

IN THE IOWA DISTRICT COURT FOR POLK COUNTY, IA.

FILED  
POLK COUNTY, IA.

LISA KRAGNES and all others similarly situated,

Plaintiffs,

Vs.

CITY OF DES MOINES, IOWA,

Defendant.

08 MAR 24 PM 4: 06  
Equity No. CE 49273

CLERK DISTRICT COURT

PLAINTIFF'S RESISTANCE TO  
MOTION FOR GAG ORDER  
AND  
RESISTANCE TO MOTION FOR  
SANCTIONS

**RESISTANCE TO MOTION FOR GAG ORDER**

COMES NOW the Plaintiff, Lisa Kragnes, by and through her counsel, and resists the Motion for Gag Order filed by the Defendant in this case and respectfully states:

1. It is admitted that the Plaintiff has retained an individual with media experience for the purpose of ensuring appropriate communication with the media. Plaintiff does not have experience in dealing with the media, in responding to requests by the media for information and updates, or in being the lead plaintiff in a large class action lawsuit involving matters of broad public interest. She is new to the legal system and the media. Defendant is not.

2. Plaintiff's media expert works with many clients in the Des Moines area who are involved in litigation of interest to the media. It is her job to manage communication with the media which might otherwise prove overwhelming under the circumstances. Plaintiff's media expert accordingly has relationships with many members of the print and electronic media around the state. She deals with members of the press regularly, and is able to communicate effectively on behalf of Plaintiff so that the Plaintiff is not deluged with requests for interviews/updates at every stage of the proceedings. In so doing, the media expert reduces and streamlines the communication that Plaintiff has with the media.

3. It is admitted that the media person has authored and submitted to the press a document called a "media update", a copy of which was attached as Exhibit A to the motion filed by the Defendant. It is denied that that media update is in any way a compilation of "lies, half truths or unethical statements and comments". It is further denied that anything such as this media update should be halted in the future. See Exhibit "1" for a copy of the Iowa Rule of Ethics, Rule 32:3.6 which does not disallow this communication.

4. It is admitted that the media update places in non-technical language the information concerning the various pleadings and stages of the proceedings in this case. It is written by one media person for use by another. It is admitted that this information is not in the legal and technical language of the court pleadings or court orders. It is asserted, however, that the media update provides, in common and ordinary language, appropriate information for the media to use as it sees fit for disclosure to the public as to the documents in this case and the stages of the litigation of which there is a matter of public interest and public concern. It is written in response to specific requests by the media for updated information regarding the status of this proceeding. It is also asserted that this media update is not the document published, with a copy of the news article published attached hereto as Exhibit "2".

5. As to the various paragraphs asserted by the Defendant and relating thereto, no comments made by any person in this litigation, either Plaintiff or Defendant, or their representatives, is in violation of any rule of professional conduct. The Plaintiff further states:

- a. The Plaintiff filed a motion to require production of documents which the Court has ordered.
- b. This case does involve a question of fairness of the Cities' imposition of a fee. This question of fairness of the fees has previously been discussed extensively in

the media, including by members of the City Council of the City of Des Moines, by the Mayor of Des Moines, by the former City Manager, Eric Anderson, by the current City Manager Rick Clark, by the City Attorney, Bruce Bergman, and by the Assistant City Attorney in this case, Mark Godwin. Copies of some of the statements made by the City Council members, the Mayor, the former City Manager, the current City Manager, Bruce Bergman, and Mark Godwin, are attached hereto as Exhibits "3i", "3ii" and "3iii", etc respectively. Some of the specific statements made to the Des Moines Register by Defendant or parties representing its interests in this matter include:

- (i) February 27, 2005 Tax cuts depend on legal battle: City Attorney Bruce Bergman said he is confident the city can win attorney Brad Schroeder's lawsuit over the utility fee, which has been used for more than 40 years.
- (ii) January 11, 2006 If D.M.'s fee goes, what's next?: City Attorney Bruce Bergman said the shortfall equaled "hundreds of layoffs" and a tax rate increase of \$2.5 per \$1,000 of value. Councilwoman Christine Hensley noted that the police and fire departments, which receive large portions of the city's \$140 million operating budget, could see dramatic cuts. She wants city employees to plan for the worst in the budget year that begins in July.
- (iii) January 14, 2006 Court to review fee ruling: Lawyers for the City of Des Moines insisted Friday that the city should be allowed to keep money from the franchise fee even if it is illegal.

- (iv) March 11, 2006 State Supreme Court hears utility-fee case: Mark Godwin, an attorney for the city, argued that past court cases have established that cities may charge a franchise fee.
  - (v) December 31, 2004 Legislator: City fees undercut tax relief efforts: The Executive Director of the Iowa League of Cities, said his group will lobby against any move to reduce or eliminate the franchise fee option, which some cities have used for more than 15 years. “That’s a traditional revenue source established between the people of a community and their local elected officials”. “It’s absolutely something that should be available.”
  - (vi) January 10, 2006 Utility fee decision could cost D.M. millions: City Councilwoman Christine Hensley said Huppert’s ruling could have “some very serious ramifications, not only for Des Moines but for cities across the state.”
  - (vii) June 1, 2006 Franchise fee ruling lands D.M. in \$40 million limbo: City Councilman Bob Mahaffey said the fee was a good way to pay for city services and that residents should be upset with Kragens. “I would think the lady who filed the lawsuit would be looked at in a negative way.” (See attached Exhibit “3”).
- c. The comment by Brad Schroeder does not violate any rule of professional conduct, because, as noted by the attached Exhibit “1”, the rule of ethical conduct cited by Defendant, this comment (i) is made upon a pleading which is filed of record; (ii) is in accordance with the pleading which was previously filed of

record; is made upon a stage of the preceding; (iii) is a reference to the fact that an investigation of the matter is in progress; (iv) is a matter which will not have any substantial likelihood of materially prejudicing any adjudicative proceeding in this matter; (v) addresses matters of legitimate interest in the conduct of judicial proceedings when these matters are general public concern; and, finally, (vi) the subject matter of this legal proceeding is of direct significance in debate and deliberation over questions of public policy. See Exhibit "1".

- d. The paragraph calling the franchise fee an "illegal franchise tax" is merely again a characterization of the legal proceedings and filed documentation. Plaintiff filed this lawsuit in July of 2004, calling this franchise fee an illegal tax or an illegal fee. No further statement of that will change this characterization that has been in existence in public record for almost four years and is repeated in numerous pleadings.
- e. At the present time, the Court has ordered certain documents to be held confidential. The Court will only allow those documents to be released if, in fact, the Court determines in the future that they can be released.
- f. The reference in the media update to the City not wanting the documents being produced relates to the fact that this is a public entity which is an assertion made by the Plaintiff in the motion. Accordingly, this again is a comment upon matters that are already of public record.
- g. The Defendant refers to a statement in the media update that for a franchise fee to be valid it may only recover expenses which are actually incurred. The Defendant apparently contends that that language is different from being "reasonably

related” to the City costs and “incidental consequences” of franchise regulation. Plaintiff asserts the language used is in accord with the language of the Supreme Court in the controlling decision previously entered in this case. Of course, that will all be a matter of legal interpretation by this Court in interpreting the decision of the Supreme Court.

