

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al</p> <p>Plaintiff,</p> <p>vs.</p> <p>CITY OF DES MOINES, IOWA,</p> <p>Defendant.</p>	<p align="center">Equity No. 49273</p> <p align="center">PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' RESISTANCE TO DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT ON REFUND ISSUE</p>
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COMES NOW the Plaintiff, Lisa Kragnes, on behalf of herself and all others similarly situated, and respectfully submits this Brief to the Court in support of Plaintiffs' Resistance to Defendant's Partial Motion for Summary Judgment on the refund issue.

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INTRODUCTION

This action focuses a challenge against the City of Des Moines' ordinances that have been enacted to impose a franchise fee/tax upon the residents of the City of Des Moines through the use of MidAmerican Energy Company in the supplying of the utilities of gas and electric to the residents of the City of Des Moines. The franchise fee/tax has been in effect for a number of years. Questions as to its legality and as to whether it is a legal franchise fee or whether it is an illegal tax had not been determined until the previous appeal in this case. As the Iowa Supreme Court in this case concluded in that appeal, the City of Des Moines is only authorized to impose a franchise fee which is reasonably related to the City's administrative expenses in exercising its police powers, including the reasonable cost of inspecting, licensing, supervising or otherwise regulating the activity under the gas and electric franchises at issue in this case. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 642 (2006). At issue and remaining in this case are (1) Determining the amount of the appropriate charges that could have been levied by the City for inspecting, licensing, supervising or otherwise regulating the activity under the gas and electric franchises to MidAmerican Energy, if any; and (2) Upon determining the amount that may be reasonably charged by the City in connection with the gas and electric franchises, a determination will need to be made as to the overage imposed and collected by the City and ordered to be refunded to class members in this case, the payers of said fees. The City claims in this motion for partial summary judgment that even if it is determined that the franchise fees imposed and collected by the City of Des Moines are in excess of the legal amounts authorized under Iowa law, the Plaintiffs are not entitled to a refund of those excess amounts imposed and paid. In doing so, they ignore the obvious facts of this case as well as existing Iowa law.

FACTS

Submitted in the Plaintiffs' Appendix hereto and referred to in the Statement of Material Facts submitted herewith are the franchise agreements as they relate to the supplying of the utilities of gas and electric in the City of Des Moines beginning in 1987, amended in 2004 and again amended (by resolution) in 2005 going through to the present time. As noted, these franchise ordinances have been enacted by the city council for the City of Des Moines. MidAmerican Energy Company, apparently in compliance with what it thought was its obligations under the Iowa Utilities Act, submitted the ordinances requiring franchise fees/taxes to the Iowa Utilities Board for approval to pass along the fee/tax imposed by the City of Des Moines ordinances. MidAmerican is not a defendant in this case.

MidAmerican has in effect tariffs as to both electric and gas, which are on file and approved by the Iowa Utilities Board, which provide that a government imposed fee or tax can, under these circumstances, be added to the bills MidAmerican sends out to its customers. For example, in August, 2004, the Iowa Utilities Board, issued a letter under the signature of a staff member that MidAmerican could pass this City of Des Moines imposed and increased fee/tax on to the customers of MidAmerican in the City of Des Moines, and remit those monies collected to the City of Des Moines. The Iowa Utilities Board in accordance with its standard procedure on these franchise fee/tax matters, did not have a hearing on the issue, did not issue a formal order relating thereto and did not actually determine the validity of the ordinances or the validity of the franchise fees, but merely agreed that the utility could pass this charge along on to its customers

and remit that fee/tax to the imposing governmental authority, in this case the City of Des Moines.¹

As noted previously, the Defendant City of Des Moines enacted these ordinances in relation to MidAmerican Energy Company's franchise for the supplying of utilities of gas and electric to the residents of the City of Des Moines. This is pursuant to its powers under Iowa Code § 364.2(4). In connection with the granting or extension of the franchise, the Defendant City of Des Moines has determined that MidAmerican Energy Company is to collect from its customers, the residents of the City of Des Moines, a "franchise fee" which is calculated as a percentage of the amount of billings each of the customers use of the gas and electric. It is undisputed that MidAmerican Energy is merely a "conduit" for the collection of these funds and submission of these monies to the City of Des Moines. MidAmerican is not allowed to retain any of the monies relating to any of its activities so its revenues are not affected in any way.

