RECEIVED by MSC 7/13/2023 4:03:11 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

JAMES HEOS, individually and as representative of a class of similarly situated persons and entities, Plaintiff/Appellant, v. CITY OF EAST LANSING, Defendant/Appellee.	Supreme Court No. 165763 COA No. 361138 *Consolidated with* COA No. 361105 *On appeal from:* Ingham County Circuit Court Case No. 20-199-CZ Hon. Wanda M. Stokes

Gregory D. Hanley (P51204)
John J. Premo (P55393)
Edward F. Kickham Jr. (P70332)
Kickham Hanley PLLC
32121 Woodward Ave., Suite 300
Royal Oak, MI 48037
(248) 544-1500
Counsel for Plaintiff/Appellant

Andrew Abood (P43366)
Abood Law Firm
Attorneys for Plaintiff
246 E. Saginaw Street, Suite 100
East Lansing, MI 48823
(517) 332-5900
Counsel for Plaintiff/Appellant

Charles E. Barbieri (P31793)
Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Brandon M. H. Schumacher (P82930)
Foster Swift Collins & Smith, PC
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
Counsel for Defendant/Appellee

DEFENDANT/APPELLEE CITY OF EAST LANSING'S
ANSWER TO PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

RECEIVED by MSC 7/13/2023 4:03:11 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ORDER ON APPEAL 1

STATEMENT OF QUESTIONS PRESENTED 2

INTRODUCTION 4

STATEMENT OF FACTS 6

STANDARD OF REVIEW 12

ARGUMENT 13

I. Plaintiff's Headlee Amendment claim and related equitable claims are barred by the statute of limitations. 13

A. Plaintiff's Headlee Amendment claim is barred because he did not file suit within one year after the franchise fee was established. 13

B. The Headlee Amendment's one-year statute of limitations bars Plaintiff's equitable claims relating to MCL 141.91 because the Headlee Amendment subsumes those claims. 19

II. Michigan law no longer recognizes assumpsit as a cause of action. 22

III. Plaintiff is precluded from enforcing the Foote Act. 24

CONCLUSION 26

RECEIVED by MSC 7/13/2023 4:03:11 PM

INDEX OF AUTHORITIES

Cases

Bolt v. City of Lansing, 459 Mich 152, 158, 587 NW2d 264 (1998) 12, 20

Brunet v City of Rochester Hills, unpublished opinion of the Court of Appeals, issued December 2, 2021 (Docket No. 354110), 2021 WL 5750616, p *4 19

Fisher Sand & Gravel Co v Neal A Sweebe, Inc, 494 Mich 543, 564; 837 NW2d 244 (2013) 22, 23

Gottesman v City of Harper Woods 21

Lothian v City of Detroit, 414 Mich 160; 324 NW2d 9 (1982) 21

Michigan Nat'l Bank v Mudgett, 178 Mich App 677, 679; 444 NW2d 534 (1989) 25

Minority Earth Movers, Inc v Walter Toebe Constr Co, 251 Mich App 87, 91, 649 NW2d 397 (2002) 12

Morgan v City of Grand Rapids, 267 Mich App 513; 705 NW2d 387 (2005) 13, 14, 16

MOSES, Inc v SEMCOG, 270 Mich App 401, 415; 716 NW2d 278 (2006) 25

TACT v Wayne Co, 450 Mich 119; 537 NW2d 596 (1995) 15, 21

Traverse City v Consumers Power Co, 340 Mich 85; 64 NW2d 894 (1954) 24

Wright v Genesee County, 504 Mich 410, 420-422; 934 NW2d 805 (2019) 23

Youmans v Charter Township of Bloomfield, 336 Mich App 161, 213-214; 969 NW2d 570 (2021) 23

Statutes

MCL 141.91 ..... 10, 11, 19, 20, 21, 22

Other Authorities

Misclassifying Modern Restitution, 55 SMU Law Rev 1577, 1600 (2002) 32

Constitutional Provisions

Const 1908, art VIII, § 28. 33

Const 1963, art 9, § 31 20

Const 1963, art 9, § 32 21

RECEIVED by MSC 7/13/2023 4:03:11 PM

ORDER ON APPEAL

Defendant-Appellee City of East Lansing agrees that Plaintiff-Appellant timely filed his Application for Leave to Appeal from the Michigan Court of Appeals' unpublished per curiam opinion dated April 13, 2023 (reconsideration denied May 11, 2023). The Court of Appeals' opinion is attached as **Exhibit A.**

RECEIVED by MSC 7/13/2023 4:03:11 PM

STATEMENT OF QUESTIONS PRESENTED

The City of East Lansing charges a franchise fee to its electric service provider, which passes along that cost to its customers, including Plaintiff. Nearly three years after the fee was approved, Plaintiff filed a class action lawsuit claiming that the fee is an unlawful tax under the Headlee Amendment.

The trial court granted summary disposition to Plaintiff on all claims except his equal protection claim. The Court of Appeals reversed, holding that Plaintiff's Headlee claim and related equitable claims were time-barred under MCL 600.308a(3), as interpreted by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005).

I. Did the Court of Appeals correctly hold that Plaintiff's Headlee Amendment claim was time-barred?

Plaintiff-Appellant, Mr. Heos, answers: No.

Defendant-Appellee, the City, answers: Yes.

The Court of Appeals would answer: Yes.

II. Did the Court of Appeals correctly hold that Plaintiff's related equitable claims under MCL 141.91 were time-barred?

Plaintiff-Appellant, Mr. Heos, answers: No.

Defendant-Appellee, the City, answers: Yes.

The Court of Appeals would answer: Yes.

III. Did the Court of Appeals correctly hold that Plaintiff failed to state a claim for a writ of assumpsit, which has been abolished by the adoption of the Michigan Court Rules?

Plaintiff-Appellant, Mr. Heos, answers: No.

Defendant-Appellee, the City, answers: Yes.

The Court of Appeals would answer: Yes.

RECEIVED by MSC 7/13/2023 4:03:11 PM

IV. Did the Court of Appeals correctly hold that Plaintiff is not a real party in interest with respect to the (now-repealed) Foote Act because Plaintiff is not an electric utility?

Plaintiff-Appellant, Mr. Heos, answers: No.

Defendant-Appellee, the City, answers: Yes.

The Court of Appeals would answer: Yes.

RECEIVED by MSC 7/13/2023 4:03:11 PM

INTRODUCTION

Contrary to Plaintiff's hyperbole, this is not "one of the most important cases the Court will consider this year,"[1] nor is the Court of Appeals "at open war"[2] with the Headlee Amendment to the Michigan Constitution. This case is far more mundane: it is a statute of limitations case in which Plaintiff filed suit three years too late.

Plaintiff brought this class-action lawsuit against the City of East Lansing to recover fees that he and other class members paid to non-party electric service provider, the Lansing Board of Water and Light ("BWL"), pursuant to BWL's franchise agreement with the City. Plaintiff alleges that the franchise fees charged by BWL constitute an unlawful tax under the Headlee Amendment, and he also sought relief under various equitable theories. The Ingham County Circuit Court granted summary disposition to Plaintiff on all claims except his equal protection claim. The Court of Appeals granted interlocutory review and reversed, holding that Plaintiff's Headlee and equitable claims were time-barred under MCL 600.308a(3).

MCL 600.308a(3) imposes a one-year statute of limitations on Headlee Amendment claims. The Court of Appeals previously held in a published opinion that when a plaintiff does not directly pay a franchise fee to the municipality, the one-year statute of limitations begins to run when the municipality first approves the franchise fee agreement with the service provider. *Morgan v City of Grand Rapids*, 267 Mich App 513, 516; 705 NW2d 387 (2005). This Court denied leave to appeal in *Morgan*. 474 Mich 1134. *Morgan* relies on this Court's decision in *Taxpayers Allied for Constitutional Taxation v Wayne County ("TACT")*, 450 Mich 119, 124 n 7; 537 NW2d 596 (1995), which likewise holds that an individual who does not directly pay the

[1] Application, p. 13.
[2] Application, p. 14.

RECEIVED by MSC 7/13/2023 4:03:11 PM

challenged fee to the municipality is subject to a one-year statute of limitations, which runs when the municipality approves the fee.

Here, the City approved the franchise agreement and first imposed the franchise fee on BWL in 2017. Plaintiff's complaint was filed in 2020. The Court of Appeals correctly followed *Morgan* and held that the action was untimely. Plaintiff's attempts to evade MCL 600.308a(3) and *Morgan* are unavailing, as the Court of Appeals held and as discussed in detail in this Answer.

Plaintiff attributes the Court of Appeals' decision to some overarching anti-Headlee bias, claiming that "the Court of Appeals simply does not like the Headlee Amendment."[3] This overgeneralization is not a genuine rebuttal of the Court of Appeals' analysis, nor is it borne out by other opinions where the Court of Appeals found Headlee violations.[4] The Court of Appeals did not side with the City out of some distaste for Headlee claims; the Court of Appeals did not even *reach* the merits of Plaintiff's Headlee claims. Rather, the Court of Appeals appropriately relied on *Morgan* and *TACT* in finding Plaintiff's claims to be time-barred.