- h. The Defendant takes out of context the question of the third full paragraph of the second page of the “media update” (which it must be remembered was never released by Plaintiff to the public as compared to the media, as confirmed by the actual article published, attached hereto as Exhibit 2), which refers to the fact that the City did not want to disclose the calculating methods in supporting documents. It is a matter of public record that the City filed a motion to prohibit disclosure of this information to the public. It is of course also true that the City would not agree to release any documentation without a requirement that some of it be held confidential. That confidentiality is being maintained according to this Court’s Order.

6. As noted before, the Defendant takes issue with statements as set out in the media update. Plaintiff takes issue with the various statements made by the Defendant to the media throughout the course of this litigation. Yet this particular case is a matter of general public concern. It has been subject to extensive newspaper and T.V. coverage. Plaintiff is the lead member in a class action that includes hundreds of thousands of class members in Des Moines. Furthermore, attached hereto marked Exhibit 4 is a copy of the newspaper article when this Court continued the trial in this case. The Court should note that before Plaintiff’s counsel or the Plaintiff actually received a copy of the Court Order as signed by the Court, this information

somehow made it into the hands of the news media and the news media were informed that it was the Plaintiff who had "requested" the continuance. Plaintiff received inquiries regarding the continuance before she or her counsel even knew that the trial had been continued. As there is no formal application on file, and the continuance order of the court does not state it was Plaintiff who requested the continuance, that information could only have come from the Defendant. This information was in the newspaper article prior to the time either the Plaintiff or Plaintiff's attorneys had actually received the signed order from the Court. It became obvious to Plaintiff at that time that the Defendant, City of Des Moines, has a direct line of contact to the media and was supplying information relating to stages of the proceeding. While the Plaintiff does not object to the City of Des Moines discussing this matter of public concern, the Plaintiff does not believe the Plaintiff or the Plaintiff's attorneys should in any way be restricted from communicating with the public and members of the media regarding those issues which are allowed within the context of the Iowa Rules of Ethics. Specifically, both the Plaintiff and the Plaintiff's attorneys should be allowed to communicate with the media as desired in order to discuss information that is contained in the public pleadings, to discuss stages of the proceedings, and to address matters of public concern, particularly where the communication at issue is ultimately largely directed to those who are already members of the Plaintiff class anyway.

7. Finally, this Court is highly unlikely to be influenced by any media coverage or statements made by any parties or their counsel. The Court will recognize that this case is to be determined by the Court upon the evidence submitted at the time of trial as well as appropriate interpretation and application of the laws. Here there is no jury as a fact finder to be affected. Furthermore, the public itself is and will be affected by this litigation and by any public policies that are altered or changed as a result of this litigation. Appropriate public information which

may generate and/or be important in public debate relating thereto is a valid and appropriate concern. The entry of the Gag Order would be contrary to the service of the public, would potentially present practical enforcement dilemmas, would unfairly imbalance the playing field, and should not be ordered.

WHEREFORE, the Plaintiff requests the Court overrule the motion of the Defendant for a Gag Order.

### **RESISTANCE TO MOTION FOR SANCTIONS**

COME NOW the Plaintiff's attorneys, and resist the Motion for Sanctions herein and respectfully state:

1. The "media update" issued by a media expert retained by Plaintiff is in no way improper or unethical. It was provided to the media who then utilized it along with all other information in the public domain to prepare a newspaper article. That newspaper article is attached hereto as Exhibit "2". In that article, the Court will note, the news media altered the information in the media update according to its own determinations, as it is the publisher of the information.

2. Iowa Rule of Professional Conduct 32:3:6 ("Trial publicity") cited by Defendant in its application prohibits only statements that ". . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter." Accordingly, Defendant must prove that the Court – as fact-finder in this matter – has suffered a substantial likelihood of being materially influenced by the statement to which Defendant takes exception. Again, this is not a jury matter.

3. The Plaintiff's attorneys resist the fact that the Plaintiff should pay any cost of the Defendant having brought this motion, which is without validity.

WHEREFORE Plaintiffs attorneys request that the Court overrule the Motion for Sanctions.

Respectfully submitted,



By: \_\_\_\_\_

Brad Schroeder PK# 000015582  
Hartung & Schroeder LLP  
Equitable Building, Suite 100  
608 Locust Street  
Des Moines, Iowa 50309  
Telephone: (515) 282-7800  
Facsimile: (515) 282-8700  
E-mail: schroeder@handslawfirm.com  
ATTORNEY FOR PLAINTIFF



By: \_\_\_\_\_

Bruce H. Stoltze (AT0007521)  
Stoltze & Updegraff, P.C.  
300 Walnut Street, Suite 260  
Des Moines, Iowa 50309  
Telephone: 515-244-1473  
Fax: 515-244-3930  
Email: bruce.stoltze@stoltzelaw.com  
ATTORNEY FOR PLAINTIFF

**ORIGINAL FILED.**

**CERTIFICATE OF SERVICE:**

A COPY of the foregoing has been hand delivered this 24<sup>th</sup> day of March, 2008, to the following:

Mark Godwin  
Deputy City Attorney

City Hall  
400 East First Street  
Des Moines, IA 50309  
ATTORNEY FOR DEFENDANT

Judge Joel D. Novak  
Polk County Courthouse  
500 Mulberry  
Des Moines, Iowa 50309

*Michelle Hirsch*

By: \_\_\_\_\_

(a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress, or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Adopted April 20, 2005, eff. July 1, 2005.

#### Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Iowa Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See rule 32:1.0(m).

#### Rule 32:3.6. Trial publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) Any communication made under paragraph (b) that includes information that a defendant will be or has been charged with a crime must also include a statement explaining that a criminal charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.

Adopted April 20, 2005, eff. July 1, 2005.

#### Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at ensuring its security. It also has a legitimate interest in the conduct

of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, and mental disability proceedings, and perhaps other types of litigation. Rule 32:3.4(c) requires compliance with such rules.

[3] The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See rule 32:3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

### Rule 32:3.7. Lawyer as witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 32:1.7 or rule 32:1.9.

Adopted April 20, 2005, eff. July 1, 2005.

#### Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

#### Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

## Details of report on franchise fee kept confidential

By **MELISSA WALKER**  
REGISTER STAFF WRITER

A court fight over collection of a special fee on utility bills in Des Moines has focused on an \$81,138 study, key details of which a judge says should be secret.

The city hired a Twin Cities firm to determine how much it cost to regulate natural gas and electric companies. Those costs are recouped through a 5 percent "franchise fee" tacked on to customers' bills, which has been challenged by a Des Moines woman, Lisa Kragnes. Kragnes calls the fee an illegal tax.

The Iowa Supreme Court ruled in May 2006 that the fee can be collected but that the amount collected cannot exceed the city's cost to regulate the utilities.

The fee, which has been collected for more than 45 years, costs the typical customer \$110 per year and brings the city about \$12.6 million per year. The money

See **FRANCHISE**, Page 5B

EXHIBIT

2

# Details of report kept confidential

FRANCHISE, from Page 1B

has paid for longer library hours and additional police officers and firefighters, among other things.

