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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al.,</p> <p>Plaintiff,</p> <p>vs.</p> <p>CITY OF DES MOINES, IOWA,</p> <p>Defendant.</p>	<p>Equity No. 49273</p> <p><b>PLAINTIFF'S REPLY TO DEFENDANT'S OBJECTION AND SECOND OBJECTION TO PROPOSED NOTICE TO CLASS MEMBERS</b></p>
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COMES NOW the Plaintiff, Lisa Kragnes, and files the following response to both the Objection to Proposed Notice to Class Members and Second Objection to Proposed Notice to Class Members filed by the Defendant City of Des Moines herein and respectfully states as follows:

1. It is important to note that in the City's First and Second Objections to Proposed Notice and Supporting Brief, the City relied almost exclusively on citations to Federal Rules and Federal case law. All of its objections are based on examples or suggestions not predicated on Iowa law relating to class actions. This is significant because in the Survey of State Class Action Law, 2007-2008 published by the Section of Litigation of the American Bar Association (page 238) it is noted in an analysis of Iowa class action rules that the Iowa Rules are much more detailed than Rule 23 of the Federal Rules of Civil Procedure. Additionally, the author states Iowa made a significant break from the federal rules when in 1980 it adopted the provisions of the Uniform Class Actions Act. To date, only North Dakota and Iowa have adopted this Act.

The fact that Iowa has adopted the Act demonstrates its intent to vary from the Federal Rules where class actions are concerned.

2. It is agreed that the notice proposed by the Plaintiff does not provide for an opt-out provision. The City of Des Moines recognizes that the Iowa Rules of Civil Procedure do not provide for an opt-out provision. In fact, Judge Huppert's ruling in this matter on class certification made findings under I.R.C.P. 1.263 (1) (a) (b) and (c), any one of which is sufficient to preclude opt-outs in such a case. Judge Huppert did not envision that an opt-out provision would necessarily be included. Rather Judge Huppert merely made mention that issues relating to opt-out would be dealt with by the Court at a later time as needed. Certainly Judge Huppert did not pre-judge the issue of opt-out before the matter was presented to the Court concerning this issue.

3. The denial of an opt-out provision does not deny constitutional due process and associational rights to members of the class. Indeed, the law is clear that opt-out is not a necessary due-process requirement when there is, as in this case, only members who have minimum contacts to the State of Iowa which is the place of jurisdiction. Furthermore, this is a case in which the main issue for determination is the question of how much of an ordinance should be allowed to be enforced and how much must be denied to be enforced. Accordingly, all citizens who receive electrical and gas service within the City of Des Moines are equally affected. Any decision entered by this Court including any orders of injunctive relief, will be equally applicable to all who receive services. This is

true for the past and for the future. This is true whether the individuals are officials of the City, the attorney for the City, employees of the City or other citizens of the City. It is simply not possible for this Court to invalidate an ordinance for some of the citizens of Des Moines and leave the ordinance in existence for other citizens of Des Moines.

4. The Rules of Civil Procedure do not require voluminous financial information to be provided in the notice. Rather, the Rules provide for general information to be given and the proposed notice of the Plaintiff does such.

Furthermore, the City of Des Moines seems to assert that "winning" this litigation will most likely cost the class members (who are still residents). The City of Des Moines fails to inform the Court, and has at this point in time failed to inform the residents of the City of Des Moines, that it was advised prior to the time it began increasing the franchise fee in September 2004, that the increase was being challenged as illegal. The City of Des Moines, in spite of the fact that this legal challenge was lodged, chose to implement the challenged procedure and thereby begin collecting increased sums of money. It is the city officials of the City of Des Moines who have chosen to follow a course of conduct which has created potential financial liability. The citizens of Des Moines are entitled to an accurate enforcement of the law. The City should not subject its citizens to threats simply because the city officials, whether that be the mayor, city council, city department heads, or even the city attorneys, have chosen a course of conduct which may be determined by a Court to be illegal. It is not proper for

the City to assert that the citizens are not entitled to an injunction stopping the illegal conduct or not entitled to any recovery because there may be financial consequences brought about by the actions of those city officials.

5. It is true that none of the "assumptions" made by Plaintiff's attorneys regarding cost of notice and cost of administration are apparent anywhere in the notice. This is not required by the Rules of Civil Procedure and have no need or any necessity to be in the notice.

6. The proposed class notification by Plaintiff has provided information as to how absent class members will be contacted. Indeed the proposed notice provides for a mailing to the last known address, that provided by MidAmerican which is the address the entity to whom the funds were initially paid. Furthermore publication will be made. That is all that is required by due process.

7. It is agreed that the proposed notice makes no allowance for the fact that many of the class members do not speak English. The I.R.C.P does not provide for such notice, and further, such notice may be in violation of Iowa law. The Court should note as follows: (1) the City of Des Moines publishes its agenda and conducts all of its meetings only in English; (2) the City of Des Moines publishes its notices of actions taken at meetings only in English; (3) the City of Des Moines published the ordinances enforced in this case only in English; (4) the City of Des Moines worked with MidAmerican to submit to the Iowa Utilities Board for notification of customers. The notice agreed upon was

only in English. Accordingly, when this increase went into effect the notice was published in English. (5) Finally, the State of Iowa has a law, upheld by the Polk County District Court, indicating that English is the official language. Under the circumstances set forth above, attempts to provide notice in a language other than English may be in violation of state law. See Iowa Code §618.1, §618.2, §4.14, and §1.18.

