

IN THE IOWA DISTRICT COURT  
FOR POLK COUNTY

LISA KRAGNES,	)	Law No. CE 49273
	)	
Plaintiff,	)	DEFENDANT'S SUPPLEMENTAL
	)	BRIEF IN SUPPORT OF ITS
vs.	)	MOTION FOR SUMMARY
	)	JUDGMENT UPON THE ISSUES
CITY OF DES MOINES, IOWA,	)	OF DUE PROCESS AND AGENCY
	)	
Defendant.	)	

**TABLE OF CONTENTS**

**DESCRIPTION**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES.....	2
FACTS.....	4
ARGUMENT.....	4
 BRIEF POINT I	
BECAUSE PLAINTIFF ALREADY HAS RECEIVED AN ADEQUATE PRE-DEPRIVATION REMEDY AND BECAUSE OTHER ADEQUATE PRE-DEPRIVATION REMEDIES EXIST, THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS DO NOT REQUIRE REFUNDS OF EXCESS FRANCHISE FEES TO UTILITY CUSTOMERS.....	4
 BRIEF POINT II	
NO PRINCIPAL/AGENT RELATIONSHIP EXISTS BETWEEN THE CITY AND MIDAMERICAN ENERGY AND EVEN IF IT DID, IT WOULD HAVE NO LEGAL SIGNIFICANCE BECAUSE NOT A SINGLE MEMBER OF THE PLAINTIFF CLASS HAS BEEN SUBJECTED TO DURESS OR COMPULSION FROM MIDAMERICAN ENERGY REGARDING PAYMENT OF FRANCHISE FEES.....	13

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**TABLE OF AUTHORITIES**

<b><u>CASE</u></b>	<b><u>PAGE</u></b>
<u>Benson v. Webster</u> , 593 N.W.2d 126 (Iowa 1999).....	17
<u>Ferguson v. Pilling</u> , 231 Iowa 530, 1 N.W.2d 662 (1942).....	14
<u>Gardin v. Long Beach Mtg. Co.</u> , 661 N.W.2d 193 (Iowa 2003).....	16,17
<u>Garren v. First Realty, Ltd.</u> , 481 N.W.2d 335 (Iowa 1992).....	17
<u>Hagge v. Ia. Dep't of Revenue and Finance</u> , 504 N.W.2d 448 (Iowa 1993).....	5,6,7,8
<u>Harbeck v. Sioux City</u> , 202 N.W. 507 (Iowa 1925).....	20
<u>Hayman v. Ramada Inn, Inc.</u> , 357 S.E.2d 394 (N.C. 1987).....	20
<u>Hogle v. Meyering</u> , 161 Mich. 472, 126 N.W. 1063 (1910).....	15
<u>Hlubeck v. Pelecky</u> , 701 N.W.2d 93 (Iowa 2005).....	21
<u>Kraft v. City of Keokuk</u> , 14 Iowa 86 (1862).....	8
<u>McKesson v. Div. Of Alcoholic Beverages and Tobacco</u> , 496 U.S. 18, 110 S.Ct. 2283, 110 L.Ed.2d 17 (1990).....	6,7,8,9
<u>McLaughlin v. Chicken Delight, Inc.</u> , 321 A.2d 456 (Conn. 1973).....	19
<u>Midwest Check Cashing, Inc. v. Richey</u> , 728 N.W.2d 396, 396 (Iowa 2007).....	10
<u>Pruss v. Ia. Dep't of Revenue</u> , 330 N.W.2d 300 (Iowa 1983).....	4
<u>Ross v. First Savings Bank of Arlington</u> , 675 N.W.2d 812 (Iowa 2004).....	19
<u>Smith v. Shagnasty's, Inc.</u> , 688 N.W.2d 67 (Iowa 2004).....	21
<u>Transform, Ltd. v. Assessor of Polk County</u> , 543 N.W.2d 614 (Iowa 1996).....	5
<u>Wapsie Power and Light Co. v. City of Tipton</u> , 193 N.W. 643 (1923).....	15
<u>Welke v. Wackerhauser</u> , 143 Iowa 107, 120 N.W. 77 (1909).....	14

