

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

<p>LISA KRAGNES , et al</p> <p>Plaintiff/Petitioner,</p> <p>vs.</p> <p>CITY OF DES MOINES, IOWA,</p> <p>Defendants/Respondent.</p>	<p>Case No. CE 49273</p> <p style="text-align: center;"><b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND RULING</b></p>
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CLERK DISTRICT COURT

The above captioned matter is a class action and came before the undersigned for a bench trial beginning October 27, 2008 and concluding on November 13, 2008. Shortly after this trial commenced the court advised counsel for the parties that in the event it was determined a refund was due and owing the City's residents he was waiving any right to any refund to which he was entitled.

The plaintiff Lisa Kragnes, hereafter Kragnes, was present in person and represented by her counsel Bruce Stoltze and Brad Schroeder. The defendant City of Des Moines, Iowa, hereafter City, was represented by counsel Deputy City Attorney Mark Godwin and City Attorney Bruce Bergman. After reviewing the file, the pre-trial and post-trial briefs, and listening to the evidence, the court makes the following findings of fact, conclusions of law, and ruling.

**STATEMENT OF THE CASE**

Plaintiff filed this class action on or about July 27, 2004. In her suit Kragnes alleges the gas and electricity franchise fees charged to MidAmerican Energy (MEC) customers in the City constitute an illegal tax. The City denies Plaintiff's allegation.

On or about October 11, 2005 the parties filed cross motions for summary judgment. Judge Michael Huppert granted Plaintiff's Motion for Summary Judgment on

January 5, 2006. The City appealed on January 9, 2006. The Iowa Supreme Court reversed on May 26, 2006 in *Kragnes v. City of Des Moines*, 714 N.W.2d 632 (Iowa 2006).

Judge Huppert granted an injunction against the collection of the fees. When he realized that the class had not yet been certified and he had no jurisdiction over the class he dissolved the injunction. The plaintiff class was certified on June 26, 2006. Kragnes never moved to have the injunction reinstated after class certification.

On October 2, 2006 the City moved for partial summary judgment, claiming that even if it had collected more in franchise fees than it was entitled to collect, Kragnes and other class members were not entitled to a refund. The trial court, Judge Don Nickerson denied the motion on July 27, 2007. The City's Application for Interlocutory Appeal was denied by the Iowa Supreme Court.

The City was subsequently allowed to amend its answer to include affirmative defenses and a counter-claim. The affirmative defenses were based upon tort immunities afforded to the City. The counter-claim was for unjust enrichment.

In 2008 the undersigned heard the City's Motion for Summary Judgment on the tort immunity affirmative defenses. The City also moved several times to decertify the class. This court denied the motions.

#### **FINDINGS OF FACT**

1. The City entered into electric and gas franchise agreements in 1960 with Iowa Power and Light Company, a predecessor in interest to MidAmerican Energy Company (MEC). The ordinance provided for "an annual franchise, occupation or privilege tax".

2. In 2004 legislation was passed reducing the sales tax on residential users of gas and electricity from 5% to 2% for the period of January 1, 2004 through December 31, 2004. The legislation further reduced the sales tax to 1% from January 1, 2005 to December 31, 2005. Finally the sales tax was completely eliminated on residential members use of gas and electricity billed on or after January 1, 2006.
3. The City wanted to continue providing or improving services to its residents without raising property taxes. These services included police, firefighters, renovation of deteriorating neighborhoods and streets, and maintenance of library hours. With the State phasing out the sales and use taxes on residential gas and electric services the City concluded that it could collect a higher franchise fee and would not have to raise property taxes and the actual cost of electricity and gas to residential customers would not change. The City determined that an increase in the franchise fee was preferable to a property tax increase. As a result the City negotiated to update the franchise agreement for gas and electric service with MEC.
4. Ordinances passed by the City in 1987 provided for a franchise fee of 1% to be charged to both gas and electric customers within the city limits of the City. The City opted to amend the franchise agreement through passage of ordinances as opposed to increasing the property tax.
5. The City amended the franchise ordinance and increased the fee from 1% to an amount equal to 3% of the gross receipts derived by MEC from the transmission or distribution of gas and electric to each of the customers within the corporate

limits of the City, excluding the sale of gas and electric to the City. The amended ordinance in fact allowed the City to increase the franchise fee up to 6%.

6. The City increased the franchise fee from 3% to 5% on both gas and electricity affective June 1, 2005.
7. The City had nothing but good intentions in increasing the franchise fees. In fact the results the City wanted to achieve were realized. Not only did the City not have to increase property taxes it enabled the City to enact one of the largest property tax cuts in history. Furthermore the revenue received from the increase in fees enabled the City to restore the library hours, increase the number of fire-fighters and police substantially and provide low-income utility assistance to qualified persons, etc.
8. In 2006, 2007, and 2008, the electric franchise fee generated \$6,794,478.00, \$7,083,352.00, and \$7,246,053.00 respectively. The gas franchise fee generated \$5,944,832.00 in 2006, \$5,380,585.00 in 2007, and \$5,823,209.00 in 2008. Therefore the total electric and gas franchise fees generated for the years 2006, 2007 and 2008, was \$12,739,310.00, \$12,463,937.00, and \$13,069,262.00 respectively. This resulted in total franchise fees generated for the three year period in an amount of \$38,272,499.
9. The parties agree that the City receives a combined estimated total of approximately \$2.5 million per 1% of combined gas and electric franchise fees. This means that the City must have approximately \$7,000,000.00 annual cost and incidental consequences attributable to the electric utility, and approximately

\$5,500,000.00 annual cost and incidental consequences attributable to the gas utility in order to sustain the validity of each fee at the 5% level.

10. Proportionally the City must then have approximately \$4,200,000.00 in annual cost and incidental consequences to justify an electric franchise fee of 3% and approximately \$3,300,000.00 in annual cost and incidental consequences to justify a 3% gas franchise fee. The City must have approximately \$1,400,000.00 annual cost and incidental consequences to justify a 1% electric franchise fee and \$1,100,000.00 annual cost and incidental consequences to justify a 1% gas franchise fee.
11. Plaintiff's exhibit 7 sets out the actual amount of franchise fee funds the City received for the electric and gas utility for the year 1999 to fiscal year 2009. It may be necessary for the court to receive additional evidence on the amount of actual franchise fee funds received by the City not contained in Plaintiff's exhibit 7.
12. If during the period from 1999 to September 1, 2004 the City's expenses in maintaining both the electric utility and gas utility in the ROW and BROW equal or exceed approximately \$2.5 million each year there is no illegal tax for that period. If during the period from September 1, 2004 to June 1, 2005 the City's expenses in maintaining both the electric utility and gas utility in the ROW and the BROW equal or exceed approximately \$7.5 million there is no illegal tax for that period. If during the period of June 1, 2005 to June 1, 2009 the City's expenses in maintaining both the electric utility and gas utility in the ROW and

the BROW equal or exceed approximately \$12.5 million each year there is no illegal tax for that period.

If on the other hand the City's expenses in maintaining the electric utility and gas utility in the right-of-way (ROW) and the border-right-of-way (BROW) do not equal or exceed approximately \$2.5 million, \$7.5 million, or \$12.5 million for the relevant periods of time set out above then the difference between the franchise fee funds received by the City and the City's expenses in maintaining both the electric utility and gas utility in the ROW and the BROW would amount to an illegal tax.

