IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0643
Bremer County Case No. CVCV05656

DENVER SUNSET NURSING HOME,
Plaintiff—Appellant,

v.

CITY OF DENVER, IOWA,
Defendant—Appellee.

APPEAL FROM THE
IOWA DISTRICT COURT FOR BREMER COUNTY
THE HONORABLE CHRIS FOY,
DISTRICT COURT JUDGE

BRIEF OF AMICUS CURIAE
IOWA ASSOCIATION OF MUNICIPAL UTILITIES

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Iowa Association of Municipal Utilities ("IAMU") is a service organization composed of more than 540 municipally-owned broadband, electric, gas, water and communications utilities in Iowa, all of which are organized and operate under the city utility provisions of Iowa Code chapter 388. Some of these municipal utilities are governed by boards of trustees consisting of three or five members, and some are governed directly by city councils consisting of as few as three and as many as nine members. See Iowa Code chapter 388 (2017).

There are 136 municipal electric utilities among IAMU's membership, including the City of Denver Municipal Electric Utility. Iowa's municipal electric utilities have both governmental and proprietary functions and powers. *See, e.g. Carroll v. City of Cedar Falls*, 221 Iowa 277, 261 N.W. 652, 657 (1935). City utilities are allowed by statute to compete with private businesses. Iowa Code §23A.2(10)(c).

Ever since cities were "granted home rule power and authority, not inconsistent with the laws of the general

assembly," cities have been allowed "to determine their local affairs and government." Iowa Constitution §38A. This grant of "municipal home rule" has long included local control over the operation of city utilities.

Unless otherwise specifically provided by statute, a municipal electric utility is not subject to regulation by the Iowa Utilities Board (IUB), and rate regulation is *not* enumerated in the list of regulatory actions to which municipal electric utilities are subject. See Iowa Code §476.1B. Council-governed city utilities must establish their rates by ordinance, and board-governed city utilities must establish their rates by resolution of the trustees, published in the same manner as an ordinance. Iowa Code §384.84(1).

Local control over their affairs is a critical issue to IAMU's 136 municipal electric utilities. Unlike large corporate utilities, municipal utilities are small, non-profit, community-owned enterprises, and unlike large corporate utilities, the ratepayers and residents of Iowa's city-owned electric utilities can participate directly in their governance through voting, running

for city council, or simply attending the open meetings of their local utility board or city council. The Iowa legislature has recognized that these differences are meaningful and has, through legislation, granted a greater degree of operational autonomy to city-owned utilities than it has to large corporate utilities. IAMU's municipal utility members pride themselves in fashioning local solutions to local problems.

Given the importance of municipal home rule to its members, IAMU has a deep and abiding interest in ensuring that principles of local control over city utility operations are preserved and that a workable billing adjustment standard is established in order to facilitate the resolution of future billing errors.

IAMU's purpose in this brief is to provide information that will assist the Court in assessing the ramifications its decision could have on the 135 municipal electric utilities in Iowa that are interested in, but not a party to, the instant case.

RULE 6.906(4)(d) STATEMENT OF AUTHORSHIP

The *amicus curiae* is represented in this matter by IAMU's legal counsel, who authored this brief in its entirety. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

Counsel for IAMU discussed the facts of this case with, and accepted technical assistance on the filing and formatting of this brief from, the Ahlers & Cooney law firm which has served as outside counsel to IAMU in other matters.

The City of Denver electric utility is a member of IAMU but counsel for IAMU has not discussed these matters with the City of Denver.

ARGUMENT

It is the view of the Iowa Association of Municipal Utilities (IAMU) that while the district court, in its order granting summary judgment, correctly limited the recovery of the Denver Sunset Nursing Home ("the Nursing Home") to five years, the court wrongly concluded that "the outcome of the case is governed by…the statute of limitations for claims based on

unwritten contracts" (Order Granting Summary Judgment (November 30, 2017), at page 4; App.___). IAMU respectfully argues that the outcome of this case is properly governed by the City of Denver's local regulations and principles of municipal home rule.

