

**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

<p>LISA KRAGNES,  Plaintiff,  vs.  CITY OF DES MOINES, IOWA,  Defendant.</p>	<p>Equity No. 49273</p> <p align="center"><b>PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESISTANCE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON REFUND ISSUE</b></p>
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COMES NOW the Plaintiff, Lisa Kragnes, on behalf of herself and all others similarly situated, and submits this Supplemental Brief to the Court in support of the Plaintiff's and class members' resistance to the motion for summary judgment filed by the Defendant City of Des Moines in connection with the refund issue.

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
Table of Contents . . . . .	1
Table of Authorities . . . . .	3
Argument . . . . .	4
1. Failure to Grant Plaintiffs' a Refund of the Monies Paid in Excess of the Amount Properly Charged for Regulation Expense would Deny Plaintiffs' Federal and State Constitutional Guarantees of Due Process .	4
2. There is No Procedure under the Iowa Utility Board for Customers to Avoid Payment of the Franchise Fee and Disconnect Procedures .	8
a. Procedures used by MidAmerican . . . . .	8
b. Procedures at the Iowa Utility Board . . . . .	9
c. The Application of the concept of "summary procedure".	12
3. MidAmerican, as the Collecting Agent of the City of Des Moines in the Collection of the Franchise Fees from the Residents of Des Moines,	

Acts with Actual, Apparent or Implied Authority so as to Bind the City of Des Moines and Impose the Obligation upon the City to Refund Monies the City has Actually Received under an Illegal Ordinance . . . . .	18
Conclusion . . . . .	24

**TABLE OF AUTHORITIES**

**PAGE**

<i>Dillon v. City of Davenport</i> , 366 N.W.3d 918, 924 (Iowa 1985) . . . . .	18
<i>FS Credit Corp. v. Troy Elevator, Inc.</i> , 397 N.W.2d 735, 740 (Iowa 1986) . . . . .	18
<i>Gabelman v. NFO, Inc.</i> , 571 N.W.2d 476, 481 (Iowa 1997) . . . . .	19-21
<i>Hagge v. Iowa Dept. of Revenue and Finance</i> , 504 N.W.2d 448, 451 (Iowa 1993) . . . . .	4
<i>Harbeck v. Sioux City</i> , 202 NW 507 (Iowa 1925) . . . . .	12-21
<i>Hendricks v. Great Plains Supply Co.</i> , 609 N.W.2d 486, 493-94 (Iowa 2000) . . . . .	18
<i>Kragnes v. City of Des Moines</i> , 714 N.W.2d 632, 636 (Iowa 2006) . . . . .	10
<i>Magnusson Agency v. Public Entity Nat. Company-Midwest</i> , 560 N.W.2d 20, 25-26 (Iowa 1997) . . . . .	19-21
<i>McKesson v. Division of Alcoholic Bev. &amp; Tobacco</i> , 496 U.S. 19 (1990) . . . . .	4
<i>Pruss v. Iowa Department of Revenue</i> , 330 N.W.2d 300, 306 (Iowa 1983) . . . . .	4
<i>Reich v. Revenue Commission of Georgia</i> , 513 U.S. 106 (1994) . . . . .	5
<i>Transform, LTD. v. Assessor of Polk County, Iowa</i> , 543 N.W.2d 614, 616 (Iowa 1996) . . . . .	4
<i>Waukon Auto Supply v. Farmers &amp; Merchants Sav. Bank</i> , 440 N.W.2d 844, 847 (Iowa 1989) . . . . .	19-21

**STATUTES**

199 I.A.C. Chapter 6 § 6.2 . . . . .	10
Iowa Code § 476.23(4)(a) . . . . .	10-11

**OTHER**

<i>18 McQuillin Mun. Corp.</i> Section 53.76.40 (3 <sup>rd</sup> Ed.) . . . . .	24
<i>John F. Coverdale, Remedies for Unconstitutional State Texas</i> , 32 Conn. L. Rev. 73, 108 (Fall 2000) . . . . .	6
Restatement (Third) of Restitution & Unjust Enrichment, section 19 (T.D. No. 1, 2001) . . . . .	5-7

## ARGUMENT

1. **FAILURE TO GRANT PLAINTIFFS' A REFUND OF THE MONIES PAID IN EXCESS OF THE AMOUNT PROPERLY CHARGED FOR REGULATION EXPENSE WOULD DENY PLAINTIFFS' FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF DUE PROCESS.**

Defendant City asserts it should not have to refund any amounts determined to have been illegally collected as a franchise fee. Plaintiffs assert that depriving Plaintiffs of a refund in this case would violate their right to due process under both the Fourteenth Amendment of the U.S. Constitution and the Iowa Constitution Article I, Sec. 9. Accordingly, if a refund is appropriate under the facts, a refund should be ordered.