**STATUTES AND REGULATIONS**

**PAGE**

Iowa Code Chapter 17A ..... 12

Iowa Code § 364.2(4) ..... 13

Iowa Code § 364.2(4)(f) ..... 13

Iowa Code § 422.30 ..... 7

Iowa Code § 480A.1 ..... 14

Iowa Code § 480A.3 ..... 14

IAC 199-6.2 ..... 12

IAC 199-6.3 ..... 12

IAC 199-6.5 ..... 12

IAC 199-6.5(3) ..... 12

IAC 199-6 ..... 12

IAC 199-7.1(6)(a) ..... 12

IAC 199-7.4(10)(d) ..... 12

IAC 199-7.28 ..... 12

IAC 199-19.1(3) ..... 10

IAC 199-19.4(i) ..... 11

IAC 199-19.4(15)(d)(3) ..... 11

**OTHER AUTHORITIES**

Restatement (Second) of Agency § 14 (Comment) ..... 17

Restatement (Second) of Agency, § 387 ..... 15

Restatement (Third) of Agency § 1.02 (Comment) ..... 16

Restatement (Third) of Agency, § 3.04 ..... 13,14

## FACTS

The facts of this case already have been briefed. The facts pertinent to this supplemental brief are that on March 30, 2007, the parties appeared before the court to argue the City's motion for partial summary judgment on the refund issue. The Court raised the issues of due process and agency and gave the parties 10 days to brief those issues.

(NOTE – Because the Court raised the issues, the City is at a prejudicial disadvantage in this briefing process as there is no pleading or other writing which outlines the Plaintiff's defenses in the areas of due process and agency. The City does not know the specifics or even the general contour of either claimed defense and is forced to guess at the same. Should the City guess wrong, in this brief, the City requests the Court grant it additional briefing to respond to unanticipated arguments from the Plaintiff.)

## ARGUMENT

### BRIEF POINT I

**BECAUSE PLAINTIFF ALREADY HAS RECEIVED AN ADEQUATE PRE-DEPRIVATION REMEDY AND BECAUSE OTHER ADEQUATE PRE-DEPRIVATION REMEDIES EXIST, THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS DO NOT REQUIRE REFUNDS OF EXCESS FRANCHISE FEES TO UTILITY CUSTOMERS.**

#### **A. REVIEW OF THE THREE CASES CITED BY PLAINTIFF AT ORAL ARGUMENT**

At the March 30 hearing referenced above, the Plaintiff cited to three cases she said showed that due process considerations would require a refund of any excess franchise fees collected from the plaintiff class. Those cases are: Pruss v. Ia. Dep't of Revenue, 330 N.W.2d 300 (Iowa 1983);

Hagge v. Ia. Dep't of Revenue and Finance, 504 N.W.2d 448 (Iowa 1993); Transform, Ltd. v. Assessor of Polk County, 543 N.W.2d 614 (Iowa 1996).

Upon review, none of the cases require the refund relief sought by Plaintiff.

Pruss came to be when the state denied an income tax refund sought under carry-back loss provisions. The state declared the application untimely under a certain statute. The Supreme Court construed the statute not to apply to carry-back loss provisions and ordered the refund. Pruss, 330 N.W.2d at 303-306.

Perhaps the most interesting aspect of Pruss is that the words "due process" do not appear in the decision.

Transform likewise offers no support for Plaintiff's position.<sup>1</sup> Transform turned upon whether a successful tax protest in an odd-numbered year relieved the taxpayer from making the same protest in the next, even-numbered year. The Supreme court said it did. Transform, 543 N.W.2d at 616-17.

The significant aspect of Transform, as it relates to this case, is that no refund was at issue and that due process was discussed (only at the trial court level) solely in the context of administrative remedy exhaustion. Id. at 616.

The final case cited by Plaintiff, Hagge, does at least talk about taxes and refunds and due process in a context that makes it relevant to our case. Unfortunately for Plaintiff, Hagge stands as support for the City's position.

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<sup>1</sup> The undersigned has more than a passing familiarity with Transform as he represented the Polk County Assessor in the suit. Transform, 543 N.W.2d at 614.

Hagge arose when a retired federal worker sought a refund of income taxes on his federal pension that he paid to Iowa. He sought the refund after the U.S. Supreme Court said, in another case, that states could not tax federal pensioners while exempting state pensioners. The trial court ordered the refund and the Iowa Supreme Court affirmed. Hagge, 504 N.W.2d at 450-453.

But just because federal retiree Hagge received a refund does not mean that utility franchise fee payer Kragnes will receive a refund. Indeed, the teachings of Hagge are that Ms. Kragnes will not receive a refund. That is because, unlike Mr. Hagge, Ms. Kragnes has available to her adequate pre-deprivation remedies, making a refund unnecessary under notions of due process. Id.