Terry Ousley is director of Customer Service in charge of several departments at MidAmerican Energy including, the call center, billing department, credit and collections, and inbound payments. (Ousley Depo p. 5, lines 8-11) (Plaintiffs' App. p. 27). He has testified:

1. MidAmerican Energy has previously received a complaint from a MidAmerican customer concerning the franchise fee charged by the City of Des Moines. (Ousley Depo p.9, lines 20-25; p. 10; p. 11, lines 1-24) (Plaintiffs' App. pp. 28-29).
2. When MidAmerican receives a call concerning the Des Moines franchise fee they attempt to explain what the fee is actually for and then direct the customer to talk

¹ This same procedure was used in 2005 when the Defendant City increased the fee to 5%, via resolution. (Plaintiffs' App. pp. 58-59).

to the City of Des Moines. (Ousley Depo p. 11, lines 2-10) (Plaintiffs' App. p. 29).

3. MidAmerican Energy's role is to "collect the tax and turn it over to the City". (Ousley Depo p. 17, lines 15-20) (Plaintiffs' App. p. 30).
4. MidAmerican's role is quite simply to accurately collect the funds and turn them over to the City. (Ousley Depo p. 18, lines 17-23) (Plaintiffs' App. p. 31).
5. MidAmerican sees the tax that's being imposed on the energy consumer not on MidAmerican. MidAmerican is the collector of the tax on behalf of the City of Des Moines. (Ousley Depo. pgs.19-20) (Plaintiffs' App. p. 31).
6. If a customer challenges the actual validity of the franchise fee through contact at MidAmerican, MidAmerican answers questions regarding the fee as to its source and refer them to the City imposing the fee. (Ousley Depo. p. 21) (Plaintiffs' App. p. 31).
7. There's nothing MidAmerican can do to change, waive or alter the fee being charged or determine if the fee imposed by the City is legal; they simply collect the fee. (Ousley Depo pgs. 21-23) (Plaintiffs' App. pp. 31-32).
8. Although MidAmerican receives partial payments frequently, their system does not readily ascertain whether or not a partial payment has been received to avoid payment of the franchise fee or other taxes. (Ousley Depo. pgs. 19-25; p. 12; p. 13, lines 1-13) (Plaintiffs' App. pp. 31-32, 29).
9. If a customer failed to pay the franchise fee imposed by the City of Des Moines on MidAmerican Energy customers, MidAmerican Energy would continue to bill the customer posting a partial payment received each month to the account

leaving the customer vulnerable to disconnection of his gas or electric utilities.
(Ousley Depo. 27, lines 13-25; p. 28, lines 1-10) (Plaintiffs' App. p. 33).

10. Upon becoming delinquent on MidAmerican billing for gas and/or electric service a delinquency is noted on the bill and thereafter a disconnection notice would be sent as well. (Ousley Depo. p. 31, lines 18-25; p. 32, lines 1-12) (Plaintiffs' App. p. 34).
11. The disconnect notice provides that you must pay the whole bill including the franchise fee to avoid disconnection of gas and/or electric service. (Ousley Depo p. 32; p. 33, lines 1-11; Ousley Exhibit 2) (Plaintiffs' App. p. 34).
12. After the disconnection notice an automated phone call would be made that would mention disconnection if the consumer did not pay their bill in full. (Ousley Depo. p. 33, lines 20-25; p. 34; p. 35, lines 1-4) (Plaintiffs' App. pp. 34-35).
13. If a customer doesn't pay the full amount that's past due their gas and/or electric service would be disconnected. (Ousley Depo. p. 35, lines 12-25; p. 36, lines 1-9) (Plaintiffs' App. p. 35).
14. Threat of disconnection of gas and utility service is effective in compelling payment. (Ousley Depo. p. 38, lines 6-25; p. 39; p. 40) (Plaintiffs' App. p. 36).
15. Customers of MidAmerican Energy need their gas and electric services for their vital daily living needs such as heating their homes, cooking and customers just don't have a choice. (Ousley Depo. pgs. 39-40) (Plaintiffs' App. p. 36).
16. In the winter months typically MidAmerican will also send a company representative to place a door tag on people's homes indicating that payments

must be received by a date certain to avoid disconnection. (Ousley Depo. p. 40, lines 24-25; p. 42; p. 43, lines 1-8; Exhibit 3) (Plaintiffs' App. pp. 36-37).

