

IN THE IOWA DISTRICT COURT FOR POLK COUNTY**LISA KRAGNES,****Plaintiff,****vs.****CITY OF DES MOINES, IOWA,****Defendant.****CASE NO. CE 49273****RULING ON MOTION FOR
CLASS CERTIFICATION**

A contested hearing on the plaintiff's motion for class certification was held before the undersigned on November 22, 2005 as previously scheduled. Upon consideration of the arguments made at the hearing, and having reviewed the court file and being otherwise duly advised in the premises, the court rules as follows:

The plaintiff seeks to have certified a class of individuals identified as "all persons, firms, or corporations who have paid a franchise fee, from July 27, 1999 to the present, pursuant to the Gas and Electric Franchise ordinance passed by the City of Des Moines in effect for the applicable period." This is in connection with her claim that the aforementioned fee is illegal and should be refunded to those persons who have paid them during the period in question. The defendant has asserted three objections to the proposed certification: 1) the request is untimely; 2) there has been no opportunity to gather evidence on the issues raised by the request for certification; and 3) certification is unnecessary, in that the defendant cannot afford the plaintiff and the contemplated class the monetary relief requested. The court will take up these objections first, and if necessary, consider the request for certification in light of the criteria set forth in IowaR.Civ.P. 1.262 and 1.263.

Timeliness of request for certification. IowaR.Civ.P. 1.262(1) provides that a hearing on the issue of class certification should take place “as soon as practicable after the commencement of a class action.” It is undisputed that the formal request for such a hearing was not made until October 11, 2005, almost fifteen months after the plaintiff’s petition was filed and less than two months before this matter was initially set for trial.

There are no Iowa appellate decisions construing the “as soon as practicable” language in rule 1.262(1). As this is the identical language which until recently was utilized in the federal class action rule, see Fed.R.Civ.P. 23(c)(1) (2003)¹, federal cases interpreting this rule are particularly helpful. Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 44 (Iowa 2003).

It is clear that the “as soon as practicable” language does not set a definite deadline for seeking class certification. Cases which have analyzed the federal language have allowed certification to be determined several years after the commencement of the litigation, see, e.g., Pyke v. Cuomo, 209 F.R.D. 33 (N.D.N.Y. 2002) (certification allowed more than ten years from start of litigation) or even after a decision on the merits of the claim, see, e.g., Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984). The primary consideration in addressing the timeliness issue in the context of a request for class certification is whether the opposing party has been prejudiced by an otherwise impracticable delay. See Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106, 1111 (8th Cir. 1977), overruled on other grounds, Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (“Furthermore, the general rule is that a delay prior to

¹ Rule 23(c)(1) was amended effective December 1, 2003, and now requires the determination regarding certification to take place “at an early practicable time.”

moving for class action certification is not a basis for refusing certification absent some showing of prejudice.”).

The defendant has been unable to persuade the court that it has been unfairly prejudiced by the manner in which this case has been submitted to this point. The parties jointly elected to submit cross-motions for summary judgments on the legal validity of the plaintiff's claim (i.e., the illegality of the city's franchise fees). Because the parties were granted leave to file dispositive motions less than 60 days prior to trial, the original trial date was chosen to hear the cross-motions, with the understanding that any further proceedings after the court's ruling would be addressed accordingly. The action has been on file now for just less than 18 months. The timing of plaintiff's motion is insufficient to justify a denial of certification on that basis alone.

Need for certification discovery. The defendant argues it is unfair to go forward with certification at this point, as no discovery has taken place on the various criteria on that issue. It neither specifies the nature of this omitted discovery, nor states how it was unable to proceed with such discovery on its own prior to plaintiff's motion for certification. If it felt that certification was problematic, it could have requested limited discovery if it had a particularized need for the information and the requests were not unduly burdensome. See M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635, 637 (D.Mass. 1984). Absent more specific concerns regarding the need for such discovery, this basis is insufficient to deny certification.

