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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA
CIVIL DIVISION

ERIC L. FRANK, on behalf of himself and all others similarly situated,
Plaintiff,

vs.

CITY OF PENSACOLA, a Florida Municipal Corporation,
Defendant.

Case No. 2015 CA 001298
Division E (Civil)

PARTIAL SUMMARY JUDGMENT

This matter is before the Court pursuant to "Plaintiff's Renewed Motion for Partial Summary Judgment on the 'Additional Revenues' Issue per Judge Bergosh's Order on Cross-Motions for Summary Judgment" (hereinafter "Plaintiff's Motion"), which was filed on December 20, 2023. The Court heard and considered arguments of counsel for both parties at a hearing on May 20, 2024, reviewed pertinent documents in the record, reviewed the applicable case law, and otherwise made itself familiar with the proceedings. The Court finds as follows:

Background and Procedural History

The Defendant, the City of Pensacola (hereinafter "City"), enacted a series of three ordinances. City Ordinance No. 32-70 (hereinafter the "1970 Ordinance") was passed by the City on June 15, 1970, and was attached to the Plaintiff's Second Amended Complaint as Exhibit "A." City Ordinance No. 27-88 (hereinafter the "1988 Ordinance") was passed by the City on July 14, 1988, and was attached to the Plaintiff's Second Amended Complaint as Exhibit "B." City Ordinance No. 46-91 (hereinafter the "1991 Ordinance") was passed by the City on September 26, 1991, and was attached to the Plaintiff's Second Amended Complaint as Exhibit "C." The 1970

Ordinance, the 1988 Ordinance, and the 1991 Ordinance shall be collectively referred to as the "Franchise Fee Ordinances" in this order.

Pensacola Energy, formerly known as Energy Services of Pensacola, is a natural gas utility provider and a department of the City. Pensacola Energy does not have an independent legal existence apart from the City. Pensacola Energy provides natural gas services in Escambia County, Florida, both inside and outside the city limits of Pensacola. The City imposes a "franchise fee" on Pensacola Energy, which Pensacola Energy charges to its Municipal Customers. For the purposes of this order, the capitalized term "Municipal Customers" means the certified class as stated in the "Order Granting Plaintiff's Motion for Class Certification" dated June 7, 2019 (Docket No. 84):

> All natural gas customers of the Defendant, City of Pensacola, located within the Pensacola city limits upon which Defendant has imposed, and from whom Defendant collected, franchise fees within the applicable statute of limitations period and in the future continue to impose and collect franchise fees.

The Plaintiff, Dr. Eric Frank, filed his "Second Amended Complaint" (hereinafter "Plaintiff's Complaint" or "Complaint") on March 30, 2016, which seeks (1) to enjoin the City from continuing to charge and collect those franchise fees (hereinafter "Franchise Fees"[1]) from Municipal Customers, (2) return of the Franchise Fees to the Municipal Customers, and (3) return to Municipal Customers any utility service taxes[2] that the City charged and collected upon the Franchise Fees. The Plaintiff's claims are for the Franchise Fees (and any utility service taxes collected thereupon) paid by Municipal Customers during the period beginning four years before

[1] For the purposes of this order, the capitalized term "Franchise Fees" means itemized charges of the same name reflected on Municipal Customers' natural gas utility bills from the City from August 6, 2011, to the present, as well as any future such charges imposed upon Municipal Customers.

[2] Section 166.231, Florida Statutes, allows municipalities to levy and retain for themselves a public service tax on the sale of natural gas (among other utility services) of up to 10% of the payments received from customers located within the municipality. That tax is commonly referred to as a "utility services tax."

this action was initiated[3] and continuing until such time as the imposition of the Franchise Fees upon the Municipal Customers ceases.