17. The door tag is utilized to remind customers that they still may be disconnected during a very cold time of year in the event of nonpayment and could be very troubling to a customer and compel payment. (Ousley Depo. p. 42; p. 43, lines 1-4) (Plaintiffs' App. p. 37).
18. On any given day there are more disconnect situations in the City of Des Moines than MidAmerican Energy has resources to actually follow up on and actually disconnect. (Ousley Depo p. 51, lines 19-24) (Plaintiffs' App. p. 39).
19. Upon disconnection it is common that customers come in and make payments to get current and get reconnected to their gas and electric services. (Ousley Depo p. 52, lines 12-22) (Plaintiffs' App. p. 39).

People do not feel as though they have the option to pay their gas and electric bills when they come due. (Kragnes Affidavit, Plaintiffs' App. p. 25). People fail to pay all or part of their MidAmerican Energy bill for gas and electric utilities are subject to disconnection. (Kragnes Affidavit, Plaintiffs' App. p. 25). MidAmerican Energy customers are not in a position to refuse to pay their bill even though they may dispute a portion of their tax levied by the City of Des Moines which is collected through payment of the MidAmerican Energy gas and electric utility bills. (Kragnes Affidavit, Plaintiffs' App. p. 25). Having gas or electric service disconnected is or would be disastrous because they are necessary to heat people's residences and to cook their meals and provide sustenance to their families and interruption of that service. (Kragnes Affidavit, Plaintiffs' App. p. 25).

ARGUMENT

THE PLAINTIFF AND ALL OTHERS SIMILARLY SITUATED ARE ENTITLED TO A REFUND OF THE AMOUNT OF FRANCHISE FEES IMPOSED BY THE CITY OF DES MOINES IN EXCESS OF THE REASONABLE COST OF INSPECTING, LICENSING, SUPERVISING OR OTHERWISE REGULATING THE ACTIVITY UNDER THE APPLICABLE FRANCHISE ORDINANCES.

The City claims in this motion for partial summary judgment that even if it is determined that the franchise fees imposed and collected by the City of Des Moines are in excess of the legal amounts authorized under Iowa law, the Plaintiffs are not entitled to a refund of those excess amounts imposed and paid. In doing so, they ignore the obvious facts of this case as well as existing Iowa law.

1. The law cited by the City is not inconsistent with a refund of the monies to the Plaintiff and the class members.

The City erroneously relies on the decision of *Kraft v. City of Keokuk*, 14 Iowa 86 (1862). In *Kraft*, the Plaintiff applied for and obtained a license from the City of Keokuk to sell liquor for 6 months. *Id.* After obtaining his permit, the Supreme Court determined that the law under which the license was given was unconstitutional and void. *Id.* Thereafter, the Plaintiff in *Kraft* filed an action to recover back the \$200.00 he had paid for the license. The Supreme Court did indeed deny relief to the *Kraft* Plaintiff and held that the act for which Plaintiff sought relief was his own voluntary act. *Id.* However, in doing so the Supreme Court in this 1862 case determined:

“The claim is based on no charge of fraud, duress, deceit or even mistake of fact but is founded alone on mistake in law, unsupported by any principal of conscious, equity or morality; in other words, that the act that the legislature referred to was inoperative and void when paid to the City of Keokuk the \$200.....”

Id. at 86. This vintage case cited and relied upon by the Defendant described valid bases for the grant of a refund for taxes and fees illegally paid and noted that the Plaintiff Kraft was not making a claim under those theories of law but instead claiming under a “mistake of law.”