I. The District Court's Order Should Be Affirmed Based on Local Ordinances Because a Contractual Relationship Is Not Supported by Municipal Law or by Public Utility Statutes.

The district court concluded without analysis that a contract existed in this case because "the utility offered to sell and plaintiff agreed to purchase electricity at a set rate per kilowatt." *Id.* There are two significant problems with this conclusion. First, it fails to recognize the statutory requirements placed on municipal corporations in the contracting process and the extent to which this Court has enforced their formality. Second, it fails to recognize that the provision of electric service is so highly regulated that the scope of contracting is quite unlike other industries.

1. The Formal Requirements of Municipal Contracting Preclude the Formation of an Unwritten Contract.

The general assembly and this Court have both made it clear that contracting with a municipal corporation such as the City of Denver is unlike contracting in the private sector. In 1968, the People of Iowa amended the state's constitution to provide cities with municipal home rule powers:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.
>
> The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Constitution §38A. The Iowa general assembly has enacted a statutory implementation of the municipal home rule amendment that allows a city to "exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety,

health, welfare, comfort, and convenience of its residents." See Iowa Code §364.1.

However, this provision alone doesn't determine the scope of the municipal contracting power, for while the constitutional grant of municipal home rule provides broad general powers, these powers may be exercised only to the extent they are "not inconsistent with the laws of the general assembly." *Id.* Perhaps not coincidentally, the general assembly has adopted many laws that place limits on a city's broad general powers. See *e.g.* Iowa Code §364.3. One of these limits provides that a city council "shall exercise a power only by the passage of a motion, a resolution, an amendment, or an ordinance." Iowa Code §364.3(1).

In construing the scope of the municipal contracting power, this Court has said that "a fundamental requirement for the enforcement of a municipal contract is that the municipality must have exercised its authority to enter into the contract within the scope of the powers conferred by statute." *Miller v. Marshall County*, 641 N.W.2d 742, 750 (Iowa 2002).

This Court has also said that "if a municipality fails to appropriately exercise its authority or comply with statutory procedures, the contract is void." *Id.* Even more emphatically, this Court has declared that "it is clear that any contract with a city entered without a formal motion, resolution, amendment or ordinance is void." See *City of Akron v. Akron Westfield Community School District*, 659 N.W.2d 223, 225 (Iowa 2003).

In addition, this Court has noted with approval that "the doctrine of ultra vires has, with good reason, been applied with greater strictness to municipal bodies than to private corporations." *Marco Development Corp. v. City of Cedar Falls,* 473 N.W.2d 41, 42 (Iowa 1991).

Finally, this Court has declared that "a city's compliance with Iowa Code section 364.3(1) is crucial." *City of Akron v. Akron Westfield Community School District*, 659 N.W.2d 223, 225 (Iowa 2003). In holding that compliance with §364.3(1) is "crucial," the *Akron* court explained that "out of respect for the legislature, we assume the formal requirements of section 364.3(1) protect city taxpayers, and are a good idea." *Id.*

This Court further explained in *Akron*, that "the legislature considered it of first importance for city officials to observe formal requirements before obligating taxpayers to finance the affairs of city government. Any party, including even another public entity like a school district, must yield to those requirements." *Id.* at 226. Thus, given the statutory requirements of municipal contracting and given that a failure to follow them voids a contract, it is unusual that the district court would treat the relationship between the Nursing Home and the City of Denver as an "unwritten contract."

In addition to not adhering to the formal requirements of contract approval under §364.3(1) and the cases interpreting it, this district court's finding of an unwritten contract is also an exception to the ordinary statutory requirements for the provision of city utility services.