As the Court is aware, the City contends Plaintiffs “voluntarily” and without protest paid gas and electric bills that included the City’s illegally-exacted franchise fee. The Supreme Court of Iowa has expressly rejected the “voluntary payment” defense since it is a violation of due process. See *Hagge v. Iowa Dept. of Revenue and Finance*, 504 N.W.2d 448, 451 (Iowa 1993). *Hagge* stated that the voluntary payment doctrine is inapplicable without a pre-deprivation remedy that would, “permit taxpayers to withhold payment and then interpose their objections as a defense.” *Id.* at 451. According to the *Hagge* Court, the taxpayers must be afforded a “meaningful opportunity” to secure post-payment relief which requires judicial relief if no statutory procedure is provided. See *id.* at 452 (citing *McKesson v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 19(1990)). See also *Transform, Ltd. V. Assessor of Polk County, Iowa*, 543 N.W.2d 614, 616 (Iowa 1996)(affirming judicial refund order on due process grounds because there was no administrative refund remedy); *Pruss v. Iowa Department of Revenue*, 330 N.W.2d 300, 306 (Iowa 1983)(rejecting the voluntary payment defense in the absence of an applicable, explicit refund statute).

In the present case, the City of Des Moines created no pre or post deprivation remedy, nor is there any mechanism by which payment may be made under protest and challenge then be processed. Therefore, under *Hagge* the voluntary payment doctrine is inapplicable because the City provides no meaningful opportunity to obtain relief. The City cannot fail to provide any such type of remedy -- whether statutorily or otherwise -- and then fairly claim later that taxpayers had a meaningful choice in paying the fee. This is the heart of the due process argument.

The U.S. Supreme Court in *Reich v. Revenue Commission of Georgia*, 513 U.S. 106 (1994) discussed, in its analysis, that in the absence of a pre-deprivation statutory remedy, a Court must provide "meaningful backward-looking relief." With the absence of an applicable refund statute, that is precisely the Court's duty in the instant case. This Court must impose a remedy if the City did not statutorily provide for one. Plaintiffs in this case paid their gas and electric bills without: 1) having access to information necessary to determine whether the City's franchise fees may have been illegal or excessive; and 2) a statutory process to effectively challenge the fee even if they had such information. That being the case, the City cannot contend that by paying their monthly bills, Plaintiffs knowingly and voluntarily relinquished their right to challenge an illegal or excessive fee.

The authority cited above is also consistent with the Restatement (Third) of Restitution & Unjust Enrichment, section 19 (T.D. No. 1, 2001). The drafters point out the "voluntary payment" defense to a taxpayer refund claim is simply a discredited, result-oriented legal fiction:

"The formulaic refusal to allow restitution in respect of illegal taxes and fees rests on the ancient fiction according to which "mistake of law" is not relievable by mistake. By this formula, everyone is presumed to know the law; therefore a person who pays an illegal tax does so with knowledge of the illegality and voluntarily, within the meaning of the voluntary-payment rule, unless payment was made under duress. Reasoning of this sort is merely circumlocution for a refusal to grant relief. If voluntary payment is given a

realistic meaning, it has no possible application to the common case in which a taxpayer seeks to recover taxes that were determined to be illegal only after they were paid.”

*Id.*, comment h. See also *John F. Coverdale, Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73, 108 (Fall 2000) (“The government has not merely solicited, but required the payment of tax by passing a statute. The degree of compulsion to which a taxpayer is subject may vary, but by no stretch of the imagination can the payment be classified as a gift or other unsolicited voluntary payment”).

The Restatement (Third) reflects the modern view that taxpayer refund claims are not subject to a voluntary payment defense because citizens do not truly intend to pay taxes in excess of those lawfully assessed. The drafters recognized:

“Any payment of tax in excess of the taxpayer’s legal liability gives rise to a prima facie claim in restitution...such a payment is involuntary on the part of the payor: not in the sense of the remark occasionally repeated in the cases, that “no one pays taxes voluntarily,” but in the legally meaningful sense that no one intends to pay a tax in excess of a liability that is both accurately and lawfully assessed. It is not the taxpayer’s willingness to pay that is the relevant consideration, but whether the payment responds to a proper legal liability. Where it does not, the result is a transfer that lacks an adequate legal basis.”

Restatement (Third) § 19, comment c.

The Restatement (Third), consistent with Iowa law, provides for taxpayer refund claims as follows:

- (1) Except to the extent that a different rule is imposed by statute, if a tax, fee, or other governmental charge is paid by mistake, or erroneously or illegally assessed or collected, the taxpayer has a claim in restitution as necessary to prevent unjust enrichment.

Comment a to § 19 further provides: “The rule stated in this section recognizes a prima facie claim in restitution to recover any payment of taxes, fees, or other governmental charges in excess of the payor’s true legal obligation.”

The Third Restatement's rules obligating cities to refund illegally assessed fees and taxes are based in large part on the same constitutional requirements outlined above. As the drafters observed:

"The Supreme Court has held that "payment of an unlawful tax" triggers the requirement of the Due Process Clause of the Fourteenth Amendment that a state "provide procedural safeguards against unlawful exactions." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990). Where those safeguards take the form of "a postdeprivation refund action" – in other words, an action in restitution – "the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.* at 39, quoting *Atchison, T. & S.F. Ry. V. O'Connor*, 223 U.S. 280, 285 (1912)."