The Plaintiff's Complaint sets forth two general grounds for relief. The first claim (hereinafter "Plaintiff's First Claim") asserts that the Franchise Fees are not valid municipal user fees, but rather impermissible taxes charged to Municipal Customers in violation of article VII, sections 1(a) and 9(a) of the Florida Constitution. The second claim (hereinafter "Plaintiff's Second Claim") asserts that the Franchise Fee Ordinances do not authorize the City to pass the Franchise Fees to, or require the Franchise Fees to be paid by, the Municipal Customers. Rather, the Ordinances only provide that the Franchise Fees are to be charged to and collected from the City's gas utility department. Plaintiff's Second Claim further asserts that in the absence of express authorization from the Pensacola City Council, the City's staff was not permitted to pass the Franchise Fees on to the Municipal Customers. It was previously decided in this case that the Ordinances do not allow the City to charge and collect Franchise Fees from the Municipal Customers.[4] Only Plaintiff's Second Claim is the subject of Plaintiff's Motion. In light of the Court's ruling herein, it is not necessary to resolve Plaintiff's First Claim.

The Franchise Fee Ordinances

The 1970 Ordinance was the genesis for the Franchise Fees and the precursor of the 1988 Ordinance and the 1991 Ordinance. Section 2 of the 1970 Ordinance states:

> As a consideration for granting of the rights, privileges and franchise above, the City of Pensacola shall be required to pay into the [City's] Excise Tax Fund, Tax Trust Account . . . an amount for gas franchise of not less than $105,000.00 . . . to be paid on an annual basis each fiscal year.

Section 3 of the 1970 Ordinance goes on to say that the $105,000.00 amount is a "minimum"

[3] This action was initiated by the filing of an initial complaint on August 6, 2015.
[4] *See* "Order on Cross-Motions for Summary Judgment" (Docket No. 85), entered on June 7, 2019.

figure. It further states that the "franchise fee" varies according to revenues and expenditures for the City's natural gas operations each fiscal year and represents "a franchise fee of approximately 5% of the gross sales from the operation of said utilities." There is no language in the 1970 Ordinance that directly levies the Franchise Fees on any natural gas customers, instructs or authorizes City staff to place the charges on any customers' bills, or otherwise pass the charges on to any customers. The 1970 Ordinance notably does not distinguish between revenues derived from municipal and nonmunicipal customers.

The 1988 Ordinance slightly amended the 1970 Ordinance. The operative text in Section 1 of the 1988 Ordinance states that the City "shall levy and collect monthly from its operating department, Energy Services of Pensacola, its successors and assigns, a franchise fee equal to five percent (5%) of gross revenues derived from the sale of natural gas to customers within the boundaries of the City by Energy Services of Pensacola, its successors and assigns." While the 1988 Ordinance, like the 1970 Ordinance before it, did not expressly impose the fee onto natural gas customers, it expressly excluded revenues from nonmunicipal gas sales in the calculation of the so-called franchise fee. The recital paragraphs of the 1988 Ordinance indicate that the Pensacola City Council's intention in the prior 1970 Ordinance was that the City's utility department, not the end user, would pay the franchise fee. The recital paragraphs of the 1988 Ordinance also indicate that, in 1981, the City began the practice of calculating the franchise fee based upon the sale of natural gas "within the boundaries of the City." It is not clear to the Court exactly when the City's utility department began providing natural gas to customers who reside outside city limits, but the text of the 1988 Ordinance reasonably implies that happened sometime before it was passed.

The 1991 Ordinance, which took effect on October 1, 1991, and remains in effect, increased