13. The City is approximately 80 square miles in size. Approximately 10 square miles is occupied by the ROW. Approximately 4 square miles of the 10 square miles comprise the BROW. Gas and electric utilities subject to the franchise fees at issue here are typically located in the BROW, with electric lines usually above ground and gas lines below ground.
14. Several different utilities occupy the ROW. Water, storm sewer and sanitary sewer are typically under the street. Natural gas lines owned by MEC typically are buried in the BROW. Electricity, cable television and telephone are typically ground on poles owned by MEC.
15. In addition to the gas, electricity, cable and telephone utilities, the BROW is home to many other uses, including sidewalks, street signs, traffic signs, traffic signals, bus stops, bus benches, fire hydrants, street lights and garbage and recycling pick-up and the like. All those "other" uses are municipal related, not-for-profit uses.

The utilities are the only for-profit uses physically occupying the ROW on a permanent basis.

16. The City has approximately 800 miles of streets. The BROW exists on both sides of the street, there are approximately 1600 lineal miles of BROW in the City.

The width of the BROW varies depending upon the type of street and upon conditions present at the location. A typical residential street is 26 feet wide with 12 feet of BROW on each side. BROW borders upon every type of property, in the City – residential, commercial, industrial, non-taxable, tax exempt, agricultural, etc.

17. Franchises herein involved grant MEC a non-exclusive right to provide gas and electric service to the customers within the city limits of the City.

18. The court heard testimony from a number of witnesses including the following:

A. The Plaintiff, Lisa Kragnes testified.

B. Council members who testified included:

1. Christine Hensley
2. Tom Classis
3. Robert Mahaffy
4. Archie Brooks

C. City employees who testified included:

1. Allen McKinely
2. Richard Clark
3. Mike Matthes
4. Bill Stowe

5. Eric Anderson
  6. Jeb Brewer
- D. The Court heard testimony from several residents of the City of Des Moines who are members of the Plaintiff Class:
1. Mel Pins
  2. Bill Moulder
  3. Preston Daniels
  4. Ben Bellus
  5. Melinda Few
- E. There was testimony presented from several fact witnesses regarding lost tree value:
1. Jerry Black
  2. Jim Puentes
- F. Several other witnesses testified on various issues:
1. Greta Knight
  2. Jim Maloney
- G. The City's experts:
1. Consulting Forester, Keith Majors – lost tree value
  2. Chad R. Frandson, MAI, CCIM – opportunity cost of BROW and property tax revenue foregone due to BROW.
  3. Nick Dragisich, Executive Vice President of Springsted, Incorporated – cost analysis of cost City incurs in the management of its right-of-way and franchise agreements.
- H. Plaintiffs' response witnesses included:

1. Kevin J. McRoberts, MAI, ASA – responding to City’s expert Frandsen as to opportunity cost lost and lost revenue from property tax revenue foregone.

2. James Mahoney, Polk County Assessor – BROW value as related to opportunity cost lost and loss of property tax revenue.

3. Dr. David Frankle, Ph.D., Economics, Massachusetts Institute of Technology (MIT), Associate Professor of Economics at Iowa State University in Ames, Iowa. – the concept of opportunity cost, economic value of the BROW, and lost tree value.

4. Charles E. Finch, AVA Analysis of the Nick Dragisich Report.

5. Jim Rock, Consulting Arborist – tree evaluation.

17. The City council members, and the Des Moines City Council as a whole never conducted an analysis or any evaluation of the cost, direct or indirect, to the City in maintaining the utilities in the BROW or in the application of those cost to determine a franchise fee to be imposed. There were memos from city management to the council discussing the need for new revenues and that a franchise fee was preferable to an increase in property taxes and would have less of an impact. However nothing was submitted to the council discussing cost. There were objections from Des Moines residents received by the City in conjunction with the franchise fee ordinance. Prior to implementation of the fee in 2004 the City was served with the present litigation but did not take any action in response to the lawsuit as it pertained to the enactment or collection of the increased franchise fee. No analysis was done as a result of the cost incurred as a result of MEC’s activities under the franchise or before the franchise increase or after until subsequent to the litigation the City needed to evaluate its cost relationship to the maintenance of the utilities.

## CONCLUSIONS OF LAW

Kragnes is representative of the class who brought this action against the City challenging that the franchise fees that the City has been charging its citizens were not franchise fees as permitted under Iowa law but were, in fact, illegal taxes. The case went to the Iowa Supreme Court. The Iowa Supreme Court reversed the initial trial judge and remanded the case with directions for trial. *Kragnes v. City of Des Moines*, 714 N.W.2d 632 (Iowa 2006).

This court is governed by the dictates of the Kragnes opinion. Therefore the court concludes that it is bound by the following law in reaching its decision in this class action:

### PRESUMPTION OF VALIDITY OF ORDINANCE

There is a broad presumption that an ordinance is valid when the Legislature vests the power in a city council to regulate, license and control. *Star Transportation Co. v. Mason City*, 195 Iowa 930, 953, 192 N.W.2d 873, 882 (1923).

*Kragnes*, 714 N.W.2d at 642.

### THE CITY DOES HAVE FRANCHISE RELATED COST

Examining the record in the light most favorable to the city and drawing all legitimate inferences from the record, there is no question that grant of the franchises to the utility cause the city to incur some ongoing administrative expenses in the exercise of its police power. These expenses would include the reasonable cost of inspecting, supervising, and otherwise regulating the gas and electric utility franchises.

*Kragnes*, 714 N.W.2d at 643.

### COST THAT ARE DIRECT AND COST THAT ARE INCIDENTAL CONSEQUENCES CAN SUPPORT FRANCHISE FEES

But the limitations of the license fee to the necessary expense will still leave a considerable field for the exercise of discretion when the amount of the fee is to be determined ... in fixing upon the fee, it is proper and reasonable to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases, the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon . . . and all reasonable intendments must favor the fairness and justness of a fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee or regulation.

*Kragnes, 714 N.W.2d at 642*

**FRANCHISE FEES NEED ONLY BE REASONABLY RELATED TO EXPENSES AND NOT BE CALUCULATED WITH MATHEMATICAL CERTAINTY.**

Consequently, any franchise fees charged by a city must be reasonably related to the City's administrative expenses in the exercise of its police power. These expenses include the reasonable cost of inspecting, licensing, supervising, or otherwise regulating the activity the City is franchising. This holding, however, does not require the City to calculate its administrative expenses to a mathematical certainty.

*Kragnes, 714 N.W.2d at 642.*

**MANDATE**

At trial, the district court shall determine what, if any, part of the franchise fees are related to the City's administrative expenses in exercising its police power, including the cost associated with any incidental consequences of the franchised services. If after trial the district court determines that none of the franchise fees are reasonably related to the City's administrative expenses, the court shall issue the appropriate order disallowing the franchise fees as contained in the ordinances. However, if the district court determines that all or part of the franchise fees are reasonably related to the City's administrative expenses, the court shall enforce the ordinances up to an amount equal to the fees reasonably related to the City's administrative expenses in exercising its police power.

***Kragnes*, 714 N.W.2d at 643.**

**I. BURDEN OF PROOF**

The court concludes as to Plaintiff's claim the burden of proof rests on the Plaintiffs as it normally does in any civil action. The court has been cited to no authority to the contrary on the part of *Kragnes*. The City has the burden of proof as it relates to the City's counter-claim.