The report, by Springsted Inc., set the utility regulation cost at about \$19.6 million, but the method used to arrive at the figure will be kept private until Judge Joel Novak decides whether it falls under an area of Iowa law that protects trade secrets.

"It defies logic to me. You're using public dollars — and a lot of them — to write this report and justify this tax," Kragnes' attorney, Brad Schroeder, said. "And then to say the documents shouldn't be public, it doesn't make sense to me."

Novak and Kragnes' attorneys are expected to receive Springsted's calculation methods today. A trial is set for October.

In the meantime, City Attorney Bruce Bergman said he will ask Novak to prevent Kragnes' attorneys from talking publicly about the document, which he said was kept confidential at Springsted's request.

Bergman said a statement sent to The Des Moines Register on behalf of Kragnes' attorneys contains inaccuracies, such as a claim that the city made an "attempt to conceal the documents."

"We can talk about things that are filed in court documents," Bergman said. "We can't go outside of that. We can't characterize conduct on the other side's part."

According to the analysis, the city's costs include:

- \$3.5 million for lost value

of trees trimmed and removed from city property. Bergman said more than 1,000 trees are cut down each year by MidAmerican Energy Co., and thousands more are trimmed for utility lines.

- \$12 million in lost property tax revenue and other potential revenue from the city's obligation to own the property where utility lines are located. Bergman said this is land that would otherwise be owned by a property-tax-paying entity.

"We cannot sell it, we cannot make another use of it," he said. "Is there value to that? Yes. Would we get rid of that property if we could? You bet."

- \$3 million in increased construction costs. Bergman said projects can cost more and be more complicated because workers have to maneuver around utility lines.

Reporter Melissa Walker can be reached at (515) 284-8451 or mewalker@dmreg.com

## The story so far

**JANUARY 2001:** Legislators vote to phase out a 5 percent state sales tax on natural gas, propane, heating oil and electricity. The move saves Iowans more than \$100 million.

**MAY 2004:** Des Moines city leaders move to increase to the city's "franchise fee" from 1 percent to 6 percent. "I think it's sad for consumers," says state Senate Majority Leader Stewart Iverson, a Republican.

**JULY 2004:** Hundreds of telephone calls and e-mails from business owners, residents and legislators push the City Council to scale back the increase, making the fee 3 percent. Resident Lisa Kragnes sues the city.

**APRIL 2005:** The fee is changed from 3 percent to 5 percent.

**JANUARY 2006:** Judge Michael Huppert rules in favor of Kragnes. The city appeals.

**MAY 2006:** The Iowa Supreme Court rules that Des Moines cannot use a utility franchise fee to raise money for city services beyond what it costs to supervise the utility.

**2007:** City attorneys and attorneys for Kragnes try to determine franchise regulation costs.

**NEXT:** The case is scheduled for a bench trial in October.

# METRO & IOWA

B  
DM  
SUNDAY  
February 27, 2005

# Tax cuts depend on legal battle

## If Des Moines loses a lawsuit on utility fees, a proposal for shifting taxes from property owners won't fly

By JASON CLAYWORTH  
REGISTER STAFF WRITER

A plan to cut taxes for Des Moines property owners hinges on the city's ability to win a legal fight over higher utility fees.

The fees, which are added to gas and electric bills, would be raised early 70 percent under a 125 million budget plan the City Council will debate Monday.

The budget could include a tax cut of up to \$30 per year for the typical homeowner if council members

boost the utility fee for the second time in a year, City Manager Eric Anderson said.

The fee, which was tripled in July and now costs the average household \$44 per year, is the subject of a lawsuit by a Des Moines attorney who says the fee is an illegal tax and

should be eliminated.

The legal stakes are high because the city faces a \$3.9 million shortfall for the budget year that begins July 1, and a new spending plan must be in place by March 15.

The idea behind Anderson's plan is to shift the tax burden away from

property owners and tap those who are exempt from taxes, such as hospitals, churches and nonprofit agencies.

"Certainly, if we can't charge the fee, then we have to make very deep cuts for the property tax has to go back to where it was," he said.

If the city loses in court, council members could be forced to eliminate an important source of revenue, and possibly be ordered to refund millions of dollars. That would gut the city's \$8 million reserve, trigger layoffs and cripple key services, Anderson said.

He wants council members to raise the fee up to 2 more percentage points before the question can be decided in court, a gamble some

See FEES, Page 6B

EXHIBIT  
3i

## Higher taxes vs. higher utility bills

Two of seven council members would save money annually with higher gas and electric charges instead of higher property taxes. The average utility user and Des Moines homeowner would pay about the same either way.

Name	Address	Monthly rise in expenses with a 2 percentage point increase in electric and gas fees	Total annual extra electric and gas expenses	Total annual tax savings with proposed tax cut
Frank Cownie	675 Harwood Dr.	\$7.28	\$87.36	\$84
Chris Coleman	3512 48th Pl.	\$4.72	\$56.64	\$48
Michael Kiernan	750 16th St.	\$4.10	\$49.20	\$55
Tom Viassis	5001 Lyndale Dr.	\$3.72	\$44.64	\$42
Bob Mahaffey	2220 E 32nd St.	\$3.94	\$47.28	\$38
Christine Hensley	753 55th St.	\$2.42	\$29.04	\$64
Archie Brooks	4102 S.E. 13th St.	\$4.90	\$58.80	\$50

\* These calculations are based upon the a tax rate of \$17.22 if there is no franchise fee increase vs. the estimated tax rate of \$18.52 per \$1,000 of property valuation if there is a 2 percentage point fee increase. Calculations are made after various tax reductions that are typically given to homeowners.

Source: City of Des Moines

THE REGISTER

# Property tax cuts in D.M. depend on legal decision

FEES, from Page 1B

council members seem ready to take.

"I love the second penny idea," councilman Chris Coleman said. "I've been on board with this for a long time. I think it's the right thing to do."

Anderson said Coleman and the rest of the council members have three basic choices:

● **No fee increase:** Property taxes would increase 17 cents per \$1,000 of value, to \$17.22. The average homeowner would pay about \$7

more per year.  
● **A 1 percentage point increase:** The same property owner would save about \$13 a year in taxes, but pay roughly \$15 more a year in utility bills.

● **A 2 percentage point increase:** A \$30 annual tax savings, but \$29 more in utility bills.

A taxpayer watchdog group supports the 1 percent increase. The utility fee is more fair than a property tax hike, said Jeff Riese, executive director of the Polk-Des Moines Taxpayers Association. Everyone uses gas and electricity, but \$1.3 billion of property in Polk County is exempt.

"When I calculated the costs on paper, it came out with a wash for the typical resident," Riese said.

But nonprofit groups have resisted the fees. Churches, homeless shelters, hospitals and most other exempt groups would have to trim their budgets to absorb the extra expenses, opponents of Anderson's plan said.

"Anytime you raise costs in a nonprofit environment, ultimately those costs are paid by the user," said Greg Boettner, senior vice president of the Iowa Hospital Association.

Iowa hospitals provide more than \$353 million in uncompensated health care each year, Boettner said. Some charitable programs would likely be cut or eliminated if utility fees continue to climb.

