

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES, )  
 )  
 Plaintiff, ) Equity No. CE 49273  
 )  
 vs. )  
 ) TRANSCRIPT OF PROCEEDINGS  
 CITY OF DES MOINES, IOWA, )  
 )  
 Defendant. )  
 )  
 )  
 )

**COPY**

The above-captioned matter came on before the Honorable Don C. Nickerson, Judge of the Fifth Judicial District of Iowa, commencing on the 30th day of March 2007, at the Polk County Courthouse, Des Moines, Polk County, Iowa.

APPEARANCES

Plaintiff by: BRAD SCHROEDER  
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 Des Moines, Iowa 50309

Defendant by: MARK GODWIN  
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## P-R-O-C-E-E-D-I-N-G-S

1  
2 THE COURT: Let's start with, the Supreme Court  
3 said that this Trial Court should, first of all, determine  
4 the classification question -- what the classification  
5 question is.

6 Has the class been certified?

7 MR. GODWIN: The class has been certified but not  
8 notified.

9 THE COURT: Okay. But it wouldn't be notified  
10 unless this litigation proceeds on.

11 MR. GODWIN: Well, it could be notified at any  
12 time. The plaintiffs have chosen not to notify, as of yet.

13 THE COURT: Well, practically speaking, unless this  
14 matter proceeds to trial --

15 MR. GODWIN: Oh, notification is important. You've  
16 got to find out who wants to opt out, first of all.

17 MR. SCHROEDER: I think it's clear from the rules  
18 there wouldn't be an opt out in this case.

19 THE COURT: Regardless of what you guys think, I  
20 want to resolve the motion for summary judgment first  
21 because I think that either allows the case to go forward or  
22 it doesn't go forward.

23 So I'll hear from you, Mr. Godwin.

24 MR. GODWIN: First of all, I'd like to report to  
25 the Court and Plaintiff what we've heard regarding

1 timetable.

2 I gave everybody some numbers, and we've gone back  
3 and forth, and they haven't worked out, and for that I  
4 apologize.

5 What happened was, we've hired three experts to  
6 look at various aspects of costs. One of those expert's job  
7 is to take all of the costs and then allocate them among the  
8 utilities -- that's Springsted, Incorporated out of  
9 Minneapolis, St. Paul.

10 They ran out of -- into trouble with the  
11 compatibility of our software that does payroll and  
12 benefits, which is called PeopleSoft -- apparently it  
13 doesn't work well with other computer programs. It's  
14 incredibly hard to filter.

15 They've hired two separate programmers -- special  
16 programmers they brought in to make the data crunchable, in  
17 terms of their programs and their computers. My  
18 understanding is the second guy was able to figure it out.  
19 The draft report is being written this week.

20 I had contact with him yesterday afternoon. The  
21 draft report is being written in a week. Some overhead  
22 costs are being finalized. They hope to get the draft to us  
23 the week of April 23rd, that's the draft.

24 Some questions will have to be answered. We'll  
25 have a meeting with them and then the counsel will get the

1 final report, hopefully, two to four weeks after the draft  
2 report. At the point it may be available to the plaintiff,  
3 it may push our timetable back. Right now we're set to go  
4 at the end of October. And I've already said we have no  
5 argument if they want to push it back farther because of the  
6 delay.

7 MR. SCHROEDER: Judge, the only thing I would say,  
8 at this point we're not in support of pushing this back.  
9 We've had many discussions about getting a trial date as  
10 soon as possible. They wanted to push it back to October in  
11 the middle of last year when we started talking with you.

12 At this point we're not in support of pushing the  
13 trial date yet. Let's see what they've got when they've got  
14 it and let's go from there.

15 THE COURT: Certainly if the parties can be  
16 prepared on the present trial date, I have no problems, but  
17 I suspect that there's going to be a round of depositions  
18 and back and forth type discovery, so I would place it on  
19 the parties -- it's incumbent upon the parties to work  
20 together, to work cooperatively and efficiently together to  
21 maintain the current trial date.

22 Now let's talk about your arguments, Mr. Godwin.

23 MR. GODWIN: Thank you, Your Honor.

24 As you saw, our facts are pretty short; there's  
25 only two of them. We think that they're the only two points

1 that are material to the issue today.

2 Plaintiff has claimed that the gas and electric  
3 franchise fees are illegal taxes which should be refunded;  
4 that's taken right out of her plea. And the Iowa Supreme  
5 Court has held that the franchise fees at issue are not, in  
6 fact, invalid franchise fees. That's why we're here.

7 If you look, there are cross-motions for summary  
8 judgment. The plaintiff said they are illegal, we said they  
9 are not. The plaintiff prevailed at the trial court level.  
10 The Supreme Court reversed on appeal and said the City does  
11 have authority to assess the franchise fee. And because the  
12 Iowa Supreme Court specifically found that at least some of  
13 the fee was justified by the City's expenses in regulating  
14 utilities in the right of way, it is a question of how much,  
15 not if.

16 That's all we're here for today is how much.  
17 That's what this case is about now, not if, how much.  
18 That's why we're here.

19 If the plaintiff had been successful, we wouldn't  
20 be making this motion. The fact that we're here means the  
21 franchise fees are valid, that's our first point.

22 As to their facts, Your Honor, we don't really, I  
23 don't think, dispute any of them that they say are in  
24 dispute. A couple of them aren't valid summary judgment  
25 evidence because they're not admissible.

1 I'd like to point out that paragraph 5 of their  
2 facts makes reference to an appendix that doesn't exist --  
3 or a page that's -- 100 or something, that's a citation;  
4 same for paragraph 10 of their facts. They both reference  
5 an appendix well into the hundreds and I don't think that  
6 exists here.

7 Paragraph 12 of their facts, Your Honor, talks  
8 about the one complaint that was received. They don't tell  
9 the whole story of all the thousands and thousands of bills  
10 that have gone out since this case was filed in July of '04.

11 I think one person complained one time on one  
12 monthly bill about a franchise fee. It was paid in full  
13 later and that person never complained again. That is the  
14 extent of complaints regarding the franchise fee in the  
15 entire history that MidAmerican keeps.

16 Paragraph 18 of their facts is pure speculation,  
17 Your Honor. It begins with the word "if," which is a tip-  
18 off and is not admissible. Anything in there is not  
19 admissible in a summary judgment motion.