This case does not warrant further review by this Court. Despite Plaintiff's mischaracterization, the Court of Appeals did not "effectively rul[e] that affected citizens cannot sue for a refund **regardless of the timing of the lawsuit."** (Application, p. 16, emphasis in original.) Rather, the Court of Appeals held that citizens must comply with the statute of limitations established by our Legislature as interpreted by this Court and the Court of Appeals. This holding is uncontroversial, and the City therefore requests that this Court deny leave to appeal.

---

[3] Application, p. 14.

[4] *See, e.g., Jackson County v City of Jackson*, 302 Mich App 90; 836 NW2d 903 (2013) (holding that the City of Jackson's storm water charge was a tax and violated Headlee); *see also In re Foreclosure of Certain Parcels of Property*, unpublished per curiam opinion of the Court of Appeals, issued May 27, 2014 (Docket No. 309229) (holding that Chesterfield Township's sewer privilege fee constituted an unconstitutional tax under the Headlee Amendment).

RECEIVED by MSC 7/13/2023 4:03:11 PM

STATEMENT OF FACTS

I. Summary of Material Facts

Very few of the facts recited in Plaintiff's Application are relevant to the statute of limitations issue. The material facts are summarized in the following timeline:

- **June 6, 2017**: The City enacted Ordinance No. 1411, which is an electric service franchise agreement with BWL.
    - The Ordinance gives BWL certain exclusive service territory, and in exchange, it provides that BWL "shall . . . collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof."
- **September 2017:** BWL customers, including Plaintiff, began paying BWL bills that included a charge for the BWL's franchise fee obligation to the City. At no time did Plaintiff directly pay this franchise fee to the City, nor did the City send Plaintiff a bill for the fee or attempt to collect the fee from Plaintiff.
- **April 13, 2020:** Plaintiff filed this class action lawsuit against the City.

As discussed below, Plaintiff's lawsuit was untimely because it was filed more than one year after the City adopted the franchise ordinance.

Plaintiff's Application includes a Statement of Facts that is largely related to the substance of Plaintiff's Headlee claim and equitable claims, not just the statute of limitations issue. Although the Court of Appeals did not reach the merits of Plaintiff's claims, the City offers a full discussion of the facts below.

II. Electric Service in the City of East Lansing

The City is serviced by two electric utility companies: the BWL and Consumers Energy Company ("Consumers"). Each company services distinct areas of the City. The BWL service area covers the "lion's share" of the City and accounts for approximately 89 percent of the City's total

RECEIVED by MSC 7/13/2023 4:03:11 PM

rights of way. [Appx 0035[5]; House Affidavit, ¶ 5, Appx 0041] The City estimates that the BWL service area covers about 76 total continuous miles of rights of way. [House Affidavit, ¶ 8; Appx 0041] Consumers' service area covers approximately 11 percent of the City's total rights of way (the "Consumers service area"). [*Id.*, ¶ 5] There are only about 10 total continuous miles of right of ways in the Consumers service area. [*Id.*, ¶ 9]

The BWL service area and the Consumers service area differ greatly in their physical characteristics and cost to the City in annual expenditures. The BWL service area includes the overwhelming majority of the densely populated portions of the City, including its expanding downtown area, and services around 6,330 residential households (around 29,000 residents) and around 600 non-residential properties. [Map, Appx 0032; Lahanas Affidavit, ¶ 4, Appx 0035; House Affidavit, ¶ 8, Appx 0041] On the other hand, the Consumers service area is located primarily in the less populated northern half of the City, with a few "pockets" located in the BWL service area, and contains a small percentage of the City's overall density with around 780 residential households (approximately 3,050 residents) and 143 non-residential properties. [Lahanas Affidavit, ¶ 6, Appx 0035; House Affidavit, ¶ 9, Appx 0041]

From an expenditure standpoint, the BWL service area is much more expensive for the City to maintain. The City spends on average between $1.4 to $1.9 million annually in maintaining the BWL service area, which includes, among other things, lighting the right of ways, tree and tree branch trimming and removal, storm water drainage and drain maintenance, and general maintenance fees. [City's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 2, EL00002-6; Appx 0047-49, 59-63] The Consumers service area comparatively only requires on average between $100,000 to $300,000 annually in

[5] Appendix references are to the appendix filed in the Court of Appeals.

RECEIVED by MSC 7/13/2023 4:03:11 PM

expenditures. *Id.* By these numbers, it is no surprise that the City expends significantly more effort and resources in maintaining the BWL service area than it does for the Consumers service area. [House Affidavit, ¶ 7, Appx 0041]

III. The City and the BWL enter a franchise arrangement for use of the City's rights of way.

The five percent fee at issue here was designed to recoup the City's costs of maintaining the rights of way from the BWL and Consumers through franchise[6] arrangements. Around 2016, the City approached both companies about possibly imposing a franchise for their use of the City's rights of way. [Lahanas Affidavit, ¶ 3; Appx 0035] Consumers rejected the City's request for a franchise outright, and no fee has been established to date. [Lahanas Deposition, p 35; Appx 0074] While the BWL initially declined to agree to a franchise without Consumers also paying a franchise fee, the BWL later removed that condition. [Lahanas Affidavit, ¶ 4; Appx 0035] The BWL also suggested that a franchise with the City was not necessary as it was potentially a Foote Act franchise. However, that issue was resolved to the BWL's "satisfaction." [Peffley Deposition, pp 21-22; Appx 0091]

After months of negotiation, the City and the BWL reached an agreement to create a franchise for the BWL's use of the City's rights of way (the "Franchise Agreement"). Under the Franchise Agreement, in exchange for paying a franchise fee (the "Franchise Fee") to the City, the BWL would receive an expanded exclusive service area within the City. [Lahanas Deposition, p 35; Appx 0074]

On June 6, 2017, the City enacted Ordinance No. 1411 (the "Franchise Ordinance") approving the Franchise Agreement and setting forth its material terms. [Franchise Ordinance (**Exhibit B**); Appx 0095-98] The relevant provisions of the Franchise Ordinance provide:

[6] In municipal and utility law, a franchise fee is a fee paid by a company that uses a municipality's rights of way.

RECEIVED by MSC 7/13/2023 4:03:11 PM

> SECTION 1. GRANT TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference.
>
> SECTION 2. FRANCHISE FEE. During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. Such fee will appear on the corresponding energy bills.

Collection of the Franchise Fee commenced in September 2017. [House Affidavit, ¶ 11; Appx 0042]

The City and the BWL further agreed to resolve the outstanding Foote Act issue identified during negotiations by providing as follows in the Franchise Ordinance:

> Nothing herein shall be construed as either party rendering an opinion or position of the [BWL's] vested franchise rights under the Foote Act, 1905 PA 264. The City does not waive any right to contest, and the [BWL] does not relinquish any right to assert. [Franchise Ordinance, § 11; Appx 0097]

The Franchise Agreement was approved by the BWL in May 2017. [May 23, 2017 Minutes; Appx 0102-106]

RECEIVED by MSC 7/13/2023 4:03:11 PM

IV. The Franchise Fee revenues offset the City's cost of maintaining the rights of way for the BWL's use.

The Franchise Fee was ultimately intended to offset the costs the City incurred in maintaining the rights of way for the BWL's use. Since the Franchise Fee was implemented, the City has received about $1.4 million annually from the BWL. [City's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 2; Appx 0047-49] The BWL makes each Franchise Fee payment to the City in quarterly increments. [*Id.*] And, most importantly, the Franchise Fee directly corresponds with the City's annualized cost of maintaining the rights of way in the BWL service area. The City spends on average between $1.4 to $1.9 million annually in maintaining the BWL service area, which includes, among other things, lighting the rights of way, tree and tree branch trimming and removal, storm water drainage and drain maintenance, and general maintenance fees. [*Id.*] Mr. Lahanas testified that he knew the annualized cost of maintaining the rights of way, and during negotiations he verified that the monies collected would be sufficient to offset most of those costs. *Id.*

BWL paid the franchise fee to the City without incident for nearly three years, until Plaintiff commenced the underlying lawsuit.

V. Procedural History

A. The class action complaint, class certification, and competing motions for summary disposition.

On April 13, 2020, Plaintiff, individually and as representative of a class of similarly situated City residents, filed a six-count class action complaint relating to the Franchise Agreement. [Class Complaint; Appx 0346-361] The counts were pled as follows:

- Count I alleged that the Franchise Agreement violates the Headlee Amendment to the Michigan Constitution.
- Count II claimed a "cause of action" for assumpsit for the City's alleged violation of MCL 141.91.

RECEIVED by MSC 7/13/2023 4:03:11 PM

- Count III asserted "unjust enrichment" for the City's alleged violation of MCL 141.91.
- Count IV alleged the City violated the equal protection clause of the Michigan Constitution.
- Count V asserted a claim of "unjust enrichment" for the City's alleged violation of the Foote Act.
- Count VI asserted a claim of assumpsit for the City's alleged violation of the Foote Act.

On August 5, 2020, the circuit court certified this case as a class action under MCR 3.501. [Order Certifying Class; Appx 0363-365] Following discovery, the parties filed competing motions for summary disposition, which were fully briefed and orally argued.