The City goes onto contend that *Kraft* is good law citing a few of the cases which cite *Kraft* with approval. The City cites *SPV v. Town of Fort Madison*, 14 Iowa 226, 1862 WL 317, *1 1862; *Bailey v. Incorporated Town of Paulina*, 29 NW 418, 419 (Iowa 1886); *Hawkeye Loan and Brokerage v. City of Marion*, 81 NW 718, 720 (Iowa 1900); *Allers v. City of Estherville*, 104 NW 453, 454 (Iowa 1905); *Glonstall v. Van Droth*, 261 NW 638, 640 (Iowa 1935); *Prosper v. Iowa Department of Revenue*, 330 NW2d. 300, 306 (Iowa 1983); 1979 Op. Atty. Gen. 42; 1982 Op. Atty. Gen. 525; 1984 Op. Atty. Gen. 137. These cases do stand for the proposition that voluntary payments made based only on a mistake of law cannot be recovered. However, these cases also reiterate that *in the absence of fraud, deceit, duress or mistake of fact*, payments voluntarily made cannot be recovered back. *Bailey v. Incorporated Town of Paulina*, 29 NW 418, 419 (1886) citing *Kraft v. City of Keokuk*, 14 Iowa 86; *Epsy v. Town of Fort Madison*, 14 Iowa 226 (1862).

The City cites *Winzer v. City of Burlington*, 27 NW 241 (Iowa 1886). In *Winzer*, a refund was ordered for taxes which had been levied by a city in violation of Iowa law. *Id.* Plaintiff’s property was assessed for general and special taxes by the city despite the fact that the property had not yet been subdivided. *Id.* Iowa law, at that time, indicated that taxes could not be levied against properties that were not divided into parcels of 10 acres or less. *Id.* In ordering the refund, the Court noted that there are provisions in Iowa law which require the refund of taxes collected by the treasurer and board of supervisors which were noted as setting a policy favoring refunds in this state, although said statutes weren’t applicable to taxes collected by a city. *Id.* at

243. The Court noted that where the tax is illegal and void and payment was made under protest, it should be refunded.

The City appears to suggest that the case of *Newcomb v. City of Davenport*, 53 NW 232, 232-33 (1892) defeats a refund in this case. In the *Newcomb* case, the Plaintiff paid the sum of \$671.48 that was assessed by the City for the construction of a sewer along a street in which the Plaintiff owned abutting property. The basis of Plaintiff's complaint was that a particular notice had not been given. *Id.* The Court found that, "...the absence of notice is treated, not as a fact for rendering the assessment and levy void, but as an irregularity that might defeat the process proscribed for enforcing the collection of the tax." *Id.* at 232. As such, the Court found that a refund was not authorized and that the notice may have defeated enforcement by the City for the collection of the tax except that the payment was made by the Plaintiff to the City "under protest" and was voluntary in that the Plaintiff was not under duress. The Court explained, "..... the City claimed the money under a color of right. The assessment was illegal and the City had no means of enforcing payment or seizing the personal property of the Plaintiff, or of selling his property and giving anyone a culpable title thereto. Knowing all of these facts, the Plaintiff voluntarily paid the money and cannot now recover it back." *Id.* at 233.

Ignoring the actual distinction annunciated in the *Newcomb* case, the City contends that the franchise fee "is not wholly void." The City argues that the franchise fees in this case "are not illegal taxes but were statutorily permitted." (Defendant's Brief p. 6). However, the City misses the point. As the Court noted in *Kragnes v. City of Des Moines*, 714 NW2d. 632 (Iowa 2006), Iowa Code §364.3(4), "a city may not levy a tax unless specifically authorized by a State law." *Id.* at 641. If a fee charged by a city exceeds the amount necessary to inspect, license, supervise or otherwise regulate the activity it is nothing more than a tax levy which the

legislature has strictly prohibited. *Id* at 641 citing Iowa Code Section 364.3(4). The very issue presented in the present case is: "If after trial the District Court determines that none of the franchise fees are reasonably related to the City's administrative expenses, the Court shall issue the appropriate order disallowing the franchise fees contained in the ordinances. However, if the District Court determines that all or part of the franchise fees are reasonably related to the City's administrative expenses, the Court shall enforce the ordinances up to an amount equal to the fees reasonably related to the City's administrative expenses in exercising its police powers." *Id* at 643. That amount in excess of the administrative expenses specifically defined as the reasonable costs of inspecting, licensing, supervising or otherwise regulating the activity, would be void as being fees imposed as an illegal tax. *Id* at 641.