The legislature has specifically addressed the provision of city utility service under contract. See Iowa Code §384.84(8)(a). In particular, the legislature has enacted a provision that allows "the governing body of a city utility" to "contract for the use of

services provided by a city utility…with persons whose type or quantity of use or service is unusual." Iowa Code §384.84(8)(a)(2). This provision clearly indicates that the legislature believes that a city utility would not ordinarily provide service on a contractual basis. To put it another way, if the legislature viewed the relationship between a city utility and its customers as contractual in nature, it would not have been necessary to enact a provision that specifically authorizes a city utility to provide service on a contractual basis.

Ordinarily, a city council would establish its utility rates and govern its utility operations by establishing an ordinance. See Iowa Code §384.84(1). Such an ordinance would be required to meet the same requirements that all local legislation must meet. See Iowa Code chapter 380. It is only when "the type or quantity of use or service is unusual" that a city utility is authorized to provide the service on a contractual basis under Iowa Code §384.84(8)(a)(2). There is nothing in the district court's order that indicates whether the Nursing Home's type or quantity of use or service is in any way "unusual."

It is clear from this Court's prior cases that if the City of Denver's electric utility had wanted to enter into a contract with the Nursing Home, the Denver City Council would need to formally approve the contract by motion, resolution, ordinance or amendment. It is also clear that under §384.84(8)(a)(2), such a contract would only be proper if the Nursing Home's needs were unusual. By not following these statutory requirements, the proposed contract would be either void or voidable, depending on the circumstances.

In the instant case, the district court's order granting summary judgment did not analyze whether the Denver City Council had by motion, resolution, ordinance or amendment acted to approve a contract with the Nursing Home. In fact, the order did not mention that formal action to approve a contract was even required. Nor did the order recognize that contractual service by a city utility is not the ordinary basis for utility service.

Plainly, it would be difficult for a city council to approve an unwritten contract of any sort and still comply with the

statutory contracting procedures. Even if the Nursing Home and the City of Denver had intended to enter into an unwritten contract, the district court arguably should have voided it rather than enforced it.

2. The Electric Utility Regulatory Framework Supplants Ordinary Contract Law as a Basis for Determining the Rights and Duties of Utilities and Customers.

Even if the rules of municipal contracting did not make the district court's finding of an unwritten contract problematic, the highly-regulated nature of the electric industry means that a contractual framework does not properly describe the relationship between the parties to the instant case.

A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts §1 (1981). In other words, the purpose of a contract is to define and enforce the rights and duties of the parties.

However, in the context of electric service, the statutory

framework of Iowa Code chapter 476 has supplanted the contract as the basis for the rights and duties of the parties. As to the utility, there is a statutory, rather than a contractual, obligation to serve the customer. See Iowa Code §476.8(1) ("Every public utility is required to furnish reasonably adequate service and facilities."). As to the customer, electricity must be purchased from whatever utility has been exclusively assigned to that customer's service area by the Iowa Utilities Board. See Iowa Code §476.25 ("…the board may establish service areas within which specified electric utilities shall provide electric service to customers on an exclusive basis.").

Many other rights and duties of a utility and its customers, which might otherwise be founded on contract, are instead created and enforced through Iowa Code chapter 476. See e.g. Iowa Code §476.3(1) ("When there is filed with the board by any person or body politic, … a written complaint requesting the board to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in

contravention of this chapter, the written complaint shall be forwarded by the board to the public utility, which shall be called upon to satisfy the complaint or to answer it in writing within a reasonable time to be specified by the board."); also see Iowa Code §476.6(2) ("All public utilities, except those exempted from rate regulation by section 476.1, shall give written notice of a proposed increase of any rate or charge to all affected customers served by the public utility no more than sixty-two days prior to and prior to the time the application for the increase is filed with the board."); and Iowa Code §476.20(1)(a) ("A utility shall not, except in cases of emergency, discontinue, reduce, or impair service to a community, or a part of a community, except for nonpayment of account or violation of rules and regulations, unless and until permission to do so is obtained from the board.").

The unavoidable effect of this comprehensive statutory framework is to drastically alter the ordinary ability of the parties to contract with each other. Instead of parties, it is primarily statutes which determine the existence, nature, and

terms of the relationship between the Nursing Home and the City of Denver.