20 Paragraphs 29 and 31, likewise, are pure  
21 speculation. They concern the affidavit of a named  
22 plaintiff, Lisa Kragnes, and she talks about paying  
23 franchise fees. She is the only person in the City of  
24 Des Moines who doesn't have to pay franchise fees.

25 THE COURT: Tell me about the injunction.

1 MR. GODWIN: Originally Judge Huppert enjoined all  
2 franchise fees. Later sua sponte he removed that  
3 injunction, except for Ms. Kragnes, because he felt the  
4 Court didn't have any jurisdiction over the other class  
5 members because it had not been certified at that point.

6 So for her to write about franchise fees is  
7 irrelevant. And to the extent she speaks for others is  
8 hearsay. She doesn't pay them and for her to talk about  
9 others not paying them is not right and pure speculation.

10 Your Honor, there are four policy reasons, we feel,  
11 that say why fees or taxes that are paid to the government  
12 later found to be unwarranted are not refunded.

13 The first is a common sense kind of thing. If you  
14 pay money to the city or the county or the state, you get  
15 something back from it, eventually you get a service back.  
16 You pay a franchise fee to the City of Des Moines and your  
17 house gets burgled, the police come and they respond; the  
18 snowplow comes and moves the snow from in front of your  
19 house when it snows whether they want you to or not.  
20 There's all kinds of services the City provides and that all  
21 comes from a general fund. Whether or not you ask for them,  
22 you receive them.

23 If you were to ask for a refund of your fees back  
24 the City will say, "Okay. How are you going to pay us back  
25 for the services we've already provided?" The fact is, you

1 paid the fees to the City and the citizens cannot refund the  
2 services from the City, so it makes no sense for the City to  
3 refund the money. The money, unwarranted when collected,  
4 was still spent for a valid government purpose. And there's  
5 been no allegation to the contrary in this case.

6 The second reason for arguing against refunds of  
7 taxes or fees paid to the government, later found to be  
8 unwarranted, is the old maxim, ignorance of the law is no  
9 excuse. If you don't know what you're doing is wrong, the  
10 burden is on you to rectify that mistake, you the taxpayer.  
11 That's what the law says, that's the law today.

12 The third reason is kind of related to the first  
13 reason, Your Honor, and it's another common sense reason,  
14 and it simply says, hey, look at what you're doing here.  
15 Your taxpayers have paid money in on a tax or fee. Some of  
16 that tax or fee is found to be unwarranted and you're going  
17 to give a refund now.

18 Guess what? You're going to tax the taxpayers to  
19 pay them back the money they paid you in the first place?  
20 Kind of feels circular and it doesn't make much sense. It's  
21 paid into the government and going back out in the form of  
22 services to the citizens.

23 And finally, Your Honor, the fourth reason is --  
24 has to do with government budgeting. I know that you've  
25 been responsible for a budget at the U.S. Attorney's Office

1 before. You know how difficult that can be at the federal  
2 level. At the state level, we're the next lowest on the  
3 totem pole, at the City it's even harder for a number of  
4 reasons, not the least of which is we are on the lowest end  
5 of the totem pole.

6 In 2002 it's kind of cast in stone. We certified  
7 the budget to the legislature. They said, "Oh, that \$5  
8 million we gave you last year, just kidding. We have a \$5  
9 million hole in our budget and we need it."

10 We scrambled. It would be made more difficult if  
11 every tax and every fee were subject to litigation and a  
12 refund at the end of that litigation. How would cities  
13 bond? How would cities plan if every tax and every fee up  
14 on challenge might be subject to refund? It would be very,  
15 very hard for municipal governments to do. That's the  
16 fourth reason.

17 There are exceptions to the no refund rule. First  
18 is statutory and doesn't apply here, but there are -- like  
19 property taxes. The State says if it's paid, in error, to  
20 much, you're entitled to a refund; that doesn't apply here.

21 The second is common law, and it provides that if  
22 the tax or fee is absolutely void or wholly wanting and paid  
23 under compulsion, you're entitled to a refund. We think  
24 those two things need to go hand in hand. It has to be  
25 wholly unauthorized or wholly wanting and paid under

1 compulsion.

2 And finally, the last one is mistake of fact, and  
3 we'll address those in order.

4 We know, first of all, that the franchise fee is  
5 not absolutely void or wholly wanting because we're here in  
6 court today. If it was wholly void, they would have won  
7 their summary judgment motion, so that one's gone.

8 It's not wholly wanting, it's not absolutely  
9 void -- we'll address the compulsion issue as well -- that  
10 fails for two reasons, we think.

11 First, we don't believe the plaintiff can meet any  
12 of the four elements necessary to claim the defense. And  
13 second, we feel that the defense is not a -- factually  
14 based. The elements come from the *Harbeck* case that the  
15 plaintiff says is the controlling case in the compulsion  
16 refund issues.

17 There must be an express threat from a public body  
18 to exercise a summary procedure to cause immediate injury.  
19 Those are the four elements out of *Harbeck*.

20 In *Harbeck*, the Commissioner of Public Safety  
21 directly and expressly threatened the plaintiff that his  
22 popcorn stand wouldn't be opened if he didn't pay the extra  
23 money that the Commissioner was demanding. In all of the  
24 four or five cases cited in *Harbeck*, the same thing  
25 happened. The government directly threatened the individual

1 with summary action causing immediate injury. Here we don't  
2 have that, Judge. Nobody has threatened anybody with  
3 anything, least of all the City of Des Moines.

4 THE COURT: Let me stop you there because you  
5 mentioned the agency -- and I'm going to give you a chance  
6 to address that matter because I'm sure it's going to come  
7 up.

8 MR. GODWIN: It hasn't been briefed, so I'll ask  
9 for a supplemental brief.

10 THE COURT: And I'll give you that time, as well as  
11 any other issue that has not been briefed.

12 MR. GODWIN: If you look at the franchise  
13 agreement, Your Honor, it is a contract between the City and  
14 MidAmerican Energy. And the contract supports the case law  
15 which calls for franchise agreements not agency agreements.  
16 They're contracts. There's -- nowhere in there does it say  
17 that MidAmerican is the agent for the City. The City has  
18 never claimed that MidAmerican is its agent. And to our  
19 knowledge, MidAmerican has never claimed to be a an agent of  
20 the City.