Therefore the burden is upon *Kragnes* to prove by a preponderance of the evidence what, if any, part of the franchise fees are or are not related to the City's administrative expenses in exercising its police power, including the cost associated with any incidental consequences of the franchise services.

If it is subsequently determined that this court was in error in assigning the burden of proof to *Kragnes* when it should have assigned same to the City, the court's analysis of this case including its findings, conclusions and ruling would remain unchanged.

*Kragnes* admits that a part of the franchise fees are reasonably related to the City's administrative expenses. *Kragnes*'s argument is that the City's administrative expenses are far less than the revenue generated by the franchise fees. *Kragnes* argues that any revenue generated by the electric franchise fee in excess of \$310,000.00 and any revenue generated by the gas franchise fee in excess of \$309,282.00 is an illegal tax.

The City counters that the City's administrative expenses far exceed the franchise fees collected by the City. The City claims it receives annual revenue from the electric franchise fee of approximately \$7,000,000.00 and its annual administrative expenses for that utility is \$12,735,453.00. The City claims that it receives annual revenue of approximately \$5,500,000.00 from the gas franchise fee and its annual administrative

expenses for that utility is \$6,837,803.00. Therefore the City claims that its total annual administrative expenses in maintaining and managing both utilities in the ROW and BROW is approximately \$19,573,000.00 per year while the total annual franchise fee funds received is approximately \$12,500,000.00.

The following is a summary of the cost/expenses the City claims are related to the City's expenses in exercising its police power, including the cost associated with any incidental consequences of the franchise services:

- a. Lost Value of Trees
- b. Lost Opportunity Cost
- c. Lost Property Tax
- d. Administrative cost
- e. Degradation cost
- f. Construction cost, which includes increased construction and engineering costs
- g. Operating cost, which includes both direct and indirect cost
- h. Disruption cost
- i. Franchise fees study cost.

The following principles come into play in the court's reaching its determination as to whether Kragnes has met her burden of proof:

1. A franchise fee must be reasonably related to the City's administrative expenses.
2. The claimed expense must be an expense resulting from the City's exercise of its police power in regulating the activity franchised. The claimed expenses include the reasonable cost of inspecting, licensing, supervising or otherwise regulating

the activity. The amount of the fee is limited to the reasonable cost of regulating, supervising, or enforcing the franchise. The court is to consider not only the direct expenses but also all the “incidental consequences that may be likely to subject the public to cost and consequences of the business license”. Stated another way, indirect expenses are to be considered.

3. The City is not required to calculate its administrative expenses to a mathematical certainty. Accordingly, the City has the authority to assess a franchise fee expressed as a percentage of the gross receipts derived from the utility sale of its services to the public.
4. Limitation of the license fee to the necessary expenses leaves a considerable field for the exercise of discretion in determining the amount of the fee.
5. In some instances the incidental consequences are much the most important, and, indeed are what are principally had in view when the fee is decided upon.
6. The fee will not be held excessive unless it is manifestly something more than a fee or regulation.

Applying these principles together with the guidance given to this court in the Kragnes decision the court now addresses each of the various items of expense or cost claimed by the City in reaching its determination as to whether the court allow or disallow an item as an appropriate expense or cost of the City in maintaining the gas and electric utility in the ROW.

**a. Lost Tree Value.**

The City claims that its trees in the ROW are either damaged or removed due to the electric and cable usage in the ROW for lines for transmission of their electricity or cable signal to the homes of its residents.

The City's experts assess the damages resulting from the trimming or removal of its trees to total \$5,223,121.00. Of this amount the City allocates \$3,482,081.00 to the electric utility and nothing to the gas utility. The City then argues that this loss of value to City trees in the ROW is an incidental consequence qualifying as an administrative expense of the City in maintaining a utility that should be included in determining what the City can legally collect as a franchise fee.

The court disagrees with the City that the lost tree value should be included as a cost or incidental consequence justifying the franchise fees collected.

The court does not believe lost tree value qualifies as the type of incidental consequence contemplated by the Iowa Supreme Court to be used in determining the appropriate amount the City can collect as a franchise fee. The lost tree value submitted by the City is nothing more than a theoretical concept and is not the type of expense or incidental consequence the court should consider in calculating and appropriate franchise fee to be collected by the City. Therefore the court concludes that the lost tree value is not a factor to be used in calculation of an appropriate franchise fee.

Even if the court should consider lost tree value as an incidental consequence as claimed by the City the court would not accept the value of that loss as established by the City's expert. In Plaintiff's challenge to the City's expert testimony and in the presentation of its own expert testimony Plaintiff established the following:

1. There is no expense to the City in the management and maintenance of the ROW due to the presence of the utility. MEC pays for the cost of trimming and removal.
2. Plaintiff has brought into serious question the data used by Defendant's experts in reaching their conclusions.
3. The loss calculated by Defendant's expert resulted in a cumulative loss as opposed to annual loss.

There is no expense to the City, direct or indirect, nor does the court consider the tree trimming and removal and any loss of value therefrom to be an incidental consequence of the City in maintaining the utility. The record evidence does not support the City's claim lost tree value should be used in the franchise fee calculation. Even if the court was to consider this as a factor the court does not find that lost tree value to the City is in the amount of \$3,482,081.00. If the court was to adopt lost tree value as a factor in the calculation it would accept the value assigned by the Plaintiff's tree expert Jim Rock. Rock opined that there is no economic damage or loss to the City resulting from the trimming of trees for utility line clearance. However he suggested that if one was to assess a dollar amount for such loss it would be approximately \$622,981.00. This is the value

the court would place on the lost tree value if it was appropriate to use this in calculating the fee.

For the reasons stated above the court concludes that Plaintiff has established that lost tree value is not an expense to be included in the franchise fee calculations by the City.

**b. Lost Opportunity Cost.**

The City claims the court should use the concept of lost opportunity cost in calculating an appropriate franchise fee. This concept relates to the opportunity cost that is associated with providing additional BROW for the public utilities within the municipality. In other words the City claims that there is an opportunity cost to the City as a result of having to own the land that is associated with the utility right-of-way for the general public. It is the City's position that if it was not required to hold this land it could sell the land thereby generating substantial revenue for the City.

Total lost opportunity cost claimed by the City is \$13,388,276.00. Of this amount the City's experts allocate \$6,024,725.00 to the electric utility and \$4,016,483.00 to the gas utility.

The City's claim that lost opportunity cost is an incidental consequence of the City's maintenance of its utilities is a novel idea to say the least. The City engineer, Jeb Brewer, said that he was not aware of any city in the country that included opportunity cost in their right-of-way management cost and he was not aware of any professional standards or guide lines that would reflect the application of such cost. He also stated that he would include opportunity

cost in his right-of-way management fee if he thought City Finance deemed it appropriate. Allen McKinely, head of City Finance, testified that he did not believe opportunity cost should be included in the City budget.

The plaintiff has established through their expert testimony and in the refutation of the City's experts the City is not entitled to use lost opportunity cost in calculating the franchise fee for the following reasons:

1. There are no potential buyers for the ROW, including the adjacent property owners. There is no reason the adjacent property owners would be interested in buying the BROW if they are not going to receive any additional benefit. Furthermore the highest and best use of the BROW is the existing use in the manner it is serving the City's residents.
2. Any value to be attributed to the BROW is already inherent within the adjacent property value. The adjacent property owner's acquisition of the BROW or right-of-way to their property would not add any additional marketable value.
3. An attempt by the City to sell the ROW or the BROW would be detrimental to the inherent value to adjacent property resulting in an adverse affect to the City and its residents. The City has to have the ROW and BROW for its public services. Remove those public services and you no longer have a city. By no stretch of the imagination is the City now or will it ever be in a position to dispose of the ROW and BROW.