Hagge relies primarily upon McKesson v. Div. Of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2283, 110 L.Ed.2d 17 (1990). There, liquor distributors challenged a Florida excise tax which gave preferential treatment to beverages manufactured from Florida crops and then bottled in Florida. Because there was no adequate, pre-deprivation relief available to the out-of-state taxpayers, and because there were no equitable considerations mitigating against a refund, the Supreme Court ordered the refund. McKesson, 496 U.S. at 32-47.

The McKesson court began its analysis by noting that the fundamental requirement of the Due Process clause is notice and an opportunity to be heard before deprivation of property. Id. at 36-37. The Court then noted that Florida required its liquor distributors to tender their taxes “*before their objections are entertained and resolved.*” Id. at 38 (italics original). Because there was no meaningful pre-deprivation remedy, said the Court, due process could be satisfied by a post-deprivation remedy of a refund. Id. at 51.

A meaningful pre-deprivation remedy, said the court, would provide for the withholding of payment while the validity of the assessment is litigated. Id. at 38.

The McKesson Court also found that while equitable considerations could obviate the due process need for a refund, those considerations were not met there. Id. at 46-48.

In Hagge, the Iowa Supreme Court followed the lead of the U.S. Supreme Court in McKesson and Mr. Hagge got his refund. Hagge, 504 N.W.2d at 450-52. He got it because:

Within the more customary channels for protesting tax assessments, the department cites neither statute nor administrative rule that would permit taxpayers to “withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.” McKesson, 496 U.S. at 37, 110 S.Ct. at 2250, 110 L.Ed.2d at 36. To the contrary, for the tax years relevant to Hagge’s amended returns, Iowa’s tax code required any person disputing an assessment to pay “all tax, interest and penalty pertaining to the disputed assessment *prior to the commencement of the contested case*” or post a bond in a comparable amount. Iowa Code § 421.8A (1987) (emphasis added). We note that the statute was struck down as unconstitutional in Schroeder, 458 N.W.2d at 604, and ultimately repealed, *see* 1990 Iowa Acts. Ch. 1232, 22. But we are convinced that, by McKesson standards, tax payment in Iowa continues to be less “voluntary” than “under duress.” *See* McKesson, 496 U.S. at 38 n. 21, 110 S.Ct. at 2251 n. 21, 110 L.Ed.2d at 37 n. 21 (taxes paid in order to avoid financial sanction or seizure of real or personal property are paid under “duress”; payments tendered under a system that permits taxpayers to withhold contested tax assessments and challenge their validity in a predeprivation hearing are “voluntary”).

Id. at 451.<sup>2</sup>

The Hagge court also considered and rejected equitable considerations offered by the State. The State said it would be unfair to order the state to refund a big sum when only little sums were involved individually.<sup>3</sup>

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<sup>2</sup> The posting of a bond is still required in income tax protests. See: Iowa Code § 422.30. Ms. Kragnes did not post a bond in this case and the City did not request she do so.

<sup>3</sup> The City does not make such an argument here.

**B. THE INJUNCTION THAT PLAINTIFF RECEIVED TO KEEP FROM PAYING HER FRANCHISE FEES IS EXACTLY THE PRE-DEPRIVATION REMEDY MANDATED BY HAGGE AND McKESSON**

Before we begin our analysis of why Ms. Kragnes is not entitled to a refund under Hagge, we must determine if Hagge applies at all. The City does not believe that Hagge is applicable to the case at bar for a multitude of reasons.

First and foremost, we must remember that the Plaintiff already has received her pre-deprivation remedy.

She asked for and received an injunction regarding her utility franchise fee payments. The teachings of Hagge and McKesson are redundant and unnecessary as to Ms. Kragnes. There is nothing Hagge can do for her that she has not already done for herself. Plaintiff is not paying the franchise fee while she litigates its validity. This is the exact remedy that both McKesson and Hagge say negates the need for a refund. Because she has stayed her payment, she has received a pre-deprivation remedy and the requirements of the Due Process Clause have been met as to her. No refund is necessary. McKesson, 496 U.S. at 32-43; Hagge, 504 N.W.2d at 450-52.

