

**LETTER OPINION
2003-L-53**

November 20, 2003

The Honorable Harvey Tallackson
State Senate
53 W 5th St
Grafton, ND 58237-1468

Dear Senator Tallackson:

Thank you for your letter regarding a utility customer charge. The City of Grafton ("Grafton") purchases electricity from a power company and sets rates, by ordinance, which electricity users must pay. Users are classified under the following categories: residential, commercial, industrial, or large industrial. Among other charges, Grafton established a minimum customer charge for each classification as follows: residential - \$9, commercial - \$40, industrial - \$150, large industrial - \$270.

You ask whether the customer charge of \$40 for commercial entities is legal, and whether it is proper for the city to classify the Masonic Temple as a commercial entity since the Masonic Temple is not used very often¹ and is a nonprofit entity.

A city governing body may enter into a contract to furnish electricity to the city's inhabitants. N.D.C.C. § 40-05-05(1). The city governing body may regulate and fix rates for providing light and power to its patrons. N.D.C.C. § 40-05-01(67). The Grafton City Code describes the customer charge as follows: "The customer charge per month is a fee to help defray part of the costs of bringing basic service to the consumer, specifically, the costs that do not change with the amount of the consumers' electrical usage." Grafton City Code § 24-201(b). See also Re Columbia Gas of Ohio, Inc., 113 P.U.R. 4th 1 (Ohio PUC, 1990) (purpose of customer charge is to provide utility with partial recovery of fixed costs which it incurs in order to provide service to a customer by mere reason of the customer's connection to the utility's system).

"The service charge and other minimum billing devices were introduced early by the utilities as a way of charging some of the fixed costs to customers having a relatively large demand but little or no consumption." 2 Leonard Saul Goodman, The Process of Ratemaking 1060 (1998). In 1923, the Missouri Public Service Commission described the customer charge or service charge as follows:

¹ The Masonic Temple is used once a month for a meeting, and once a year for a fundraiser.

The service charge is a uniform charge to all consumers, which together with another charge based upon the amount of gas consumed constitutes the entire rate to be paid. The sum of these two charges is such that the aggregate collected from all consumers is sufficient to pay operating expenses, including taxes and depreciation, and a reasonable return on the fair present value of the property used and useful in rendering service.

The service charge does not require the consumer to pay for something he does not receive. The plant must be kept in condition to render immediate service to each and every consumer whether he uses it or not. The consumer who is connected to the mains and uses little or no gas should be compelled to contribute his full share of the burden that he imposes on the property. The very purpose of the service charge is to equitably distribute this expense among the consumers.

Under a flat rate schedule of charges for gas, the consumer who uses little or no gas escapes from the payment of his share of the costs, and the consumer who uses gas in quantities is unjustly required to carry all or most of the burden. The purpose of the service charge is to eliminate this unjust discrimination against the patron who actually makes use of the service.

There are certain costs common to all users, and which are incurred whether the consumer uses gas in large quantities or uses no gas at all.

Interest and depreciation on the investment in the meter, the inspection of the meter, and the removals and repairs to meters are all items of expense that are wholly independent of the amount of gas consumed. Interest, depreciation, and maintenance of services owned by the company are all items of expense that are incurred even though no gas is consumed. Meters must be read, charges entered on the books, bills rendered to consumers, accounts collected, stationery and supplies used, and all of the foregoing work supervised although not a cubic foot of gas is consumed. It is these costs that the service charge distributes equitably among consumers so that each customer will pay the actual expense he causes the company, and all customers will pay the same price for gas consumed.

Re Joplin Gas Company, P.U.R. 1923D 332, 348-49 (Mo. PSC 1923). The customer charge or service charge is a minimum charge applied to each user. "The term 'minimum charges,' as usually employed in connection with the meter system, signifies a right of compensation for the expense and labor of being ready to supply water or electricity or gas or telephone service, at the will of the customer, even though the supply is not used at all." 12 Eugene McQuillin, Municipal Corporations § 34.139 (3d ed. 1995). "The rates charged

by a municipal utility must be fair, reasonable, just, uniform, and nondiscriminatory . . .”
Id. at § 35.37.05.

Thus, it is my opinion that minimum customer charges are not inherently unlawful. Compare Ennis v. City of Ray, 595 N.W.2d 305 (N.D. 1999) (ordinance requiring resident to pay for garbage collection despite his refusal to utilize service did not violate resident’s due process rights). Whether the customer charges established by Grafton are reasonable is a question of fact on which this office will not issue an opinion. See N.D.A.G. Letter to Price (Dec. 11, 1991) (whether entrance fee to recreation area charged by water resource district is reasonable is a question of fact upon which the Attorney General cannot issue a legal opinion).

You also ask whether it was proper for Grafton to classify the Masonic Temple as commercial for purposes of determining the rates it must pay for electricity.

A municipality has the right to classify consumers under reasonable classifications based upon such factors as the cost of service, the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter that presents a substantial difference as a ground of distinction. Accordingly, a lack of uniformity in the rate charged is not necessarily unlawful discrimination. The establishment of classifications and charging different rates for the several classes is not unreasonable and does not violate the requirements of equality and uniformity.

12 Eugene McQuillin, Municipal Corporations § 35.37.10 (3d ed. 1995) (footnotes omitted). Basic classifications include residential, commercial, and industrial. 2 Leonard Saul Goodman, The Process of Ratemaking, 1029 (1998).

Grafton classifies its users as residential, commercial, industrial, or large industrial. It appears more appropriate to classify the Masonic Temple as commercial rather than residential. Also, the fact that the Masonic Temple is a nonprofit entity does not affect its classification for electricity rates. In conclusion, it is my opinion that it is not unreasonable for Grafton to classify the Masonic Temple as commercial.

Sincerely,

Wayne Stenehjem
Attorney General