4. The rights-of-way are used for pedestrian traffic, vehicular traffic, and other safety services. Therefore the City needs the BROW to provide for sidewalks, future street expansion, street signals and signage, and fire-hydrants. All of these are necessary uses of the BROW by the City and would be required whether or not electric or gas utilities are in the BROW. When you consider the aforementioned necessary uses it clearly removes lost opportunity cost as a factor to be used by the City in calculating an appropriate franchise fee.

As with the lost tree value concept the court concludes that the lost cost opportunity likewise is a theoretical concept and is not an incidental consequence associated with the franchise services. Therefore it should not be used in calculating the franchise fees.

**c. Lost Property Tax Revenue.**

The City claimed that as a result of it having to maintain the BROW for utilities it cannot sell the BROW and that results in a loss of tax revenue to the City. As one can see this claim is directly connected with the concept of lost opportunity cost.

The City's calculations result in the City claiming a loss of property taxes due to the BROW in the amount of \$2,707,865.00. The City then allocates this loss to three utilities. Electric \$1,218,539.00, gas \$812,360.00, and cable \$676,966.00.

If there is no lost opportunity cost there can be no lost property tax revenue. The same reasoning and analysis of the court in reaching the

conclusion that lost opportunity cost is not an incidental consequence of utility use of the BROW to use in calculating an appropriate franchise fee is also applicable to the City's claim of lost property tax revenue.

As Plaintiff points out the City maintains the BROW for public purposes before any consideration of the usage of the BROW by the utilities. The City holds the BROW in trust for the benefit of the public. The City is well aware that it can not, will not and does not intend to sell the BROW.

As with lost opportunity cost the court concludes that lost property tax revenue is not a factor to be used in calculating the franchise fee.

The court will now address the remaining items the City asserts should be considered as cost/expenses of the City in calculating an appropriate franchise fee.

**d. Degradation cost.**

Degradation is defined as depreciation to the roadway, sidewalks, boulevard/landscaped areas and other infrastructure or amenities that result form intrusion into the public right-of-way.

The City's calculation of the annual cost of degradation cost incurred by the City was \$630,069.00. This was allocated among the six utilities as follows:

1. Electric \$37,373.00
2. Gas \$35,030.00
3. Water \$389,785.00
4. Sewer \$167,880.00

5. Storm \$0.00

6. Cable \$0.00

Plaintiff accepts the monetary value per utility as calculated by the City and agrees that this is an appropriate indirect or incidental cost.

**e. Disruption Cost.**

Disruption costs are those costs that result in the interruption of the normal use of the public right-of-way. For example lane closures and detours.

Plaintiff has no dispute with calculation and monetary value for disruption cost determined by the City.

The agreed upon disruption cost by the parties is as follows:

Electric \$843.00

Gas \$2,038.00

Water \$14,291.00

Sewer \$5,691.00

Storm \$0.00

Cable \$0.00

TOTAL \$22,863.00

**f. Cost of Franchise Fee Study**

The City is claiming that it will incur an annual cost for an analysis similar to that prepared by the Springsted Group. The City believes that cost will be in the approximate amount of that charged by the Springsted Group for the work performed in this case which was \$102,134.00

Plaintiffs do not dispute that this would be a proper cost to be included in calculating the franchise fee. However Plaintiff questions as to whether such an analysis is needed annually or that the amount would exceed \$100,000.00 each year.

The court concludes it is reasonable for the City to have such an analysis performed annually if it deems it necessary and it is not unreasonable for the cost of such an analysis to be in the approximate range of \$100,000.00. The court believes that this amount should be allocated among seven utilities which results an allocation to the electric and gas utility for this cost item in the amount of \$14, 591.00 each.

This cost can be adjusted if it is determined in the future that such an analysis is not needed on an annual basis or the amount of such an analysis needs to be increased or decreased.

**g. Number of Utilities.**

Plaintiff argues that it was error on the part of the City not to include the telephone utility in the City's allocation of the expenses the City claims it has in maintaining the electric and gas utility in the ROW and BROW. The City made the allocation among six utilities.

The court agrees with the Plaintiff that seven utilities should be used in the allocation of the expenses incurred by the City in maintaining the electric and gas utility in the ROW and BROW.

**h. Administrative Expense.**

Plaintiff agrees with the City that it would be appropriate to add an administrative cost to the actual expenses for the supporting activities that occur with the direct/indirect expenses the City incurs in its management of the utilities. Plaintiff also agrees that 12.78% is an appropriate rate of the administrative cost. However, the Plaintiff does not agree that the 12.78% administrative cost should be added to the construction cost.

Plaintiff's expert Finch asserts that the administrative cost calculation of 12.78% should not be added to the construction cost as the construction company has already added its own administrative cost on the figure billed therefore the administrative cost is already accounted for in the charge made by the contractor and in the amount charged in the operating expense portion of the Finch's analysis of expenses in this case.

The City's expert disagrees arguing that the construction project involves a lot more overhead because of the very nature of the construction and interruptions that are caused that goes beyond the contract work itself and paying the contractor.

The court agrees with the City's expert and concludes that the 12.78% administrative cost should be added to the construction cost in calculating an appropriate franchise fee.

**i. Interests (bond expense 4.62%)**

The City claims that the cost of bonding should be added onto the construction and engineering project cost. The City expert opined that this

was necessary since these project costs had to be paid when the projects were active, and there would be a lag time for the franchise fee to pay the expenses. Accordingly, the City would need to borrow the money to pay for the project and its cost, including the added cost due to the utilities. The City expert applied a bond rate of 4.62% in calculating the amount of additional cost due to the maintenance of the utilities.

Plaintiff's expert disagreed. It was his opinion that the franchise fee in this case under these ordinances were to be paid quarterly therefore Des Moines would be getting money from the franchise fee while the construction projects were occurring. Therefore Plaintiff's experts saw this as essentially a simultaneous payment.

The City's expert counters by stating that there is some logic in the Plaintiff's argument in a perfect world. However this is not a perfect world. The problem is that the City's construction cost do not flow evenly year to year. Therefore if you attempted to establish a franchise fee at a rate that would allow you to collect sufficient revenues to account for the increased construction cost you would have a franchise fee that would vary considerably from year to year. The City would have to adjust its franchise fee either up or down to make sure it actually achieved that revenue in the current fiscal year the contractor performed the work. Contractors are not interested in being paid at some point in the future. The City's expert argues that there would be extreme volatility in the amount of the franchise fee which would not be very well received by the City's residents. Residents prefer something that is

relatively stable. It would be better for the City to issue debt and avoid the franchise fee volatility.

The court agrees with the City's expert that the additional component of bonding cost should be added to the additional cost in constructions and engineering costs for the projects due to the regulations of the utilities in the ROW.

**j. Construction Cost.**

The City argues that there should be allocated to the electric and gas utilities \$1,533,657.00 each as construction cost incurred by the City in managing its franchise agreements and ROW. Plaintiff's expert argues that that amount should be reduced substantially for the reasons hereafter discussed.

First of all Plaintiff's expert, Finch, argues that there should be a reduction related to (1) federal and state funds used to pay construction costs, (2) sanitary/storm sewer projects, and (3) WRA projects.