Second, the taxes at issue in both Hagge and McKesson were discriminatory on their faces. They intentionally favored one group over another. That Hagge applies only to discriminatory tax/fee cases can be inferred from the fact that it does not overrule or even modify the no-refund line of cases found in Kraft v. City of Keokuk, 14 Iowa 86 (1862) and its progeny.

Third, as a result of the discriminatory nature of the tax in McKesson, the Court then refused to allow equitable considerations to obviate any refund. McKesson, 496 U.S. at 47. But the court gave strong indication that a non-discriminatory tax would be treated differently. The

court said:

In any event, however, we reject respondents' premise that "equitable considerations" justify a State's attempt to avoid bestowing this so-called "windfall" when redressing a tax that is unconstitutional because discriminatory. In *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859 (1934), we enforced a statutorily created pass-on defense in a refund action designed to redress a tax overassessment. Comparing such an action to one in assumpsit for "money had and received," we affirmed the Federal Government's power in this equitable action to withhold the amount that the taxpayer had already passed on to others, on the theory that the taxpayer ought not be "unjustly enriched" by his recovery from the Government after he has already "recovered" his losses through the pass-on. We observed that if the taxpayer "has shifted the [economic] burden [of the tax] to the purchasers, they and not he have been the actual sufferers and are the real parties in interest," *id.*, at 402, 54 S.Ct., at 449, and he ought not receive a windfall for their injury.

*But petitioner does not challenge here a tax assessment that merely exceeded the amount authorized by statute; petitioner's complaint was that the Florida tax scheme unconstitutionally discriminated against interstate commerce. The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-à-vis competitors distributing preferred local products.*

McKesson, 496 U.S. at 47-48 (italics added).

Of course, the primary equitable consideration here is synonymous with the main policy reason behind the general rule of no refunds. The Court will recall that policy reason from the City's earlier brief – no refund is given because the citizen cannot refund the services she received for the taxes or fees she paid.

In its essence, this argument is exactly the same as the equitable/unjust enrichment argument examined in the McKesson quote above. If Plaintiffs are awarded a refund in this case,

they will be unjustly enriched. They will be unjustly enriched because they will have received the services in return for the fees they paid initially AND they will then receive the fees back.

In McKesson, the equitable considerations did not apply because the discriminatory nature of the tax placed some taxpayers at a competitive disadvantage vis-à-vis other taxpayers. Id. But in our case, all utility customers are on equal footing and the equitable consideration of unjust enrichment should prevail.

Thus for the three reasons outlined above, the City does not feel that Hagge applies to this case. But, even if it does, it changes nothing. If Hagge's requirement of a pre-deprivation remedy is necessary here, then that requirement is satisfied by the comprehensive administrative scheme that allows utility customers to withhold payment of a portion of their utility bill while discussing the same with, first, the utility and then, second, with the Iowa Utilities Board. The analysis is the same under state and federal due process law. Midwest Check Cashing, Inc. v. Richey, 728 N.W.2d 396, 396 (Iowa 2007).

**C. ANOTHER, ADEQUATE, PRE-DEPRIVATION REMEDY IS AVAILABLE THROUGH THE IOWA ADMINISTRATIVE CODE.**

Should Plaintiff need yet *another* pre-deprivation remedy, that remedy is found in the Iowa Administrative Code. It begins with the defining of 'complaint' as a "question by . . . a utility customer . . . alleging a wrong, grievance, injury, dissatisfaction, illegal action or procedure, dangerous condition or action, or utility failure to fulfill an obligation. IAC 199-19.1(3)<sup>4</sup> (underline added).

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<sup>4</sup> IAC 199-19 deals with services supplied by Gas utilities. IAC 199-20 is exactly the same in content and numbering as it deals with services supplied by electric utilities. In the interest of brevity only § 199-19 will be cited here.

The remedy continues in IAC 199-19.4(i). There, the utility is required to tell its customers, in each bill, how to complain to a utility. In addition, the customers are told that if they can't resolve the complaint with the utility, they can seek assistance from the utilities board. Id.

Also, each customer must receive a summary of rights and responsibilities approved by the board. IAC 199-19.4(15)(d)(3). A standard form is prescribed. Id.

The standard form provides:

1. What should I do if I receive a notice from the utility that says my gas service will be shut off because I have a past due bill?
- e. Tell the utility if you think part of the amount shown on the bill is wrong. However, you must still pay the part of the bill you agree you owe the utility. (See #5 below).
5. What should I do if I believe my bill is not correct?