Plaintiff argued that the Franchise Fee constituted an unlawful tax in violation of the Headlee Amendment and MCL 141.91 for which they were entitled to "restitution." [Plaintiff's Motion for Summary Disposition, pp 10-20; Appx 0142-152] He requested summary disposition in his favor as to Counts I, II, and III of the Class Complaint. [*Id.*] The City opposed Plaintiff's motion, arguing that the Franchise Fee was a user fee and not a tax and thus complied with the Headlee Amendment. [City's Response Opposing Appellee's Motion for Summary Disposition, pp 11-20; Appx 0379-388] The City also argued that Plaintiff's claims were barred on the basis of the statute of limitations and for other procedural reasons as well, including governmental immunity. [City's Motion for Summary Disposition]

B. The March 31 Orders.

The circuit court granted Plaintiff's motion for summary disposition and denied essentially all of the City's motion for summary disposition, including its claim of governmental immunity. [March 31 Orders; Appx 0002-28] The only aspect of the City's motion that the circuit court decided in the City's favor was Plaintiff's equal protection claim (Count IV), which the circuit court dismissed under MCR 2.116(C)(10). [*Id.*, pp 14-15; Appx 0015-16] The circuit court

RECEIVED by MSC 7/13/2023 4:03:11 PM

reserved the question of damages, such that the summary disposition decisions were not final orders closing the case.

C. Proceedings in the Court of Appeals

The City timely filed a claim of appeal in the Court of Appeals regarding the circuit court's denial of governmental immunity. (Court of Appeals No. 361105.) The City also timely filed an Application for Leave to appeal as to all of the other issues that were not appealable by right. (COA No. 361138.) The Court of Appeals granted the City's Application and consolidated the appeals.

Following oral argument, the Court of Appeals issued its unpublished per curiam opinion on April 13, 2023. The Court of Appeals held that the trial court "erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations" and further held that "plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims, and are therefore likewise time-barred." (Op. at 2.) The Court of Appeals also concluded that "plaintiff is not a real party in interest for purposes of enforcing the Foote Act." *Id.* Plaintiff filed a motion for reconsideration, which was denied.

STANDARD OF REVIEW

This Court reviews *de novo* the circuit court's denial of a motion for summary disposition based on MCR 2.116(C)(5), (7) (statute of limitations and governmental immunity), MCR 2.116(C)(8), and MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118, 597 NW2d 817 (1999). Questions of law are also reviewed *de novo*. *Minority Earth Movers, Inc v Walter Toebe Constr Co*, 251 Mich App 87, 91, 649 NW2d 397 (2002); *Bolt v. City of Lansing*, 459 Mich 152, 158, 587 NW2d 264 (1998).

RECEIVED by MSC 7/13/2023 4:03:11 PM

ARGUMENT

I. Plaintiff's Headlee Amendment claim and related equitable claims are barred by the statute of limitations.

The Court of Appeals correctly held that Plaintiff's Headlee claims were time barred by MCL 600.308a(3), as interpreted by the Court of Appeals' post-*TACT* decision in *Morgan v City of Grand Rapids*, 267 Mich App at 513, which held that a Headlee claim accrues when the municipality first imposes the franchise fee on the service provider. The Court of Appeals did not err, and thus this Court should deny leave to appeal.

A. Plaintiff's Headlee Amendment claim is barred because he did not file suit within one year after the franchise fee was established.

i. MCL 600.308a(3) establishes a one-year statute of limitations on Headlee Amendment claims.

Count I of Plaintiff's Complaint alleges that the City violated the Headlee Amendment when it enacted the Franchise Ordinance, entered the Franchise Agreement, and received the Franchise Fee from the BWL. [Class Complaint, Count I; Appx 0354-355] The Headlee Amendment is an amendment to the Michigan Constitution that provides as follows:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon . . . [Const 1963, art 9, § 31.]

Section 32 of the Michigan Constitution further provides an express cause of action to enforce the Headlee Amendment: "Any taxpayer of the state shall have standing to bring suit . . . to enforce the provisions of Section[] . . . 31, inclusive." Const 1963, art 9, § 32.

The Legislature has statutorily barred claims after one year under Section 32 in MCL 600.308a(3): "A taxpayer shall not bring or maintain an action under this section unless the action is commenced **within 1 year** after the cause of action accrued." (Emphasis added.)

RECEIVED by MSC 7/13/2023 4:03:11 PM

In this case, Count I is barred because Plaintiff was required to file suit by July 2018. This is shown by the timing of events leading up to Plaintiff's first payment of the Franchise Fee in September 2017. The "wrong" upon which Count I is based—alleged imposition of a tax in violation of the Headlee Amendment—arises from the City's entry into the Franchise Agreement with the BWL, enactment of the Franchise Ordinance, and collection of the Franchise Fee. [Class Complaint, ¶¶ 12-25, 34-41, Appx 0349-355; Franchise Ordinance, Appx 0095-98; May 23, 2017 Minutes, Appx 0102-106] *All of these events occurred in 2017*. The BWL approved the Franchise Agreement on May 23, 2017, [Class Complaint, ¶ 14, Appx 0350; May 23, 2017 Minutes, Appx 0102-106]; the City approved the Franchise Agreement through its enactment of the Franchise Ordinance on June 6, 2017, [Class Complaint, ¶ 15, Appx 0350; Franchise Ordinance, Appx 0095-98]; and the BWL collected the Franchise Fee from Plaintiff and the class members beginning in September 2017, with the first payment being sent to the City in November 2017. [House Affidavit, ¶¶ 11-12, Appx 0042; City's Answers to Plaintiff's First Set of Interrogatories and Requests for Production of Documents, Interrogatory No. 2, Appx 0047-49] All of the "elements" of Plaintiff's cause of action, including damages, were present and existed in September 2017. This means that Plaintiff's Headlee Amendment claim accrued *at the latest* in September 2017. *Henry*, 319 Mich App at 734. Under MCL 600.308a(3) Plaintiff was required to file suit no later than September of 2018. Plaintiff did not file suit until April, 2020. Accordingly, the claim is time barred.

ii. *Morgan* is the controlling authority.

The Court of Appeals' published opinion in *Morgan* is directly on point and establishes that Plaintiff's Headlee Amendment claim is time-barred. *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005). Notably, this Court denied the plaintiff's application for leave to appeal in *Morgan.* 474 Mich 1134.

RECEIVED by MSC 7/13/2023 4:03:11 PM

Morgan involved a cable franchise fee rather than electric franchise fee, but the facts are otherwise the same. The plaintiff in *Morgan* filed a class-action lawsuit against the City of Grand Rapids based on a 5% franchise fee imposed by Comcast and remitted to the city pursuant to a franchise agreement. *Id.* at 514-15. Comcast "paid the charge [to the city] and merely passed the charge's burden onto plaintiff's shoulders." *Id.* at 515. Plaintiff argued that the franchise fee was an unlawful tax under the Headlee Amendment.

Citing *TACT v Wayne Co*, 450 Mich 119; 537 NW2d 596 (1995), the Court of Appeals acknowledged that the plaintiff generally could bring a Headlee Amendment claim against the city even though the fee was paid to Comcast and not directly to the city. *Id.* at 515-16. But the Court of Appeals agreed with the trial court that the plaintiff's Headlee claim was time-barred. The city and Comcast's franchise agreement was approved in July 2001, and plaintiff filed suit more than one year later.[7] *Id.* at 514, 516.

Plaintiff argued that the statute of limitations began to run "the moment she received her bill," but the Court of Appeals disagreed and held that "the inclusion of the charge on the bill was Comcast's action, not defendant's [the city's]." *Id.* at 516. The Court of Appeals further held that "[the city's] collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff." *Id.* This Court therefore concluded that under *TACT*, "**plaintiff's Headlee claim accrued when defendant <u>first</u> imposed the 'franchise fee' on Comcast**—July 10, 2001. Because plaintiff failed to bring her Headlee claim within one year from that date, the trial court correctly granted defendant's motion for summary disposition." *Id.* (emphasis added).

[7] Based on the trial court case number – 03-010906-CZ – it appears that the plaintiff in *Morgan* filed suit in 2003.

RECEIVED by MSC 7/13/2023 4:03:11 PM

Morgan controls here. The Franchise Ordinance was approved on June 6, 2017, and the franchise fee was first collected from BWL customers in September 2017. Plaintiff did not file suit until April 13, 2020, far more than one year later. Plaintiff's Headlee claim is therefore time-barred.

Plaintiff asserts that *Morgan* is "completely inapposite" (Application, p. 24), but a side-by-side comparison of the cases shows that they are about as analogous as any two cases can be:

Morgan v City of Grand Rapids	***Heos v City of East Lansing***
Comcast paid the city a "franchise fee" consisting of five percent of its gross revenues. *Morgan*, 267 Mich App at 514.	BWL paid the city a "franchise fee" consisting of five percent of its gross revenues.
The fee was set by a franchise agreement between Comcast and the city. *Id.* at 515.	The fee was set by a franchise ordinance agreed to by BWL and the city.
The city had no recourse against plaintiff for any unpaid portion of her Comcast bill. *Id.* at 515.	The city has no recourse against plaintiff for any unpaid portion of his BWL bill.
Plaintiff failed to file her Headlee claim within one year after the city first imposed the franchise fee on Comcast, so her claim was time-barred. *Id.* at 516.	Plaintiff failed to file his Headlee claim within one year after the city first imposed the franchise fee on BWL, so his claim was time-barred.