21 Mr. Harvey, whose deposition does appear in this  
22 record, did not claim to be an agent of the City in any way,  
23 shape, or form. Some of the representatives of  
24 MidAmerican -- I'm not so sure they're here. We have no  
25 control over them, none. It's a contract. We can't fire

1       them. The committee can't do away with this thing. This  
2       agreement is good until 2015 or 2022, I forget the end date.  
3       It's a contract that can't be terminated.

4               THE COURT: Why would you want to terminate them if  
5       they collect the fees and pay the City? You wouldn't want  
6       to terminate them.

7               MR. GODWIN: Well, if that's the only factors to  
8       consider, I agree. I don't know if there's any others down  
9       the road. Maybe another energy company comes in and wants  
10      to do business and we want to terminate that agreement,  
11      that's entirely possible. There's a lot of facts that could  
12      happen.

13              When you say -- sure, if all we're considering is  
14      what's going on right now, yeah, we probably wouldn't. And  
15      the case law is filled with cases of terminated franchises,  
16      so it has happened, the cities do terminate franchises, they  
17      don't get renewed, things like that. But I just -- nobody  
18      has ever said they were an agent, they never claimed to be,  
19      we don't want them to be. We're not giving them any  
20      compensation for this and they're not being paid anything.  
21      It's just a contractual relationship.

22              One of the things they agreed to do was collect the  
23      franchise fee. Some of the things we agreed to do was give  
24      them the right of eminent domain for condemning rights of  
25      way for nonpublic rights of way for their gas and electric

1 lines. It was an arm's-length transaction, consideration on  
2 both sides, not an agency agreement in any way, shape, or  
3 form, but we'd be happy to brief it.

4 THE COURT: I would like you to, because when I  
5 take a look at an agency agreement under Iowa law, the  
6 wording of the agreement itself has to be compared alongside  
7 the conduct of the parties. And if one party, being the  
8 principal, has control over the secondary party or the  
9 subordinate party, and the principal consents to the actions  
10 undertaken by the subordinate party on behalf of the  
11 principal, that can be compared alongside the franchise  
12 agreement, so I do want you to brief that issue.

13 MR. GODWIN: We will. But, Your Honor, even if  
14 there is an agency agreement, we don't think it's going to  
15 affect summary judgment in this case.

16 THE COURT: Real fine.

17 MR. GODWIN: The second element from *Harbeck*, after  
18 the expressed threat from public bodies, to exercise a  
19 summary procedure -- well, if you've had occasion to read  
20 Mr. Ousley's deposition, you will see that it is not a  
21 summary procedure that leads to anybody being disconnected  
22 for failure to pay their gas or electric franchise fee.

23 First of all, it's never happened. Nobody --  
24 MidAmerican can't point to one person -- the plaintiff can't  
25 point to one person and say this person was disconnected

1 because they failed to pay a franchise fee. As far as  
2 MidAmerican knows, nobody has. It hasn't happened. It's  
3 pure speculation at this point. The entire compulsion  
4 argument is pure speculation. It hasn't happened. And pure  
5 speculation cannot be grounds for summary judgment for  
6 reversing -- from precluding summary judgment.

7 Mr. Ousley testified that the company, MidAmerican  
8 Energy, goes through a number of procedures before they  
9 actually do disconnect somebody. They start with a letter,  
10 they might follow up with a letter, they put a placard on a  
11 door. And he testified that in Des Moines, if somebody  
12 didn't pay their franchise fee, it would probably take up to  
13 two years to disconnect them; hardly a summary procedure,  
14 hardly an immediate injury, which is the fourth element  
15 under *Harbeck*, but that's not the whole story.

16 What Mr. Ousley says is, there are a number of  
17 guarantees to utility customers found in the Iowa  
18 Administrative Code and the Iowa Code. 476.20, I think, of  
19 the Iowa Code talks about how the Iowa Utilities Board is to  
20 establish rules for a utility disconnection.

21 In Iowa Administrative Code section 199, 19 and  
22 20 -- 19 has to deal with gas, 20 has to deal with electric,  
23 and they have discontinuance procedures -- there is -- the  
24 bill must tell the customer to contact the IUB if you have a  
25 complaint to resolve, contact the Utilities Board.

1 Further, you can pay part of your bill and not pay  
2 part of your bill; you could pay the gas and electric charge  
3 and not pay the franchise charge, and you can tell the  
4 utility, "I'm not paying you. I want to talk to you about  
5 it," and we can't cut you off for 45 days. Check that cite.

6 Then you can take your same complaint to the  
7 utilities board and you can buy another 60 days before  
8 you're cut off. Hardly a summary procedure. That was 105  
9 days right there.

10 If you can't resolve the complaint, then you can  
11 start a contested case before the Utilities Board. And the  
12 Court is familiar -- you have the full panel of procedure  
13 rights, administrative appeal and further chance for appeal  
14 to the Supreme Court, all the processes; hardly a summary  
15 procedure.

16 199.6 and 199.7, in addition to 199.19 and 20, have  
17 some of the things we just talked about, the complaint  
18 procedure before the Utility Board.

19 We need to look at the language from *Harbeck*,  
20 Your Honor, the case the plaintiffs rely on. It says, "If  
21 the payer be menaced only with a personal action against  
22 him, he is thereby presented with a sufficient opportunity  
23 to test the legality of the demand against him."

24 That's what we have here. All the customer has to  
25 do is say, "I got a problem," and start the process; and

1 it's not summary and it's not immediate.

2 The second reason -- in addition to not being able  
3 to meet any of the elements, the second reason that the  
4 compulsion issue won't work is that it's just not factually  
5 based. We've already touched on that, Your Honor. It's  
6 purely speculative.

7 Nobody has been disconnected, nobody is in the  
8 process of being disconnected. As far as this record  
9 reflects, it just isn't happening and it's pure speculation  
10 that it might happen. We're in this now for coming up on  
11 three years. Certainly with the time cycles since  
12 Mr. Ousley's deposition two years ago, there should have  
13 been disconnects already, but it's not happening.

14 If you look at the franchise agreements themselves,  
15 Your Honor, Section 8 of each agreement is kind of  
16 interesting. What it says is, MidAmerican Energy has to  
17 remit to the City the franchise fees it collects, period.  
18 It doesn't compel MidAmerican to collect those that people  
19 refuse to pay or don't pay. It doesn't compel them to pay  
20 off their utilities. It doesn't compel them to do anything.