Plaintiff argues that the City is able to make application and receive federal and state funding for its construction projects. The City uses this funding for its construction projects. Plaintiff's expert, Finch, opines that it would not be a cost of construction if the City's revenue was not actually used to pay for the construction. His opinion was that if the City used other sources of revenue, such as bonds or property taxes or such, then it would be properly be considered a City cost of construction. But if the construction cost was

actually paid by the state or the federal government, then it is not an actual cost the City incurs in managing the ROW.

Finch also disagreed with the inclusion of these construction cost projects related to sewer projects. He argues as he did in the analysis as to state and federal funding, i.e., a separate funding mechanism already exists as to this item of expense. The separate funding mechanism he is referring to is the user fees for these costs. While these projects and costs would normally be appropriate to include in the calculation for an appropriate franchise fee Finch argues that the City is already being paid through specific user fees for the cost associated with such construction projects. Therefore Finch opines that Des Moines already has in place the user fees necessary to be recompensed for the construction cost projects. Allowing this expense is tantamount to allowing the City to use two separate user type fees to collect the same expense. Finch goes on to state that if, at sometime in the future, the City adjusts the user fee charge to sewer users to not include that portion involved in this case, then the City could include the cost in its franchise fee.

Finally Finch argues that there needs to be an adjustment related to the Waste Water Reclamation Authority (WRA) projects.

The WRA is a separate governmental entity. The cities in the Des Moines metropolitan area formed the WRA to handle waste water reclamation for the member cities. The WRA is a separately funded entity from each of its member cities. The City is the operating entity.

The WRA provides the piping and other facilities to reclaim the waste water produced by the member cities. The cities have sanitary sewers that collect from the residents of the cities. This is transported to the WRA piping and then onto the WRA treatment facilities where the water is treated and disposed of.

WRA is in need of installing, upgrading and/or replacing its piping and other facilities. Since the City is the operating entity for the WRA, its construction projects for these various purposes are conducted by the City but the money for the projects come from WRA funds.

The WRA calculates and institutes a user fee which is charged back to the public entities and then passed onto the customers or residents of the City. Plaintiff claims that this user fee is specifically calculated to include enough of a charge to allow for the payment of the operating cost as well as the construction cost of the WRA.

Plaintiff argues that the project costs included are not even the project costs of the City, but rather of a different entity. Furthermore Plaintiff argues that since there is a separate user fee already in place to collect these sums the City is not using tax revenues for these items, and the cost of these projects should not be included.

In *Kragnes* the Supreme Court made the following statement: "Just because the record is replete with references that the City used some portion of the franchise fees for purposes other than administrative expenses, this fact does not mean that the City is not using other streams of revenue to cover the

administrative expenses it incurs as a result of granting MidAmerican the gas and electric utility franchises.” *Kragnes* at 643.

The court agrees with the City that the federal and state money, once given to the City, becomes the City’s money. If the construction cost increase it is the City money, regardless of where the money came from.

The aforementioned quote from *Kragnes* leads the court to the conclusion that there is nothing wrong with the City using these federal and state funds as other sources of revenue for meeting expenses incurred by the City due to the franchise services and should be used in calculating a franchise fee. The City is correct when it argues that the money it spends on construction projects should be considered City money regardless if its source is bond proceeds, federal or state funds, property tax receipts or any other source, including franchise fees. Therefore the court concludes there should be no reduction in utility-related increased construction cost related to the federal and state funds received by the City and used in some of the construction projects.

Finally the court concludes that it should not be too quick to adopt the Plaintiff’s argument that construction cost involving enterprise entities such as sanitary sewer and WRA should be discounted in the City’s calculation of cost to determine an appropriate franchise fee.

The City’s expert, Dragisich, makes a credible argument that failure to allow recovery of the gas and electric utility-related increased construction costs would unfairly shift those increased costs onto the sanitary sewer system and the WRA, which have no independent avenue to recover those costs and,

at the same time would allow the utilities a free ride in the area. He went on to state that the City can recoup the increased construction costs through the franchise fees, and then work out any reimbursement issues through negotiations with the sewer utility and the WRA. Finally he argued that not allocating the increased construction costs of City sewer and WRA projects to the utilities unfairly shifted those costs away from the utilities and onto the consumer.

The court concludes that there should be no reduction as claimed by the Plaintiff for the sanitary sewer system and the WRA projects. However, the court believes in terms of fairness the City should be required to negotiate some method of reimbursement with the enterprise entities to avoid any double recovery for increased construction costs resulting from the franchise fees and user fees collected.

The parties and witnesses were all in agreement that the City would incur various construction and engineering cost irrespective of whether utilities are located in the public ROW or not. The parties and the witnesses agree that some method had to be devised to separate and quantify the amount or percentage of the construction and engineering cost that would attributed to the utilities operations in the ROW. However, the parties and witnesses have serious differences as to what that percentage should be.

The City argues that the court should use a 15% increase in construction costs and a 20% increase in engineering costs. Plaintiff argues that the court should use 3.5% for the increase in engineering costs and 5% for the increase

in construction cost. However, Plaintiff concedes that in an effort to compromise the court could find that the proper figure to use is 7% for the increase in engineering costs and 10% for the increase in construction costs..

The argument between the parties as to what would be an appropriate percentage to allocate to these increased costs is a result of strong disagreement as to how one should interpret the results of the survey conducted by the City's expert.

Plaintiff's expert Finch concluded that notwithstanding that the survey was flawed and could be disputed in a number of areas, using the survey, it would be reasonable to conclude that the overall City engineering cost are increased by 3.5% and the City's construction cost are increased by 5% due to the presence of the utilities in the public ROW. The City's expert disagrees and argues that his percentages are appropriate percentages to allocate to these increased costs.

There is a considerable amount of activity surrounding these utilities and accommodating them in the ROW. The City is entitled to charge a fee for the cost it is incurring. As pointed out by the Iowa Supreme Court the City does not have to be exact, just have a reasonable basis for its calculations.

The City admits the survey results were used in an advisory way. The survey was result of the Springsted staff working in conjunction with the City engineering department. While the Plaintiff's have raised some questions as to the validity of the survey in the final analysis the court finds that the survey evidence is credible and will be accepted by this court. Therefore the court

will use a 15% increase in construction costs and a 20% increase in engineering costs..

**k. Operating Cost.**

The City claims that it incurs utility related operating costs in the managing and maintaining of the ROW. The City explains that these costs benefit the utilities in that they enable the utilities easy access to their facilities and provide protection to the facilities without the utilities incurring any cost for the benefits they receive. The City claims that these cost amount to \$669,241.00. As to these cost the Plaintiff's expert had no objection and agreed that they were appropriate to be included.

The City's expert then calculated what portion of the remaining operating cost were attributable to the utilities and there presence in the ROW. He statead that an additional \$1,571,640.00 of the City's ROW operating cost are attributable to the utilities for a total operating cost of \$2,240,892.00. With certain adjustments the City claims the total cost allocated to operating costs including the 12.78% adjustment is \$2,413,081.00.

Plaintiff states that the City's expert is overstating the operating cost by the \$1, 571,640.00. This is due to the fact that those costs would be incurred to manage and maintain the ROW regardless of the presence of the utilities in the ROW. However, the operating cost Plaintiffs agree should be included is the \$669,241.00 increased by the 12.78% overhead. Therefore the operating cost that the Plaintiff agrees to is the amount of \$754,780.00. Plaintiff then

says that this amount should be divided over seven utilities resulting in an annual amount of \$107,824.00 per utility.