Plaintiff's attempts to distinguish *Morgan* are creative but unavailing. First, Plaintiff argues that BWL is not "independently liable" to the City of East Lansing for the franchise fees but was instead a mere "collection agent." (Application, pp. 18, 20.) But as the Court of Appeals correctly held, "it is not apparent that the BWL was even arguably an agent of the City because it is unclear that the City had any right to control the conduct of the BWL, or that the BWL had actual or apparent authority to act on the City's behalf." (Op. at 5.)

Contrary to Plaintiff's arguments, the Franchise Ordinance imposes duties on BWL that would be enforceable if not performed: BWL "**shall** . . . **collect and remit to the City** a franchise

RECEIVED by MSC 7/13/2023 4:03:11 PM

fee in an amount of five percent (5%) of the revenue" in exchange for "the use of [the City's] streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof." (Ordinance, Section 2.) This obligation is supported by consideration; BWL is assuming this duty in exchange for permission to use the City's streets and public ways. If BWL fails to charge the franchise fee and pay it to the City, then the City can sue for breach of contract or terminate the franchise, which would require BWL to pull its equipment from the City's rights of way – a serious penalty. (Ordinance, Section 2.)[8] The Franchise Ordinance therefore establishes BWL's independent obligation to collect and remit the franchise fee, and Plaintiff's agency argument is without merit.

Plaintiff further argues that "the franchise fees in *Morgan*, by federal law, were legally imposed on the cable companies but here they are imposed on the end-users of the BWL." (Application, p. 18.) This argument fails because the City did not impose a franchise fee on BWL's customers, and the federal law under which the cable franchise fee was imposed in *Morgan* is irrelevant.

As the Court of Appeals recognized, BWL and the City have a contractual arrangement through the Franchise Ordinance, and Plaintiff has a contractual arrangement with BWL – but Plaintiff does *not* have a contract with the City, and Plaintiff does not owe the franchise fee to the City:

> [P]laintiff's only liability for paying the franchise fee stems from his obligations to the BWL. If plaintiff does not pay the fee to the BWL, the City has no recourse against plaintiff. While the BWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers.

[8] Plaintiff's response to this argument is that "this fact only reinforces the agency relationship, because an agent must act in the interest of its principal." Application, p. 21, fn 11.) It is unclear how this statement supports Plaintiff's argument.

RECEIVED by MSC 7/13/2023 4:03:11 PM

(Op. at 4.) If Plaintiff fails to pay his franchise fee to BWL, the City has no remedy against Plaintiff. The City cannot sue Plaintiff for the franchise fee or turn off his electric service for failure to pay. Only BWL has any remedy against Plaintiff. Plaintiff's counsel conceded this at oral argument in the Court of Appeals:

> **Judge Gleicher**: Okay, so what happens if your client says "I'm not paying the 5% of my bill. I'm just not paying it."
>
> **Counsel**: Then the Board of Water and Light would shut their electric off.
>
> **Gleicher**: Right, exactly.[9]

Thus, as in *Morgan*, Plaintiff is not legally liable to the City for the franchise fee, does not directly pay the City for the franchise fee, and is not a "taxpayer" with respect to the fee. His only option was to file suit on behalf of the public, which would have to be filed within one year after the franchise fee was passed by ordinance under *Morgan* and *TACT*.

The fact that the cable franchise fee in *Morgan* was authorized by federal law is immaterial. The franchise fee at issue here is not unlawful; that is, Michigan law does not prohibit a city and a utility provider from contracting for a franchise fee. The dispositive question is whether Plaintiff directly owes the franchise fee to the City. Because he does not, the Court of Appeals correctly concluded that *Morgan* controls, and Plaintiff's claims are barred by the statute of limitations.

Finally, Plaintiff attempts to distinguish the following holding of *Morgan*:

> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, but the inclusion of the charge on the bill was Comcast's action, not defendant's. Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff.

[9] Link to oral argument video: https://www.youtube.com/watch?v=IetRU1y-10Q (Timestamp: 34:30-35:00.)

RECEIVED by MSC 7/13/2023 4:03:11 PM

Morgan, 267 Mich App at 516. Plaintiff argues that in this case, the inclusion of the charge on the bill was the City's action, not "a unilateral act by the BWL," such that Plaintiff's statute of limitations runs anew each time he receives a bill. (Application, p. 24.)

But there is no dispute that BWL generates and sends the electric bills to its customers, with whom it has independent contractual relationships. The City does not send bills for the franchise fee to Plaintiff or any other BWL customers. The "starting point for the limitations period" is when the *defendant* – here, the City – did the alleged wrong. *Morgan*, 267 Mich App at 516. Because the City did not send any electric bills, the bills themselves cannot start the clock on the statute of limitations. Rather, under *Morgan*, the clock began to run when the City first imposed the fee on LWBL in 2017. Plaintiff's 2020 lawsuit was untimely.

B. The Headlee Amendment's one-year statute of limitations bars Plaintiff's equitable claims relating to MCL 141.91 because the Headlee Amendment subsumes those claims.

Presumably aware of his statute of limitations problem, Plaintiff attempted to circumvent Headlee's one-year limitations period by pleading "equitable" claims for violations of MCL 141.91. The Court of Appeals correctly held that Plaintiff's equitable claims were identical to his Headlee claim and were thus also time barred.

MCL 141.91 provides that "[e]xcept as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

The statutory language covers the same substance as the Headlee Amendment. In fact, courts use *Bolt*'s Headlee Amendment test to evaluate claims brought under MCL 141.91. *See Brunet v City of Rochester Hills*, unpublished opinion of the Court of Appeals, issued December 2, 2021 (Docket No. 354110), 2021 WL 5750616, p *4. Substantively, a claim under MCL 141.91

RECEIVED by MSC 7/13/2023 4:03:11 PM

requires the same proofs as a Headlee Amendment claim. Both the Headlee Amendment and MCL 141.91 require the City look to constitutional or statutory authority to impose a tax, although the Headlee Amendment is more stringent as it requires a vote of the electorate to approve the tax. The overlap between these two provisions is fatal to Plaintiff's claims under MCL 141.91 because it means that the statute is subject to the one-year statute of limitations in MCL 600.308a(3). Plaintiff's counts under MCL 141.91 are derivative of his Headlee Amendment claim and cannot be used to subvert the one-year statute of limitations that applies to Headlee Amendment claims.

This Court has held that statute of limitations "may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. To resolve Counts II and III, the circuit court necessarily needed to reach the merits of Plaintiff's Headlee Amendment claim; it had to analyze the *Bolt* factors and decide the status of the Franchise Fee as an appropriate user fee or alleged tax. In short, Counts II and III are derivative of the Headlee Amendment claim and thus are subsumed by it, meaning the Headlee Amendment provides the *sole remedy* where an unlawful tax is alleged to have occurred.

To even evaluate Counts II and III, the circuit court *had* to ignore the applicable statute of limitations and nevertheless decide whether the Headlee Amendment was violated. Simply put, these "equitable claims" are artful pleadings that attempt to revive Plaintiff's time-barred Headlee Amendment claim by bootstrapping it to specious equitable theories claiming violations of a statute (MCL 141.91) that is coextensive with the Headlee Amendment. By doing so, Plaintiff attempted to avoid the statute of limitations and "reach back" to capture damages no longer available. This is contrary to Michigan law. The statutory scheme the Legislature enacted is comprehensive and exclusive. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 390; 738 NW2d 664 (2007). This is nothing more than a novel method of trying to create a non-statutorily based exception to the Legislature's statutory scheme. A *timely* Headlee Amendment claim avoids the need to evaluate or look to MCL 141.91 altogether: it provides for prospective relief through

RECEIVED by MSC 7/13/2023 4:03:11 PM

an injunction and damages for any monies collected in violation of its provisions. Allowing Plaintiff to maintain equitable "claims" to bootstrap, revive, and expand a stale Headlee Amendment claim is improper.

The Court of Appeals agreed with the City, relying on *TACT*: "'If legal limitations periods did not apply to analogous equitable suits, a plaintiff could dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity.'" (Op. at ___, quoting *TACT*, 450 Mich at 127 n 9.)

Plaintiff nonetheless relies on a 2019 unpublished decision in *Gottesman v City of Harper Woods*, in which the Court of Appeals suggested that claims under MCL 141.91 offer a different remedy than the Headlee Amendment because they allow a longer period of recovery. (Application, p. 30, n 17.) But importantly, this Court ***vacated*** the Court of Appeals' decision in *Gottesman* and remanded the case for the Court of Appeals to decide "whether plaintiff may seek equitable remedies for the alleged violation of MCL 141.91 beyond the one-year limitations period governing the Headlee Amendment claim." *Gottesman v City of Harper Woods*, 964 NW2d 365 (Mem). The parties subsequently settled the case and stipulated to dismiss the appeal. Plaintiff cannot rely on *Gottesman* for the proposition that claims under MCL 141.91 are entitled to a longer limitations period.