Lisa Kragnes and all others similarly situated do seek a refund of that illegal portion, i.e. of all or part of the fee that constitutes an illegal tax. An exaction of an illegal tax is not an irregularity but, in law and fact, an illegal tax. The very nature of this claim is that while the City is authorized to collect a "franchise fee" that fee cannot exceed the reasonable cost of inspecting, licensing, supervising or otherwise regulating an activity or it shall be a tax. No where in the Iowa Code is the City authorized to collect such tax and in fact, 364.3(4) prohibits a city from levying a tax unless specifically authorized by a State law. That amount which is in excess of the administrative costs as described above, is illegal and void and must be refunded. None of the cases cited by the Defendant are inconsistent with the Plaintiffs' position that a refund of the illegal portion will be proper.

The City attempts to identify the "exceptions" to the no-refund rule in its brief at pages 5 through 6 of its brief. In doing so, the City relies on *Burlington Northern Railroad Co. v. Board of Supervisors and Adair County*, 418 N.W.2d. 72, 74 (Iowa 1988) for the proposition that a

refund is available when the statute explicitly authorizes a refund. There do exist statutes in Iowa law which provide for refund procedures for certain taxes collected by the state, county and various state agencies. It is also true, that statutes enacted under Iowa law providing for the methodology of tax protest and possible refunds are followed by the Courts and traditionally those public officials whose obligation it is to follow the procedures set forth in Iowa law. However, as the City notes, the Iowa Code is silent on the issue of refunds by municipalities of monies illegally or inappropriately collected. The Iowa Code's silence on the issue of refunds does not demonstrate the unavailability of refunds to the plaintiffs in this case, but instead demonstrates the legislature's intent to allow refunds in the event that such payments are deemed involuntary under applicable Iowa case law. This is consistent with *McQuillin Municipal Corporations* 3rd Rev. Ed. §44.180 which provides: "Although illegally assessed taxes may be recovered whether paid by a compulsory process or not, generally, in the absence of statute there can be no recovery of taxes which have been voluntarily paid, but even where there is no such statute, if the payment is involuntary, a municipal tax that is wrongfully exacted may be recovered."² As the Supreme Court has decided, when the legislature enacts a law it is aware of the existing state of the law and or prior interpretations of similar statutory provisions. *State v. Freeman*, 705 NW2d. 286, 291 (Iowa 2005) cited by *Kragnes v. City of Des Moines*, 714 NW2d. 632 (2006). Considering the long line of Iowa cases discussing the issue of refunds of charges imposed and collected by cities, the analysis is that the legislature was fully aware of cities obligations to under the common law to refund under certain circumstances as discussed hereinafter in this brief.

² The Court should note that the Defendant cites this section of *McQuillin* at page 4 of its brief, but fails to provide the Court with the full quote, thereby perhaps creating a incomplete understanding of the concept.

2. The law of Iowa provides that fees paid on gas and electric services are considered paid under duress and properly to be refunded to the extent shown as illegally exacted and collected.

A. The law.

The City does not address a material holding which is a basic premise of the voluntary payment rule as cited in *Kraft* and which provides that a charge that is levied under fraud, duress, deceit or even mistake of fact. *Kraft v. City of Keokuk*, 14 Iowa 86 (1862). In fact this premise was reiterated and acted upon in 1925 in the controlling case of *Harbeck v. Sioux City*, 202 NW 507 (Iowa 1925). In the *Harbeck* case the Supreme Court stated:

“It is a rule which has often been applied that the payment of money into a public treasury, where the payer is under no other stress or menace than that of a personal action against him for the recovery of such amount, then the payment is voluntary rather than under duress. The appellee relies upon this line of cases.