"Everything has an impact," he said.

The city's operating budget was hit this year with more than \$2.2 million in salary increases and more than \$1.3 million in new health insurance costs. A 1 percentage point fee increase would generate roughly \$2.3 million. A 2 percentage point

## Talk about it

The first budget hearing to set Des Moines' tax rate and decide increases in fees on gas, electricity and parking will be at 4:30 p.m. Monday at City Hall, 400 Robert D. Ray Drive.

## Figure your taxes

**CITY RATE:** \$17.05 per \$1,000 of property value.

**PROPOSED:** An increase to as much as \$17.22, or a decrease to as low as \$16.52.

**TAX BREAK:** The state reduces the amount of residential property subject to taxes to prevent a shift in the burden from agricultural to residential property. The "rollback" figure this year dips from about 51 percent to 48 percent. For example, \$48,000 of a \$100,000 home's value will be taxed.

### FIGURE YOUR BILL

1. Multiply the assessed value of a home by the state's rollback.
2. Divide by 1,000.
3. Multiply by the city's tax rate.

### EXAMPLE

1. 100,000 X .48 = 48,000
2. 48,000 divided by 1,000 = 48
3. 48 X \$17.05 = \$818.40

increase: \$4.6 million.

"Like most people, I'm not real fond of any tax that taxes me," east-side resident Gordon Quinn Sr. said. "On the other hand, I'm smart enough to know that \$7 isn't enough to break me."

City Attorney Bruce Bergman said he is confident the city can win attorney Brad Schroeder's lawsuit over the utility fee, which has been used for more than 40 years.

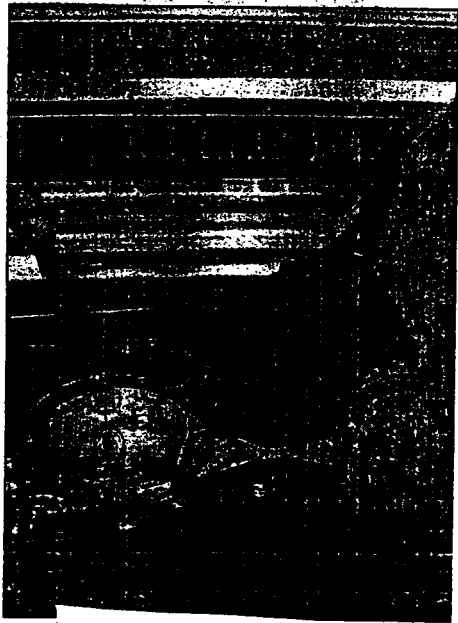
A key state lawmaker who criticized the city's fee increases has even softened his opposition.

Senate Republican President Jeff Lambert of Ankeny last month threatened legislation to freeze or eliminate the fees because they erode the \$100 million a year Iowans will save when a state sales tax on natural gas, propane, heating oil and electricity disappears.

Lambert last week said he has had second thoughts because Des Moines "has made a huge step in the right direction" by promising to lower taxes as the fee increases.

"My goal has never been to pick a fight with Des Moines but rather to protect taxpayers," he said. "Actually, I'm reasonably pleased with what they did."

# If D.M.'s fee goes, what's next?



DAVID PETERSON/THE REGISTER  
**Victorious:** Lisa Kragnes has fought City Hall and won. She sued Des Moines in July 2004, saying a surcharge on gas and electricity bills constituted an unfair tax.

## Ruling could bring layoffs, service cuts, tax increase, officials say

By JASON CLAYWORTH  
REGISTER STAFF WRITER

Des Moines leaders say it would be difficult to refund \$26 million in energy fees without massive layoffs, public safety cuts or a \$100 annual tax increase for a typical homeowner in the city.

All three options are unsettling to Sondra Mitchell, who lives on the city's south side. But it's a choice City Council members could face if a judge orders them to pay back five years' worth of what he said are illegal franchise fees on utility bills.

"It would just come back to us and increase our taxes," Mitchell said Tuesday. "I am for our police and fire department having that money."

Judge Michael Huppert this week ruled in favor of a Des Moines woman who said the surcharge on gas and electricity bills represents an unfair tax. Elected officials say the fee helps shift the city budget burden away from homeowners to nonprofit groups that pay no property taxes.

Huppert will rule as early as Friday on whether his

decision applies to every household in the city, and on whether city officials should be ordered to repay the fees from the past five years.

The ruling would also apply in more than a dozen other Iowa cities that use utility fees to balance budgets and keep property taxes in check.

"Obviously, this has implications," said Tom Ekdeweg, executive director of the Iowa League of Cities.

Huppert ruled initially that Des Moines must stop collecting the fee. City attorneys persuaded him to narrow the

ruling to fees collected from Lisa Kragnes, who took the city to court.

"I don't remember how I heard about the fee, but I understood they were raising it and I started asking questions about what it was for, what it meant, and nobody could really give me a good answer," Kragnes said.

She called attorney Brad Schroeder, who discovered judges' rulings against similar fees. The lawsuit was filed in July 2004 to block the city's plan to increase the fee.

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# D.M. officials ponder response to decisions on franchise fee

FEE, from Page 1B

Des Moines has increased the franchise fee to 5 percent from 1 percent over the past 2½ years. The money has been used to hire police and fire department employees, balance the budget and cut the city's tax rate.

The fee will generate an estimated \$15.1 million this year.

Mayor Frank Cownie and Acting City Manager Rick Clark declined Tuesday to speculate about what types of cuts would be required if a legal appeal was unsuccessful. City Attorney Bruce Bergman said the shortfall equaled "hundreds of layoffs" and a tax rate increase of \$2.50 per \$1,000 of value.

Councilwoman Christine Hensley noted that the police and fire departments, which receive large portions of the city's \$140 million operating budget, could see dramatic cuts. She wants city employees to plan for the worst in the budget year that begins in July.

"This is a big deal," she said.

Councilman Chris Coleman said public safety is a budget priority, but that "it's probably not fair to say anything will be taken off the table at this time." An unfavorable ruling, he said, would be "a clear signal that we have to redefine what local government is."

Police Chief William McCarthy does not anticipate cuts. "If that happens, we'll cross that bridge. But it's not anything I'm going to worry about," he said Tuesday.

The fee increases were proposed by former City Manager Eric Anderson. They allowed the council last year to cut taxes by roughly \$30 a year for the typical homeowner. The fee increase cost the same resident about the same amount.

City lawyers last year noted that Des Moines has charged some sort of franchise fee for more than 45 years. They were certain Kragnes' lawsuit would be thrown out.

Hundreds of cities across the nation levy franchise fees on utility bills, said Cheryl Leanza of the National League of Cities. More than 290 cities in California, for

## City services

Examples of city services and the amounts of property taxes that go to each.\*

School crossing guards  
| \$96,000

School resource officer program  
| \$163,000

Gray's Lake Park  
| \$319,000

Swimming pools  
| \$337,000

Cemetery maintenance and services  
| \$348,000

Police tactical unit  
| \$1.5 million

Fire department  
| \$22.2 million

Police department  
| \$34.9 million

\*Overall budgets contain other sources of revenue

Source: City of Des Moines

THE REGISTER

example, collect franchise fees each year that total more than \$120 million.