Restatement (Third) § 19, comment b. The Iowa *Hagge* and *Transform, Ltd.* cases discussed above are consistent with these well-reasoned, common sense, due-process principles.<sup>1</sup>

In short, the "voluntary payment" defense asserted by the City of Des Moines in this case is at odds with both the due process requirements of the U.S. and Iowa Constitutions and the most elemental notions of fairness. If citizens want to make additional donations beyond what they are required by the enacted statutes or ordinance to pay, that would be properly classified as voluntary. However, neither gratuitous donations nor gifts are the subject of this lawsuit. The City forced Plaintiffs into paying an illegal tax, with no effective choice in the matter, and Plaintiffs are, accordingly, entitled to a refund of any sums determined to be in excess of the proper and legal amount. Thus, the City's "voluntary payment" argument is not an appropriate justification in this circumstance. The Court should conclude the franchise fees were not paid voluntarily, and a refund will not be precluded for this reason.

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<sup>1</sup> In *Hagge* the Iowa Supreme Court held that possible injunctive relief from a Court as to collection of a tax is also not a sufficient predeprivation remedy. *Hagge* at 450.

2. **THERE IS NO PROCEDURE UNDER THE IOWA UTILITY BOARD FOR CUSTOMERS TO AVOID PAYMENT OF THE FRANCHISE FEE AND DISCONNECT PROCEDURES.**

a. *Procedures used by MidAmerican.*

The issue has previously been addressed by the parties as to the procedures that are used relating to collection of the franchise fee in this case. Relating thereto, it is already agreed to and undisputed that the City of Des Moines utilizes MidAmerican to collect the franchise fee. (Ousley Depo p. 17-18, lines 15-20 Pl. App. 30-31). MidAmerican, a result of its entering into the franchise agreement with the City of Des Moines, submitted the matter of the collection of the franchise fees to the Iowa Utility Board for notation of the franchise fee as a matter of the tariff. (Wesley Bridgeman Depo. pp. 6-8, Plaintiff's Supplemental App. 2-4). This then became part of the legal tariff for MidAmerican. (Bridgeman Depo. 7-9, Pl Supp. App. 3-6). MidAmerican then, after making the appropriate changes in its computer programs, assessed the franchise fee as an automatic portion of the utility bill. (Ousely Depo. 19, 53-54, Pl App. 31, 39). That utility bill is then sent to the customer for payment. (Ousely Depo. 53, Pl. App. 39).

The customer is required to pay the utility bill. (Ousley Depo. pp. 32-34, Pl App. 34-35). The utility uses several steps in enforcing payment of the utility bill. (Ousley Depo. p. 33, Pl App. 34). It sends a reminder notice if the bill is not paid in full. (Ousley Depo. pp. 31, Pl App. 34). It then sends additional letters wherein notification of the amount due is advised and payment is required to be made. (Ousley Depo. pp. 32-33, Pl App. 34). These communications state that disconnection will occur if the customer does not pay the bill. (Ousley Depo. pp. 32-33, Pl App. 34). Eventually, if the bill is not paid, the service is disconnected. (Ousley Depo. p. 37, Pl App. 35). No lawsuit to collect the bill is filed in a court; rather the disconnect procedure is utilized. (Ousley Depo. pp. 35-36, Pl App. 35).

MidAmerican has stated in testimony from its Accounts Manager, that it has no power to alter or change the franchise fee. (Ousley Depo. pp. 21-23, Pl App. 31-32). It does nothing other than to collect the fee and then turn it over to the City of Des Moines. (Ousley Depo. pp. 17-18, 20, Pl App. 30-31). If a customer is to complain about the franchise fee, all that can be done is referral to the City of Des Moines and education. (Ousley Depo. p. 21, Pl App. 31). It has no authority to alter the franchise fee. (Ousley Depo. p. 21, Pl App. 31).

MidAmerican has also stated that it does not differentiate on its bills when it engages in disconnect procedures whether the procedure for the purpose of the services or the franchise fee. (Ousley Depo. pp. 19-25, Pl App. 31-32; Ousley Depo. p. 27, Pl App. 33; Ousley Depo. pp. 12-13, Pl. App. 29). Or for that matter the state tax that is part of the bill as well. Rather, the utility merely acts to collect all of the monies that are billed and to turn over to the City of Des Moines any monies collected for the franchise fee. (Ousley Depo. pp. 19-20, Pl App. 31). This discussion of processes demonstrates that the customers of MidAmerican have no process with the utility, MidAmerican, to avoid payment of the franchise fees billed. It also establishes that MidAmerican uses the duress of the threat of disconnection throughout the entire process with the specific intent to cause payment of the gas or electric bill (which bill has as part thereof the franchise fee assessment), knowing that the customer is bereft of any ability to conduct normal activities of living without the gas and electric. (Ousley Depo. pp. 38-40, Pl App. 36).

b. *Procedures at the Iowa Utilities Board.*

In the meantime, the question also arose at the time of hearing on this matter as to whether or not the procedure in 199 I.A.C. Chapter 6 applies to give relief to the customer whose bill is unpaid or who would challenge the franchise fee. This is the chapter of the Iowa Utilities

Board that provides for complaint procedures. The purpose of this portion of the brief will be to discuss this procedure in somewhat more detail.