21 All it does is compel the agreement to pay to the  
22 City the franchise fees it collects from its customers,  
23 that's all. So to the extent of being an agent, we're  
24 certainly not making them do it, that's for sure.

25 As to the mistake of fact, Your Honor. If you

1 start with the petition in the plaintiff's case, you see  
2 that she never claimed any kind of mistake of fact there.  
3 You look at her affidavit that's in the appendix in this  
4 case. She doesn't claim a mistake of fact there.

5 In her brief what she says, this is page 21, "The  
6 citizens paying the franchise fee lacked knowledge  
7 concerning the City's computation of its costs of  
8 administering the electric and gas franchises."

9 And we've cited at least one case, and I think  
10 several in our brief, that directly and simple say, lack of  
11 knowledge is not a mistake of fact. Lack of knowledge is  
12 lack of knowledge, it's not a mistake at all. It's just you  
13 didn't know something.

14 Further, Your Honor, this case is filed in equity.  
15 Typically, cases involving mistakes of fact are filed at  
16 law; not always, but typically. This is the first time  
17 we've heard "mistake of fact" out of the plaintiff's mouth  
18 in three and a half years. Never once, anywhere along the  
19 line, did they say "I made this mistake of fact." And it's  
20 still not clear, other than what they're saying is lack of  
21 knowledge. All they're saying is, "we didn't know." That's  
22 not a mistake, that's just simply a lack of knowledge.

23 For those reasons, Your Honor, we think there is no  
24 refund that would flow to Plaintiff and we think summary  
25 judgment is appropriate in that regard.

1 THE COURT: Mr. Schroeder.

2 MR. SCHROEDER: Thank you, Judge.

3 Judge, from our standpoint -- I know the Court has  
4 some other questions, and we'll get into those as well.

5 From our standpoint, we think this motion before  
6 the Court can really be decided on one key issue, and that  
7 is, Judge, when you look at the average utility customer in  
8 the City of Des Moines, the average homeowner, does that  
9 homeowner really have a choice about whether or not they are  
10 going to choose to pay their utility bill on a monthly  
11 basis, pay their gas and electric bill, and all attendant  
12 tax and surcharges, franchise fees, or do they really have  
13 another choice?

14 Do they really have the choice to simply refuse gas  
15 and electric service coming into their home going forward?  
16 Are there huge stockpiles around the City of coal and  
17 woodpiles to rely on in their homes to do their cooking and  
18 cleaning and heating?

19 The City would have you believe that there is no  
20 duress. They can say, "You don't need gas and electric  
21 service." We submit to you, in 2007, that is not a viable  
22 option, that is not a real choice.

23 THE COURT: Let me ask you this. What would we  
24 have if we had a mismatch of people choosing coal, choosing  
25 wood, choosing solar? How would the City run its government

1 if people had choices to that extent?

2 MR. SCHROEDER: I agree with you, Judge, that would  
3 be more difficult, that gets at the very issue of choice.

4 They don't have this choice right now. This is  
5 duress. They don't have an alternative.

6 We need MidAmerican. That's who they've chosen to  
7 get gas and electric from in this city. That's who people  
8 need to rely on. We submit that the City's argument here is  
9 to be followed, you know, that there are a bunch of other  
10 issues we're going to have to get into today.

11 Our position is, if you look solely at this issue  
12 of whether there's effective meaningful choice, we think  
13 that it becomes clear that this is a duress-type situation.  
14 And as we look at the case law from start to finish, as we  
15 look at the *Kraft* case, *Harbeck*, and its progeny, we see  
16 that there is no effective choice. This is a duress-type  
17 situation and, therefore, refund is appropriate.

18 Judge, I do want to address an issue of facts as  
19 dictated by the City in this case. Mr. Godwin indicates  
20 that they do only list two in their statement of material  
21 facts, and that's correct. We would certainly take  
22 exception to their characterization of issue number 2,  
23 though.

24 Judge, they say the Iowa Supreme Court has held  
25 that at issue are not illegal taxes but instead are

1 statutory franchise fees, which the City is empowered to  
2 assess and collect. Absolutely not. Absolutely not. That  
3 is not what that Court held. It's not what the ruling says.

4 What the Court said, Judge, is just what we've been  
5 maintaining throughout, which is, the City cannot do what it  
6 has historically done, which is simply charge the fee for  
7 general revenue purposes. As this case developed, they made  
8 no qualms about saying that's exactly what they were doing.

9 The Supreme Court fully and wholeheartedly  
10 supported our position on appeal. They said that they  
11 absolutely cannot do what they've been doing, if that's what  
12 they've been doing; and the City said that's what they've  
13 been doing.

14 What the Supreme Court did was let the City off the  
15 canvass, they gave them another bite at the apple. They  
16 said, "Okay. Even though what you've been doing is illegal,  
17 is wrong, if you can go back now and justify some portion of  
18 the fee that you've been charging, we'll let you keep it."  
19 And that's what the next stage of the proceeding is, Judge.  
20 They did not say that what the City has been doing is legal,  
21 exactly the opposite.

22 To the extent that future proceedings -- they are  
23 charging more than they can justify, they're exceeding their  
24 cost for regulating activity under the gas and electric  
25 service, that portion of the fee is wholly illegal, it's

1 wholly void, and we fully expect that after we get to the  
2 next stage of the proceedings and those numbers are  
3 established, Judge, that it will become what portion of that  
4 fee is, in fact, wholly void and wholly illegal. That's  
5 what the Supreme Court's ruling said, in our estimation.

6 THE COURT: Can I stop you there?

7 MR. SCHROEDER: You bet.

8 THE COURT: Mr. Godwin, I read the last page in  
9 *Kragnes*; that's reverse with directions to this Court as  
10 being consistent with what Mr. Schroeder just told me.

11 MR. GODWIN: Partially, Your Honor, I agree. But  
12 at the same time, their position from the git-go was this  
13 franchise fee is void. Okay. And that's what Judge Huppert  
14 held, this franchise fee is void.

15 And the Supreme Court said, "No, it's not void,  
16 because the City has costs it incurs in regulating the  
17 presence of utilities in the right-of-way." The franchise  
18 fee is not void. It's only a question of how much. That's  
19 why we're here. If it was void we wouldn't be here.