To the contrary, *TACT* mandates the opposite result. The *TACT* Court held that a statute of limitations "may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. *TACT* is premised on *Lothian v City of Detroit*, 414 Mich 160; 324 NW2d 9 (1982), in which this Court observed as follows:

> Equity follows the analogies of the law in all cases where an analogous relief is sought upon a similar claim. . . . The reason underlying this "by analogy" technique is self-evident. **This approach plugs the gap which might otherwise allow a plaintiff to dodge the bar set up by a limitations**

RECEIVED by MSC 7/13/2023 4:03:11 PM

> **statute simply by resorting to an alternate form of relief provided by equity.**
>
> If [a claim is held] barred at law, it must be held barred in equity also. The policy of the statute cannot be evaded by the party electing one forum rather than another for litigating the rights which he disputes; but equity by analogy will apply the limitation to his case.

Id. at 169-70 (internal citations and quotation marks omitted) (emphasis added).

This is what Plaintiff attempts to do here: he wishes to "dodge the bar set up by a limitations statute" (the one-year statute of limitations for Headlee claims) "by resorting to an alternate form of relief provided by equity" (claims under MCL 141.91). *Id.* But because his claim is barred at law, "it must be held barred in equity also." *Id.* The one-year limitations period for the Headlee claim must apply by analogy to Plaintiff's "equitable" claims under MCL 141.91, as the Court of Appeals correctly held.

II. Michigan law no longer recognizes assumpsit as a cause of action.

Plaintiff further attempts to couch his untimely Headlee claim as claims for "assumpsit." But the Court of Appeals properly held that these assumpsit claims were not distinct from Plaintiff's Headlee claims and are time-barred, as discussed above.

Even beyond the untimeliness, Michigan law does not recognize assumpsit as a cause of action. Historically, an action for assumpsit was a claim at law based on either "[a]n express or implied promise . . . by which one person undertakes to do some act or to pay something to another" or "a common-law action for breach of a promise or for breach of a contract." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Assumpsit was abolished as a form of action in 1963. *Id.* ("With the adoption of the General Court Rules of 1963, assumpsit as a form of action was abolished.").[10] Although abolished, the substantive remedies

[10] This Court explained:

RECEIVED by MSC 7/13/2023 4:03:11 PM

available under assumpsit (including assumpsit for money had and received (Count II)) were preserved, *Id.*, and are available under the modern doctrine of unjust enrichment. *Wright v Genesee County*, 504 Mich 410, 420-422; 934 NW2d 805 (2019); *Youmans v Charter Township of Bloomfield*, 336 Mich App 161, 213-214; 969 NW2d 570 (2021) ("Hence, an 'assumpsit' claim is modernly treated as a claim arising under 'quasi-contractual' principles, which represents 'a subset of the law of unjust enrichment.'").

In *Wright*, this Court explained that prior to the abolition of the division between law and equity, unjust-enrichment claims, "through ascribed different labels," proceeded in both courts. The court identified a claim for "money had and received" as being one such example that was traditionally brought through assumpsit. *Id.* at 421, citing and quoting *Misclassifying Modern Restitution*, 55 SMU Law Rev 1577, 1600 (2002) ("[t]he actions for money had and received, money paid, quantum meruit, and quantum valebat eventually were catalogued under the rubric of 'quasi-contract,' but it is important to appreciate that these actions were not based on principles of contract, but rather on principles of unjust enrichment" and that "[t]he 'quasi-contract' label apparently resulted from the fact that these actions *developed in assumpsit*, where contractual actions also developed"). The court went on to conclude:

> Unjust enrichment has evolved from a category of restitutionary claims with components in law and equity *into a unified independent doctrine* that serves a unique legal purpose: it corrects for a benefit received by the defendant rather than compensating for the defendant's wrongful behavior. [*Id.* at 422 (Emphasis added).]

The Michigan Court Rules state that "[t]here is one form of action known as a 'civil action.'" MCR 2.101(A). *Former* GCR 1963, 110.3 abolished the technical forms of pleading:

All common counts, general issues, demurrers, pleas, fictions and technical forms of action or pleading, are abolished. The form and sufficiency of all motions and pleadings shall be determined by these rules, construed and enforced to secure a just, speedy, and inexpensive determination of all controversies on their merits. [Reprinted in 1 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed.), p. 176.] [*Fisher*, 494 Mich at 564 n 59.]

RECEIVED by MSC 7/13/2023 4:03:11 PM

In short, "assumpsit" as pleaded in Counts II and VI of the Class Complaint has been abrogated and merged into Plaintiff's claims for unjust enrichment (Counts III and V). Thus, these claims are redundant and non-viable as a matter of law.

III. Plaintiff is precluded from enforcing the Foote Act.

Count V of the Class Complaint alleged a claim for "unjust enrichment" based on the City's alleged violation of the Foote Act. [Class Complaint, Counts V and VI; Appx 0358-360] The Foote Act is a vestige of the state's early efforts to expand electrical utility service across Michigan. It provided in relevant part that any person, firm, or corporation in the business of producing and supplying electricity, subject to certain restrictions, "shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along or across any public streets, alleys and highways." 1905 PA 264. The Foote Act, in its entirety, is included in the City's appendix. [Foote Act; Appx 1058-1059] The Foote Act was repealed by the 1908 Michigan Constitution. Const 1908, art VIII, § 28. However, while the Foote Act was constitutionally abrogated, this Court has held that its repeal did not impair any existing Foote Act franchise because an existing franchise constituted a vested contractual right that could not be impaired. *Traverse City v Consumers Power Co*, 340 Mich 85; 64 NW2d 894 (1954).

The Court of Appeals correctly held that the Foote Act only applies to electric utility providers and that Plaintiff is not a real party in interest. Plaintiff nonetheless continues to pursue this theory in his Application, but his arguments lack merit.

Plaintiff lacks standing and capacity to sue to enforce the Foote Act because he is not the real party in interest. Under MCR 2.201(B), an action must be prosecuted "in the name of the real party in interest." A real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another." *MOSES, Inc v SEMCOG*, 270 Mich App 401, 415; 716 NW2d 278 (2006). This standing doctrine recognizes that litigation should be

RECEIVED by MSC 7/13/2023 4:03:11 PM

begun only by a party having an interest that will assure sincere and vigorous advocacy. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 679; 444 NW2d 534 (1989).

The Foote Act unambiguously grants *electric utility companies* a right to franchise within the City so long as it existed prior to 1909. [Foote Act; Appx 1058-1059] In this case, the *BWL* is the electric utility that is intended to be protected by the Foote Act and that would have the vested right to bring any claim for the City's alleged violation, not Plaintiff. Plaintiff cannot step into the shoes of the BWL to bring the BWL's alleged claim against the City. Plaintiff has not identified any authority where this Court or the Court of Appeals allowed a private citizen, rather than a utility company, to enforce the now-expired statute. The absence of such authority is telling; any existing rights under the Foote Act belong to an electric utility company that existed prior to 1909 and not Plaintiff. Plaintiff does not rebut this argument in his Application.

Further, Plaintiff has not made the necessary factual showing that the BWL had a Foote Act franchise in response to the City's motion under MCR 2.116(C)(10). Plaintiff presented no record evidence showing that the BWL was servicing residents of the City prior to 1909. [Appellee's Response Opposing City's Motion for Summary Disposition, pp 17-19; Appx 0761-763] Without presenting such record evidence, he could not meet his burden of opposing the motion under MCR 2.116(C)(10). *Maiden*, 461 Mich at 120-121. The only "evidence" involves allegations by Plaintiff, in a single email where Mr. Meadows speculated that the BWL was potentially providing electrical service to the City prior to 1908, and undocumented, unsupported assertions by the BWL during its negotiations with the City about the Franchise Agreement. Tellingly, even the BWL chose not to press this issue and instead opted to enter into the Franchise Agreement. [Peffley Deposition, pp 21-22; Appx 0091] Without actual evidence of the BWL having a Foote Act franchise, Plaintiff could not establish a violation of the Foote Act.

RECEIVED by MSC 7/13/2023 4:03:11 PM

CONCLUSION

For these reasons, the City of East Lansing requests that this Court DENY Plaintiff's Application for Leave to Appeal.

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Defendant/Appellee

Dated: July 13, 2023

By: /s/ Laura J. Genovich
Charles E. Barbieri (P31793)
Michael D. Homier (P60318)
Laura J. Genovich (P72278)
Brandon M. H. Schumacher (P82930)

86735:20004:7255304-1

RECEIVED by MSC 7/13/2023 4:03:11 PM

EXHIBIT A

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

RECEIVED by MSC 7/13/2023 4:03:11 PM

STATE OF MICHIGAN

COURT OF APPEALS

JAMES HEOS, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellee,

v

CITY OF EAST LANSING,

Defendant-Appellant.

UNPUBLISHED
April 13, 2023

No. 361105, 361138
Ingham Circuit Court
LC No. 20-000199-CZ

Before: GLEICHER, C.J., and O'BRIEN and MALDONADO, JJ.

PER CURIAM.

In these consolidated appeals, defendant, the City of East Lansing (the City), appeals the trial court's opinions and orders partially denying the City's motion for summary disposition and granting partial summary disposition to plaintiff[1] on his competing motion for summary disposition.