It is true that Chapter 6 of the Iowa Utility Board Administrative Procedures, does have a procedure to allow a customer to file a complaint. But that procedure does not and cannot provide any relief as to franchise fees of a City such as the City of Des Moines.

The procedures provide in particular, in 199 I.A.C. §6.2 that it is available in the following situations:

**“Complaint.** Any person or body politic may file a written complaint requesting *a determination of the reasonableness of rates, charges, schedules, service, regulations or anything done or not done by the public utility* subject to service or regulation by the Board...” (emphasis applied).

Note that the Board can only act to determine the *reasonableness* of the actions of the *utility*. In this case the Iowa Supreme Court has already determined that the Iowa Utility Board does not have the jurisdiction to act as to the actions of the City and the validity of the franchise fee of the City. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 636 (Iowa 2006). (mentioning but not overturning the District Court’s determination that the District Court and not the Utilities Board has subject matter jurisdiction of the legality of the franchise fee). Further, the Iowa Code specifically denies the authority of the Board to interfere with the City’s rights. See Iowa Code §476.23(4)(a):

4. If not inconsistent with the provisions of this division:
  - a. All rights of municipal corporations under Chapter 364 to grant a person a franchise to erect, maintain, and operate plants and systems for electric light and power within the corporate boundaries, and rights acquired by franchise or agreement shall be preserved in these municipal corporations;

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Even if one were to go beyond the first sentence of the provision of complaint procedures in Chapter 6, the very next paragraph further clarifies the matter. It provides:

*“Information to be filed.* Any person may, by filing a written complaint, request the Board to determine the utilities charges, practices, facilities or services are in compliance with applicable statutes and rules established by the Board, or the Utility and its tariff, and lawfully issued Board orders” (emphasis added).

Note that the only thing the Board can do is determine if the actions of the **utility are in compliance** with the statutes, rules and tariff. It has already been determined that the Board’s authority does not extend to determining whether the franchise fee is in the correct amount or is valid. All the Board can do is look at whether the utility is acting in conformance with the tariff. Here, it is undisputed that the tariff allows for the placement of the charge and the bill, the tariff and the rules allow for the use of disconnection to effectuate payment of the bill. The agency can do nothing: to deny the franchise nor the franchise agreement; to change the amount of the franchise fee; to stop the utility from complying with the franchise agreement, to deny the utility from enforcing the tariff provisions or to deny the utility from using the procedures allowed under the tariff for collection of the monies due. In other words, once the City used its statutory power to enact the franchise fee ordinance and enter into franchise agreement with the utility under its own statutory authority, the Iowa Utility Board could only act to rule that the franchise fee become part of the tariff and then enforced under the provisions of the tariff. Any procedure started under Chapter 6 would merely result in the customer losing the procedure as the Utility Board could only have found that the utility conduct was proper since it was in conformity with the tariff and the rules of the agency. It took a lawsuit in a court to have the ordinance assessing franchise fees declared illegal to the extent those fees exceed the cost of regulation. Accordingly, again that complaint procedure in front of the agency itself could and can give no relief to the Plaintiffs.

C. The application of the concept of "summary procedure".

In addressing this concept, it may again help to look at the language of the case of *Harbeck v. Sioux City*, 202 NW 507 (Iowa 1925). In the *Harbeck* case the Supreme Court stated:

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

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

202 NW at 507 (emphasis added).

First, it is important to note that the disconnect procedure is not the use of a "personal action" to collect the bill. In other words, the comparison here is between a procedure that involves a "personal action" (e.g. a lawsuit in court) compared to a summary procedure that effectuates payment. A personal action would be a procedure used to enforce or cause payment by the filing of a lawsuit and the obtaining of a judgment which then would have collection procedures under law available. This would mean that a customer would have the ability to dispute the charge and any basis for the charge and get a ruling on the validity of the charge.

To this personal action procedure (which not only addresses the issue of voluntary payment but also the concept of due process), must be compared the concept of a "disconnect procedure". In a disconnect procedure as used by the City and its collector, MidAmerican, if a bill is not paid, the concept is: a notice is sent reminding of payment due; then 1-3 notices are sent informing of payment due and threatening disconnection of the gas and electric service if the bill is not paid; then disconnection occurs. If a person disagrees with the franchise fee, they can:

(1) Object to MidAmerican who will not disconnect for 45 days, but who cannot do anything as to the charge since the charge is a City of Des Moines' charge (Ousley Depo. pp. 21-263, Pl App. 31-32). At the end of this procedure MidAmerican will merely continue to work to collect the monies due and disconnect if not paid.