20 THE COURT: But they're not continuing the claim  
21 that the franchise fee --

22 MR. GODWIN: They haven't amended their position.

23 THE COURT: What's that?

24 MR. GODWIN: They haven't amended their position,  
25 they're still continuing to claim it.

1           THE COURT:  Practically speaking, I've got the  
2 responsibility to carry out what the Supreme Court has asked  
3 me to do.  And the way I see what my charge is, I need to  
4 decide what portion of the fee is devoted to maintenance,  
5 inspection, and the other items in legitimate police power  
6 authority.  And we have a determination on any other charges  
7 that are in excess of the police power authority, do you not  
8 agree?

9           MR. GODWIN:  Yes.  But I think the case law is  
10 clear, that we briefed already, if you charge a tax or a  
11 fee, and you're allowed to charge that -- and we're  
12 certainly allowed to do that --

13          THE COURT:  I know you're allowed.

14          MR. GODWIN:  -- and if you charge too much, it's  
15 not wholly void or wholly wanting under the case, as we've  
16 cited.  If we weren't allowed to charge a franchise fee and  
17 charged it, that would be wholly void and wholly wanting.

18          If we had a franchise fee and no costs associated  
19 with regulation, it would be wholly void and wholly wanting;  
20 those aren't the facts.

21          We have a franchise fee that is valid.  We don't  
22 know the extent of its validity, but that's not important  
23 for this motion.  The fact that it's valid saves it from  
24 refund; that is our contention and that's what the case law  
25 says.

1 THE COURT: I better understand your point now.

2 I'm sorry, Mr. Schroeder. I just like to get all  
3 these things in my mind simultaneously.

4 MR. SCHROEDER: On that point, Judge, we would just  
5 argue to the Court that there's no difference between just a  
6 little bit illegal and wholly illegal. If after the next  
7 stage of this proceeding the Court determines that the City  
8 has been exceeding its scope of authority in charging and  
9 collecting these fees, that portion which has exceeded the  
10 scope of its authority is wholly illegal, not just a little  
11 bit illegal. There's no distinction to be made. It either  
12 is or isn't.

13 It's like you're pregnant or you're not, there's no  
14 in between, So I think it's really splitting hairs. For the  
15 City to void, it wouldn't be kind of void and kind of  
16 illegal, there's no distinction, Your Honor. It would be  
17 them exceeding what their costs are for gas and electric; it  
18 would be illegal, period.

19 THE COURT: You're saying that's the starting point  
20 for me?

21 MR. SCHROEDER: Absolutely, absolutely.

22 THE COURT: Real fine.

23 MR. SCHROEDER: If I may go back to *Kraft* for a  
24 little bit, which Mr. Godwin cited and is well briefed  
25 before the Court.

1           *Kraft vs. City of Keokuk*, 14 Iowa 86 (1862).

2 They're already talking about in that case no refund where  
3 there's no fraud, duress, deceit, or mistake of fact.

4 Obviously, as the Court is aware, we're arguing both duress  
5 and misstatement of facts, so we're arguing from those rules  
6 from *Kraft*.

7           THE COURT: Tell me about the duress.

8           MR. SCHROEDER: Judge, as a practical matter, it  
9 is -- this is Judge Huppert's word -- "In fact, it is  
10 disingenuous for the City still to be standing here in front  
11 of this Court saying today that MidAmerican is doing this,  
12 this is not us." They've made that argument from the get-go  
13 and nobody has bought it, and I don't expect anybody will,  
14 Judge.

15           The record is replete with instances where the  
16 Supreme Court, for example, page 635 of the *Kragnes* decision  
17 says, this is a city -- the role of MidAmerican is simply to  
18 collect the fee. This is the City's action, this is not  
19 MidAmerican." But at every turn the City has been raising  
20 its arms saying, "Whoa. Not us, MidAmerican."

21           You know what? If you're charging the fee, you  
22 should at least stand up and say, "Yeah, this is us doing  
23 it. We are behind this," and be honest about it and be  
24 forthright about it.

25           The deposition we took of Mr. Terry Ousley, which

1 Mr. Godwin mentions -- at page 19 onto page 20.

2 "Question, you're just sort of the conduit --

3 "Exactly," Mr. Ousley of MidAmerican says.

4 " -- through which the fee passes?

5 "Uh-huh, yes.

6 "So is it more accurate to say this is a fee that's  
7 imposed on the customers of MidAmerican?

8 "Answer, yes.

9 "And then once that decision's been made by the  
10 City of Des Moines, MidAmerican's job is simply to collect  
11 it; is that correct?

12 "Correct.

13 "Does MidAmerican at any stage have any say so, to  
14 your knowledge, in the amount of the fee or whether --

15 "Answer, no, no say.

16 " -- it's a fair fee?

17 "No.

18 "That's not something you --

19 "We have no say in that, that I know of.

20 "Question, you're not in a position to challenge  
21 that --

22 "Answer, no."

23 Judge, this is the City who's imposing this thing  
24 on that issue of agency. For them to come before the Court,  
25 for them to say that it's somebody else doing it is not only

1 disingenuous, as Judge Huppert pointed out, it's -- we know  
2 who's behind this thing.

3           There really is no effective choice that an  
4 individual homeowner in the City has about whether they get  
5 gas or electric service. Mr. Ousley told us in the  
6 deposition that this is a summary proceeding, when we're  
7 talking about disconnects. It's summary in that if you  
8 don't pay you will be disconnected.

9           If you want to stay in your home, continue to care  
10 for your family in your home, and you decide you don't want  
11 to pay, if it's just the franchise fee -- the whole bill  
12 based on objection of franchise fee, you will be  
13 disconnected. It's simply a matter of time. There's really  
14 no effective choice, Judge.

15           As we look at, also, Judge, this issue of duress,  
16 obviously we got a look at *Harbeck*, the 1925 case, which  
17 Mr. Godwin got into. *Harbeck*, we believe, is a controlling  
18 case; it's good law; it controls in this case. It complies  
19 with the due process requirements of the Iowa Constitution,  
20 of the U.S. Constitution. It, Judge, obviously sets out in  
21 further detail what our standard is on this issue of duress.

