

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

QWEST CORPORATION d/b/a
“CenturyLink QC,” WINDSTREAM
COMMUNICATIONS. LLC fka
“Windstream Communications, Inc.” and
MCLEOD-USA TELECOMMUNICA-
TIONS SERVICES, LLC.,

Plaintiffs,

vs.

CITY OF DES MOINES, IOWA,

Defendant.

No. 4-15-cv-00305-CRW-HCA

FACTS, LEGAL CONCLUSIONS,
and JUDGMENT for the Defendant

Plaintiffs Qwest Corporation, Windstream Communications, LLC, and McLeod-USA Telecommunications Services, LLC. (plaintiffs) are telecommunication companies using fiber optic cable; they challenge as unlawful an increased annual management fee adopted by the City of Des Moines (City). Plaintiffs seek declaratory and injunctive relief, contending that the fee to become effective January 1, 2018 violates a federal statute (47 U.S.C. section 253)(fee for managing public right-of-way must be “reasonable” and imposed on a “competitively neutral and nondiscriminatory basis”), and a State statute (Iowa Code section 480A.3)(restricting local government to a public-right-of-way fee that does not exceed administrative costs).

The court held a bench trial on November 7 and 8, 2016.¹ Having now considered the extensive stipulations of fact and all of the evidence and applicable law, the court now concludes there is no merit in the plaintiffs’ multiple claims for relief. The clerk of court

¹ In pretrial proceedings, plaintiffs sought to preclude the City’s expert witness Nicholas Dragisich from providing expert opinions. (Docket #35). The court denied the motion to exclude (Docket #54).

shall enter judgment for the City, with costs taxed to the plaintiffs.

Findings of Fact.²

1. The defendant City of Des Moines (City) is an Iowa municipal corporation located in Polk County.
2. The City has a population of approximately 210,000.
3. The City owns real estate that it dedicates as public right-of-way (PROW) for use by the general public to convey traffic, pedestrians, cars, bicycles, and utilities.
4. The PROW includes public streets, sidewalks, bridges, and material underneath such structures.
5. The City estimates its PROW is 5,190,966 equivalent lineal feet (ELF) both above and below the ground.
6. Several different utilities consistently occupy the PROW. These include water, sanitary sewer, natural gas, electrical, cable television, and telecommunications.
7. Water, sanitary sewer, and natural gas utilities are generally located exclusively underground, while other utilities are located both overhead on wires and underground within the PROW.
8. In addition to utilities, the PROW space is used for many other purposes including, but not limited to, pedestrian sidewalks, street signs, traffic signs, traffic signals, bus stops, bus benches, fire hydrants, street lights, garbage pickup and recycling pickup.
9. The City enacted a PROW Management Ordinance in 1998. In 2003, the

²The parties' joint statement of stipulated facts (Docket # 63) is incorporated here in part as a substantial portion of the underlying facts for this final decision.

Ordinance was amended to define and identify the manner and type of PROW regulation and management to be undertaken by the City.

10. Pursuant to the 2003 Ordinance, the City, through the Engineering Department, Traffic and Transportation Division, was charged with collecting permit fees for excavations and obstructions within the PROW. The Division was also charged with collecting private license fees from private-entity PROW users and PROW management fees as allowed under Iowa Code chapter 480A.

11. The plaintiffs are three telecommunication utilities. Facilities owned by plaintiffs physically occupy the PROW on a permanent basis.

12. In 1960, the City entered into an electrical franchise agreement with Iowa Power and Light Company, a predecessor to MidAmerican Energy Company.

13. The agreement was codified in an ordinance which provided an annual franchise tax of 1% of the gross receipts the company received from customers within City limits.

14. The City entered into a similar agreement with the Iowa Power and Light Company in regard to natural gas.

15. These franchise agreements for the provision of gas and electrical services were renewed annually via ordinance for years pursuant to Iowa Code section 362.2(4)(a).

16. In 2004, the State of Iowa phased out sales taxes on residential users of gas and electrical services.

17. Following that phase-out, the City passed ordinances increasing the franchise fee on MidAmerican gas and electrical services to 5%.

18. A class-action suit was filed against the City for the increased franchise fee, alleging that the franchise fee increase constituted an illegal tax. The Iowa District Court for Polk County enjoined the City from collecting or assessing the franchise fees on the ground that they raised revenue instead of paying for the City's costs.

19. On appeal to the Iowa Supreme Court, the court remanded the case for the enforcement of the fee ordinance, but only up to an amount equal to the fees reasonably related to the City's administrative expenses in exercising its police power. See Kragnes v. City of Des Moines, 714 N.W. 2d 632, 633 (Iowa 2006)(Kragnes I). The Iowa Supreme Court stated that the administrative expenses were not required to be calculated with mathematical certainty.