(2) File a complaint with the Iowa Utilities Board. But the Board can only look at the reasonableness of the charges for the utility services which the Board regulates, or check to see if the conduct of the utility is wrongful which would only happen if the utility was not acting in accordance with the law, ordinance, regulations or tariff. At the end of this procedure, since the Board cannot determine the validity of the franchise fee, the Board could only determine that the conduct of the utility was in accordance with the law, in accordance with the ordinance and franchise agreement, is in accordance with the regulations of the board and was in accordance with the tariff. The customer can get no relief from the procedure since the Board has no authority to act to disallow the franchise fee.

This procedure is one which, accordingly, summarily subjects the customer to a futile procedure that can only result in the payment the bill (which includes the franchise fee) or a

disconnection from the service. No true or meaningful relief occurs or could occur from those procedures.

Applying the wording of the *Harbeck* case, it is clear that:

1. A person (MidAmerican and Des Moines) or municipality (Des Moines) has exacted (MidAmerican and Des Moines) or received (Des Moines) more than is legally due.
2. The customer is “under the menace of injurious interference” with his/her property. The property is the home or business and the ability to provide for the basic necessities of life.
3. The customer was not menaced only with a personal action where he/she could test the validity of the tax or action. Rather, the customer was presented with a threat of disconnection and some futile avenues of complaint (at least futile as it relates to the franchise fees).
4. The public body here has the power of summary procedure. That power was obtained by the City by its use of the statutory power under Iowa Code §364.2(4), to cause a MidAmerican to sign a franchise agreement that contained provisions that required the utility to assess and collect a franchise fee and remit that fee to the City. (Pl. App. 10-12, 17-19). That power caused the utility to incorporate that franchise fee into its tariff, into its billing and into its use of the disconnect procedures to collect the bill, which included the franchise fee.<sup>2</sup>

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<sup>2</sup> The Defendant attempts to present a misleading picture in this. Evidence is that crews proceed to disconnect. (Ousley Depo. pp. 30-34, Pl App. 34-35). Sometimes it can take up to two years. (Ousley Depo. pp. 30-34, Pl App. 34-35). But person who is told of a right to disconnect doesn't know that. (Ousley Depo. pp. 30-34, Pl App. 34-35). It depends upon the person's background and payment history. (Ousley Depo. pp. 30-34, Pl

5. The summary procedure is the power to disconnect the supply of gas or electric service. As to this the Court should note that *Harbeck* refers to “summary procedure” as: “the power of summary procedure such as the power to seize the property or person, or to evict the payer, or to cut off his supply of water, or gas, or of electricity as the case may be, and thereby to effect immediate injury to the payer or to his business. In other words, it is the **power** to cut off the supply of gas or electric that is summary because it can effect immediate injury to the payer. Note this is the power to do so – not referring to whether it is actually used or not.<sup>3</sup> Accordingly, it is the power to cut off the gas or electric not the question of

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App. 34-35). Note the hypothetical—person who has paid bills- assumed amount – and what can possibly can happen. (Ousley Depo. pp. 30-34, Pl App. 34-35). Astonishingly, the City then asserts this as the required case. That is distorted and incorrect. Likewise it is distorted when the City states that “no one has been disconnected for non payment of franchise fee non payment.” The fact is that the utility cannot say that. (Ousley Depo. pp. 30-34, Pl App. 34-35). It does not differentiate between unpaid bill and unpaid franchise fee. (Ousley Depo. pp. 30-34, Pl App. 34-35). Rather, it notes unpaid and then acts to disconnect. (Ousley Depo. pp. 30-34, Pl App. 34-35). Since it has, in fact, disconnected Des Moines residents service since 1999 and since the bills have had the franchise fee in it (albeit not broken down) these residents have actually been disconnected for failure to pay the franchise fee—again albeit as part of the whole bill they did not pay. i.e. they failed to pay their bill which consisted of the gas, the electric, the state tax and the franchise fee. The City has wrongly taken out-of-context and cited testimony that a bill has not been disconnected due to “the franchise fee”. In other words, has their been a case where the only thing not paid was the franchise fee and has MidAmerican then disconnected for failure to pay that fee? That is a hypothetical that has not risen. The utility does not differentiate between the different elements of the bill. That does not mean that franchise fees have not been part of the bill for which disconnection has occurred. In fact, such disconnections have occurred. Some of the Plaintiffs in this case have had their gas and electric service disconnected due to non-payment of a bill that included the City’s franchise fees. (Ousley Depo. pp. 27, 30-34, Pl. App. 33-35). The City’s assertion otherwise is simply misleading and disingenuous.

<sup>3</sup> At hearing the Defendant cited to *Ostrander v Linn*, 237 Iowa 694, 22 N.W.2d 223 (1946) for the definition of “summary procedure. That citation is inapposite. Not only does that citation by the Defendant refer to a dissenting opinion without itself citing to any case( see *Id.* at 234), but the argument of the Defendant ignores the use of the phrase by the Iowa Supreme Court in the

whether it is actually so used in such a fashion. (accord the notices of MidAmerican which threaten the disconnect without notifying the customer when or even having a specific schedule as to when to do so). Note also that this power is also actually used by MidAmerican in the collection of its unpaid bills, which include the illegal franchise fees. (Pl. App. 48, 50).