22           Mr. Godwin cited a little bit of that language.  
23 "It is also the rule that where a person or municipality  
24 exacts and receives more than is legally due from the payer,  
25 while such payer is under the menace of injurious

1 interference with or seizure of his property or person, such  
2 payment will not be deemed voluntary. If the payer be  
3 menaced only with a personal action against him, he is  
4 thereby presented with a sufficient opportunity to test the  
5 legality of the demand against him. If he chooses to pay  
6 rather than to contest, his payment is deemed voluntary.  
7 On the other hand, where the public body has the power of  
8 summary procedure such as the power to seize the property or  
9 person, or to evict the payer, or to cut off his supply of  
10 water, or gas, or of electricity as the case may be, and  
11 thereby to effect immediate injury to the payer or to his  
12 business, the payer is deemed to stand not in equality with  
13 a municipality or other body which makes such demand. The  
14 yielding of the payer to a demand under such circumstances  
15 is deemed involuntary and a form of legal duress."

16 That's right from the *Harbeck* case. It mentioned  
17 gas and water and electric specifically. And if there's an  
18 immediate injury that's at issue that is a clear duress  
19 case.

20 THE COURT: But the City says practically there's  
21 no immediate injury because of all the appeal processes, and  
22 all of that.

23 MR. SCHROEDER: There's no appeal processes, Judge.  
24 It's already been established. The Supreme Court told us  
25 the Utility Board doesn't have any jurisdiction here. They

1 exercised their authority in this case. The City has made  
2 their argument at the outset of the case that they failed to  
3 exhaust our administrative remedy because we didn't start  
4 with the Iowa Utility Board.

5 Our position has been, throughout, that there is no  
6 effective administrative remedy available. On this  
7 particular issue, there is no way that the Iowa Utilities  
8 Board can look at this issue and make any sort of  
9 pronouncement about whether or not this is a fair fee,  
10 whether the City is exceeding its authority to tax.

11 THE COURT: I agree with you there, but I think  
12 you're misquoting the decision of the Supreme Court. I  
13 thought the Supreme Court indicated that the Iowa Utilities  
14 Board didn't have jurisdiction over the question of whether  
15 or not this was an activity for the City to be conducting,  
16 not whether the Iowa Utilities Board, and the courts, and  
17 other administrative bodies, could consider the question of  
18 interruption.

19 I didn't see where the Court, in the -- the Supreme  
20 Court dealt with that question. I thought it was just the  
21 larger question of whether or not the Iowa Utilities Board  
22 had the authority to declare the fee illegal.

23 MR. SCHROEDER: Judge, which, I think, begs the  
24 question that you're getting at, which is to say that an  
25 individual has the ability to lodge any kind of meaningful

1 complaint with the Iowa Utilities Board that begs the  
2 question, ultimately, what authority the Iowa Utility Board  
3 could possibly have of this question, if ultimately they've  
4 got to get to the question on whether or not this is a valid  
5 tax or fee. It's almost always going to end up in the same  
6 place. The Utilities Board is going to say, "That's not for  
7 us to decide." So there's no real meaningful mechanism in  
8 place for anyone to challenge it. That's why we filed it in  
9 the Supreme Court and that's why the Supreme Court agreed  
10 with us when it made the ruling it did.

11 We talked about that issue at oral argument, for a  
12 lengthy period of time, about whether the utility board had  
13 jurisdiction or not. The Supreme Court didn't address it in  
14 the ruling, they simply went ahead and ruled on the merits  
15 of the case. So that, to me, is indicative of their  
16 feelings that they're right, the Utilities Board can't  
17 decide this. They're not the kind of body to make that  
18 determination.

19 So that being said, there's really no effective  
20 mechanism for somebody like Lisa Kragnes who wants to file  
21 any kind of complaint with the Utility Board, because the  
22 Utilities Board is going to be left to decide whether or not  
23 there is an illegal case.

24 THE COURT: No, I disagree with you. I don't think  
25 the Utilities Board will be called upon to decide if this is

1 an illegal tax. I think the role in this matter would be if  
2 the question of whether -- I think the role of the Utilities  
3 Board would be to look at the procedures, in terms of  
4 irreparable immediate injury. And the Utility Board would  
5 decide the administrative rights of Ms. Kragnes, whether she  
6 had the right to contest the charge, too, because it  
7 involved a franchise fee that she didn't agree with. I see  
8 the two functions as different.

9 MR. SCHROEDER: Let me come at it a different way,  
10 if I may.

11 THE COURT: Please do.

12 MR. SCHROEDER: Judge, when we spoke with  
13 Mr. Ousley and we talked to him about what procedures are  
14 available for a homeowner or a business who feels like this  
15 is an invalid fee or tax, when we talked with him about what  
16 sort of remedies are available, if somebody complained to  
17 you, what their -- what your options would be to deal with  
18 that, he said, "All we can do is educate. All we can do is  
19 tell them it's the City's problem. It's the City doing it  
20 to them. There is nothing that can be done on this end,  
21 this is the City."

22 So from that standpoint, Judge, if the bill isn't  
23 getting paid, he said, "We make no distinction between, you  
24 know, whether somebody is withholding for a franchise fee or  
25 for a portion of the fee -- a portion of the bill. It's not

1 getting paid, period. We have procedures put in place that  
2 are approved by the Utilities Board. There is no provision  
3 for any sort of specific exception for somebody who doesn't  
4 want to pay their franchise fee. We start by sending them  
5 notices, door tags, and eventually they're going to be  
6 disconnected."

7 THE COURT: There may not be a procedure in place  
8 with regard to the franchise fee, but since it's included in  
9 the bill, we do have procedures in place for people to avoid  
10 disconnect and shutoff, don't we?

11 MR. SCHROEDER: Not in this instance, Judge.

12 THE COURT: We don't?

13 MR. SCHROEDER: No, no.

14 THE COURT: Okay.

15 MR. SCHROEDER: There's nothing available --

16 THE COURT: So you're saying strictly in terms of  
17 the franchise fee -- I see.

18 MR. SCHROEDER: If you have a problem with the rate  
19 you're being paid, you think the meter guy is measuring  
20 wrong out of your meter, there's something for that. In a  
21 franchise fee dispute, that's something that only the City  
22 of Des Moines can handle. They're imposing it, all we can  
23 do is educate them. It's a City issue, take it up with  
24 them.

25 THE COURT: So you have an objection to the

1 franchise fee versus the bill?

2 MR. SCHROEDER: Absolutely, absolutely.

3 THE COURT: Real fine.

4 MR. SCHROEDER: I want to talk a little bit about  
5 the mistake of fact issue now, at this point, Judge.

6 Well, backing up, I guess, if I may, before we move  
7 on to that. The policy reasons that Mr. Godwin cited  
8 flowing from the *Kraft* case about why it is from a policy  
9 standpoint that there should be no refund in a case like  
10 this, I think those arguments basically fall into two  
11 categories.