At issue is a "franchise fee" that the Lansing Board of Water and Light (LBWL), a public utility provider, charged its customers (plaintiff and the class). The LBWL collected the fees and remitted them to the City pursuant to a franchise agreement between the LBWL and the City. Plaintiff brought this class action challenging the franchise fee as an unlawful tax imposed in violation of the Headlee Amendment,[2] MCL 141.91, and the Foote Act, 264 PA 1905. In partially denying the City's motion for summary disposition, the trial court reasoned that plaintiff's Headlee claim was not barred by the statute of limitations. The trial court further reasoned that plaintiff's claims for unjust enrichment and assumpsit premised on MCL 141.91 were distinct from his

[1] The trial court granted plaintiff's request for class certification.

[2] More precisely, plaintiff claims that the "franchise fee" was a new local tax levied without voter approval contrary to Const 1963, art 9, § 31. "The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121; 537 NW2d 596 (1995).

RECEIVED by MSC 7/13/2023 4:03:11 PM

Headlee Claim. As to plaintiff's claims based on the Foote Act, the trial court denied the City's motion for summary disposition.

Being bound by *Morgan v City of Grand Rapids*, 267 Mich App 513; 705 NW2d 387 (2005), we conclude that the trial court erred by holding that plaintiff's Headlee claim was not barred by the statute of limitations. We further conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are not distinct from his Headlee claims, and are therefore likewise time-barred. Finally, we conclude that plaintiff is not a real party in interest for purposes of enforcing the Foote Act. Accordingly, we reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting summary disposition in favor of the City.

I. BACKGROUND

The City is serviced by two electric utility providers—the LBWL and Consumers Energy. The LBWL provides service to a significantly larger portion of the City; its service area encompasses about 89% of the City's total rights of way, while Consumers services the rest.

In 2015 or 2016, the City approached the LBWL and Consumers about charging them a franchise fee to continue operating within the City. Consumers refused to pay a franchise fee, while the LBWL was amenable to paying one. Eventually, the LBWL and the City came to an agreement in which the City granted the LBWL use of the City's rights of way, permission to conduct its business of distributing electricity within the City, and an exclusive right to service certain areas of the City. In exchange, the LBWL agreed to "collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax, from the retail sale of electric energy by the [LBWL] within the City," with the fee "appear[ing] on the corresponding energy bills." The franchise agreement further provided that it should not be construed as the LBWL relinquishing any rights it had under the Foote Act, nor as the City waiving its ability to contest the LBWL's assertion of such rights. The City began receiving franchise fees from the LBWL pursuant to their franchise agreement in September 2017.

In April 2020, plaintiff filed the six-count complaint giving rise to this case. Counts I, II, and III alleged that the franchise fee was an impermissible tax and requested a refund of the franchise fees paid. Count I alleged a Headlee claim, while Counts II and III were based on alleged violations of MCL 141.91, which prohibits the collection of taxes not authorized by law. Count IV alleged that the franchise fee violated the Equal Protection Clause of the Michigan Constitution, Const 1963, art I, § 2, because it applied only to customers of the LBWL, not customers of Consumers. Counts V and VI alleged that the franchise fee was prohibited by the Foote Act, and requested a return of the franchise fees paid.

The parties eventually filed competing motions for summary disposition. The City argued that it was entitled to summary disposition on all counts. As to Count I, the City argued that plaintiff's Headlee claim was barred by the statute of limitations. The City argued that Counts II and III were likewise barred by the statute of limitations because those counts were indistinct from Count I. For Count IV, the City argued that plaintiff could not request money damages for an equal-protection violation. For plaintiff's claims premised on the Foote Act, the City argued that plaintiff was not a real party in interest and could therefore not enforce the act. The trial court

RECEIVED by MSC 7/13/2023 4:03:11 PM

granted the City's motion for summary disposition as to plaintiff's equal-protection claim, but otherwise denied the motion.

In his competing motion, plaintiff asked the trial court to grant plaintiff and the class summary disposition on Counts I, II, and III of the complaint. In granting the motion, the trial court held that the franchise fee could be a tax on plaintiff and the class because, under the terms of the franchise agreement, plaintiff and the class were "responsible for paying the franchise fee." The trial court then applied the criteria from *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998) to the franchise fee to determine whether it was a "user fee" or a "tax," and concluded that the franchise fee was a tax. As the tax had not been approved by a majority of voters and was not otherwise authorized by law, the trial court held that plaintiff was entitled to summary disposition on Counts I, II, and III.

This appeal followed.

II. STATUTE OF LIMITATIONS

On appeal, the City argues that the trial court erred when it ruled that plaintiff's Headlee claim in Count I was not barred by the statute of limitations. The City further argues that plaintiff's equitable claims premised on MCL 141.91 in Counts II and III are likewise time-barred because they are identical to plaintiff's Headlee claim in Count I. We agree.

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Michigan Assn of Home Builders v City of Troy*, 504 Mich 204, 211; 934 NW2d 713 (2019). An argument that a claim is barred by the statute of limitations is properly brought under MCR 2.116(C)(7). See *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 222; 779 NW2d 304 (2009). As explained in *Dextrom v Wexford County*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

B. HEADLEE CLAIM

"The 'Headlee Amendment' is the popular name for Const 1963, art 9, §§ 25-34." *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 121 n 2; 537 NW2d 596 (1995) (*TACT*). As pertinent to this case, Const 1963, art 9, § 31 provides that a local governmental unit is "prohibited from levying any tax not authorized by law or charter" unless a majority of

RECEIVED by MSC 7/13/2023 4:03:11 PM

voters have approved the levying of the new tax. See also *Shaw v City of Dearborn*, 329 Mich App 640, 652; 944 NW2d 153 (2019). Const 1963, art 9, § 32 provides that "[a]ny taxpayer of the state shall have standing to bring suit . . . to enforce the provisions of" the Headlee Amendment. MCL 600.308a(1) provides in which courts an action "under section 32 of article 9 of the state constitution of 1963 may be commenced," and subsection (3) provides that such an action must be "commenced within 1 year after the cause of action accrued."

Our Supreme Court has held that when a plaintiff is seeking a refund of an unlawful tax under the Headlee Amendment, the claim "accrues at the time the tax is due." *TACT*, 450 Mich at 123. The tax at issue in this case is slightly different than the one in *TACT*. In *TACT*, at issue was a one-time property transfer tax that was paid by the property owner directly to the governmental entity-defendant. Here, on the other hand, at issue is a recurring (alleged) tax on plaintiff's electricity bill that plaintiff paid to a third party—the LBWL—who remitted the alleged tax to the City. The parties dispute what effect this has on when plaintiff's claim accrued. Plaintiff argues that these differences do not affect the analysis, and that a Headlee claim accrued each time the alleged tax was due. The City, on the other hand, argues that this case is analogous to *Morgan*, 267 Mich App 513, and that, like in *Morgan*, plaintiff's claim accrued when the City entered into the franchise agreement with the LBWL.

We agree with the City that this case is analogous to *Morgan*. At issue in *Morgan* was a franchise fee charged by Comcast pursuant to a franchise agreement it had entered into with the City of Grand Rapids on July 10, 2001. *Id*. at 514. The plaintiff brought a proposed class action on behalf of Comcast cable subscribers to recoup the franchise fees, arguing that the fees constituted an unlawful tax in violation of the Headlee Amendment. *Id*. This Court held that the plaintiff's action was untimely, explaining:

> Comcast paid defendant a "franchise fee" consisting of five percent of its gross revenues. The five percent fee is specifically permitted by the federal Cable Communications Policy Act, 47 USC 521, *et seq*, which also allows cable providers to list separately in their billing statements the amount representing the subscriber's portion of the franchise fee. 47 USC 542. However, the mere listing of the charge on a separate line does not render plaintiff the charge's payer. Rather, plaintiff paid her entire bill according to her contractual obligation to Comcast, which paid the charge to defendant according to the franchise agreement. Defendant had no recourse against plaintiff for any unpaid portion of her bill, so this case is analogous to a sales tax scenario in which the seller passes on the sales tax obligation to the buyer but remains primarily liable to pay the tax. *World Book, Inc v. Dep't of Treasury*, 459 Mich 403, 407-408; 590 NW2d 293 (1999); *Sims v Firestone Tire & Rubber Co*, 397 Mich 469, 474; 245 NW2d 13 (1976). In those situations, courts have generally held that the sellers must challenge the illegal taxes directly, and the consumers have no standing to pursue tax relief unless the tax burden potentially interferes with a federal right. See *Nat'l Bank of Detroit v Dep't of Revenue*, 334 Mich 132, 141-142; 54 NW2d 278 (1952), and the cases cited therein. In short, when the tax obligation falls primarily on the retailer, "retailers are considered to be the taxpayers." *Sims*, 397 Mich at 474. In this case, Comcast, as the retailer, paid the charge and merely passed the charge's burden onto plaintiff's shoulders.