6. Due to the above the Des Moines' customer is not deemed to stand in equality with the "municipality or other body" which makes such a demand and any payment is not deemed made voluntary. Note that here the Iowa Supreme Court specifically refers to the making of a demand – not the use of the disconnect procedure. It is the demand the Court focuses on, not necessarily the actual disconnect. That makes sense since the concept being addressed is the concept of "duress", i.e. the non-voluntary yielding to a demand. Further, the Supreme Court uses the phrase "municipality or other body" clearly understanding that it may be a body other than the municipality itself that makes the demand on behalf of the municipality.
7. Under these circumstances any payment is deemed not voluntary but it a form of legal duress. That takes it out of the voluntary rule application and forces a refund.

As noted, the Supreme Court noted the summary procedure to be the "power" to cut off the gas or electric. This was in contrast to the "personal action" procedure. The Supreme Court

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*Harbeck* case as discussed in this brief. Further it is clear that a summary procedure is not one which lacks formality or delay. For example, the Iowa Rules of Civil Procedure contain a process for "summary judgment". It is considered a summary procedure even though it has built into it periods of delay and formalities. The phrase simply cannot be taken out of context as the Defendant City has tried to do in this case.

did not define the procedure to be based upon the concept of the number of demands made before disconnection occurs or even the possible length of time when the actual disconnect would occur. Rather it based its distinction between the concept of a "personal action" which allows for the assertions of defenses to the existence of a "power" to cut of the essential utility of gas or electric. In the case of a personal action, the normal or ordinary type of pressure is exerted while in the case of the making of a threat of disconnection of an essential utility, the pressure is extraordinary. When it comes to the consideration of the rate to be charged or the usage made, the Utility Board has jurisdiction to initially examine and set and approve and it has the jurisdiction to examine and evaluate and intervene in the actions of the utility. Indeed, that is what the regulations provide for in 199 IAC Chapter 6.

This is to be distinguished from the situation of the imposition of the franchise fee/tax. Here the Utility Board has no authority to set the fee/tax. It has no authority to challenge the fee/tax or to interfere with it or its collection. It has no procedures that allow for it to do anything to interfere with or otherwise void the collection of the fee/tax. The regulations in 199 IAC Chapter 6 have no application to these fees/taxes.

The power and authority here to implement and assess a franchise fee exists only with the City under Iowa Code §364.2(4). It existed with the City when it entered into a contract with MidAmerican conditioning the utility's right to provide the residents of Des Moines with gas and electricity upon the agreement of MidAmerican to use its tariff to collect and pay to Des Moines the franchise fee/tax as set by the City. With this procedure, no need exists for any personal action where a customer could challenge the ordinance or challenge the validity of the fee/tax. Rather the customer is simply threatened with disconnection if the customer does not pay. Since the franchise fee/tax is billed with the gas and electric bills themselves and no distinction is made

by MidAmerican in the threat to disconnect, the City obtains the fee/tax with no effort, no cost, no need for suit where defenses as to the validity of the fee/tax could be challenged without prepayment of the amounts but rather payment is obtained in a summary procedure that utilizes duress arising from the customer's need to have gas and electric for the home or business and no procedure to contest that franchise fee charge. This is rather the course of procedure of a disconnection and that results in the *Harbeck v. City of Keokuk* case stating that it is considered to be "legal duress". Not only does the procedure used by the City of Des Moines to extract payments involuntarily but it offends due process unless a refund is allowed. This Court should so hold.

3. **MIDAMERICAN, AS THE COLLECTING AGENT OF THE CITY OF DES MOINES IN THE COLLECTION OF THE FRANCHISE FEES FROM THE RESIDENTS OF DES MOINES, ACTS WITH ACTUAL, APPARENT OR IMPLIED AUTHORITY SO AS TO BIND THE CITY OF DES MOINES AND IMPOSE THE OBLIGATION UPON THE CITY TO REFUND MONIES THE CITY HAS ACTUALLY RECEIVED UNDER AN ILLEGAL ORDINANCE.**

The City of Des Moines attempted at oral argument of this case to assert it is not bound by the acts of MidAmerican and can avoid the obligation to refund taxes it has collected under an illegal ordinance. This brings up a discussion of the authority of an agent and its binding effect upon the principal.

The burden of showing that an agent acted within the scope of the agency's actual or apparent authority is on the party claiming that such authority exists. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 493-94 (Iowa 2000). Under principles of agency law, whatever an agent does is binding upon his or her principal when done within the agent's actual or apparent authority. *Dillon v. City of Davenport*, 366 N.W.2d 918, 924 (Iowa 1985); *FS Credit Corp. v. Troy Elevator, Inc.*, 397 N.W.2d 735, 740 (Iowa 1986). Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct

which, reasonably interpreted, allows the agent to believe that that agent has the power to act. *Gabelman v. NFO, Inc.*, 571 N.W.2d 476, 481 (Iowa 1997). Whereas, apparent authority arises when the principal does not actually grant authority, but knowingly permits the agent to act in a certain manner, or holds the agent out as possessing such authority. *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989); *Magnusson Agency v. Public Entity Nat. Company-Midwest*, 560 N.W.2d 20, 25-26 (Iowa 1997). Under the facts of the present case the City of Des Moines is bound by the actions of MidAmerican as it relates to the collection of the franchise fee/tax as the City of Des Moines clothed MidAmerican with actual, apparent or implied authority to collect the fee/tax.