12 One, you would have to pay the same taxpayers to  
13 return the illegal tax, which doesn't make any sense, in  
14 their estimation; and number 2, it would avoid uncertainty  
15 that the tax has been illegally taxed and collected.

16 In this case -- we've got different payers in this  
17 case. We've got those that have been paying the franchise  
18 fee and those that are property owners who are paying  
19 property taxes, so it wouldn't necessarily be the same  
20 folks, at all, who are paying one or the other.

21 Secondly, we've got specific limits on property tax  
22 amounts. There are protections built into the system  
23 regarding the property tax. It's interesting to note,  
24 Judge, that from the outset of this case, the City's  
25 position was, not only can we charge a fee that doesn't need

1 to be related to costs incurred, but, therefore by  
2 extension, we can charge the fee in any amount we deem  
3 appropriate with no relation to any sort of number in the  
4 real world.

5 So when we talked at depositions with City folks  
6 about could you ostensibly charge a 10 percent fee, 15  
7 percent fee, the answer to the question was yes. We've got  
8 two very different issues there when we're looking at  
9 franchise fees versus property tax restrictions.

10 And then lastly, when we're talking about property  
11 taxes, we've got a deductibility issue that we lose when  
12 we're talking about franchise fees, as well. So we're not  
13 talking about the same group where we're robbing Pete to pay  
14 Paul.

15 Secondly, Judge, on the second policy issue that  
16 the City has argued, that we avoid uncertainty following  
17 discovery that the tax has been illegally charged and  
18 collected, I don't want the Court to lose sight in this case  
19 that this lawsuit was filed in July of 2004, before the City  
20 even raised its fee from 1 percent to 9 percent, and then  
21 nine months later raised it from 3 percent to 5 percent. So  
22 while this lawsuit has been on file, the City knowingly  
23 raised it twice, so this is not an unfair type of issue to  
24 the City.

25 On the mistake of issue fact, Judge, we are still

1 here, obviously, today with the City telling us we don't  
2 know what our costs are. When we look at the mistake of  
3 fact case law and CJS, and all the authority out there, they  
4 tell us where there's a complete lack of knowledge on a  
5 material factual issue, that is a mistake of fact case.  
6 That's what we're telling the Court is exactly at issue  
7 today.

8 We're saying that the average homeowner has no way  
9 to reasonably get ahold of information to calculate what the  
10 City's costs are to know whether there should be a challenge  
11 that's properly mounted. And we know that, Judge, by virtue  
12 of the fact that the City is sitting here today  
13 two-and-a-half years later and telling us we still don't  
14 know what our costs are yet.

15 They want to hold the homeowner to a higher  
16 standard. "The information is out there if you just go get  
17 it." It doesn't make any sense.

18 On this issue of due process, Judge. It's not an  
19 issue that was briefed, but I think it's one that certainly  
20 came to light further in the City's reply brief. And we'd  
21 be happy, again, to do a surreply brief, if the Court would  
22 like.

23 THE COURT: I would like that.

24 MR. SCHROEDER: I think it's important to raise  
25 this due process issue. We believe that to deny refund in

1 this case would violate the due process clauses of the Iowa  
2 and U.S. Constitution. There are no safeguards, as we've  
3 already argued, to allow citizens to protest before the  
4 disconnect eventually occurs.

5 And I brought three cases with me on that, Judge,  
6 that I would just read the cites into the record. And as I  
7 said, we'll fully brief them, but the first is *Hagge* --  
8 H-a-g-g-e -- *versus Iowa Department of Revenue and Finance*.  
9 The cite is 504 N.W.2d 44.

10 The second is *Transform Limited versus Assessor of*  
11 *Polk County, Iowa*. The cite there is 543 N.W.2d 614.

12 And the third is *Pruss* -- P-r-u-s-s -- *versus Iowa*  
13 *Department of Revenue*, 330 N.W.2d 300.

14 Judge, I will also, just for the record, too, take  
15 a look at the cites that Mr. Godwin mentioned and make sure,  
16 if there's an error, we get that corrected and find what the  
17 Court is looking for in all of our materials.

18 Judge, I just want to mention a couple more things  
19 in going back and hitting on some arguments Mr. Godwin made.

20 We won't necessarily know if people have already  
21 been disconnected due to objection to the franchise fee, we  
22 don't know. Terry Ousley told us that in his deposition, it  
23 may have already happened and we simply don't know.

24 Obviously, on a motion for summary judgment, those sorts of  
25 questions, those sorts of uncertainties get resolved in our

1 favor. The fact of the matter is, we may never know, but  
2 our contention is it may very well have happened.

3 THE COURT: Let me stop you there. There's clear  
4 authority that this Court cannot deny summary judgment based  
5 on speculated facts.

6 MR. SCHROEDER: Absolutely.

7 THE COURT: And is what you're talking about the  
8 fact that you don't know and the City doesn't know about  
9 whether folks have been disconnected because the franchise  
10 fee is, in fact, in a category of speculation?

11 MR. SCHROEDER: No, Judge, I don't think it is.

12 THE COURT: Why?

13 MR. SCHROEDER: Because the bigger issue is this  
14 issue of duress, that's what we're getting at with this  
15 inquiry. And the fact of the matter is, just because no  
16 one's been disconnected, even if you accept the City's  
17 argument there, that doesn't mean duress isn't in play.

18 In fact, Judge, that may mean just the opposite.  
19 The fact that no one's been disconnected because of the  
20 franchise fee means there's severe duress because they don't  
21 have a choice.

22 Lisa Kragnes can certainly speak to duress, Judge.  
23 Her affidavit is relevant, even though she is not being made  
24 to pay the franchise fee presently. She brought the action  
25 because she knows what the issue is. She brought the action

1 because she knows there's no recourse for her as a single  
2 mother with a child, a single mom. She knows there's no  
3 other choice but to have gas and electric. She knows her  
4 affidavit is certainly relevant.

5 And onto your question about the agency issue.  
6 We'll certainly go back and brief that, as well. I'll point  
7 out for the Court's own interest, today as we stand here,  
8 that we also took depositions of two other folks for  
9 MidAmerican who told us that there was no real negotiating  
10 when this franchise agreement was entered into, that this  
11 was a fee imposed by the City.