the "franchise fee" from five percent to six percent "of gross revenues derived from the sale of natural gas to customers within the boundaries of the City." The 1991 Ordinance is the City's purported basis for charging and collecting the Franchise Fees from Municipal Customers, yet it lacks any operative language authorizing the City to do so. The operative language in Section 1 of the 1991 Ordinance states: "Energy Services of Pensacola, its successors and assigns, shall pay to the City of Pensacola a franchise fee equal to six percent (6%) of the gross revenues derived from the sale of natural gas to customers within the boundaries of the City." The plain meaning of this language does not authorize the City or its staff to place the Franchise Fee as a charge on the Municipal Customers' bills. Nevertheless, the Franchise Fees began appearing as an itemized charge on the bills of Pensacola Energy's municipal customers after the passage of the 1991 Ordinance. The title of the 1991 Ordinance is "An Ordinance Setting Forth the Franchise Fee to Be Paid by the City of Pensacola's Operating Department, Energy Services of Pensacola." The plain meaning of this title further indicates that the Pensacola City Council intended that the City's utility department, not the Municipal Customers, would pay the Franchise Fees. The plain meaning of the Fourth Recital Paragraph in the 1991 Ordinance also indicates that the 1988 Ordinance had an identical meaning: "Whereas [the 1988 Ordinance] provided that the City of Pensacola would levy and collect a franchise fee from its operating department, Energy Services of Pensacola."

Notably, a "Committee Memorandum" for the "Committee of the Whole" (hereinafter "Committee Memo") dated September 24, 1991,[5] contradicts the plain meaning of the 1991 Ordinance. The Committee Memo indicates that Escambia County imposed a franchise fee on the City's natural gas department for its nonmunicipal customers in February of 1990. The Committee further says the City's 1992 budget "passed the County franchise fee and the City's 6 percent

[5] This Committee Memo, which was filed by the City, was attached to the "City of Pensacola's Second Motion for Final Summary Judgment" filed on November 18, 2019.

franchise fee on to the customer." It goes on to say that City Ordinance 43-91, which was also passed in 1991, reduced the natural gas rate for all customers, both municipal and nonmunicipal, by three percent, and that such reduction was in addition to another three percent reduction that was previously approved by the City Council.

Nevertheless, the operative language of the relevant ordinances is clear and unambiguous, and there is no authority for the City or its staff to levy the Franchise Fees on the Municipal Customers.

> Municipal ordinances are subject to the same rules of construction as are state statutes. . . . [C]ourts generally may not insert words or phrases in municipal ordinances in order to express intentions which do not appear, unless it is clear that the omission was inadvertent, and must give to a statute (or ordinance) the plain and ordinary meaning of the words employed by the legislative body (here the City Council).

Rinker Materials Corp. v. City of North Miami, 286 So.2d 552, 553–54 (Fla. 1973)). Regardless of what the City intended, municipal government agencies do not possess inherent authority and may act only incident to the powers expressly conferred by the legislative body. *See City of Jacksonville v. Sohn*, 616 So. 2d 1173, 1174 (Fla. 1st DCA 1993) ("[A]ny action taken by a municipality must be in conformity to the ordinances of the municipality."); *Hall v. Career Service Commission,* 478 So. 2d 1111, 1112 (Fla. 1st DCA 1985) ("[T]he general rule is that an express grant of power to an agency will be deemed to include such powers as are necessarily or reasonably incident to the powers expressly granted."). The 1991 Ordinance does not confer authority for the City's natural gas utility department, presently known as Pensacola Energy, to place the Franchise Fees on the Municipal Customers' bills.

Prior Orders on Summary Judgment Motions

The parties filed cross-motions for summary judgment[6] on the issue of whether the

[6] The relevant motions were filed on August 25, 2017, and July 27, 2018. *See* Clerk's Docket Nos. 53 and 68.

Franchise Fee Ordinances authorize the City to collect the Franchise Fees from the Municipal Customers. Those motions were heard on October 5, 2018. An "Order on Cross-Motions for Summary Judgment" was rendered on June 7, 2019. That order stated the following on page one:

> The core legal question raised by the competing motions is whether the three ordinances (one passed in 1970, one in 1988, and one in 1991) authorize the City of Pensacola to collect a "franchise fee" directly from customers of Pensacola Energy. The Defendant claims that the ordinances do, and the Plaintiff claims they do not. After careful consideration of the issue, the Court finds applicable ordinances do not authorize the City of Pensacola to collect additional revenue from its customers than would be paid if said ordinances did not exist.