8. It is denied that a large number of the class members do not have access to the computer or to the internet. Additionally, the City of Des Moines has a library which has internet access which is free and available to any resident who wants to use it. Accordingly, the internet provides the best method of attempting to provide a large and substantial amount of information, which will be provided by the most important documents being published in the website. A toll-free number is not necessary for the distribution of appropriate information in this case and is not provided for in the Iowa Rules. Furthermore, there is and should be no opt-out period during which class members would need to obtain information as suggested by the City of Des Moines.

9. It is agreed that the proposed notice contains no mention of the attorney's fees to be requested of the Plaintiff if successful. Accordingly, Plaintiff is submitting an amended notification to provide this information. See attached Exhibit 1amended.

10. It is agreed that the proposed notice did not contain a disclaimer stating that the Court has not made a determination as to the merits of the case.

Accordingly, an amended class notice is attached hereto which adds this information to the proposed notice.

11. It is agreed the notice does not contemplate the appointment of a class action administrator. At this time, Plaintiff's attorneys have not determined that such a class action administrator will be necessary. The Iowa Rules do not make such a requirement in the processing of a class action. However, Plaintiffs submit to the Court that Plaintiff's counsel has identified a class administrator who can assist in the managing of a class action at a reasonable cost if necessary.


12. It is agreed the notice does not indicate that it is a court order. Attached to this response is an amended class notice which adds this information.

13. The "Exhibit A" attached to the Defendant's Objections taken from Newberg on Class Actions, is a notice which contains information which is unnecessary and overly broad and contains information not needed or necessary for class members in this case. The Plaintiff's proposed notice does in fact provide all information required by the Iowa Rules of Civil Procedure. By establishing a website and/or establishing a post office box where individuals who want the significant pleadings of the case forwarded to them, Plaintiff's have taken appropriate action to allow those members who want to have more information to obtain more information.

14. Plaintiff hereby incorporates its supplemental Brief filed simultaneously herewith.

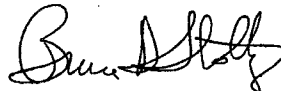
WHEREFORE the Plaintiff respectfully requests the Court to issue an order approving the proposed class notice, attached hereto as Exhibit "1" amended, and issue appropriate order relating to the mailing thereof and publication thereof and for such other relief as the Court believes just and proper.

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.  
P.O. Box 93295  
300 Walnut Street, Suite 260  
Des Moines, Iowa 50393  
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  
20<sup>th</sup> day of August, 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: \_\_\_\_\_

Gas and Electric Franchise Fee Litigation  
P.O. Box \_\_\_\_\_  
Des Moines, Iowa 50 \_\_\_\_\_

<p>NOTICE OF CLASS ACTION</p> <p>THE BACK OF THIS CARD PROVIDES A WEBSITE AND AN ADDRESS WHERE YOU CAN OBTAIN ADDITIONAL INFORMATION</p> <p>THIS NOTICE ADVISES YOU OF A PENDING CLASS ACTION AGAINST THE CITY OF DES MOINES, IOWA</p> <p>THIS NOTICE MAY AFFECT YOUR LEGAL RIGHTS</p> <p>PLEASE READ IT CAREFULLY</p>	
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***Lisa Kragnes v. City of Des Moines, Iowa, Polk County District Court Case No. CE 49273***  
**(This notice is by order of the Court. The Court has not yet decided the merits of the case and is intended only as a summary of the case before the Court and your rights as a potential class member).**  
Your rights may be affected by a class action brought by Lisa Kragnes of Des Moines, Iowa, as representative, and pending against The City of Des Moines, Iowa (hereinafter "Defendant") in the Iowa District Court for Polk County. The suit claims that the Defendant violated Iowa law by imposing a gas and an electric franchise fee in excess of its actual cost of regulation thereby collecting an illegal tax. It seeks a declaration as to the proper amount of fee, an injunction on any future collections in accordance with the determination and a refund of all amounts paid in excess of the legal amount. The Defendant denies the allegations. MidAmerican's records indicate that you may be a member of the class, having paid gas and electric franchise fees in the time from July 27, 1999 and continuing through the conclusion of the litigation. This case is currently set for trial beginning October 27, 2008. The purpose of this notice is to advise you that you may be a member of this class and may thereby be entitled to protection by an injunction prohibiting the Defendant from imposing any illegal portion of the fee and to a refund, if a refund is ordered. Because of the nature of this class action there is no right to opt out. Any judgment entered, whether favorable or not, will be binding upon all members of the class. Plaintiff's attorney's fees and expenses will be paid out of any recovery in this case pursuant to a contract previously approved by the Court. In addition attorney's fees and expenses may be recovered from the Defendant if and as ordered by the Court. You may enter an appearance in this case either personally or by your own separate counsel. You can obtain further information on this litigation by reviewing the Court file at the Polk County Courthouse, 5<sup>th</sup> & Mulberry, Des Moines, Iowa or by writing to attorneys, Brad Schroeder and Bruce H Stoltze at P.O. Box \_\_\_\_\_, Des Moines, Iowa 50 \_\_\_\_\_; or by going to the following website: \_\_\_\_\_. All significant pleadings filed with or Orders entered by the Court will be posted on this website for class members to access and review.