12 MidAmerican goes along with it. They're the  
13 conduit. It's a fee that the City imposes, not MidAmerican.  
14 And I think that's something, Judge, that you'll be  
15 interested in seeing when we submit that, as well. I think  
16 that is all I have.

17 THE COURT: Real fine. Briefly, a response,  
18 please. I have a matter where I have to be out of this  
19 courtroom by 10:00.

20 MR. GODWIN: I can do it in seven minutes.

21 THE COURT: And keep in mind, I'm going to give  
22 both parties a chance to supplement your brief and  
23 authority, so that which you don't cover in seven minutes  
24 you can cover in written form.

25 MR. GODWIN: We all have choices, we don't have

1 choices. As a plaintiff in *Harbeck*, Your Honor, whether or  
2 not you have a choice isn't an element. Were you compelled?  
3 Not whether you had a choice, were you compelled? Were you  
4 made to do something? Okay. Summary procedure, Judge, in  
5 other words, one is present here.

6 Charging too much does not make the overage  
7 refundable, it just makes it an overage. That's what the  
8 cases we've briefed and submitted to the courts say. And I  
9 don't think the plaintiffs have a single case to the  
10 contrary.

11 You need to look at the cases, Judge. If you  
12 charge \$100 and you can only charge \$50, if the 50 was  
13 valid, the other 50 is not necessarily liable for refund.

14 THE COURT: See, Mark, the problem I have with  
15 that -- and I'll go back and read the *Kragnes* decision again  
16 very closely. I'm wondering why would the Supreme Court  
17 instruct this Court to conduct further proceedings to  
18 determine what's valid?

19 MR. GODWIN: To see how much we could charge.

20 THE COURT: Okay. Then -- so you're saying, even  
21 if I go through that exercise with the parties, the fact  
22 that you've charged beyond what's necessary to carry out the  
23 police power functions, you don't have to --

24 MR. GODWIN: Correct. Yes. If we had had a  
25 procedure in place, before this lawsuit, that had figured

1 our costs. If we hired the experts beforehand -- let's say  
2 we figured the costs wrong, okay, which is, like, in a  
3 number of cases we cited, same thing.

4 THE COURT: Okay.

5 MR. GODWIN: Mr. Ousley was not involved in the  
6 negotiations about the franchise agreement. His deposition  
7 reflects he's not a member of the Utilities Board. So to  
8 the extent that the plaintiff -- what Mr. Ousley says is  
9 binding on the Utility Board, he doesn't have that  
10 knowledge, Your Honor.

11 Summary -- there's a case, *Ostrander versus Linn* 22  
12 N.W.2nd 223, 234 Iowa 1946. "Summary means without delay or  
13 formality."

14 THE COURT: 22 N.W.2d 223, 234?

15 MR. GODWIN: "Summary means without delay or  
16 formality." We have a two-year delay and we have lots of  
17 formality, Your Honor. Lots and lots of formality.

18 To answer the question whether or not a person  
19 should be disconnected for failing to pay their franchise  
20 fee does not require the Iowa Utilities Board to determine  
21 the validity of the franchise fee. The disconnect is all  
22 the Utility Board cares about, should the person be  
23 disconnected for whatever reason.

24 Here's the problem. One, Administrative Code  
25 1996-2, "Anyone can file a complaint to the Iowa Utility

1 Board with anything having to do with rates and fees. They  
2 have 20 days to respond."

3 1996-3, "If the customer is dissatisfied with the  
4 resolution, they can start by submitting a formal  
5 complaint."

6 1996-5, "This applies to discontinuance of  
7 service."

8 1997.1(6)(A). There is a procedure in place so  
9 that each and every MidAmerican customer subject to this  
10 franchise fee can follow, if he or she chooses to do so;  
11 they have not done so. And as we pointed out previously,  
12 you can specifically -- it's specifically addressed in the  
13 Code.

14 And you can pay part of your bill and not part and  
15 tell the Utility Board why you're doing it. They've got 45  
16 days to work out. Then you go to the Board in 60 days, then  
17 you can appeal. It applies to -- paying part of your bill  
18 applies to continuance and not the other part.

19 Mistake of fact. We didn't misrepresent anything  
20 to the citizens of this city, Your Honor. The City of Des  
21 Moines said, "This is our franchise fee and it's based on a  
22 percentage of our sales." That's all we ever said. We  
23 never said it was based on calculations, therefore there  
24 can't be a mistake as to what they didn't know. We didn't  
25 base it on that.

1           We thought they were able to charge a fee on gross  
2 sales for 90-plus years. There's no mistake of fact here.  
3 We said, "We think we can do it this way." The Supreme  
4 Court said, "No. You've got to be cost-based." That's a  
5 legal question, not a factual question.

6           THE COURT: Your seven minutes are close.

7           MR. GODWIN: I have two left and I only have one  
8 point left.

9           THE COURT: Okay.

10          MR. GODWIN: The plaintiff, as the Court pointed  
11 out, is not entitled to any speculative relief. In fact,  
12 they're only entitled to reasonable inferences.

13          Here's the state of the case. We are nearly three  
14 years into it, the plaintiff can't point to a single person  
15 who has been disconnected. The plaintiff can't point to a  
16 single person that's in the process of being disconnected.  
17 The plaintiff can't point to a single person whose been  
18 threatened with disconnection three and a half years or four  
19 years into the case, nothing; it is pure speculation. And  
20 they are not entitled to resist summary judgment on those  
21 speculative grounds. Thanks, Judge.

22          THE COURT: Real fine. Please submit any  
23 additional authority with regard to the issue we discussed  
24 within 10 days. Okay?

25          MR. SCHROEDER: Thank you, Judge.

(Proceedings concluded at 9:57 a.m., on the 30th  
day of March 2007.)

## 1 CERTIFICATE OF REPORTER

2 I, SUSIE K. STROUD, Certified Shorthand Reporter  
3 and Official Reporter for the Fifth Judicial District of  
4 Iowa, do hereby certify that I was present during the  
5 foregoing proceedings and took down in shorthand the  
6 testimony and other proceedings held; that said shorthand  
7 notes were transcribed by me by way of computer-aided  
8 transcription; and that the foregoing pages of transcript  
9 contain a true, complete, and correct transcript of said  
10 shorthand notes so taken.

11 DATED this 10th day of April 2007.

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