The Court further elaborated on page six:

> [T]he Court finds that taking additional revenue from the customers of Pensacola Energy under the guise of a "franchise fee" would not be authorized by the applicable ordinances. However, if the City merely set aside a certain percentage of revenue it would have obtained regardless of the "franchise fee" designation and transferred such monies to a different "pot" of money within the City budget, such action would be consistent with the ordinances and a lawful exercise of the City's authority.

The Court concluded that "[t]he applicable ordinances do not authorize the City of Pensacola to collect additional revenue from its customers than would be paid if said ordinances did not exist."

The parties filed subsequent motions for summary judgment on the "additional revenues" issue raised by the "Order on Cross-Motions for Summary Judgment." Those subsequent motions were heard on September 27, 2022. The City contended that its natural gas rate reduction in 1991 reduced the Municipal Customers' natural gas rates to completely offset the Franchise Fees, thus effectively making it the City's utility department, not the Municipal Customers, who paid the Franchise Fees. The City also claimed that the rate reduction has remained in effect continuously since 1991.[7] To support its summary judgment motion, the City filed a November 5, 2019, affidavit, and selected deposition testimony of the City's then Chief Financial Officer, Richard

[7] *See* "City of Pensacola's Second Motion for Final Summary Judgment" filed November 18, 2019, at pp. 4-6. (Clerk's Docket No. 89).

Barker, and a September 6, 2022, affidavit of the City's then Deputy Finance Director, Laura Amentler (née Picklap). The Plaintiff filed discovery responses purporting to show that the 1991 rate reduction referenced by Defendant did not, in fact, offset the Franchise Fees paid by the Municipal Customers, and even if it had, that rate reduction was for only one year (1991 to 1992) and did not offset Franchise Fees paid by the Municipal Customers during the period applicable to this lawsuit (August 6, 2011, to the present).[8] The Plaintiff asserted that the affidavits submitted by the City do not demonstrate that the one-year rate reduction continued past 1992.

The Court rendered its "Order Denying Plaintiff's Motion for Summary Judgment" on March 15, 2023, which stated in part:

> The Plaintiff presented evidence (Section 10-4-17 of the Pensacola Code of Ordinances, the City's Natural Gas Rate Schedules included in its Gas System's Annual Reports, the City's Natural Gas Cost of Service Studies, and the Deposition of Richard [Barker]), which does not include a reference to a 6% reduction, and which further indicates that the 6% reduction did not continue after 1991.
>
> In contrast, the Defendant presented evidence that the 6% reduction was preemptively applied to customers before being charged a 6% franchise fee annotated on their bills, and that this reduction continued to applicable years of this case (Pensacola City Ordinance 46-91, Affidavit of Laura Amentler, Deposition of Richard [Barker]), rather than being limited to the year of the newly enacted ordinance.
>
> Whether the 6% franchise fee charged to Pensacola Energy customers was nullified by a corresponding 6% reduction is a disputed genuine issue of material fact precluding Summary Judgment.

Laura Amentler and Richard Barker were again deposed, which led to the instant proceedings.[9] The Plaintiff claims this additional deposition testimony has resolved the remaining issue of material fact.

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[8] *See* "Amended Memorandum of Law and Factual Positions in Support of Plaintiff's Second Motion for Partial Summary Judgment" filed June 9, 2022 (Clerk's Docket No. 110).

[9] The transcripts of these depositions were filed on November 9, 2023 (Clerk's Docket Nos. 140 and 141). The deposition exhibits were filed on November 16, 2023 (Clerk's Docket Nos. 142 and 143).

Findings of Fact and Conclusions of Law

In addition to filings related to prior summary judgment motions, the Court reviewed the documents filed for the instant hearing, including the transcript of Laura Amentler's deposition on June 21, 2023, the transcript of Richard Barker's deposition on September 7, 2023, and copies of the exhibits for those depositions. The additional testimony and exhibits have resolved the disputed issue of material fact that remained when the Court's prior order was rendered on March 15, 2023. Summary judgment is no longer precluded.