Des Moines city leaders have long argued the franchise fee is more fair than property taxes, because roughly 40 percent of Des Moines' property is tax-exempt.

Mike Van Milligen of Dubuque, president of the Iowa City/County Management Association, said Des Moines leaders should not be faulted for their decision to lean on fees to keep taxes down.

"Franchise fees are well-founded in Iowa law and practice," Van Milligen said.

Pleasant Hill City Administrator Bob Fagan said he's concerned but optimistic about Huppert's upcoming decisions. His city uses the roughly \$150,000 it gets from franchise fees each year for street improvements.

Des Moines resident Bill Buck said he was frustrated with the ruling, and that he thought the fee is more fair than taxes. "This is almost like a no-win situation, as far as I'm concerned," he said.

Reporter Jason Clayworth can be reached at (515) 699-7858 or jclayworth@dmreg.com

# Court to review fee ruling

By JEFF ECKHOFF  
REGISTER STAFF WRITER

Iowa Supreme Court justices have decided to review a Polk County judge's ruling that a 5 percent franchise fee on Des Moines gas and electric bills is an illegal municipal tax.

Word that justices will take up the case effectively shelves any efforts to expand it into a class-action lawsuit. That means lawyers for the Des Moines woman who brought the initial complaint will have to wait at least a few months before learning whether it can be broadened to include all other utility customers in the city.

Millions of dollars are at stake if attorneys for Des Moines resident Lisa Kragnes successfully win

refunds for all Des Moines utility customers who paid the fee over the past 5½ years. City officials have said receipts from the franchise fee are expected to total \$26 million between July 27, 1999, and June 30, 2006.

Des Moines attorneys say they have been told that the Supreme Court could hear arguments as early as March on the city's appeal of a decision by Judge Michael Huppert.

Huppert's rulings over the past week in Kragnes' 2004 lawsuit have ordered the city to stop collecting the franchise fee from Kragnes. But the judge stopped short of ordering any refund or prohibiting collection from other Des Moines residents.

Huppert had been expected to rule Tuesday on whether the case could go forward as a class-action lawsuit.

Lawyers for the city of Des Moines insisted Friday that the city should be allowed to keep money from the franchise fee even if it is illegal. Iowa law says taxpayers are not entitled to have illegal taxes returned unless they were "paid under compulsion" or a refund is ordered by a specific statute, the city contends.

City officials also contend that the franchise fee has been in place for more than 40 years and is more equitable than paying city bills from property taxes. Roughly 40 percent of the property in Des Moines is tax-exempt.

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# State Supreme Court hears utility-fee case

If cities rule against the fees, cities could have to return millions of dollars to residents.

By **JASON CLAYWORTH**  
REGISTER STAFF WRITER

The fate of Des Moines' controversial franchise fee on gas and electricity rests in the hands of the Iowa Supreme Court, which heard arguments Friday about the fee that pumps more than \$15 million into the city's budget each year.

"It's a waiting game," said resident Lisa Kragnes, who took the city to court over the energy fee in 2004. "I'm glad it has come this far."

The decision is critical throughout the state because dozens of cities have propped their budgets with similar franchise fees. If the court rules against the fees, those cities ultimately could be forced to refund millions of

## Fees in Iowa

Iowa cities that have increased franchise fees:

**ALGONA:** 5 percent on natural gas.

**DES MOINES:** 5 percent on gas and electricity.

**LOGAN:** 5 percent on gas and electricity.

**ROCK VALLEY:** 5 percent on gas and electricity.

**WINDSOR HEIGHTS:** 5 percent on gas and electricity.

**EARLY:** 4 percent on gas and 3 percent on electricity.

**LYTTON:** 4 percent on natural gas.

**PLEASANT HILL:** 4 percent on gas and electricity.

**AKRON:** 3 percent on natural gas.

**OSKALOOSA:** 2 percent on gas and electricity.

**PERRY:** 2 percent on electricity.

**SIOUX CITY:** 2 percent on gas and electricity.

Source: MidAmerican Energy

FRANCHISE, Page 2B

# guard: Cons win

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t of people, believes  
th o Hansl. He

had some interesting comments and asked some excellent questions.

I can't respond to all of them, but here goes:

● You say Hansl had nothing to hide. When he applied for a visa and his U.S. citizenship, did he mention his SS membership? That would be very surprising.

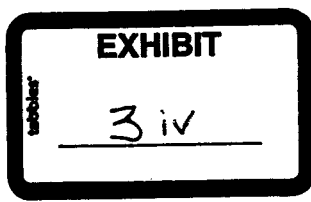
Response: In the visa-application process, Hansl brought his Waffen SS discharge papers with him to at least one of three interviews.

During the discovery process a few years ago, the government provided papers showing that Hansl's status as a guard at Sachsenhausen had been well-documented.

● With the Cold War kicking up, we were more interested in being friends with the Germans than

See **HANSEN**, Page 3B

*March 11, 2006*



thousands of dollars for batti-  
cades, tests and engineering stud-  
ies, legal bills and relocating. The  
community lost a great and historic

inside, floors sag and p  
cracked and falling. i.  
stained glass windows are i  
damaged by the buildin.

# State Supreme Court hears utility-fee arguments

FRANCHISE, from Page 1B

dollars to residents and halt future collections.

That means, particularly in Des Moines, that things such as a popular property-tax cut or extra firefighters who were hired with the fee revenue might go away.

"As someone who pays property taxes, I sure know how I'd vote" if I were on the state Supreme Court, said Des Moines City Councilman Chris Coleman, who attended Friday's oral arguments session.

Polk County District Judge Michael Huppert in January ruled in favor of Kragnes, who says the fee is an illegal tax.

Des Moines has had a franchise fee for more than 45 years. The city put the fee at 3 percent in July 2004, and then raised it to 5 percent in April last year. The extra revenue was intended to help balance the city's budget, reduce property taxes and hire additional

firefighters.

Mark Godwin, an attorney for the city, argued that past court cases have established that cities may charge a franchise fee.

The main case Godwin cited did not directly address the issue about the amount that could be charged or what is fair, Supreme Court Justice David Wiggins pointed out.

Godwin said a number of safeguards are in place to ensure fairness. He said Kragnes could have attended City Council meetings or launched a petition to require a public vote on the item before it was approved, he said.

Kragnes' attorney, Brad Schroeder, argued there's little or no oversight to ensure that the fee is fair. The Iowa Utilities Board often is a "rubber stamp," he said.

Chuck Seel, manager of customer services for the utilities board, which is a state regulatory group, said Schroeder's statement is essentially accurate. The board is

## Timeline

**JANUARY 2001:** Legislators vote to phase out a 5 percent state sales tax on natural gas, propane, heating oil and electricity. That tax ended Jan. 1, 2006; lowans saved more than \$100 million.

**MAY 2004:** Des Moines city leaders increase the city's franchise fee on energy from 1 percent to 5 percent. A survey of 1,400 Des Moines residents showed that 76 percent preferred higher fees over higher property taxes.