You may dispute your utility bill. You must tell the utility you dispute the bill. You must pay the part of the bill you think is correct. If you do this, the utility will not shut off your service for 45 days from the date the bill was mailed while you and the utility work out the dispute over the part of the bill you think is incorrect. You may ask the Iowa Utilities Board for assistance in resolving the dispute. (See #9 below).

9. Is there any other help available besides my utility?

Disputed bill. If the customer has received notice of disconnection and has a dispute concerning a bill for natural gas service, the utility may require the customer to pay a sum of money equal to the amount of the undisputed portion of the bill pending settlement and thereby avoid disconnection of service. A utility shall delay disconnection for nonpayment of the disputed bill for up to 45 days after the rendering of the bill if the customer pays the undisputed amount. The 45 days shall be extended by up to 60 days if requested of the utility by the board in the event the customer files a written complaint with the board in compliance with 199 – Chapter 6.

Id.

Chapter 6 of Section 199 of the IAC is entitled "Complaint Procedures." It provides that anyone can file a complaint about any utility matter passed upon by the IUB. IAC 199-6.2. The utility has 20 days to respond. IAC 199-6.3. If the customer is dissatisfied, a formal complaint procedure can begin. IAC 199-6.5. If the Board refuses to accept the formal complaint, resort can be had to administrative appeal under Iowa Code Ch. 17A. IAC 199-6.5(3). Once the complaint is docketed, the procedures of 199-7 apply. IAC 199-6.6. The proceedings under Ch.7 apply to discontinuance of service issues. IAC 199-7.1(6)(a). The complainant can request expedited proceedings. IAC 199-7.4(10)(d). If the complainant is unhappy with the ultimate decision, a stay can be requested while a 17A appeal is pursued. IAC 199-7.28.

Then, of course, all the due process safeguards of 17A are available as well. *See: generally: Iowa Code Ch. 17A.*

In short, Ms. Kragnes has a pre-deprivation remedy available to her through the code and the administrative code. But, really, that remedy is merely a redundancy. As the undisputed facts of this case exist, Plaintiff already has received her pre-deprivation remedy.

There is no statute that forbids enjoining the payment of the utility franchise fees at issue as there was in McKesson and Hagge. Plaintiff sought an injunction. Plaintiff got an injunction. Plaintiff has her pre-deprivation remedy in hand. Her due process rights are protected. She is entitled to no refund.

## BRIEF POINT II

**NO PRINCIPAL/AGENT RELATIONSHIP EXISTS BETWEEN THE CITY AND MIDAMERICAN ENERGY AND EVEN IF IT DID, IT WOULD HAVE NO LEGAL SIGNIFICANCE BECAUSE NOT A SINGLE MEMBER OF THE PLAINTIFF CLASS HAS BEEN SUBJECTED TO DURESS OR COMPULSION FROM MIDAMERICAN ENERGY REGARDING PAYMENT OF FRANCHISE FEES.**

### **A. THE CITY DOES NOT HAVE THE CAPACITY TO BE A PRINCIPAL**

A principal can only be a principal if capacity to act as a principal exists. In other words, the principal must be able to do for itself what it would have its agent do for it. If the principal cannot do what the agent is doing, then no principal/agent relationship exists. This concept is embodied in the Restatement (Third) of the Law of Agency, § 3.04 (Capacity to Act as a Principal), which states:

(1) An individual has capacity to act as a principal in a relationship of agency as defined in § 1.01 if, at the time the agent takes the action, the individual would have capacity if acting in person.

An examination of the statutes governing utility franchises in Iowa reveals that the City cannot be a principal in the franchise relationship, because the City cannot do what MidAmerican Energy does as far as collecting the fee from its customers.

The ability of a City to confer a utility franchise is contained in the Iowa Code. Iowa Code § 364.2(4). That same statute gives the City the power to assess a franchise fee upon a franchised utility. Iowa Code § 364.2(4)(f).

But the fee itself can be recovered by the City only from the utility, not from the utility customers.

The general assembly finds that it is in the public interest to define the right of local governments to charge public utilities for the

location and operation of public utility facilities in local government right-of-way.

Iowa Code § 480A.1, and:

A local government shall not recover any fee from a public utility for the use of its right-of-way, other than a fee for its management costs.

Iowa Code § 480A.3.