Futility of requested relief. The defendant argues that the monetary relief requested on behalf of the class (refunds of any improperly assessed fees) cannot be had by anyone other than MidAmerican Energy, as the entity who charged the fees to the

purported class as its customers. As the plaintiff correctly points out, however, while MidAmerican charged the fees, it in turn passed them on to the defendant. Assuming that a refund of any illegally assessed fees is in order, there is no reason why the defendant, as the entity which received the ultimate benefit of those fees, should not be the one making the refund. The defendant has appeared to have contemplated such a scenario when it passed the franchise fee ordinances in 2004 which state in part, "If a refund to customers is ordered by the Supreme Court in a final non-appealable decision, the city agrees to repay to the Company such fees as are ordered to be repaid." Plaintiff's Exhibits 3 and 4 to Motion for Summary Judgment.

This court has previously ruled that MidAmerican Energy is not an indispensable party to this litigation, in that any information in its possession may be obtained through standard discovery. MidAmerican's presence is neither required to facilitate the compilation of information necessary to see this case through, or to accomplish any monetary relief that may be forthcoming. The defendant remains free to seek the joinder of MidAmerican as a party to foster these goals. However, its absence as a party is insufficient as a basis for denying certification, if otherwise in order. Having addressed the stated objections of the defendant to certification, the court will now address that issue in the context of the requirements of rule 1.262 and 1.263.

To certify a class action, this court must find all of the following: 1) the class is so numerous that joinder of all parties is impracticable; 2) there is a question of law or fact common to the class; 3) a class action should be permitted for the fair and efficient adjudication of the controversy; and 4) the representative parties fairly and adequately will protect the interests of the class. Luttenegger v. Conseco Financial Servicing Corp.

671 N.W.2d 425, 436-37 (Iowa 2003) (citing IowaR.Civ.P. 1.261 and 1.262). The plaintiff has the burden of proving that the purported class meets all these criteria. Id. The plaintiff's burden in this regard has been described as "light." Comes v. Microsoft Corp., 696 N.W.2d 318, 324 (Iowa 2005).

The first two criteria do not appear to be in reasonable dispute. The parameters of the purported class would appear to be vastly greater than the minimum threshold of forty individuals necessary to satisfy the numerosity requirement of IowaR.Civ.P. 1.261(1). Martin v. Arnana Refrigeration, Inc., 435 N.W.2d 364, 368 (Iowa 1989). The court takes judicial notice of the fact that the city of Des Moines had a population of 198,682, with 85,067 housing units, according to the 2000 census. See <http://quickfacts.census.gov/qfd/states/19/1921000.html> (summary of information from U.S. Census Bureau); State v. Proulx, 252 N.W.2d 426, 431 (Iowa 1977) (use of judicial notice of population evidenced by census reports). Based on the definition of the purported class (residents of Des Moines who have been customers of MidAmerican Energy or its predecessors), it is more than large enough to satisfy the numerosity requirement.

In addition, there are also common legal questions that run throughout each of the claims held by the members of the purported class. These include whether the franchise fees in question are appropriate or illegal as taxes, and whether the class members are entitled to declaratory, injunctive or monetary relief.² The only differentiating issue among the purported class members would be the amount of any monetary damages allowed, based on the amount of fees paid, should a refund be allowed. This is

² This court has already ruled on Ms. Kragnes' entitlement to declaratory and injunctive relief after concluding the fees were in fact illegal. Whether Ms. Kragnes is entitled to monetary relief in the form of a refund, and the scope of any relief to the class should certification be granted, remain for the court's consideration.

insufficient in and of itself to preclude certification. City of Dubuque v. Iowa Trust, 519 N.W.2d 786, 792 (Iowa 1994). This element has been satisfied as well.