**JULY 2004:** Hundreds of telephone calls and e-mails from business owners, residents and legislators push the City Council to scale back the increase to 3 percent. Resident Lisa Kragnes sues the city.

The \$8.7 million from the increased franchise fee was used to hire more police officers and firefighters, to repair streets and to restore library hours.

**APRIL 2005:** Des Moines increases the franchise fee from 3 percent to 5 percent. The revenue generated from the increase brought about the largest tax rate decrease in the city's history.

**JANUARY 2006:** Polk County District Judge Michael Huppert rules in favor of Kragnes. The city appeals.

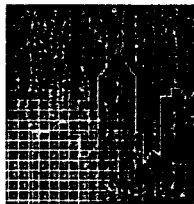
**FRIDAY:** The Iowa Supreme Court hears arguments for and against the fee.

only concerned about whether a fee is billed correctly, not whether it is justified.

Court officials have not said when they will rule in the case. City

Attorney Bruce Bergman predicted a ruling could be released within the next two or three months.

Reporter Jason Clayworth can be reached at (515) 699-7058 or jclayworth@dmreg.com



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## Legislator: City fees undercut tax relief efforts

**Iowa lawmakers hope to eliminate franchise fees, while city leaders say they're needed to bolster budgets.**

By JASON CLAYWORTH  
REGISTER STAFF WRITER  
December 31, 2004

A controversial move to increase city fees on Des Moines utility customers has gained steam elsewhere in the state and struck a nerve with lawmakers who say it undercuts their efforts to reduce the tax burden on Iowans.

Legislators in 2001 began to phase out a 5 percent state sales tax on natural gas, propane, heating oil and electricity. The tax will disappear Jan. 1, 2006. Iowans will save more than \$100 million each year.

But Des Moines city leaders in July tripled a 1 percent franchise fee on gas and electric service to raise about \$3 million for their battered budget.

"This is, in my opinion, a rather sneaky and backdoor way to tax people, and I believe it's a regressive tax," said Des Moines resident Allan Demorest.

The fee now costs the average Des Moines household \$4.50 a month, or \$55 a year.

A key legislator says he'll look for support for a law that would halt all recent and future franchise fee increases statewide.

"I still think it's inappropriate to see cities increase a tax that we eliminated," Senate President Jeff Lamberti, an Ankeny Republican, said. "Essentially, they're increasing their tax base. . . . We can't afford to be growing government."

### In Iowa

Cities that charge franchise fees on gas or electric utilities.

- ALGONA : 5 percent
  - ANAMOSA : 2 percent
  - BOONE : 1 percent
  - BOXHOLM : 1 percent
  - DES MOINES : 3 percent
  - DUBUQUE : 3 percent
  - HUXLEY : 3 percent
  - LYTTON : 4 percent
  - MADRID : 1 percent
  - MANCHESTER : 4 percent
  - MONTICELLO : 3 percent
  - OGDEN : 1 percent
  - OSKALOOSA : 2 percent
  - ROCK VALLEY : 5 percent
  - SIOUX CITY : 2 percent
- Sources: MidAmerican Energy, Alliant Energy and Aquila Energy.

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Since Des Moines raised its fee, Pleasant Hill's council voted to establish a 3 percent tax on gas and electric bills and Rock Valley in western Iowa added a 5 percent franchise fee. Pleasant Hill will collect about \$75,000 a year. Rock Valley will pick up about \$120,000.

Officials in Anamosa and Manchester will put gas franchise fees into effect in 2005. Anamosa's is 2 percent; Manchester's is 4 percent. Manchester will also consider a 4 percent fee on electricity that could begin July 1.

"Cities have seen a lot of funding cuts from the state in the last couple of years," Rock Valley's city administrator, Tom Van Maanen, said. "We were in a position where we either find other revenue sources or we start cutting services."

Des Moines leaders said the increase was necessary to repair streets, hire police officers and firefighters, and help libraries reopen on Sundays. They originally proposed a 6 percent fee, but backed off in the face of public discontent.

Fee increases in other cities are likely, state and local officials acknowledged. Windsor Heights city leaders, for example, will consider a franchise fee as high as 5 percent on gas and electricity. A City Council vote could come next month. Officials in other cities will also keep the option open.

"Right now, it's not on the agenda. But it certainly could come up as we're looking at revenue and expenses," said West Des Moines Mayor Gene Meyer.

State legislators in 2003 cut about \$71 million that would have gone directly to cities. Des Moines' loss was about \$4.7 million. The revenue decline prompted the City Council to turn off 4,225 street lights, reduce library hours and delay hiring some police officers and firefighters.

A survey of 1,400 people earlier this year showed that 76 percent of Des Moines residents prefer higher fees over higher property taxes.

Mayor Frank Cownie noted that legislators have long told city leaders they should make sure property owners are not overburdened. Des Moines would be hard hit if lawmakers yank the ability to charge franchise fees, he added.

"I'm not going to judge, nor will I predict, what the Legislature will do. But I can say that we've been very specific with what we're doing with the money," Cownie said. "That money is used for very critical services."

The franchise fee, unlike property taxes, is paid by most nonprofit groups that pay no property taxes.

Polk County has more than \$1.3 billion in property that is exempt from taxes, according to the county assessor.

Tom Bredeweg, executive director of the Iowa League of Cities, said his group will lobby against any move to reduce or eliminate the franchise fee option, which some cities have used for more than 15 years.

"That's a traditional revenue source established between the people of a community and their local elected officials," Bredeweg said. "It's absolutely something that should be available."

Urbandale Mayor Brad Zaun, a Republican, leaves his city office next month to work as a state senator. Zaun, who will represent Des Moines in the Senate, said he will support legislation to reverse any franchise fee that has been recently increased or enacted.

"I think what the cities are doing is wrong," Zaun said. "I'm sure that statement will make Des Moines real happy."

**Your legislator**

E-mail addresses and telephone numbers for most state leaders can be found at [www.legis.state.ia.us/](http://www.legis.state.ia.us/)

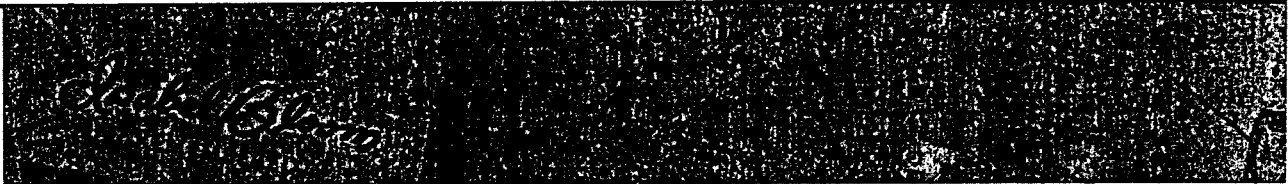
**WHAT'S NEW:** Des Moines officials have asked a judge to throw out a lawsuit that challenges their right to raise the franchise fee on utilities.

**BACKGROUND:** Brad Schroeder, a local attorney who filed the lawsuit in July, said the fee is an illegal tax and is "just another way of raising revenue."

**RESPONSE:** The city's lawyers say Iowa law has allowed franchise fees on utilities for more than 40 years. City Attorney Bruce Bergman said a ruling against the city would have a statewide impact.