By law, the City can only charge the franchise fee to the public utility. Iowa Code § 480A.1. By law, the City can only recover the franchise fee from the public utility. Iowa Code § 480A.3. Therefore, by law, the City cannot be the principal (and MidAmerican cannot be the agent) because the City cannot charge or recover the franchise fee from MidAmerican's customers, only the utility can do that. In other words, the City lacks the capacity to be a principal in this scenario because it cannot perform the acts that MidAmerican performs in charging and collecting the fees from the Plaintiff Class. Restatement (Third) of Agency § 3.04.

Iowa courts have not had occasion to visit the Third Restatement, but they are in accord with its teachings on capacity. A principal without capacity is not a principal at all. Ferguson v. Pilling, 231 Iowa 530, 533, 1 N.W.2d 662, 663 (1942) [If principal loses capacity to act, agent is not authorized to act]; Welke v. Wackerhauser, 143 Iowa 107, \_\_\_\_\_, 120 N.W. 77, 78-79 (1909) [weak minded principal lacked capacity to ratify acts of agent].

The City lacks the capacity to charge or recover the franchise fees from MidAmerican customers. Therefore, the City cannot be a principal and MidAmerican cannot be its agent in this regard.

**B. IN THE UTILITY FRANCHISE RELATIONSHIP THE CITY CANNOT BE THE PRINCIPAL BECAUSE THE STATE IS THE PRINCIPAL AND THE CITY IS ACTING AS ITS AGENT.**

In the previous brief point we examined those sections of the Iowa Code that have the legislature giving cities the right to enter into franchise agreements with, and assess franchise fees upon, utilities. There can be no question that the state retains an abiding interest in utility franchises and utility occupation of municipal rights-of-way throughout the state.

That interest is so significant that Iowa courts have recognized that it is the state that is the principal, and the City its agent, in the utility franchise granting arena:

We have recognized that there is a clear distinction between the granting of a franchise to a corporation and the making of a contract by the city for the purchase of any product such as water, gas, or lights which the city may itself distribute to its inhabitants. In *State v. Railway*, 159 Iowa, 259-281, 140 N.W. 437, 446, we said:

“In the granting of franchises for the use of its streets and highways by street railways, waterworks, electric light, and telephone or other public service companies, a city is not ordinarily acting in a private or proprietary capacity or as a corporation for pecuniary profit, but as an instrumentality of government acting as an agent for the state in a sovereign capacity. Its franchise is in effect a grant from the state, and by all the authorities is to be interpreted as such. In contracting with water companies for water for fire or other purposes, and with electric light companies for lighting its streets and in other such matters, it is acting in a private and proprietary capacity, and the rule for which counsel contend is generally held applicable to such cases. This distinction is pointed out in many cases, and is bottomed upon fundamental and axiomatic principles.”

Wapsie Power and Light Co. v. City of Tipton, 193 N.W. 643, 646 (1923).

The law will not permit a person to act in the dual capacity of principal and agent in the same transaction. Hogle v. Meyering, 161 Mich. 472, \_\_\_\_\_, 126 N.W. 1063, 1068 (1910); Restatement (Second) of Agency, § 387, [“Unless otherwise agreed, an agency is subject to a duty

to his principal to act solely for the benefit of the principal in all matters connected with his agency.”]. Nothing in the record of this case shows any agreement between the state (as principal) and the City (as agent) which would allow the City to also act as a principal.

As such, no principal/agent relationship exist between the City and MidAmerican Energy.

**C. THE CITY CANNOT BE THE PRINCIPAL, AND MIDAMERICAN ENERGY CANNOT BE ITS AGENT, BECAUSE THE CITY LACKS THE NECESSARY ELEMENT OF CONTROL OVER MIDAMERICAN'S ACTIONS TO BE A PRINCIPAL.**

The number and nature of legal relationships between people and entities is myriad. Employers hire employees. Owners engage independent contractors. Franchisors contract with franchisees. And as we begin our analysis of this franchisor/franchisee relationship we must remember:

Many common legal relationships do not by themselves create relationships of agency as defined in § 1.01. These include relationships between suppliers and resellers of goods or property, franchisors and franchisees, lenders and borrowers, and parent corporations and their subsidiaries.

Restatement (Third) Agency, § 1.02, comment.

In Iowa an agency relationship exists when:

. . . there is (1) a manifestation of consent by one person . . . that another . . . shall act on the former's behalf and subject to the former's control and (2) the consent of the latter to so act.

Gardin v. Long Beach Mtg. Co., 661 N.W.2d 193, 199 (Iowa 2003).