The court agrees with Plaintiff that it should not allocate to the respective utilities as operating cost the \$1,571,640.00 the City incurs regardless of whether the utilities would be in the ROW. Therefore, the court concludes that \$754,780.00 is the amount that should be considered as a management expense incurred by the City as a result of the location of the utilities in ROW. Dividing this amount over seven utilities results in an allocation of \$107,824.00 per utility.

**I. One-Time /Acute Costs.**

The City wants the court to assign annual costs in the amount of \$250,000.00 each for the gas and electric utility. This is what the City claims it cost the City in utility related costs that do not occur annually and that do not occur in a set pattern. The City uses the following as examples:

- a. A 2008 lawsuit settlement of \$1.6 million. A young man fell through a missing grate on a City bridge and was severely injured.
- b. Costs of burying MEC electric lines along Martin Luther King Blvd. east roadway at City expense, to foster economic development in the area.
- c. Emergency cleanup after weather-related disasters, the clean-up being necessary so MEC could have access to the BROW to repair lines and restore power to its customers.

The court does not find that the lawsuit settlement in 2008 is a cost due to the City's management and maintenance of the utility.

As to the other costs the City admits that these costs cannot be predicted and it is difficult to annualize them as a matter of fact. These costs vary in nature and difficult to quantify in determining such costs to the City. However when they do occur they result in considerable costs to the City. Such as the electric move mentioned above which cost the City \$1,625,934.00 in 2005. Emergency cleanup after weather-related disasters can cost the City hundreds of thousands of dollars.

While it might be difficult to annualize these costs there is no doubt that they are direct costs attributable to either the gas or electric utility. While they may not occur regularly they do occur. The City is not required to establish utility related cost with a mathematical certainty. The court concludes that it should allocate \$100,000.00 to the electric utility and \$100,000.00 to the gas utility for such costs to be used in calculating the franchise fees.

### **SUMMARY**

As can be seen from the findings and conclusions of law set out about the court has determined that certain costs claimed by the City in maintaining the utilities in the ROW and BROW should not be used in calculating the appropriate franchise fees in this case. The court concludes that such expenses were not contemplated by the Iowa Supreme Court in Kragnes when it mandated this court to determine what if any part of the franchise fees are related to the City's administrative expenses in exercising its police power, including the costs associated with any incidental consequences of the franchise services.

The court concludes that the costs to be used in the calculation of an appropriate franchise fee divided over seven utilities are as follows:

1. Total Construction Costs \$9,201,942.00 results in an allocation for construction costs to the electric utility in the amount \$1,314,563.00 and to the gas utility in the amount \$1,314,563.00.
2. Operating Costs – Total operating costs in the amount of \$754,780.00. Allocating this amount over seven utilities results in an allocation of operating costs to the electric utility and the gas utility in the amount of \$107,824.00 per utility.
3. Degradation Costs – Total degradation costs in the amount of \$630,068.00 results in an allocation of degradation costs to the electric utility in the amount of \$37,373.00 and to the gas utility in the amount of \$35,030.00.
4. Disruption Costs –Disruption costs in the total amount of \$22,863.00 results in the disruption costs allocation to the electric utility in the amount of \$843.00 and to the gas utility in the amount of \$2,038.00.
5. Franchise Fee Study – Total costs for franchise fee study \$102,137.00 results in a franchise fee study allocation to the electric utility in the amount of \$14,591.00 and to the gas utility in the amount of \$14,591.00.
6. One Time/Acute Costs - \$100,000.00 allocated to electric utility and \$100,000.00 allocated to gas utility.

The court has found and concluded that the following costs should not be used in the calculation of an appropriate franchise fee:

1. Lost Tree Value – An allocation to the electric utility in the amount of \$3,482,081.00.

2. Lost Opportunity Costs – An allocation for lost opportunity costs to the electric utility in the amount of \$6,024,724.00 and to the gas utility in the amount of \$4,016,483.00.
3. Lost Property Tax Revenue – Lost property tax revenue allocation to the electric utility in the amount of \$1,218,539.00 and to the gas utility in the amount of \$812,360.00.

Utility	Degradation Costs	Construction Costs	Operating Costs	Disruption Costs	Franchise Fee Study	Lost Tree Value	Lost Opportunity Costs	Lost Property Tax	One Time Acute Costs
Electric	\$37,373.00	\$1,314,563.00	\$107,824.00	\$843.00	\$14,591.00	\$0	\$0	\$0	\$100,000.00
Gas	\$35,030.00	\$1,314,563.00	\$107,824.00	\$2,038.00	\$14,591.00	\$0	\$0	\$0	\$100,000.00
Water	\$389,785.00	\$1,314,563.00	\$107,824.00	\$14,291.00	\$14,591.00	\$0	\$0	\$0	\$0
Sewer	\$167,880.00	\$1,314,563.00	\$107,824.00	\$5,691.00	\$14,591.00	\$0	\$0	\$0	\$0
Storm	\$0	\$1,314,563.00	\$107,824.00	\$0	\$14,591.00	\$0	\$0	\$0	\$0
Cable	\$0	\$1,314,563.00	\$107,824.00	\$0	\$14,591.00	\$0	\$0	\$0	\$0
Telephone	\$0	\$1,314,563.00	\$107,824.00	\$0	\$14,591.00	\$0	\$0	\$0	\$0
<b>TOTAL</b>	<b>\$630,068.00</b>	<b>\$9,201,942.00</b>	<b>\$754,780.00</b>	<b>\$22,863.00</b>	<b>\$102,137.00</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$200,000.00</b>

**Based upon the above the court finds and concludes that \$1,575,194.00 is the amount to be allocated to the City's administrative expenses in maintaining and managing the electric utility and \$1,574,046.00 is the amount to be allocated to the City's administrative expenses in maintaining and managing the gas utility.**

## **LEGAL THEORIES**

Plaintiff claims that it has a right to recover a refund for the class under any one of three legal theories: Declaratory Judgment, Mandamus, and Unjust Enrichment/Restitution. The court must now address the issue of whether Kragnes and the class is entitled to a refund under one or more of the theories asserted.

### **1. Declaratory Judgment.**

Iowa Rule of Civil Procedure 1.1101 to 1.1109 provide the authority for this court to grant the type of declaratory relief requested by the plaintiff.

As result of the findings of fact heretofore set out in this ruling together with its conclusions of law Plaintiff is entitled to a declaratory judgment as set out below:

- a. City of Des Moines Ordinances Nos. 6280 and 14341 pertain to the electric utility franchise fee. This court declares \$1,575,194.00 of the electric utility franchise fees are reasonably related to the City's administrative expenses in exercising its police power. Any amount exceeding \$1,575,194.00 per year under the electric utility franchise fee ordinances constitute an illegal tax and unless otherwise provided by law shall hereafter be disallowed and unenforceable to that extent.
- b. City of Des Moines Ordinance Nos. 6281 and 14342 pertain to the gas utility franchise fee. This court declares \$1,574,046.00 of the gas utility franchise fees are reasonably related to the City's administrative expenses in exercising it police power. Any amount exceeding \$1,574,046.00 per year under the gas franchise fee ordinance constitute an illegal tax and

unless otherwise provided by law shall hereafter be disallowed and unenforceable to that extent.

**2. Injunction.**

On April 26, 2009, the Iowa legislature passed Senate File 478, commonly referred to as the Salary and Appropriations Bill. Division XXII of SF478 amended various sections of the Iowa Code relating to gas and electric franchise fees, including Iowa Code 364.2(4)(f).