20. In 2006, the City retained Springsted Incorporated, and in particular Nicholas Dragisich, to provide services as an expert in the Kragnes litigation. Dragisich is the Executive Vice President and Management Consultant for Springsted Incorporated, serving as the head of the Management Consulting Services Division.

21. Dragisich testified in the remanded second Kragnes (Kragnes II) case. See Kragnes v. City of Des Moines, 810 N.W.2d 494 (Iowa 2012).

22. In Kragnes II the district court had found that a portion of the franchise fee collected by the City was excessive. On appeal, the Iowa Supreme Court modified the franchise fee amounts to be charged in certain categories, but essentially adopted Dragisich's expert testimony.

23. Following the decision in Kragnes II, the City again retained Springsted to update the 2007 PROW cost recovery plan. The 2013 Report was built upon the work done in the 2007 Study, using those costs approved by the Iowa Supreme Court in Kragnes II. The Report

was presented to the City in October 2013.

24. On or about July 27, 2015, the Des Moines City Council adopted Ordinance 15,386, providing a \$.12 per ELF right-of-way management fee to be implemented gradually over a six year period with the elimination of the additional license fees for licensed PROW users.

25. Since approximately 2002, the annual management fee for the plaintiffs has been calculated each year at a range from \$.0083 to \$.0092/foot.

26. The Ordinance amended Des Moines Municipal Code section 102-766 (c) to eliminate the license fee and require all non-franchised occupants of the PROW to pay an annual management fee. The Ordinance also amended Des Moines Municipal Code section 102-711 (j) to provide that the annual management fee would be pre-set and included in the fee schedule.

27. The fee schedule also requires an annual payment of \$100 per unit of “equipment” for each plaintiff user with “unit-based equipment” in the PROW.

Conclusions of Law.

1. This court has federal jurisdiction over this lawsuit under 28 U.S.C. section 1391 (federal question) and 28 U.S.C. section 1367 (supplemental); venue is proper in this court pursuant to 28 U.S.C. section 1391 (b)(1) and (2).

2. The court finds admissible and credible the Dragisich testimony on which the City relied in adopting the Ordinance here challenged. Dragisich’s extensive experience working on city engineering projects in several states and his deliberate, detailed approach to providing a

basis for the Ordinance satisfy the Daubert³ guidelines, as well as Federal Rule of Evidence 702. His testimony was more believable than that of the plaintiffs' two expert witnesses Fitzsimmons and Schwartzkopf, who had not been as experienced in municipal engineering activities.

3. Dragisich's testimony also had provided a solid basis for the Iowa Supreme Court's decision in Kragnes II.

4. The city properly relied on Dragisich's "Springsted Study" in enacting its Ordinance setting the utility fees that are here challenged.

5. Dragisich properly acknowledged that the future fees were to be based on future cost expectations and could not be based solely on past studies. He did also include reference to his consideration of the Springsted cost study. See City Trial Exhibit A. Plaintiffs presented no such survey and report..

6. The City's Ordinance does not violate federal law, 47 U.S.C. section 253, as contended in Count I of the complaint. The plaintiffs presented no credible evidence to prove the Ordinance would have an actual adverse effect that would eliminate their ability to provide telecommunication services. As in Level 3 Communications LLC v. City of St. Louis, 477 F.3d 528, 532 (8th Cir. 2007), here plaintiffs presented no evidence that increased fees would actually or effectively prohibit the provision of services. Even the plaintiffs' expert witness Fitzsimmons was unable to explain in testimony any actual adverse impact on services to be provided.

7. The City's Ordinance does not violate State law, Iowa Code section 480A.3, as contended in count III of the complaint. The Springsted Study demonstrated that the Ordinance

³ See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993)(requiring that expert testimony be relevant and that it "rests on a reliable foundation").

is competitively neutral and reflects “proportionately the costs incurred by (the City) as a result of the various types of uses of the PROW. The City’s estimate of future costs complies with the general language of the Iowa Supreme Court presented in Kragnes II.

8. Count V of plaintiffs’ complaint contended the City Ordinance provisions required them to provide “in kind” services. This claim too is dismissed. After plaintiffs filed their complaint, the City adopted a revised Ordinance that eliminated “in kind services” concerning equipment installed in PROW trenches and ducts. Count V is dismissed as moot.

Judgment. The defendant City of Des Moines is entitled to judgment dismissing all six claims of the plaintiffs’ complaint and their prayer for injunctive relief, for the reasons here set forth and on all the grounds set forth in the City’s proposed order (Docket # 60-1) filed on October 19, 2016 and Supplement (Docket #75) filed on November 22, 2016.

IT IS SO ORDERED.

Dated this 27th day of December, 2016.


CHARLES R. WOLLE, JUDGE
U.S. DISTRICT COURT