The burden of proving the existence of the agency relationship falls squarely upon the person asserting its existence. Id.

And most importantly:

The key to determining whether an agency relationship exists is the

principal's right of control.

Gardin, 661 N.W.2d at 199. Put another way:

The agency relation results if, but only if, there is an *understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts*. It is the element of continuous *subjection* to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements.

Restatement (Second) of Agency § 1 cmt. B. (1958) (emphasis added). Thus, implied in any agency relationship is the notion that the principal exercises some type of control over the agent in performance of the act to be done and that the agent agrees to be subject to that control.

Benson v. Webster, 593 N.W.2d 126, 130 (Iowa 1999) (italics original). The right to control exists before the agent acts and when the agent acts. Restatement (Second) Agency, § 14, comment.

In this case we begin by looking at the franchise agreements because an agency relationship is typically created by contract. Garren v. First Realty, Ltd., 481 N.W.2d 335, 337 (Iowa 1992).

The first thing one notices about the franchise agreements in Plaintiff's Appendix (Pages 1, 6, 9, 16) is that none of them purports to create a principal/agent relationship. The City is not called a principal. MidAmerican Energy is not called an agent.

The second thing one notices about the franchise agreements is that they are lacking contract language that one would expect to find in almost every instance if a principal/agent relationship was in the contemplation of the parties.

No provision is made in the franchise agreements for the payment of taxes.

No provision is made for the purchase of insurance or the naming of additional insureds.

No provision is made for indemnity.

No provision is made for subrogation.

And the final thing one notices about the agreements is that they are virtually silent on the necessary element of continuous control as well. In the franchise agreements there is no control over MidAmerican in the following areas where one would anticipate control if the parties intended an agency relationship. Those areas include:

- (1) No provision as to how MidAmerican is to collect the franchise fees.
- (2) No provision as to when MidAmerican is to collect the fees.
- (3) No provision as to what to do with the fees between collection from customers and payment to City.
- (4) No provision for maintenance of records by MidAmerican.
- (5) No provision for logging franchise fee complaints.
- (6) No provision for dealing with franchise fee complaints.
- (7) No provision for an audit by the City of fees collected.
- (8) No provision for the means of collection if fee not paid.
- (9) No provision for the timing of collection if fee not paid.
- (10) No provision for utility disconnect if fee not paid.
- (11) No provision for means of utility disconnect if fee not paid.
- (12) No provision for timing of utility of disconnect if fee not paid.

In sum, there is not a scintilla of evidence that the City is a principal and MidAmerican its agent. Above are a dozen critical issues in the franchise fee arena. As to each and every issue, MidAmerican decides whether to proceed. As to each and every issue, MidAmerican decides how

to proceed. As to each and every issue, MidAmerican decides when to proceed. As to each and every issue the City has no control whatsoever.

A review of the entire deposition of Mr. Ousley will lead to the same conclusion. The City has absolutely no control over the disconnect process (which hasn't happened) if someone should refuse to pay the franchise fees (which hasn't happened). If a customer refused to pay a franchise fee, MidAmerican would deal with it according to MidAmerican collection policy and procedure. The City would have no input or control. The City would not even be notified. (See: Ousley Depo. generally, App. 26-51).

Likewise, if MidAmerican were to initiate utility disconnect procedures, MidAmerican would do so according to its policies and procedures. Again, the city would have no input or control. And again, the City would not even be notified. Id.<sup>5</sup>

By analogy, other franchise cases are instructive as to the lack of a principal/agent relationship between franchisor and franchisee.

In McLaughlin v. Chicken Delight, Inc., 321 A.2d 456 (Conn. 1973) a vehicle owned by a fast food franchisee killed Plaintiff's decedent. The estate sought to assert an agency relationship between the franchisee's driver and the franchisor. The franchisor controlled many areas of the fast food operation. But it did not control the means or method of chicken delivery, said the Court, so no agency existed. Id. 321 A.2d at 458-460.

In our case, if a MidAmerican vehicle on its way to place a sticker on the door of a customer who had not paid a franchise fee was involved in an accident, a similar result would attach.

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<sup>5</sup> Where a person collects money for another, and the person has tremendous discretion as to the means and method of collection, then there is not enough control to confer jurisdiction on the collector. Ross v. First Savings Bank of Arlington, 675 N.W.2d 812, 819 (Iowa 2004).

Because the City has absolutely no control over the driver or the collection process, no agency relationship would exist.