The governor approved the legislation on May 26, 2009 and it became effective on that date.

It is the court's understanding at this time that the legislation, amending the specific language in Iowa Code Section 364.2(4)(f) would do the following:

- a. Authorize cities including the City of Des Moines to charge a gas and electric franchise fee "based on a percentage of gross revenues generated from sales of the franchisee within the city not to exceed five percent without regard to the city's cost of inspecting, supervising, and otherwise regulating the franchise."
- b. Authorize cities which collect franchise fees "pursuant to an ordinance in effect on the effective date of this division of this Act" [Senate File 478] to use fees collected in excess of the amounts necessary to inspect, supervise and otherwise regulate the franchise to "be used by the city for any other purpose authorized by law."

Based upon the above the court concludes there is no need for injunctive relief as requested by Kragnes.

### **3. Monetary Damages.**

In addition to the declaratory relief and injunctive relief sought by the Plaintiff, the Plaintiff is also requesting monetary damages equaling the amount of all illegally collected taxes under the franchise fee ordinances.

The City argues that even if the court were to find that a portion of the franchise fees collected amounted to an illegal tax Plaintiff is not entitled to a refund. The City presents several arguments in support of this position. The court now addresses the City's argument.

#### **a. UNJUST ENRICHMENT.**

The City argues that the franchise fee money collected by the City has been spent and/or used for lawful purposes, including but not limited to, police, fire and library services, increasing the City's reserve fund balance and reducing City property taxes, accruing to the benefit of all class members. Therefore the City's position is that even if the City's costs and incidental consequences did not equal or exceed the franchise fees received, the court should not allow the Plaintiff a refund. The City argues that it would be unfair to force the City to give a refund to its residents since it has not retained the franchise fee funds but has expended them for the benefit of the residents.

Secondly the City puts forth a similar argument to that discussed above in that the City argues that principles of equity alone do not justify a refund. The City asserts that this court has broad discretion and regardless of precedent, as a court sitting in equity it can tailor relief and "devise a remedy to meet the situation, though no similar relief has been given before."

The City states that any refund would be equitably problematic, regardless of how much. In support of this position the City points out that by the time this matter is finally resolved including the appellate procedure ten years or more will have elapsed and much will have changed concerning class members and their personal conditions, the beginning point for any refund, and that time in the future when a refund might be ordered. Those many changes the City argues make a refund inequitable.

The court disagrees with the City's position that equity mandates there be no refund to the class. If the court was to accept the City's position of no refund under the City's benefit/no detriment argument the court would be sending a message to all cities in Iowa that as long as the cities use funds from the illegal taxation of its citizens for good and honorable purposes, the taxpayers don't have anything to complain about and have no right to a refund of the funds illegally collected. The City's position in this regard is not supported by any just, fair, or equitable principle. The court should not and will not send such a message.

Next the City argues that the voluntary nature of the payment by the class precludes the class from relief in the form of a refund of the amount of illegally collected taxes. The court also finds no merit in this argument.

The court believes the following legal principles are applicable to the voluntary payment argument:

1. If a state has a pay your taxes first and obtain a review of the taxes validity later in a refund action, the due process clause requires the state to

afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid. *See McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 238, 110 L.Ed.2d 17 (1990).

2. It violates due process to allow a state to collect an illegal tax by coercive means and not incur any obligation to pay the taxes back. *McKesson Supra*.

3. You cannot validly make a due process challenge to a state's tax revenue scheme in so far as the challenge is addressed to the absence of a hearing prior to deprivation. The absence of a pre-deprivation hearing in the taxing context is justified by the practicalities of tax collection. A pre-deprivation hearing requirement would result in mass chaos, paralyze tax collection, and paralyze the courts. *Schroeder Oil Co. v. Iowa State Department of Revenue and Finance*, 458 N.W.2d 602 (Iowa 1990).

4. Once the State proceeded with an assessment and collected a tax, due process entitles a protesting taxpayer to request and obtain a hearing. Therefore the absence of a meaningful post-deprivation hearing is a violation of due process.

5. Taxes which are paid in order to avoid financial sanction or seizure of real or personal property are paid under "duress" while payments tendered under a system that permits tax payers to withhold contested tax assessment and challenge their validity in a pre-deprivation hearing are "voluntary". *Hagge v. Iowa Department of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993).

6. It is not a valid argument for a taxing authority that it would be inequitable to impose an onerous fiscal burden on the taxing authority in order to remedy a deprivation suffered individually by taxpayers. Equity cannot over-ride the due process requirements. *McKesson, Supra*.

7. The voluntary payment rule. In the absence of fraud, duress, deceit or mistake of fact there will be no refund of taxes and fees later found to have been collected in excess as the payments are considered voluntary. *Kraft v. City of Keokuk, 14 Iowa 86 (1862)*.

In support of its position the City argues the following:

1. There can be no refund where the Plaintiff cannot complain of fraud, duress, deceit, or a mistake of fact. *Kraft Supra*.
2. The franchise fees in question are based on an ordinance in turn based on a statute. The Iowa Supreme Court says that the fees are statutorily allowed and otherwise legal. *Kragnes* at 714 N.W.2d at 643-44.
3. The City is dependent on taxation for its maintenance. If the City has illegally taxed its residents it would have to tax the same residents again to raise the necessary money to refund them the illegal tax collected. In other words, the taxpayer would have to be paid the illegal tax, paid by them, out of their own pockets.
4. The City would be placed in financial uncertainty if the court was to allow a taxpayer a refund for an illegally collected tax following the discovery that the taxing authority collected and spent monies under an illegal tax.

This court cannot accept that under the facts and circumstances of this case it would be fair, just, or equitable to the Plaintiff and the class as taxpayers to deny a refund on the basis of the City's arguments that no refund is justified. The City is correct when it states that it has the authority to assess franchise fees expressed as a percentage of the gross receipts derived from the utilities sale of its services to the public. However, this grant is not without limitation. The charge must be reasonably related to the reasonable cost of inspecting, licensing, supervising or otherwise regulating the activity that is being franchised. *Kragnes*.

The court realizes that requiring a refund would amount to the City's residents paying the refund out of one pocket and placing it in the other pocket. The City has placed its residents in this position by exacting an illegal tax. The court cannot allow the City to exact an illegal tax and escape responsibility for its conduct based on the arguments set forth by the City.

The City also argues that the Plaintiff class is not entitled to a refund because their payments were not made under duress but were voluntary. The City sets forth a number of reasons in support of this position. First, nobody was threatened by the City with gas or electricity shut-off for failure to pay a franchise fee. Second, nobody was threatened by MEC with a gas or electricity shut-off for failure to pay a franchise fee. Third, if anyone had been threatened with a gas or electricity shut-off for failure to pay a franchise fee it would be MEC, not the City, doing the threatening. Fourth, MEC's procedure for turning off a customer's gas or electricity is lengthy and is not a "summary procedure", instead the gas or electricity shut-off procedure for failure to pay a franchise fee in the City takes about two years and therefore is not the type of "immediate entry" envisioned by the law.

And finally, the decision to cut off utilities for failure to pay a fee is solely the decision of MEC.