RECEIVED by MSC 7/13/2023 4:03:11 PM

> In *Taxpayers Allied for Constitutional Taxation* [*TACT*] *v Wayne Co*, 450 Mich 119, 124-125 n 7; 537 NW2d 596 (1995), our Supreme Court held that individuals who do not pay a tax directly may still challenge whether the tax violates the Headlee Amendment. Const 1963, art 9, § 32. However, the Court noted that the one-year statute of limitations, MCL 600.308a(3), would apply to such a plaintiff and would begin running at the time the offending tax resolution was enacted. *TACT*, 450 Mich at 125 n 7. The Court reasoned that "the only wrong that could give rise to a cause of action is the enactment of the resolution—an action that is not continuing in nature." *Id*. at 124-125 n 7.
>
> Like the situation described in *TACT*, the starting point for the limitations period depends on when the defendant did the alleged wrong. Plaintiff points to the moment she received her bill as the moment of initiation, but the inclusion of the charge on the bill was Comcast's action, not defendant's. Similarly, defendant's collection from Comcast would not initiate the period, because the collection would be a wrong against Comcast, not plaintiff. Following the example in *TACT*, plaintiff's Headlee claim accrued when defendant first imposed the "franchise fee" on Comcast—July 10, 2001. Because plaintiff failed to bring her Headlee claim within one year from that date, the trial court correctly granted defendant's motion for summary disposition. [*Morgan*, 267 Mich App at 514-516.]

The crux of *Morgan*'s holding relies on the fact that Comcast agreed to pay the franchise fee to the defendant as a condition of the defendant granting Comcast a franchise. The plaintiff did not owe the franchise fee to the defendant; the plaintiff paid the franchise fee to Comcast pursuant to the plaintiff's contractual obligation to Comcast, and if the plaintiff did not pay the charge, the defendant had no recourse against the plaintiff. While Comcast passed the franchise fee onto consumers, *Morgan* held that this did not make the plaintiff a taxpayer, similar to how a consumer is not a taxpayer if the retailer passes the burden of sales tax onto the consumer.

Analogously, here, the LBWL agreed to pay the franchise fee to the City as a condition of the City granting the LBWL a franchise. Plaintiff does not owe the franchise fee to the City; plaintiff's only liability for paying the franchise fee stems from his obligations to the LBWL. If plaintiff does not pay the fee to the LBWL, the City has no recourse against plaintiff. While the LBWL passed the franchise fee onto plaintiff and the class, this did not make them taxpayers. Thus, we conclude that, like in *Morgan*, plaintiff's only means of contesting the franchise fee as an allegedly unlawful tax under the Headlee Amendment was through a suit on behalf of the public as identified in *TACT*, 450 Mich at 124-125 n 7, which accrued when the franchise fee was passed by ordinance. See *Morgan*, 267 Mich App at 515-516. It follows that, because more than one year has passed since that time, plaintiff's Headlee claim is time-barred.

Plaintiff attempts to distinguish *Morgan*, but his arguments are unpersuasive. Plaintiff argues that this case is distinguishable from *Morgan* because "the LBWL is not independently liable to the City for any amount of Franchise Fees; the LBWL merely adds the Franchise Fees to Plaintiff's bill (and the bills of all class members) and gives the City whatever money the LBWL collects . . . ." Here, however, it appears that the LBWL *is* "independently liable" to the City for the franchise fees. Ostensibly, if the LBWL did not pay the franchise fees to the City pursuant to their agreement, the City would have any number of remedies against the LBWL, including not

RECEIVED by MSC 7/13/2023 4:03:11 PM

only bringing a breach-of-contract claim to recover the fees from the LBWL but revoking the LBWL's franchise.

Plaintiff also argues that he "has standing to sue the City because the LBWL was a mere collection agent for the Franchise Fees . . . ." Plaintiff, however, is rather flippant with his characterization of the LBWL as the City's agent. Agency is a legal doctrine, and plaintiff makes no attempt to demonstrate how, as a matter of law, the LBWL was an "agent" of the City. Cursorily reviewing relevant caselaw, it is not apparent that the LBWL was even arguably an agent of the City because it is unclear that the City had any right to control the conduct of the LBWL, or that the LBWL had actual or apparent authority to act on the City's behalf. See *St Clair Intermediate Sch Distt v Intermediate Ed Assn/Michigan Ed Ass'n*, 458 Mich 540, 557-558; 581 NW2d 707 (1998). Rather, the LBWL and the City were two independent parties with contractual obligations to one another.

Accordingly, because we are bound by *Morgan*, we conclude that plaintiff's Headlee claim was time-barred.

C. MCL 141.91

In *TACT*, our Supreme Court stated that it "has long recognized that statutes of limitation may apply by analogy to equitable claims." *TACT*, 450 Mich at 127 n 9. Both parties agree on appeal that plaintiff's claims premised on MCL 141.91 are equitable in nature, and so we accept that as true for purposes of this opinion. Plaintiff's claims premised on MCL 141.91 rely on the same arguments and proofs as plaintiff's Headlee claim; plaintiff did not even present distinct arguments for his Headlee claim and his MCL 141.91-related claims when arguing that he was entitled to summary disposition. For all three claims, plaintiff argued that the franchise fee was a tax because plaintiff and the class bore the "legal incidence" of the fee, and then argued that the *Bolt* criteria should be applied to the fee to determine whether it was a tax or a user fee. According to plaintiff, applying the *Bolt* criteria made clear that the fee was actually a tax, which entitled plaintiff to summary disposition on both his Headlee claim and his MCL 141.91-related claims.

It is apparent both from the pleadings and from plaintiff's arguments that plaintiff's claims premised on MCL 141.91 are identical to his Headlee claim. As the "statute of limitations may apply by analogy to equitable claims," *TACT*, 450 Mich at 127 n 9, we conclude that plaintiff's unjust enrichment and assumpsit claims premised on MCL 141.91 are barred by analogy.

Plaintiff asserts that his claims premised on MCL 141.91 "are distinct causes of action from his Headlee Amendment claim," but he never explains a difference between them except by noting that he is seeking "a one-year refund under Headlee and a six-year refund under MCL 141.91." This, however, is what our Supreme Court sought to avoid with its guidance in *TACT*: "If legal limitations periods did not apply to analogous equitable suits, a plaintiff could dodge the bar set up by a limitations statute simply by resorting to an alternate form of relief provided by equity." *TACT*, 450 Mich at 127 n 9 (quotation marks, citation, and alteration omitted).

RECEIVED by MSC 7/13/2023 4:03:11 PM

III. FOOTE ACT

The City also argues that the trial court erred by not dismissing plaintiff's Counts V and VI, which are premised on the Foote Act. The Foote Act provided in relevant part:

> Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity for purposes of lighting, heating and power, and which shall be engaged or which shall hereafter desire to engage in the business of the transmission of such electricity, shall have the right to construct and maintain lines of poles and wires for use in the transmission and distribution of electricity on, along or across any public streets, alleys and highways and over, under or across any of the waters of this state, and to construct and maintain in any such public streets, alleys or highways all such erections and appliances as shall be necessary to transform, convert and apply such electricity to the purposes of lighting, heating and power, and to distribute and deliver the same to the persons, firms and public or private corporations using the same: Provided, that the same shall not injuriously interfere with other public uses of such streets, alleys or highways, or with the navigation of said waters, and that the designation and location of all lines of poles and wires shall be subject to the regulation, direction and approval of the common council of cities, the village council of villages, and the township board of townships, as the case may be: Provided, that this act shall not apply to the county of Wayne: Provided further, that nothing herein shall deprive cities, villages or townships of the power and control over their streets and highways, which they have by the general laws of this state. [264 PA 1905. See also *Lansing v Mich Power Co*, 183 Mich 400, 404; 150 NW 250 (1914).]

The Foote Act was abrogated by Const 1908, art 8, § 28. But, in *Lansing*, 183 Mich at 410-411, our Supreme Court held that Const 1908, art 8, § 28 could not impair a state franchise that had already vested under the Foote Act before the 1908 Constitution's enactment. The Court explained, in pertinent part:

> The [Foote Act] tendered a franchise to defendant; such franchise was accepted by defendant by way of installing its service equipment in the public streets and providing a service of a public utility; and this tender and acceptance constitute a contract between the state and defendant beyond the power of the Legislature, the Constitution, or of this court to impair by destroying the contract right to remain in the streets. [*Lansing*, 183 Mich at 410-411.]

See also *Traverse City v Consumers Power Co*, 340 Mich 85, 103; 64 NW2d 894 (1954) ("This Court has held that rights acquired under the 1905 act are vested rights . . . .")

Plaintiff's complaint alleged that the LBWL operated in the City prior to 1908, and so the Foote Act prohibited the City from imposing any fees as a condition of allowing the LBWL to provide electric service to the City. The City argues that plaintiff cannot assert such claims because the Foote Act applies only to electric utility providers, and, thus, plaintiff is not a real party in interest. We agree.

RECEIVED by MSC 7/13/2023 4:03:11 PM

"Whether an individual is the real party in interest is a question of law that we review de novo." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

As explained by this Court in *Beatrice Rottenberg Living Trust*:

> [A]lthough the principle of statutory standing overlaps significantly with the real-party-in-interest rule, they are distinct concepts. See *Kent v Northern Cal Regional Office of American Friends Serv Comm*, 497 F2d 1325, 1329 (CA 9, 1974). The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. *Miller v Allstate Ins Co*, 481 Mich 601, 608-612; 751 NW2d 463 (2008). In contrast, the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another. See, e.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 12; 124 S Ct 2301; 159 L Ed 2d 98 (2004); *Zurich Ins Co v Logitrans, Inc*, 297 F3d 528, 532 (CA 6, 2002).
>
> "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). The real-party-in-interest rule " 'requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted . . . .' " *Rite-Way Refuse Disposal, Inc v VanderPloeg*, 161 Mich App 274, 278; 409 NW2d 804 (1987) (citation omitted). [*Beatrice Rottenberg Living Trust*, 300 Mich App at 355-356.]