It is also the rule that where a person or municipality exacts and receives more than is legally due from the payer, while such payer is under the menace of injurious interference with or seizure of his property or person, such payment will not be deemed voluntary. If the payer be menaced only with a personal action against him, he is thereby presented with a sufficient opportunity to test the legality of the demand against him. If he chooses to pay rather than to contest, his payment is deemed voluntary. On the other hand, where the public body has the power of summary procedure such as the power to seize the property or person, or to evict the payer, or to cut off his supply of water, or gas, or of electricity as the case may be, and thereby to effect immediate injury to the payer or to his business, the payer is deemed to stand not in equality with a municipality or other body which makes such demand. The yielding of the payer to a demand under such circumstances is deemed involuntary and a form of legal duress. For cases illustrative of this rule, see the following: *Chicago v. Northwestern Mut. L. Ins. Co.*, 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 L. Ed. 1013; *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062; *Gentry v. Lincoln*, 146 Ill. App. 60.”

202 NW at 507 (emphasis added).

Accordingly, the Iowa Supreme Court has already specifically addressed the issue presented in this case and addressed by the City’s Motion. *Harbeck* specifically recognizes a

“legal duress” exists and the right of refund exists when a municipality, in exacting or receiving more than is legally due from a payer, “*has the power of summary procedure such as to cut off his supply of water or gas or of electricity as the case maybe*.” *Id* at 507. (emphasis added). It also recognizes that having available that power allows the city to be able to “*thereby to effect immediate injury to the payer or to his business*”. (emphasis added). This type of a situation causes a “legal duress” since the payer “*is deemed to stand not in equality with a municipality or other body which makes such demand*. (emphasis added). Since the payer is not deemed to stand in equality with the city, the “*yielding of the payer to a demand under such circumstances is deemed involuntary and a form of legal duress.*”(emphasis added).

B. Application of the law to the facts.

In applying this law to the case at bar it is useful to review the franchise ordinances as passed by the City of Des Moines. The franchise ordinance specifically requires MidAmerican Energy to collect the franchise fees from customers within the city limits of the City of Des Moines. This amount has been 1% through part of the applicable period, 4% though a short period to 5% at the present time. (Plaintiffs’ App. pp. 1, 9, 11, 12, 16, 18, 23, 24, 58, 59). There is no provision in the franchise ordinance that allows a fee payer any form of review or appeal relative to the assessment of the fee. (Plaintiffs’ App. pp. 1-24). It also important to note in the language that there is no procedure by MidAmerican to utilize discretion or otherwise hear appeals from individuals or corporations that contest the fee. (Plaintiffs’ App. pp. 1-24). In fact, as Terry Ousley, the Director of Customer Service for MidAmerican Energy, noted that MidAmerican cannot do anything for a customer that contacts them concerning the fee except to explain the nature of the fee and direct any such customer to the City of Des Moines. (Plaintiffs’ App. pp. 30-31) (pp. 17-18 Ousley deposition). MidAmerican’s role is simply to accurately

collect these funds and turn them over to Des Moines. (Plaintiffs' App. p. 31). (Ousley deposition p. 18).

To this must be added the fact that there's nothing MidAmerican can do to change, waive or alter the fee being charged or determine if the fee imposed by the City is legal; they simply collect the fee. (Plaintiffs' App. pp. 31-32). (Ousley Depo pgs. 21-23). If a customer failed to pay the franchise fee imposed by the City of Des Moines on MidAmerican Energy customers, MidAmerican Energy would continue to bill the customer posting a partial payment received each month to the account leaving the customer vulnerable to disconnection of his gas or electric utilities. (Plaintiffs' App. p. 33). (Ousley Depo. 27, lines 13-25; p. 28, lines 1-10). Upon becoming delinquent on MidAmerican billing for gas and/or electric service a delinquency is noted on the bill and thereafter a disconnection notice would be sent as well. (Plaintiffs' App. p. 34). (Ousley Depo. p. 31, lines 18-25; p. 32, lines 1-12).

The disconnect notice provides that you must pay the whole bill including the franchise fee to avoid disconnection of gas and/or electric service. (Plaintiffs' App. pp. 34, 48). (Ousley Depo p. 32; p. 33, lines 1-11; Ousley Exhibit 2). After the disconnection notice an automated phone call would be made that would mention disconnection if the consumer did not pay their bill in full. (Plaintiffs' App. p. 34). (Ousley Depo. p. 33, lines 20-25; p. 34; p. 35, lines 1-4). If a customer doesn't pay the full amount that's past due their gas and/or electric service would be disconnected. (Plaintiffs' App. p. 35). (Ousley Depo. p. 35, lines 12-25; p. 36, lines 1-9).