In Hayman v. Ramada Inn, Inc., 357 S.E.2d 394 (N.C. 1987) a motel guest sued a franchisor for injuries she received on a franchisee's premises. The court said that because the franchisor did not have control over the day-to-day operations of the hotel, the franchisor was not liable as a principal. Id. 357 S.E.2d at 396-98.

If a MidAmerican customer went to MidAmerican headquarters to discuss a franchise fee, and slipped and fell while there, a like result would follow. The City has no control over MidAmerican and can't be its principal.

**D. EVEN IF MIDAMERICAN IS AN AGENT FOR THE CITY, IT MATTERS NOT AS NOT ONE SINGLE UTILITY CUSTOMER HAS BEEN DISCONNECTED FOR FAILURE TO PAY THE FRANCHISE FEE, NOT ONE SINGLE CUSTOMER IS IN THE PROCESS OF BEING SO DISCONNECTED AND NOT EVEN ONE CUSTOMER HAS BEEN THREATENED WITH SUCH DISCONNECTION.**

As previously briefed and argued, Plaintiff's allegation in this area is pure speculation.

Plaintiff's claim is that MidAmerican is an agent for the City. Plaintiff claims this satisfies the element which requires summary *government* action before a refund of taxes or fees.

But even if MidAmerican is the City's agent, it matters not. The reason it doesn't matter is that, as previously briefed and argued, MidAmerican does not have a summary utility disconnect procedure resulting in immediate damage as required by Harbeck v. Sioux City, 202 N.W. 507 (Iowa 1925).

The Plaintiff's suit was filed in July of 2004. We are now more than 2 ½ years into the litigation. As MidAmerican informed, it would take about two years for a utility customer in Des

Moines to get disconnected for failure to pay the franchise fee. (Ousley Depo., P.57, L.5-23, App. 40).

And yet, 2 ½ years into the litigation, not one single customer, out of the thousands and thousands of customers in Des Moines, has been disconnected for failure to pay a utility franchise fee. Not one single customer is even in the 2-year disconnect pipeline. The Plaintiff cannot even point to a place in the record where a single customer has been threatened with disconnection for failure to pay the utility franchise fees.

Neither the City nor its agent (if any) has threatened anyone with anything. Plaintiff's attempt to claim to the contrary is pure speculation, and summary judgment cannot be defeated by 11th-hour resort to the same. Speculation is not sufficient to generate a genuine issue of fact for purposes of defeating a motion for summary judgment. Hlubeck v. Pelecky, 701 N.W.2d 93, 96 (Iowa 2005). Likewise, an inference drawn from the summary judgment record is not legitimate if it is based upon speculation. Smith v. Shagnasty's, Inc., 688 N.W.2d 67, 72 (Iowa 2004).

### **CONCLUSION**

Plaintiff's due process claims are illusory. She already has received the adequate pre-deprivation remedy of injunctive relief. Other pre-deprivation remedies are available through the administrative process.

Plaintiff's agency claims are likewise illusory. In addition, they are irrelevant. The City does not have the capacity to be a principal in this instance. The law holds that the City is instead an agent for the state. Even if the City had the capacity to be a principal, it lacks all indicia of the necessary element of control. And finally, it would not matter if MidAmerican was an agent of the City's as, in this record, MidAmerican has not coerced any utility customer into paying a franchise

fee.

The Plaintiff is not entitled to a refund of utility franchise fees paid, even if those fees are higher than the City's cost of regulating the utility. As such, the City is entitled to summary judgment on the refund issue.

Mark Godwin  
Mark Godwin  
Deputy City Attorney  
City Hall  
400 Robert D. Ray Drive  
Des Moines, IA 50309-1891  
Telephone: 283-4564  
Fax: (515) 237-1748  
ATTORNEY FOR DEFENDANT  
CITY OF DES MOINES

Original Filed.

Copy to:

Honorable Don C. Nickerson  
Judge, Fifth Judicial District

Mr. Brad Schroeder  
Hartung & Schroeder LLP  
Equitable Building, Suite 100  
608 Locust Street  
Des Moines, IA 50309  
ATTORNEY FOR PLAINTIFF

**PROOF OF SERVICE**  
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of attorneys of record herein at their respective addresses disclosed on the pleadings on 4-11-07  
By:  U.S. Mail       FAX  
 Hand Delivered       Overnight Courier  
 Federal Express       Other:  
Signature Diane Rascoe