**QUOTE:** "These fees aren't exactly brand new. There have been franchise fee charges for many, many years," Bergman said.

**WHAT'S NEXT:** A judge's ruling is expected early next year.



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# Utility fee decision could cost D.M. millions

The \$26 million the city gained from the 'illegal' tax is about what's budgeted for street repair in 2007.

By JEFF ECKHOFF  
and JASON CLAYWORTH  
REGISTER STAFF WRITERS

Des Moines city government could be forced to refund up to \$26 million collected from what a Polk County judge said Monday is an illegal tax on heating and electrical bills.

City leaders fear the ruling could trigger stiff property tax increases and cripple the budget at a critical time of growth.

Judge Michael Huppert ruled that a "franchise fee" levied for decades on utility bills in Des Moines oversteps the city's legal authority to collect such fees.

The fee has risen from 1 percent to 5 percent over the past 2½ years, and city leaders have used the extra money — about \$110 per year from the typical MidAmerican Energy customer — to help balance the budget and keep property tax hikes at bay.

The amount at risk from Huppert's ruling is roughly the amount budgeted for street improvements next year.

The fee was challenged in 2004 in a lawsuit filed on behalf of Des Moines resident Lisa Kragnes and "all others similarly situated."

Kragnes' lawyers

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contended that the city should not be allowed to use heating and electric bills as a municipal mony-maker. City officials argued that the franchise fee is fair because it eases budget pressure that otherwise would require property tax to rise.

Today's ruling has no immediate effect on the roughly dozen other Iowa cities that levy utility franchise fees. Des Moines leaders are expected to appeal to the Iowa Supreme Court and potentially force a decision that will apply statewide.

Kragness could not be reached for comment Monday.

Pleasant Hill, Anamosa and Manchester are among cities that followed Des Moines' lead and boosted their fees or created new ones after Iowa lawmakers in 2004 began to phase out a 5 percent state sales tax on utility bills.

In Des Moines, the franchise fee was expected to generate roughly \$15 million in the budget year that ends this summer.

City Councilwoman Christine Hensley said Huppert's ruling could have "some very serious ramifications, not only for Des Moines but for cities across the state."

"We'll have no option" but to raise taxes if the Supreme Court upholds Huppert's ruling, she said. "You just go into automatic damage control."

City attorney Bruce Bergman said if the entire shortfall were made up by a tax increase, the cost would be approximately \$115 on a \$100,000 house.

City Manager Rick Clark told council members in August that they face a budget shortfall of about \$1.6 million, despite the higher franchise fee collections. The city in the past five years has cut hundreds of jobs, raised fines and, for several months, turned off more than 4,000 street lights to help balance budgets. Most of the cuts stemmed from roughly \$10 million in reduced state aid between 2000 and 2004.

According to Huppert's ruling, Des Moines' use of the franchise fee violates state law because "the Legislature has not provided specific statutory authority for the use of a city's franchise fee as a revenue-generating measure."

Critics have argued that the fee is a tax that hits poor people hardest. They warned that churches, homeless shelters, hospitals and most other groups that don't pay property taxes would have to trim their budgets to absorb the extra expenses from the utility fee.

"I think the decision is good from my standpoint," said Forrest Harms, Des Moines Area Religious Council executive director.

Des Moines resident Bob Wessel, who once publicly called the franchise fee "totally, grossly unfair," expressed a different attitude Monday.

Wessel noted that every building or group receives city services such as police protection even if they never pay a dime of taxes. The franchise fee "is the only way we're going to get any money out of the nonprofit," he said.

Brad Schroeder, one of Kragness' three lawyers, said Iowa governments probably are allowed to collect reasonable administrative costs connected with regulating utility rights-of-way.

"If they can show there's some cost they're recouping, great," Schroeder said. "But they have said throughout that they don't feel that they need it."

Des Moines city budget director Allen McKinley referred questions to city lawyers, who were unavailable Monday. City attorneys

the lawsuit would be dismissed because Des Moines has levied various forms of franchise fees for more than 40 years.

In Sioux City, franchise fees have been around for more than 30 years and generate roughly 10 percent of the general operating budget. The 2 percent fee collects \$2.2 million.

## Fee fight

**HISTORY:** State law has allowed so-called franchise fees. Des Moines has collected the fee for more than 40 years from gas and electric customers as part of their monthly energy bills. The money is collected by the energy company but goes to the city.

**REASON:** The Des Moines fee is largely considered payment for MidAmerican Energy's use of city-owned rights-of-way.

**INCREASES:** The fee stood at 1 percent in 2004, when then-City Manager Eric Anderson proposed a gradual increase to 5 percent

**TAX:** Legislators in 2001 voted to phase out a 5 percent state sales tax on natural gas, propane, heating oil and electricity. The tax disappeared Jan. 1.

**CRITICISM:** Lawmakers in 2004 said increases in the city fees would wipe out consumers' savings from the eliminated tax. "I don't like the idea of taxing people on their basic necessities," said state Sen. Michael Gronstal, a Council Bluffs Democrat.

**COMPLAINTS:** Hundreds of telephone calls and e-mails from business owners, residents and legislators in the summer of 2004 pushed the council to scale back the proposed fee increase to 3 percent. The council increased the fee to 5 percent a year later.

**BUYS:** The \$8.7 million the increase has produced — about \$110 per year per typical household — has been used in Des Moines to hire police officers and firefighters, repair streets and restore library hours.

## Gas fees

Some towns in Iowa charge franchise fees on gas. Rates include:

DES MOINES: 5 percent

OSKALOOSA: 2 percent

SIoux CITY: 2 percent

ALGONA: 5 percent

LYTTON: 4 percent

ROCK VALLEY: 5 percent

LOGAN: 5 percent

PLEASANT HILL: 4 percent

EARLY: 4 percent

AKRON: 3 percent

WINDSOR HEIGHTS: 5 percent

PERRY: 2 percent

## Electric fees

Some towns in Iowa charge franchise fees on electricity. Rates include:

DES MOINES: 5 percent

OSKALOOSA: 0.2 percent

SIoux CITY: 2 percent

LOGAN: 5 percent

PLEASANT HILL: 4 percent

EARLY: 3 percent

WINDSOR HEIGHTS: 5 percent

ROCK VALLEY: 5 percent

Source: MidAmerican Energy

Huppert's ruling is "certainly a matter of concern," said John Meyers, Sioux City finance director.

The decision prohibits Des Moines from collecting fees only on Kragness' utility bill. Huppert is expected to decide within a week whether the ruling should be expanded to cover every energy customer within the city limits who paid a utility bill in the five years before the lawsuit was filed.

Mayor Frank Cownie said Des Moines has no immediate plans to stop collecting the 5 percent fee.

"We haven't decided yet," Cownie said. "We don't have enough information."

McKinley said the franchise fee generated \$11.2 million between July 1999 and June 30, 2005. Another \$15.1 million is expected to be generated this budget year, driven by the higher fee and higher natural gas prices. Des Moines' operating budget is about \$140 million.

# Franchise fee ruling lands D.M. in \$40 million limbo

Meanwhile, fee opponents accuse the city of acting irresponsibly in failing to have a backup plan.