Threat of disconnection of gas and utility service is effective in compelling payment. (Plaintiffs' App. p. 36). (Ousley Depo. p. 38, lines 6-25; p. 39; p. 40). This is clearly because customers of MidAmerican Energy need their gas and electric services for their vital daily living needs such as heating their homes, cooking and customers just don't have a choice. (Plaintiffs'

App. p. 36). (Ousley Depo. pgs. 39-40). Even in the winter months MidAmerican will only also send a company representative to place a door tag on people's homes indicating that payments must be received by a date certain to avoid disconnection. (Plaintiffs' App. pp. 36-37, 50-51). (Ousley Depo. p. 40, lines 24-25; p. 42; p. 43, lines 1-8; Exhibit 3). Still, a customer unmistakably understands that gas and electricity can be disconnected even in the winter if the bill is not paid. The coerciveness of this collection effort cannot be denied. It is effective. It is effective due to the essential characteristic of the utility service. It effectively forces customers to make arrangements to pay the bill for the service. Dire consequences are visited upon the customer if he/she fails to respond and pay the bill.

The rationality of the position taken by the Supreme Court in *Harbeck* cannot be challenged. A Court can take judicial notice of the indisputable fact that in the society of today (and even 80 years ago) the essential nature of gas and electric for home and business usage. The residents of the City of Des Moines were subjected, by the City through ordinance, to a fee that was automatically placed upon their gas and electric bills. That fee became part of the bill that had to be paid to MidAmerican. Failure to pay that bill subjects the customer to the threat of disconnection. That threat, at the present time and as in the time of *Harbeck*, is one of sufficient force to constitute legal duress making payment thereof involuntary and compelling a refund to the extent shown as excessive in this case.

3. **The law of Iowa provides that fees paid on gas and electric services are considered not voluntarily paid when paid under a mistake of fact.**

A. **The Law.**

The law in the State of Iowa makes it clear that a taxpayer can recover a refund of illegally paid taxes if the taxpayer paid those taxes due to a mistake of fact. See *Kraft v. City of Keokuk*, 14 Iowa 86 (1862) and *Des Moines Register and Tribune Company v. Iowa Department*

of Revenue, 1984 WL 180951 (Iowa 1984). The residents of the City of Des Moines paid the franchise fee in question based on a mistake of fact. The Court should deny the Defendant's motion for summary judgment on this issue.

Iowa case law and secondary sources on the subject of refunds make it clear that a taxpayer can receive a refund based on a mistake of fact, but not based on a mistake of law. In *Des Moines Register* the Iowa Supreme Court explained that a *mistake of law* cannot form the basis of a refund. *Des Moines Register* at *12. (stating, "Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it back,") The Court defined a mistake of law, "Again, at page 1281, Cooley states: 'A *mistake of law* occurs where a person is truly acquainted with the existence or nonexistence of facts but is ignorant or comes to an erroneous conclusion as to their legal effect, and includes ignorance of the law.'" *Id.* (emphasis added). The negative implication of this statement is that if a person is not, "truly acquainted with the existence or nonexistence of facts" and incorrectly pays a tax based on the lack of this true acquaintance then a refund is appropriate. The Corpus Juris Secundum supports this interpretation stating:

Taxes paid under a mistake of fact are ordinarily recoverable, not being a voluntary payment, at least if such mistake of fact is made by the revenue officers in the form of a statement to the taxpayer or in taking some official action on the correctness of which the latter has a right to rely.

Generally, a "mistake of fact," within the exception to the voluntary payment rule as a bar to a tax refund claim, is such an error or want of knowledge as to a fact, past or present, or such belief in the past or present existence as a fact of that which never existed, or such real and honest forgetfulness of a fact once known, as that the true recollection or knowledge of the fact, or of its existence or nonexistence, would have caused the taxpayer to refrain from making the payment. 85 C.J.S. Taxation § 918.

The aggregate of these statements is that if the taxpayers paid the illegal taxes based on a mistake of fact then a refund is appropriate.