The franchise fee ordinance passed by the City of Des Moines makes it mandatory that MidAmerican comply with the franchise ordinance together with any and all other valid other ordinances enacted by the City. (See Section 5, Plaintiffs' App. p. 18). The ordinance also requires, in no uncertain terms, the collection of the franchise fee by MidAmerican. The provisions of the franchise ordinances imposing on MidAmerican Energy its duty to "collect" the fee from the customers obtaining gas and electric services within the city limits of the City of Des Moines are contained in total in the ordinances enacted by the City. (Plaintiffs' App. pp. 16-22). However, the mandatory direction imposed by the ordinances, is here highlighted in a few sections explicitly.

Section 6 of both the gas and electric franchise ordinances provides:

".....there is hereby imposed upon the company and by its acceptance of this franchise, it agrees that **there should be collected from the company's customers within the corporate limits of the City and remitted by the company to the City**, a franchise fee in an amount equal to 3% of the gross receipts derived by the company from the transmission or distribution of [electric or gas] energy to customers within the corporate limits of the City commencing with the gross receipts received on or after September 1, 2004, and that the franchise fee may increase to an amount not greater than 6% upon any additional

majority vote of the Des Moines City Council at a duly scheduled city council meeting after 14 days advanced public notice.”<sup>4</sup> (Emphasis added).

(Plaintiffs’ App. pp. 18-19).

Section 7 of the franchise ordinances provides:

“The company shall be relieved of **its obligation to collect from its customers and remit to the City the franchise fee** if the franchise fee or the manner in which it is collected from customers is ruled to be unlawful by the Supreme Court of Iowa in a final, non-appealable decision. If a refund to customers is ordered by the Supreme Court in a final, non-appealable decision, the City agrees to repay the company such fees that are ordered to be repaid.” (Emphasis added).

(Plaintiffs’ Supplemental App. p. 19).

Section 2 of the Ordinances manifest the City’s understanding that the company shall provide electric and gas service pursuant to the rules of the Iowa Utilities Board. (Plaintiffs’ App. p. 17). As discussed in the Initial brief, the Utilities Board regulation and the collection structure of MidAmerican Energy envisions and structures “collection” in the form of disconnection of the utility.

Accordingly, the specific ordinance enacted by the City of Des Moines makes it mandatory that the franchisee, MidAmerican Energy, “collect” from its customers a fee, at this time which is set at 5 percent. The City of Des Moines controls the conduct of MidAmerican by these Ordinances. There is nothing that MidAmerican can do to change, waive or alter the fee being charged or determine if the fee imposed by the City is legal; they simply collect the fee. (Plaintiff’s App. pp. 31-32) (Ousley Depo pp. 21-23). See discussion page 18 of Plaintiff’s Brief and Resistance to Defendant’s Motion for Summary Judgment for further discussion of the process utilized by MidAmerican Energy under authority of the law. In the event the company fails to comply with these franchise ordinances it is to be cause for forfeiture of the franchise and

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<sup>4</sup> The City did increase the franchise fees on gas and electric energy by subsequent City Council action in the spring of 2005 to 5 percent.

the termination of all rights under the franchise. See Section 10 of the Gas and Electric Franchise Ordinances (Plaintiffs' App. p. 18).

These cited provisions demonstrate actual authority to act. Here actual authority is created since the principal (Des Moines) intentionally conferred authority (through the Ordinance) on the agent (MidAmerican) either by writing (the Ordinance) or through other conduct (agreement to the change in the tariff and acceptance of the monies) which, reasonably interpreted, allows the agent to believe that that agent has the power to so act. See *Gabelman v. NFO, Inc.*, 571 N.W.2d 476, 481 (Iowa 1997). Apparent authority exists as the principal (Des Moines) knowingly permitted the agent (MidAmerican) to act and held the agent out as possessing such authority (here through agreement to the tariff and with knowledge MidAmerican imposes the fee/tax on its bills). *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989); *Magnusson Agency v. Public Entity Nat. Company-Midwest*, 560 N.W.2d 20, 25-26 (Iowa 1997).

Again stated, the terms set forth above demonstrate an unambiguous control by the City and a duty imposed upon MidAmerican Energy by virtue of the gas and electric franchises which are the subject of this case. The City required the company to "collect" the franchise fees from the residents of Des Moines and then to "remit" those franchise fee monies to Des Moines. The only relief from this "obligation" imposed by virtue of the ordinances is in the event the fee is ruled to be unlawful by the Supreme Court in a final, non-appealable decision. The franchises govern the utilities being provided to customers within the city limits of the city of Des Moines and require the collection. Iowa law and company policies provide for disconnection in the event of nonpayment.