Prior to the 1991 changes to the City's municipal code, natural gas customers who lived in the City paid a five percent franchise fee, which the City's utility department subsequently paid to the City. This fee was not billed as separate line item. It was considered an "operating expense" for the City's utility department. As an operating expense, it was factored into the calculation for the municipal natural gas rate.

The 1991 Ordinance increased the fee to six percent, but other changes not encompassed within the plain text of the 1991 Ordinance were also implemented. The City decided the fee would no longer be considered an operating expense on the utility department's ledger or a factor in determining the municipal natural gas rate.[10] Instead, the City's natural gas utility department began billing the Franchise Fee as a separate line item on Municipal Customers' bills, collecting the Franchise Fees from Municipal Customers who paid their bills, and passing the money on to the City, which remains the current state of affairs.

The City's natural gas rate reduction in 1991 did not nullify the Franchise Fees that are presently being paid by the Municipal Customers. Rather, the so-called rate reduction was part of

[10] Section 10-4-17 of the City of Pensacola Code of Ordinances sets forth the specific charges and assessments that the Pensacola City Council has authorized to be levied and assessed on the Municipal Customers for natural gas utility service. Current and prior versions of this ordinance were filed in this cause on June 1, 2022, at Clerk's Docket Nos. 100 and 101.

the foregoing changes in how the Franchise Fees were accounted for by the City and billed to Municipal Customers. The natural gas rate was reduced so that the customer's bills would not increase as a result of those changes.[11] The Municipal Customers are still ultimately the ones who pay the Franchise Fees. The 1991 Ordinance is the only law the City presently cites to justify the imposition of the Franchise Fees, yet its plain meaning does not grant the City the authority to collect the Franchise Fees from Municipal Customers. Such collection is thus *ultra vires*. The foregoing findings are limited to the facts and relevant law in effect from August 6, 2011, to the present. It is beyond the scope of this order to say whether the City's imposition of any franchise fees upon any of its natural gas customers was legal before then, such as before the various changes implemented in 1991 that are discussed above.

It is therefore **ORDERED AND ADJUDGED:**

A. Plaintiff's Motion is **GRANTED**.

B. The Defendant is hereby enjoined from charging and collecting Franchise Fees from the Municipal Customers.

C. The Defendant shall return to the Municipal Customers all Franchise Fees (and the utility service taxes thereupon) charged to and collected from the Municipal Customers after August 5, 2011.

D. Therefore, the Plaintiff shall take from Defendant:

a. All Franchise Fees charged to and collected from the Municipal Customers after August 5, 2011;

b. All utility service taxes charged to and collected from the Municipal Customers on the Franchise Fees contemplated in subparagraph (a), above;

[11] The rate reduction applied to all the City's natural gas customers, not just those who resided within the city. The County imposed its own franchise fee on the City for its natural gas customers who resided outside the city limits.

c. Prejudgment interest as provided by law upon the amounts contemplated in subparagraphs (a) and (b), above;

d. The amounts contemplated in subparagraphs (a) and (b), above, shall bear interest from the date hereof at the rate of 9.46% a year; and

e. All for which let execution issue.

E. The Court hereby retains jurisdiction of this action to enter such further orders and take such further actions as may be appropriate including, but not limited to, those pertaining to determining and/or clarifying the specific amounts contemplated in Paragraph D, above; oversight and administration of the certified class and the claims process applicable thereto; determination and award, as appropriate, of taxable costs and attorney's fees; and all such other matters as contemplated by or pertaining to rule 1.220, Florida Rules of Civil Procedure.

F. The parties have no right to a direct appeal at this time because this is not a final order. *See Dixon v. Allstate Ins. Co.*, 609 So. 2d 71 (Fla. 1st DCA 1992).

DONE AND ORDERED in Chambers at Escambia County, Florida.

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signed by CIRCUIT COURT JUDGE JAN SHACKELFORD 07/18/2024 05:48:26 H59yyMbS

Copies furnished to all counsel of record.