B. Application of Law to the Facts.

The class represented by the Plaintiff paid the franchise fee as the result of a mistake of fact and not a mistake of law. The Supreme Court clarified that a franchise fee is not an illegal tax to the extent that it is not reasonably related to the City's administrative expenses in exercising its police powers, including the reasonable cost of inspecting, licensing, supervising or otherwise regulating the activity subject to the franchise fee. *Kragnes* at 642. The law makes it clear that every person that paid the franchise fee is presumed to know that the franchise fee is legal only to the extent it is reasonably related to the costs of administering gas and electric. That is the question of law. The question of fact is whether the City of Des Moines was collecting a franchise fee that the City had determined was reasonably related to cost of administering the fee. The citizens paying the franchise fee lacked knowledge concerning the City's computation of its costs of administering the electric and gas franchises. The City, even as of today, has not come forward and identified those costs despite being faced with this lawsuit. Without this "true acquaintance" with the facts the franchise fee payer could never make a conclusion concerning the presumed legal standard. The payer could never determine whether to protest the franchise fee without these facts and, therefore, the payment of the franchise fee was due to a mistake of fact, more specifically a "want of knowledge as to a fact," and not a mistake of law. Without the proper facts the payment of this fee could never be characterized as a voluntary payment.

The citizens of Des Moines were entitled to rely upon the City of Des Moines to ensure the franchise fee was reasonably related to the costs of administering the franchise. The CJS

states makes it clear that a taxpayer can recover a refund on the basis of a mistake of fact when the City takes an action and the taxpayer has a right to rely upon the correctness of that action. In this case the City of Des Moines was calculating its franchise fee based on a percentage of the gross revenue of the gas and electric franchise. The taxpayer had a right to rely on the fact the City of Des Moines was setting the percentage in a manner required by law and reasonably related to the costs of administering the franchise. The average taxpayer, even the exceptional taxpayer, does not have the time and wherewithal to audit the City's books to determine the costs reasonably related to franchise fee. The taxpayers' inability to properly audit the City's books means the taxpayers had a right to rely on their elected officials to properly apply the law and perform the calculations in question. In other words, since the City could properly charge a franchise fee, the residents had the right to rely upon the City officials to correctly calculate that fee before assessing it. When it was assessed, the residents were entitled to rely on the belief that the fee was correctly calculated. To the extent that the fee is now shown as excessive, it will be a mistake of fact that the fee was correctly calculated.

The recovery of the franchise fees paid in this case are the type of mistake of fact for which recovery is appropriate. The Corpus Juris Secundum clarifies when a mistake of fact should allow recovery stating, "Recovery will not be allowed where the mistake is made by the taxpayer himself or herself, and is the result of his or her neglect of some legal duty, or where the facts which will show the mistake are within his or her possession or within his or her reach." 85 C.J.S. Taxation § 918. In this case the citizens of the City do not have a legal duty to determine the City's method for calculating the franchise fee or the costs related to the gas and electric franchise. Similarly, the facts that might have demonstrated the mistake of fact are not within the payer's possession or reach because the costs associated with the franchise and the method of

calculating the fee in relation thereto were not available in this case. The previous evidence in this action demonstrated the Defendant's agents may have apparently incorrectly calculated the costs associated with the franchise and upon which the charge was based and instead used the franchise fee for other expenses. *Kragnes* at 643. This sort of mistake of fact on the part of the public authorities and not the taxpayer, namely when the taxpayer does not have a legal duty to obtain the information and the information is not within the taxpayer's possession or reach, is exactly the sort of mistake of fact that allows the recovery of a refund. The Defendant's Motion seeking a ruling otherwise should be overruled.

CONCLUSION

The Defendant City of Des Moines has moved for partial summary judgment on the question of refunds. At this point it is unknown how much, if any, of the franchise fee is going to be determined to be in excess of the amount legally able to be charged. Be that as it may, to the extent any is shown to be excessive, the Plaintiffs contend it was paid by the residents of Des Moines under circumstances that demonstrate both duress and mistake of fact. This suit was filed to stop the duress and to correct the mistake of fact. As such, the sums paid in excess are due to be refunded by the City to the customers. The Court should overrule the present Motion for Partial Summary Judgment.

RESPECTFULLY SUBMITTED



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CERTIFICATE OF SERVICE:

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