"A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013).

The Foote Act plainly applies only to electric utility providers. See 264 PA 1905 ("Any person, firm, or corporation authorized by the laws of this state to conduct the business of producing and supplying electricity . . . shall have the right . . . ."). Thus, the entity here with a potential "vested right" is the LBWL; plaintiff and the class have no rights or interests stemming from the Foote Act. Accordingly, plaintiff and the class cannot assert a cause of action stemming from a violation of the Foote Act because they are not a real party in interest.[3]

IV. CONCLUSION

For the reasons explained, the trial court erred by denying the City's motion for summary disposition as to Counts I, II, III, V, and VI of plaintiff's complaint, and granting summary

[3] We further note that nothing in the Foote Act or subsequent cases interpreting the act prevents electric utility providers from relinquishing their vested rights under the act, or—as is the case here—from agreeing to reserve but not pursue their rights under the act. While this may also go to the merits of plaintiff's claim (i.e., there was no Foote Act violation), it tangentially relates to whether plaintiff is a real party in interest—the LBWL holds any vested rights under the Foote Act, and it is the only entity that can decide whether and how it wishes to enforce those rights.

disposition to plaintiff on Counts I, II, and III of plaintiff's complaint. We therefore reverse the trial court's opinions and orders, and remand for the trial court to enter an order granting the City's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien
/s/ Allie Greenleaf Maldonado

RECEIVED by MSC 7/13/2023 4:03:11 PM

RECEIVED by MSC 7/13/2023 4:03:11 PM

EXHIBIT B

RECEIVED by MSC 7/13/2023 4:03:11 PM

Attachment 1- East Lansing Electric Franchise

CITY OF EAST LANSING

ORDINANCE NO. 1411

LANSING BOARD OF WATER AND LIGHT ELECTRIC FRANCHISE ORDINANCE

AN ORDINANCE, granting to LANSING BOARD OF WATER AND LIGHT, its successors and assigns, the right, power and authority to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business in the defined service area in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years.

THE CITY OF EAST LANSING ORDAINS:

SECTION 1. GRANT, TERM. The CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, hereinafter City, hereby affirms the right, power and authority to the Lansing Board of Water and Light, a municipally owned utility, its successors and assigns, hereinafter called the "Grantee," to, in the defined service area, construct, maintain and commercially use electric lines consisting of towers, masts, poles, crossarms, guys, braces, feeders, transmission and distribution wires, transformers and other electrical appliances, hereinafter referred to collectively as electric lines, for the purpose of, in the defined service area, transmitting, transforming and distributing electricity on, under, along and across the highways, streets, alleys, bridges, waterways, and other public places, and to do a local electric business and have an exclusive franchise to provide electricity and electric service in the defined service area only, in the CITY OF EAST LANSING, INGHAM AND CLINTON COUNTIES, MICHIGAN, for a period of thirty years, with said defined service area being shown and depicted on Exhibit A, which is attached hereto and incorporated herein by reference.

SECTION 2. FRANCHISE FEE.
During the term of this franchise, or the operation of the electric system pursuant to this franchise, and to the extent allowable as a matter of law, the Grantee shall, upon acceptance of the City, collect and remit to the City a franchise fee in an amount of five percent (5%) of the revenue, excluding sales tax from the retail sale of electric energy by the Grantee within the City, for the use of its streets, public places and other facilities, as well as the maintenance, improvements and supervision thereof. Such fee will appear on the corresponding energy bills.

The fiscal year for purposes of determining the annual franchise fee to commence on July 1, 2017, with the new fiscal years commencing on July 1st for each year thereafter, with the first

Meadows 2/9/21
Exhibit 14

RECEIVED by MSC 7/13/2023 4:03:11 PM

franchise fee to be paid by the Grantee to the City of East Lansing on October 1, 2017, with the Grantee to pay the franchise fees to the City of East Lansing on a quarterly basis thereafter.

The City shall at all times keep and save the Grantee harmless from and against all loss, costs, expense and claims associated with the collection and remittance of this franchise fee.

Either party, upon sixty (60) days written notice by the party may terminate this Ordinance granted franchise, franchise fee collection and remittance. However, to the extent the Grantee is precluded from collecting such franchise fees remittance to City will cease.

SECTION 3. CONSIDERATION. In consideration of the rights, power and authority hereby affirmed, said Grantee shall faithfully perform all things required by the terms hereof.

SECTION 4. CONDITIONS. All of Grantee's towers, masts, and poles shall be so placed on either side of the highways, streets, alleys and bridges as not to unnecessarily interfere with the use thereof for highway, street, alley and bridge purposes. All of Grantee's wires carrying electricity shall be securely fastened so as not to endanger or injure persons or property in said highways, streets, alleys, and bridges. All work performed by said Grantee in said highways, street[s], alleys, and bridges shall be done so as to minimize interference with the use thereof, and when completed, the same shall be left in as good condition as when work was commenced. The Grantee shall have the right to cut or trim trees if necessary in the conducting of such business.

Said lines and appurtenances shall be constructed so as to interfere as little as possible with the proper lawful use of the streets, alleys, and public places. The installation of all poles, conduits, and appurtenances shall be according to industry standards and shall be subject to such reasonable regulations as shall be prescribed by said City from time to time.

SECTION 5. HOLD HARMLESS. Said Grantee shall at all times keep and save the City free and harmless from all loss, costs and expense to which it may be subject by reason of construction or maintenance. Provided, however, that Grantee's obligations under this Section 5 shall not apply to any loss, cost, damage or claims arising out of the negligence of the City, its employees or its contractors. Grantor shall indemnify, hold harmless and defend the Grantee from any and all claims, losses or litigation which result from the Grantee's compliance with this Ordinance. However, Grantor is not responsible for Grantee's negligent or intentional misconduct associated with the provision of utility services.

SECTION 6. EXTENSIONS. Said Grantee shall construct and extend its electric distribution system within the defined service are of said City, and shall furnish electric service to applicants residing in the defined service area in accordance with applicable laws, rules and regulations.

SECTION 7. NONEXCLUSIVE FRANCHISE. Certain rights, power and authority herein granted, are exclusive as to providing electricity and electric service in certain areas of the City of East Lansing as described in Exhibit A. Otherwise, with respect to jurisdiction of East Lansing, this remains a nonexclusive franchise.

RECEIVED by MSC 7/13/2023 4:03:11 PM

The exclusive right to service certain areas of the City of East Lansing as described in Exhibit A is a condition concurrent to the collection and remittance of the Franchise Fee described in Section 2. As such either party may terminate the exclusive right to serve upon 60 days prior written notice. Therefore, to the extent either shall cease, both ceases.

SECTION 8. RATES. The rates and Rules and Regulations governing the supply and use of electricity shall be the same as in the City of Lansing except that the rates shall be increased within the boundaries of the City by the amount of any taxes, license fees, franchise fees, or any other charges against the Grantee's property or its operations, or the production and/or sale of electrical energy, levied or imposed by the City or otherwise incurred by Grantee as a result of this Ordinance.

Section 10. SERVICE AREA. To the extent permitted by law, Grantee shall furnish electric service to all customers requesting such service within Grantee's service area or the non-exclusive area.

Section 11. FOOTE ACT FRANCHISE. Nothing herein shall be construed as either party rendering an opinion or position of the Grantee's vested franchise rights under the Foote Act, 1905 PA 264. The City does not waive any right to contest, and the Grantee does not relinquish any right to assert.

Section 12. GRANTEE RULES. The Grantee shall have authority to promulgate such rules, regulations, terms and conditions governing the conduct of its business as shall be reasonably necessary to enable the Grantee to exercise its rights and perform its obligations under this franchise, and to assure uninterrupted service to each and all of its customers. Provided, however, that such rules, regulations, terms and conditions shall not be in conflict with the provisions hereof or of laws of the State of Michigan.

SECTION 13. EFFECTIVE DATE. This ordinance shall take effect upon the day after the date of publication thereof; provided, however, it shall cease and be of no effect after thirty days from its adoption unless within said period the Grantee shall accept the same in writing filed with the City Clerk. Upon acceptance and publication hereof, this ordinance shall constitute a contract between said City and said Grantee.

Section 14. PUBLICATION AND ADMINISTRATIVE COSTS. The City shall assume the cost of publication of this franchise. A BWL administrative charge of ½ percent (0.5%) of collected franchise fees for the quarterly billing will apply.

Section 15. SEVERABILITY. If any provision of this franchise is to any extent illegal, otherwise invalid, or incapable of being enforced, such provision shall be excluded to the extent of such invalidity or unenforceability; all other provisions hereof shall remain in full force and effect.

We certify that the foregoing Franchise Ordinance was duly enacted by the City Council on the 6 day of June, 2017.

Marie Wicks
City Clerk

June 16, 2017

RECEIVED by MSC 7/13/2023 4:03:11 PM