**By JASON CLAYWORTH**  
REGISTER STAFF WRITER

The city of Des Moines has put nearly \$40 million in civic spending — for everything from new firefighting equip-

ment and street improvements to sidewalks near schools — on hold.

City leaders made the move Wednesday as they pondered the effect of an Iowa Supreme Court decision that could drastically reduce the amount Des Moines collects from a 5 percent fee on natural gas and electric bills.

The City Council also approved a temporary hiring

freeze and agreed to review other expenses to deal with the "good deal of uncertainty," City Manager Rick Clark said.

The high court ruled late last week that the city's so-called "franchise fee" cannot exceed what it costs to regulate the utility. The fee was expected to generate about \$13.5 million next year — about \$110

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tabbies

# Councilman blasts resident who filed suit

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per customer — with the money used to plug budget holes, hire police officers and extend library hours.

The court battle could take a year or more to untangle, so "I think it's simply honest for us to say and acknowledge up front" that some service cuts are possible, Clark said.

City employees will recommend which projects and expenses should be put on hold. Judge Michael Huppert, who earlier described the fee as an unfair tax, will preside over a new trial to determine how much the city is allowed to collect and keep.

In his initial ruling, he did not stop the city from collecting the fee from anyone except the plaintiff, resident Lisa Kragnes.

The city's overall budget is almost \$430 million.

The franchise fee was boosted from 1 percent to 5 percent over the past two years. Kragnes sued in 2004 to stop the fee.

Last week's decision was a blow to leaders, who declined to adjust budget estimates despite two years of legal wrangling and past shortfalls.

A \$4.7 million budget cut in June 2003 cut power to streetlights, raised parking meter fines to \$15, delayed the hiring of 14 firefighters and police officers, eliminated 43 jobs, and limited animal control.

A negative result in the next trial could trigger even deeper cuts and cause the city to refund some of the money.

Mayor Frank Cownie left a closed-door meeting at City Hall without comment Wednesday. Councilmen Chris Coleman and Bob Mahaffey defended the decision to increase the franchise fee.

"I disagree with the premise that we didn't have a backup plan," Coleman said. "I do think we've tried to use our

## Projects in jeopardy

Here is a list, by category, of improvements that could be delayed. Go to [DesMoinesRegister.com](http://DesMoinesRegister.com) to find a list of specific projects.

CATEGORY	AMOUNT (rounded)
Bridge and viaduct	\$2.45 million
Fire protection improvements	\$2 million
Library improvements	\$1.5 million
Municipal improvements	\$3.9 million
Parks improvements	\$7.7 million
Sidewalk improvements	\$1.2 million
Street improvements	\$13.2 million
Traffic control improvements	\$290,000
Neighborhood and economic development improvements	\$4 million
<b>Total cost of projects</b>	<b>\$38,875,000</b>
Total value of bonds to be issued	\$38,875,000
Estimated bond issuance rate	\$50¢ per \$100

## What do you think?

What services or projects would you cut to avoid a tax increase? Weigh in at [DesMoinesRegister.com/talk](http://DesMoinesRegister.com/talk).

resources in a prudent way."

City budget officer Allen McKinley testified in January that the council had no contingency plan if it lost the franchise fee battle.

Mahaffey said the fee was a good way to pay for city services and that residents should be upset with Kragnes.

"I would think the lady who filed the lawsuit would be looked at in a negative way," he said.

Kragnes said the blame is on mismanagement at City Hall.

"They knew about the lawsuit before they increased the franchise fee, so if anybody is technically to blame, it is them," she said.

Kragnes' attorney, Brad Schroeder, said Mahaffey's statement is the equivalent of placing blame on a whistle blower. "If the city truly values adherence to the law and accountability in government, they should be the first to thank her," Schroeder said.

Fewer than 20 Iowa cities collect franchise fees on gas and electricity, but they depend heavily upon the money,

said Tom Bredeweg, executive director of the Iowa League of Cities. His group might lobby the Legislature for more power to charge higher fees, he said. Dubuque City Manager Michael Van Milligen said last week in a press release that he would also recommend reductions to city projects in response to the ruling. Dubuque collects a 2 percent fee on gas and electric bills.

"We just continue to get put back to property taxes as the only way to supply city services," Bredeweg said.

Des Moines city leaders have long said the franchise fee is fairer than property taxes, because roughly 40 percent of property in the city is tax-exempt, largely because the owners are nonprofit groups.

Roger Thompson, who lives in the River Bend neighborhood, said he was disappointed that some critical projects could be delayed indefinitely, but "the city has to be fiscally responsible."

Reporter Jason Clayworth can be reached at (515) 699-7058 or [jclayworth@dmreg.com](mailto:jclayworth@dmreg.com).

## Fee fight

**JANUARY 2001:** Legislators vote to phase out a 5 percent state sales tax on natural gas, propane, heating oil and electricity. That tax ended Jan. 1; Iowans saved more than \$100 million.

**MAY 2004:** Des Moines city leaders propose an increase to the city's so-called franchise fee from 1 percent to 6 percent. "I think that's sad for consumers," said state Senate Majority Leader Stewart Iverson, a Dows Republican. "At the state level, we're trying to reduce the bind on people, and here the council wants to increase it."

**JULY 2004:** Hundreds of telephone calls and e-mails from business owners, residents and legislators push the City Council to scale back the increase to 3 percent. Resident Lisa Kragnes sues the city.

**April 2005:** The fee goes from 3 percent to 5 percent.

**JANUARY 2006:** Judge Michael Huppert rules in favor of Kragnes. The city appeals.

**LAST WEEK:** The Iowa Supreme Court rules that Des Moines cannot use a utility franchise fee to raise money for city services beyond what it costs to supervise the utility.

## Gas fees

**Des Moines:** 5 percent

**Oskaloosa:** 2 percent

**Sioux City:** 2 percent

**Algona:** 5 percent

**Lytton:** 4 percent

**Rock Valley:** 5 percent

**Logan:** 5 percent

**Pleasant Hill:** 4 percent

**Early:** 4 percent

**Akron:** 3 percent

**Windsor Heights:** 5 percent

**Perry:** 2 percent

## Electricity fees

**Des Moines:** 5 percent

**Oskaloosa:** 0.2 percent

**Sioux City:** 2 percent

**Logan:** 5 percent

## **Lawsuit on utility fee pushed back to October**

A resident's lawsuit against the city of Des Moines over the city's 5 percent fee on gas and electric utilities won't go to court until October.

The case was set to go before a judge March 24, but Lisa Kragnes' attorney filed a continuance last week.

Polk County District Judge Joel Novak is scheduled to hear the case Oct. 27.

The city has collected the fee on utility bills for more than 45 years. It costs the typical customer about \$110 a year, and brings in about \$12.6 million each year that is used to pay for longer library hours and additional police officers and firefighters, among other things.

Kragnes sued in 2004, claiming the fee was an illegal tax. The Iowa Supreme Court ruled in May 2006 that the fee can be collected but that the amount collected cannot exceed the city's cost to regulate the utilities.

City attorneys are preparing to justify the amount when the case goes to trial in October.