It is also clear by virtue of this case that the legal structure in which the City sought to operate belies any claim by the City that MidAmerican imposed the fee/tax. MidAmerican did not impose the fee/tax. It has no such authority to do so as that authority is granted to the City under Iowa Code §364.2(4). Further, the fee was imposed for the sole benefit and at the behest of the City of Des Moines. Indeed, the City urged previously in this case that the fee was intended to and used for the raising of revenue for the operations of the City. *Kragnes* at 635. Even now this case proceeds before this Court on remand for this Court to determine what amounts are proper franchise fees (which the City will use to pay for the costs of regulation) and what amounts are illegal taxes (which were intended by the City to be used for general revenue purposes). Either way the monies are solely for the benefit of the City, the principal, who uses the utility to collect the taxes for it.

The fee's collection was not optional. The City did not provide any form of mechanism for MidAmerican to afford customers a procedure where the obligation to collect the fee was relieved after due process. Instead the City made it mandatory that the fee be collected and paid over to the City by MidAmerican Energy. It is these actions that have amounted to the imposition of the summary procedure, the power, to threaten disconnection of a utility for failure to pay an unlawful franchise fee. MidAmerican Energy is merely the collection agent for a fee imposed and mandated by the City of Des Moines and the customer has no right of protest, due process or other mechanisms so as to avoid the threat of summary disconnection for failure to remit the fee.

The suggestion by the City that its enactment of the ordinances, imposition of its mandates, and its utilization of the utility company for the purpose of "collecting" the fee under a traditional utility structure where the consumer is not provided any form of due process to

contest the imposition of the fee, its legality and/or validity without facing the threat of disconnection defies logic or a basis in the law.<sup>5</sup> Section 364.2(4) Iowa Code (2006) does not authorize a utility company to determine, impose and collect a fee from customers located within the city limits of the City of Des Moines. The Iowa legislature only authorized the municipality, here the City of Des Moines, to impose a franchise fee. This case now stands for the proposition that the City of Des Moines sought to collect an illegal franchise fee as it used the fee as a tax. The City seems to argue that it cannot be held liable for refunding of money that it illegally collected because it required a third party to do the collection. It invokes the phrase of "independent contractor" and says it does not have to refund the money illegally collected by that so-called independent contractor. Nonsense! The City is the one with the illegal money. The City is the one who conditioned MidAmerican's right to provide gas and electric to Des Moines customers upon the obligation of MidAmerican to act as a collector of a City of Des Moines tax disguised as a franchise fee. The City of Des Moines got the money – not MidAmerican.<sup>6</sup> The proposition is entirely contrary to traditional concepts of agency. Indeed, McQuillin's Municipal Corporations states, "where the contractor is employed to do an act unlawfully in itself or which of itself involves a trespass, the municipality is liable, without

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<sup>5</sup> It would be illogical for a forced collector to not be an agent of the principal. At the very least MidAmerican would be citing under the color of law in collecting the franchise fee for the City of Des Moines and its actions then be binding upon the City. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) and *Almand v Benton County*, 145 B.R. 608, 613-615 (W. D. Ark. 1992). See also Am Jur 2<sup>nd</sup>, Civil Rights, §72.

<sup>6</sup> One wonders of this scenario: The City hires a band of street thugs to collect the tax. The street thugs use guns to extract the money and then give the money to the City. Independent Contractor?? No liability of the City?? Here it was MidAmerican, coerced through an ordinance, to bill and collect the fee/tax required by the City and to turn the money over to the City. Consistently, and as a matter of course, the threat of disconnection of a needed service, gas and electric, has been used as the coercive tool to make the collection. The tax is illegal, at least the portion here discussed for refund. It is illogical, not in accord with law and not in accord with common sense to relieve the City of the obligation to refund its illegal tax due simply to the fact that someone else was forced by the City to do the dirty work, to collect the illegal tax.

regard to what measure of control, if any, it retains over the performance of the work. 18  
*McQuillin Mun. Corp.* Section 53.76.40 (3<sup>rd</sup> Ed.). The City empowered and directed  
MidAmerican to collect the illegal franchise fee/tax. It controlled that collection through the  
imposition of an ordinance. It told MidAmerican what to do. It got the benefits of that direction  
to MidAmerican – it got illegal tax monies. It is bound to refund them.

**CONCLUSION**

In *Harbeck v. Sioux City*, 202 NW 507, 507-508 (Iowa 1925), the Iowa Supreme Court  
stated as follows:

Good conscience and morality are with the plaintiff in this case, even if no other  
ground were apparent in the record than that of payment by mistake. .... We  
may take judicial notice that police power has a preemptory quality, and that its  
exercise by police officials is often summary. Result was that the plaintiff paid to  
the city excess fees amounting to more than \$1,200. Good morals often point an  
index to good law. The pointing is very plain in this case.

The same remains true in the present case. The Court should overrule the Motion for Summary  
Judgment filed by the Defendant.

Respectfully Submitted,



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ORIGINAL FILED.

Copies of the foregoing have been mailed this  
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