Summarizing the above the City argues that the franchise agreement between the City and MEC only requires MEC to remit those franchise fees it collects. The agreement does not require MEC to remit all fees billed. The agreement does not require MEC to make any effort on the City's behalf to collect unpaid franchise fees. Any effort to collect the fees, and utility cut off after such an unsuccessful effort, is completely at the discretion of MEC and not the City.

The voluntary payment rule was initially discussed in the case of *Kraft v. City of Keokuk Supra*. The rule was once again addressed in *Harbeck v. Sioux City*, 202 N.W. 507 (Iowa 1925). As applied to this case the rule would be that if the City receives more than is legally due from its residents, while the residents are under duress, such payments are not deemed voluntary.

The City is collecting franchise fees through MEC. MEC is collecting the franchise fees at the same time it is collecting money owed MEC for the services it provides. The bill is not separated as to the franchise fees collected for the City as opposed to the service fees collected on behalf of MEC. MEC has a collection procedure for bills that go unpaid including disconnection. Customers are not made aware that there will be no disconnection if they pay all of the bill consisting of MEC services and not the franchise fee portion of the bill. Under these circumstances the court does not see how it can be realistically argued that the monies paid by the customers are voluntary and not subject to claims of coercion/duress. It would be simple enough for the City to put into place a procedure where customers are advised that if they want to challenge the

franchise fee portion of the bill they do not have to pay that portion of the bill and will not be subjected to the disconnection process. As of this time no such procedure is in place. While the record reveals that nobody has been threatened by the City or MEC with a gas or electricity shut-off for failure to pay a franchise fee alone the threat is always there. Furthermore the records would indicate that MEC has disconnected utilities in Des Moines for non-payment of utility bills which included the franchise fees held illegal in this case and were a part of the unpaid billing that led to and caused the disconnection.

The City's argument that the payments are voluntary is without merit.

Due process requires a refund to the City residents. To rule otherwise would reward the City for its illegal conduct no matter how well intentioned that conduct was. It would be wrong for this court to ignore the illegal exaction of taxes from the residents because the residents have benefited from the illegal taxes. As mentioned failure of the court to grant a refund in this case would send the wrong message to the City and other cities. The message this court is sending is there must be financial consequences from the illegal taxation of the City's residents notwithstanding that the funds received from the illegal taxation were used wisely, legally, and with the best intentions for the residents. To do otherwise would provide no incentive for the City to conduct itself differently in the future.

**Mandamus.**

In addition to recovering on the theory of Declaratory Judgment the Plaintiff asserts that it is entitled to recover under theories of Mandamus. The court disagrees.

Chapter 661 controls the action of mandamus. Iowa Code Sections 661.1

provides as follows:

The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station.

Principles governing mandamus are well established. Its principals are discussed in *Bellon v. Monroe County*, 577 N.W.2d 877 (Iowa App. 1998) as follows:

1. Mandamus is a drastic remedy to be applied only in exceptional circumstances.
2. It is not to be used to establish rights but to enforce rights that have already been established.
3. The writ can be used to compel a tribunal to act but cannot control its decision.
4. If there is a plain, speedy, and adequate remedy at law, mandamus does not lie.
5. When such a remedy is available through certiorari or appeal, mandamus should not be ordered.
6. The other available remedy must be competent to afford relief on the very subject matter in question, and be equally convenient, beneficial, and effectual.

The essential prerequisites for an action seeking mandamus is: (a) duty enjoined by law upon the defendant, in the performance of which the plaintiff, if a private individual, has a personal interest; (b) a breach or non-performance of such duty by the defendant; (c) a legal right in the plaintiff to damages because of such nonperformance; and (d) absence of any other adequate remedy in the ordinary course of the law. *Charles Gabus Ford, Inc. v. Iowa State Highway Commission*, 224 N.W.2d 639 (Iowa 1974).

Based on the court's ruling the Plaintiff in fact has an adequate remedy at law under the theory of Declaratory Judgment. As a result the court does not believe this is a case in which Mandamus should issue. Plaintiff's claim based on Mandamus is denied.

**Restitution/Unjust Enrichment.**

The final legal theory Plaintiff relies on is the theory of Unjust Enrichment/Restitution. Plaintiff's argument is the City has been unjustly enriched by its exaction of illegal taxes under the guise of the gas and electric franchise fees.

Plaintiff argues Iowa law has routinely allowed actions in unjust enrichment against municipalities. *See Dolezal v. The City of Cedar Rapids*, 336 N.W.2d 355 (Iowa 1982).

A claim for unjust enrichment is routed solely in equitable principles. *Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23 (Iowa App. 2000). It is premised on a theory that "one shall not be permitted unjustly enrich oneself at the expense of another or to receive property or benefits without making compensation for them." *West Branch State Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1991). The necessary elements of such a claim are: (1) the conferment of a benefit by a plaintiff to its detriment, (2) that the defendant had an appreciation of receiving the benefit, (3) that the defendant accepted and retained the benefit under circumstances making it inequitable for there to be no compensation for its value, and (4) that no remedy exists at law that can appropriately address the claim. *Id.*

The court concludes that Plaintiff's claim under this theory should also be denied. As in the case of Mandamus Plaintiff has an adequate remedy through the action of Declaratory Judgment.

For the reasons set forth above the court concludes that the plaintiff is not entitled to recovery on either a theory of Mandamus or Restitution/Unjust Enrichment.

### **CITY'S COUNTER-CLAIM**

Based upon the above the court finds and concludes that the City has failed to meet its burden of proof concerning the City's counter-claim. The City's counter-claim is dismissed.

### **RULING**

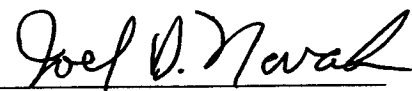
#### **IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

1. To the extent the annual electric franchise fees charged under Des Moines Ordinance No's 6280 and 14341 exceeded \$1,575,194.00 and to the extent the annual gas franchise fees charged under Des Moines Ordinance No's 6281 and 14342 exceeded \$1,574,046.00, the said ordinances are determined to be illegal, during the period of July 27, 1999 to May 26, 2009.
2. The City of Des Moines shall comply with all provisions of this Order and Decree and shall in the future comply with all applicable requirements of law in the establishment of franchise fees under Iowa Code Section 364.2(4) and any amendment thereto becoming affective as of May26, 2009.
3. The City shall negotiate some method of reimbursement with the enterprise entities to avoid double recovery for increased construction costs that might result from the collection of both franchise fees and user fees.
4. Judgment shall be and is hereby entered in favor of the Plaintiff class and against the Defendant City of Des Moines in the amount of all fees for gas and electric franchise fees that have been paid to the City of Des Moines in excess of the

amount herein determined to be legally charged franchise fees for the period of time commencing July 27, 1999 to May 26, 2009.

5. All sums to be paid hereunder shall be paid with appropriately determined prejudgment and post-judgment interest.
6. The Court retains jurisdiction to determine the following:
  - a. The actual amounts collected and precise dollars required to be refunded over the periods in question.
  - b. The specific amounts of judgment monies to be paid to each class member as well as all other aspects of the administration of this class.
  - c. The manner of payment of the refunds including the feasibility of refunds paid to class members on an installment basis.
7. Any award of attorney fees and expenses shall be determined after notice and hearing and upon determination of the extent to which legal and administrative work remains for class counsel to conclude this case.
8. After notice and hearing the court will determine the costs of the action to be taxed against the Defendant City of Des Moines.

Dated this 3<sup>rd</sup> day of June, 2009.



JOEL D. NOVAK, JUDGE  
Fifth Judicial District of Iowa

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