In determining whether a class action should be permitted for the fair and efficient adjudication of the controversy, the court is required to consider and give appropriate weight to thirteen different criteria found at IowaR.Civ.P. 1.263(1)(a)-(m). While the court is required to make factual findings on the factors so considered, it is not required to make such findings as to each factor. Comes, 696 N.W.2d at 321. Of the factors listed in rule 1.263(1), this court considers those listed in subparagraphs (a), (b), (e), (f) and (g) to have the most relevance to this case. The remaining factors either have little pertinence to this dispute, or none at all.

There is considerable commonality in the proposed class. The interests of each purported class member are identical; they only vary as to the amount of fees collected by the city for the applicable period. If each individual member of the purported were required to fend for themselves in pursuing relief against the defendant, there would be a significant risk of inconsistent adjudications as these individual claims made their way through the trial court system. Because many of these individuals would presumably be eligible to pursue their in small claims court due to the size of their monetary claims,³ there would also be significant issues of whether these varying adjudications would have preclusive effect in later claims. See Khan v. Heritage Property Management, 584 N.W.2d 725, 728 (Iowa Ct.App. 1998) (issue adjudicated in small claims judgment has no preclusive effect in subsequent district court action).

³ It is believed that even the named plaintiff would find herself in this situation had she so chosen, as it is alleged that her individual claim or monetary relief would be approximately \$600, well below the amount in controversy for small claims actions. See Iowa Code §631.1(1) (2005).

These individual claims (which could total into the tens or hundreds of thousands, based on the aforementioned population figures) could quickly overwhelm the defendant and its legal department. Since the legal issues raised by plaintiff's petition are equally applicable to all the potential members of the requested class, it stands to reason that the most efficient way to address these claims in their totality would be to allow them to be adjudicated in a single proceeding which would bind all parties and the members of the class. The amounts, if any, of any monetary relief deemed appropriate could be dealt with through the notice and opt-out provisions of IowaR.Civ.P. 1.266, as well as those rules otherwise pertaining to the conduct and resolution of such an action. See IowaR.Civ.P. 1.268, 1.271, 1.274.

The factors in rule 1.263(1) center on two broad considerations: achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants, both those presently in court and those who are only potential litigants. Comes, 696 N.W.2d at 321 (citing Luttenegger, 671 N.W.2d at 425). For the reasons outlined above, the court concludes that these considerations have been satisfied and that a class action should be permitted for the fair and efficient adjudication of the controversy at hand.

The final consideration for this court is whether the named plaintiff as the proposed representative of the class will fairly and adequately protect the interests of the class. To come to this conclusion, the court must be able to conclude the following: 1) the attorneys for the named plaintiff will adequately represent the interests of the class; 2) the named plaintiff does not have a conflict of interest in the maintenance of the class action; and 3) she has or can acquire adequate financial resources, considering

IowaR.Civ.P. 1.276, to ensure that the interests of the class will not be harmed.

IowaR.Civ.P. 1.263(2)(a)-(c). The determination of whether the class representative will be able to fairly and adequately represent the class has been deemed "perhaps the most significant of the prerequisites to a determination of class certification," in large part because of the need to protect the due process rights of the absent class members. Stone v. Pirelli Armstrong Corp., 497 N.W.2d 843, 846 (Iowa 1993) (quoting Folding Cartons, Inc. v. American Can Co., 79 F.R.D.698, 701 (N.D.Ill. 1978).

The defendant has raised no issues regarding the ability of the attorneys for the plaintiff to prosecute this action, and the court likewise has no concerns in that regard. Present counsel has been able to successfully respond to two dispositive motions filed by the defendant, and has preliminarily convinced this court that the underlying premise for this litigation (i.e., the legality of the defendant's franchise fees) is valid. While present counsel of record is a small firm, they have entered into an agreement with a larger litigation firm to assist in these proceedings. On the whole, they appear to be sufficiently qualified, experienced and able to conduct the litigation as a class action. See In re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d Cir. 1992). Based on the information before the court at present, it finds that counsel for the plaintiff will adequately represent the interests of the class.