II. The City of Denver's Municipal Ordinances Provide the Correct Remedy.

It is simply not necessary to find a contractual relationship in order to fashion a remedy in this case. Happily, the statutory framework brings together principles of utility regulation with principles of municipal home rule. Iowa Code chapter 476 gives the Iowa Utilities Board authority over "public utilities," including municipal utilities, that furnish electricity "to the public for compensation." Iowa Code §476.1.

The extent of the board's authority over municipal utilities is different than its authority over investor owned utilities and rural electric cooperatives. Compare Iowa Code §476.1A and Iowa Code §476.1B. In particular, "unless otherwise specifically provided by statute, a municipally owned utility furnishing gas or electricity is not subject to regulation by the board under this chapter, except for regulatory action pertaining to [a list of enumerated items]". Iowa Code §476.1B. Notably, the list of

authorized regulatory actions does not include the regulation of rates or the requirement to file tariffs with the board. *Id.* Thus, the mandatory refunds for overcharges in 199 Iowa Administrative Code 20.4(14)(e) do not apply to municipal electric utilities, which allows them to determine locally how best to handle issues of incorrect billing.

The City of Denver owns and operates a municipal electric utility, and "if not inconsistent with the laws of the general assembly," is entitled to "exercise any power and perform any function it deems appropriate." Iowa Code §364.1. With regard to its municipal electric utility, this means, among other things, observing a number of laws that regulate the governance of such utilities as well as the setting of rates and charges. See generally Iowa Code chapter 388, and in particular, see Iowa Code §384.84 and Iowa Code §388.6.

In this case, the City of Denver has elected to adopt a local regulation that incorporates the Iowa Utilities Board's rules for refunds of utility overcharges:

> 14.04.010 State Regulations Adopted. The "Regulations Governing Service Supplied by Electric Utilities" required by the Iowa State Commerce Commission, Utilities Division in compliance with Chapter 490A, Code of Iowa, 1966 are hereby adopted by reference as the official regulations governing service supplied by the City of Denver electric utility. An official copy of the "Regulations" as adopted is on file in the office of the City clerk and is available for public inspection. (Ord. 2-66 §l, 1966).

Denver, Iowa, Code §14.04.010 (May 2004), available at http://cityofdenveriowa.com/city-Code/.

In other words, even though not required to follow them and even though the Iowa Utilities Board cannot enforce them here, the City of Denver has voluntarily elected to comply with the same requirements that apply to other utilities in Iowa, including the bill adjustment rule in 199 Iowa Administrative Code 20.4(14)(e).

This means that, under Denver's own ordinances, the Nursing Home is entitled to a refund of five years' worth of the overpayments. This is the same result that would be available to the Nursing Home if it had been overbilled by MidAmerican Energy or Alliant Energy, it is the same result that would be available if this complaint were before the Iowa Utilities Board,

and in the end, it is the same result reached by the district court when it applied the statute of limitations for unwritten contracts under Iowa Code §614.1(4). See Order Granting Summary Judgment (November 30, 2017), at page 4; App.___.

IAMU maintains that, unlike the district court's order, which reached the "right" result for the wrong reasons, applying the City of Denver's local ordinances in this case leads to the right result for the right reasons.

CONCLUSION

The *amicus curiae* Iowa Association of Municipal Utilities respectfully requests that the decision of the district court be affirmed based on Denver's local ordinances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.906(4), 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Bookman Old Style in 14-point size font and contains 3,058 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Timothy J. Whipple — 7/19/18

Timothy J. Whipple — **Date**

CERTIFICATE OF FILING

The undersigned hereby certifies that the Final Brief of the Amicus Curiae was electronically filed via the Iowa Supreme Court's Electronic Data Management System (EDMS) on the 19th day of July, 2018

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CERTIFICATE OF SERVICE

It is hereby certified that on the 19th day of July, 2018, the undersigned party, or person acting on its behalf, did file via EDMS the foregoing document, which gives notice thereof to the following:

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