

N.W.2d 532, 537 (Iowa 2002). Therefore, when a court fails to rule on an issue properly raised, the party raising the issue “must file a motion requesting a ruling in order to preserve error for appeal. Id. A motion under I.R.C.P. 1.904(s)¹ “is a procedural mechanism that permits parties to request reconsideration of a ruling and authorizes the court to change its ruling.” Id. at 138.

The Court should change its ruling in this case, and decide the issue of whether a refund is available to Plaintiff because there is no genuine factual dispute surrounding the issue.

If the parties were at trial, there would be a genuine factual dispute as to how much of a franchise fee the City is entitled to. Indeed, that is the ultimate fighting issue - how much cost is reasonably related to regulating the gas and electric utilities in the City’s right-of-way.

But we are not yet at trial. We are in a summary judgment posture. And for purposes of the summary judgment, the City conceded - *arguendo* - that it will be entitled to less franchise fees than it collects.

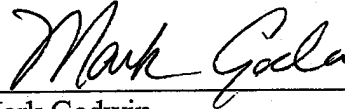
In other words, for purposes of summary judgment, the City is saying, in effect, “Let’s assume the Plaintiff prevails upon her claim that the franchise fees are too high.” And then, having made the assumption and concession that the *factual* possibility of a refund exists, the City then made the argument that the Plaintiff has no *legal* right to a refund. (See Motion and Brief.)

CONCLUSION

The Court misapprehended the City’s argument and found a factual dispute to exist, where, by express concession of the City for purposes of argument, the factual dispute could not exist. Because of the Court’s misapprehension, the Court failed to rule on the refund issue properly raised by the City. The Court should enlarge and amend its findings and conclusions and modify its ruling

¹ Formerly Rule 179(b)

to hold that even if the Plaintiff proves the franchise fees are too high, the Plaintiff is nevertheless not entitled to a refund.



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

Original to:

Honorable Don C. Nickerson
Judge, 5th Judicial District

Copies to:

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

Bruce Stoltze
6701 Westown Parkway, Ste. 100
West Des Moines, IA 50266-7703
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 8-6-07

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other:

Signature Diane Roscoe