Second, nothing has been brought to the court's attention that would indicate that the plaintiff has a conflict of interest if this action were to be maintained as a class action. Her interests vis-à-vis the class members do not appear to diverge, and no one from the prospective class has come forward with any concerns or objections in this regard. There is no close affiliation between the plaintiff and her present counsel that might otherwise

indicate the potential for conflict, especially as pertains to the potential for a settlement that might be less favorable to the class but beneficial to counsel in terms of attorney fees. See Susman v. Lincoln American Corp., 561 F.2d 86, 90-91 (7th Cir. 1977). The plaintiff as the representative party of the purported class does not have a present conflict of interest in the maintenance of the class action.

The final hurdle to certification, the financial resources of the plaintiff, is frankly the most problematic for the court. Nothing regarding the plaintiff's financial condition has been provided to the court. While it is the court's understanding that the plaintiff is employed, it has no information regarding her income and other assets and liabilities such as would allow for a proper examination of this issue. See Stone, 497 N.W.2d at 848. The court is wary of coming to any conclusion regarding the plaintiff's financial wherewithal under these circumstances. This is an especially important consideration, as stated in Stone:

Other than a bare promise, Stone has made no showing as to how she will reimburse her attorneys for litigation expense advancements if she loses. On this point, one court has noted that

“[i]n view of the binding effect on absent class members, courts ought to be especially chary about certifying inadequately resourced plaintiffs as class representatives. Plaintiffs must be able adequately (1) to fund discovery and expert testimony, (2) to resist inadequate settlements that plaintiffs in more exigent circumstances would feel compelled to accept, and (3) to fund ... notices to class members....

....
Other courts are increasingly wary of having class representatives before them who, because of their indigency, are impervious to, and therefore unrestrained by, the prospect of being liable for costs.”


Id. (quoting Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 496, 510 (E.D.Ark. 1980)). The fee agreement submitted by counsel pursuant to Iowa R.Civ.P. 1.276 offers little comfort on this issue. It provides that the plaintiff is exclusively responsible for any and all expenses incurred during the course of this litigation and may be billed periodically for such expenses during the pendency of the litigation. It further provides that in the event she would be unable to pay any interim billing statement for such expenses, the attorney-client relationship would be considered terminated and she would be obligated to reimburse counsel for the time they have expended on the case at the hourly rate of \$500 per hour (\$100 per hour for legal assistant time). While an initial retainer is referenced in the agreement, it is unclear how much, if any, has been paid by the plaintiff for such a retainer.

This lack of financial documentation is particularly troubling to the court for the same reasons as noted in Stone; namely, it leads to the undesirable situation where counsel may acquire a financial interest in the litigation and therefore potentially compromise the interests of the class. Id. at 848-49. While this part of Stone was measured by the predecessor to our current Rules of Professional Conduct, the Iowa Code of Professional Responsibility for Lawyers, id. at 848, and these rules differ on whether advanced expenses must be repaid, compare DR5-103(B) (client must remain ultimately liable for advanced expenses) with Iowa Court Rule 32.1.8(e)(1) (repayment for advanced litigation costs and expenses may be contingent on outcome of matter), the fact remains that if counsel is required to take on the role of litigation financier because of the inability of their client to do so, there is a real risk that such financial considerations could overtake counsel's proper interest in representing the class.

It may be that the plaintiff and her counsel have provided for the financial contingencies addressed in Stone and by the court in this ruling. However, as has been pointed out, nothing has been provided to the court to minimize its concerns in this regard. There will no doubt be considerable expenses that will need to be incurred, should this case be allowed to proceed as a class action. For now, the court is unable to find that the plaintiff has or can acquire adequate financial resources to ensure that the interests of the class will not be harmed if she is allowed to serve as its representative. As a result, she has failed in her obligation to prove that she can fairly and adequately protect the interests of the class, as required by IowaR.Civ.P. 1.262(2)(c).

IT IS THEREFORE ORDERED that the plaintiff's motion for class certification is denied.

Dated this 12th day of January, 2006.



Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:

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