional majority vote of the Des Moines City Council at a duly scheduled City Council meeting after fourteen (14) days advance public notice.

As to this:

A. The Defendant complains that Plaintiff wrongly asserts the ordinances "impose" the franchise fee on MidAmerican and its customers. Yet, the Court should note that the ordinance says that the fee is "imposed" by the City.

B. The Court should note that the ordinance goes on to state that if MidAmerican agrees to the Ordinance, then the Ordinance specifically requires that 3% shall be collected from the Company's customers and remitted to the City.

C. Plaintiff's positions cannot be more properly supported by the language of the Ordinances.

D. Even so, if one were to read the Ordinances as the Defendant City urges, the "fee" is still imposed for the purpose of raising revenues generally and not in relation to the cost of regulation. That means the fees remain illegal taxes.

### CONCLUSION

Iowa law defines that the right to collect a fee as to regulation is limited to "the reasonable cost of inspecting, licensing, supervising, or otherwise regulating an activity may be

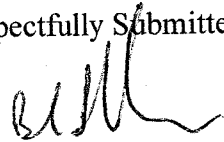
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<sup>4</sup> This is now 5% by resolution. See Plaintiff's Appendix Pg. 1.

imposed on those engaging in the activity in the form of a license fee, permit fee, or franchise fee.” *Home Builders Association of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 347 (2002). The Defendant City’s insistence that it has charged the fee in this case for the general raising of revenue demonstrates beyond dispute of fact and law, that it has violated the law in exacting these fees, a/k/a taxes, from the residents of Des Moines. Plaintiffs respectfully submit that Plaintiffs have established, as a matter of law, that the “franchise fees” imposed by the City of Des Moines are illegal. They are illegal fees/taxes. Plaintiffs respectfully request the Court to declare that these franchise fees are illegal and are taxes and to schedule appropriate hearing for evaluation and determination of damages and other remedies, including injunction, to be entered against the Defendant herein and in favor of the Plaintiff and class members.

Respectfully Submitted,

By:



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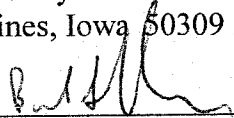
ORIGINAL FILED.

CERTIFICATE OF SERVICE:

Copies of the foregoing have been mailed this 17<sup>th</sup>  
day of November, 2005, to the following;

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

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

By:  \_\_\_\_\_