WATER AND SEWER UTILITY OVERCHARGES – IS THERE A LIMITATIONS PERIOD?

By Paul L. Stephanides

Introduction

The ILGL "Listserv" is an invaluable resource for ILGL members. A few months ago, I read with interest a discussion regarding a substantial overpayment by a municipal water utility customer that occurred over a period of approximately 17 years due to a computer glitch. The ultimate question that was raised was what is the applicable statute of limitations period applicable to a municipal water utility customer? Per the discussion, quite a few members have dealt with this question during their municipal careers, including myself, and I noticed that there was no consensus on an answer to the question. This motivated me to conduct further research into the issue and this article summarizes the results of that research. This article is relegated to the topics of water and sewer utility services and does not touch upon the myriad of other utility services provided by municipalities in Illinois.

Public Utility Customers

A "public utility" is defined in section 3-105 of the Public Utilities Act. 220 ILCS 5/3-105. Utilities run by municipalities are specifically excluded from the definition:

> Public utility" does not include, however:
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> (1) public utilities that are owned and operated by any political subdivision, public institution of higher education or municipal corporation of this State, or public

> utilities that are owned by such political subdivision, public institution of higher education, or municipal corporation and operated by any of its lessees or operating agents . . .

220 ILCS 5/3-105(b)(1). Despite this exclusion, the applicable statute of limitations for overpayments made by public utility customers can be instructive, especially from a laches perspective as further discussed below. Section 9-252 of the Public Utilities Act provides:

> When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.
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> If the public utility does not comply with an order of the Commission for the payment of money within the time fixed in such order, the complainant, or any person for whose benefit such order was made, may file in a circuit court of competent jurisdiction a complaint setting forth briefly the causes for which the person claims damages and the order of the Commission in the premises. Such action shall proceed in all respects like other civil actions for damages, except that on the trial of such action the order of the Commission shall be prima facie evidence of the facts therein stated. If the plaintiff shall finally prevail, he or she shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the action.
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> All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order, except that if an appeal is taken from the order of the Commission, the time from the taking of the appeal until its final adjudication shall be excluded in computing the one year allowed for filing the complaint to enforce such order.
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> The remedy provided in this section shall be cumulative, and in addition to any other remedy or remedies in this Act provided in case of failure of a public utility to obey a rule, regulation, order or decision of the Commission.

220 ILCS 5/9-252 (emphasis added). Pursuant to the above, a complaint for excessive or unjustly discriminatory amounts charged by a public utility must be filed with the Illinois Commerce Commission ("ICC") within two (2) years from the time the service was furnished or performed.

A complaint regarding incorrect billing charged to a customer must also be filed within two (2) years pursuant to the statute below from the Public Utilities Act:

> When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error either in charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or at a rate prescribed by rule of the Commission. Refunds and interest for such overcharges may be paid by the utility without the need for a hearing and order of the Commission. Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.

220 ILCS 5/9-252.1. The ICC has adopted a regulation that mirrors the above provision regarding incorrect billing. 83 Ill. Adm. Code 280.110(g)(1)-(2).

The ICC has shorted the two-year limitations period above for when a public utility seeks to collect charges for services that were not billed to one year for residential customers and two (2) years for non-residential customers:

Section 280.100 Previously Unbilled Service

a) Intent: This Section provides for the billing and payment of previously unbilled service caused by errors in measuring or calculating a customer's bills.

b) Time Limits:

1) Bills for any utility service, including previously un-billed service, supplied to a residential customer shall be issued to the customer within 12 months after the provision of that service to the customer.

2) Bills for any utility service, including previously un-billed service, supplied to a non-residential customer shall be issued to the customer within 24 months after the provision of that service to the customer.

3) The time limits of subsections (b)(1) and (2) shall not apply to previously unbilled service attributed to tampering, theft of service, fraud or the customer preventing the utility's recorded efforts to obtain an accurate reading of the meter.

4) No utility shall intentionally delay billing beyond the normal bill cycle.

83 Ill. Adm. Code 280.100(a)-(b).

There is no Limitations Period Provided in the Illinois Municipal Code

The Illinois Municipal Code does not contain a statutory limitations period for the overpayment of water or sewer charges. Each of the enabling statutes for the provision of water and sewer utility services does contain that permits the municipal corporate authorities to "make and enforce all needful rules and regulations" for the construction and management of water and sewer systems. 65 ILCS 5/11-125-3; 65 ILCS 5/11-126-4; 65 ILCS 5/11-129-10; 65 ILCS 5/11-139-8; 65 ILCS 5/11-14-1-16. These statutes also give municipalities the authority to fix the rates for such services. *Id.*

The authority to make and enforce rules and regulations has been interpreted to mean that a municipality can mandate that property owners must connect to a municipal water system and pay for the service. *Village of Algonquin v. Tiedel,* 345 Ill.App.3d 229, 233-34, 280 Ill.Dec. 493, 802 N.E.2d 418 (2nd Dist. 2003). Also, a municipality may require that the cost of repair and maintenance of water service pipes from the main to the curb be charged to abutting property owners. *Rosborough v. City of Moline,* 30 Ill.App.2d 167, 184-85, 174 N.E.2d 16 (2nd Dist. 1961).

The defendants in the *Village of Algonquin* case argued that they could not be forced to receive or use the water furnished absent a contract and that they never contracted for the village to supply water. The appellate court found that the ordinance in question which required connection to the municipal water system was a valid exercise of police power. *Village of Algonquin v. Tiedel,* 345 Ill.App.3d at 234.

Statute of Limitations for Contract Actions

The court in the earlier Second District Appellate Court case of *Tepper v. County of Lake,* 233 Ill. App. 3d 80, 174 Ill.Dec. 164, 598 N.E.2d 361 (2nd Dist. 1992), reached a different conclusion and found that the municipal supply of water was a contract. In the *County of Lake* case, a water customer filed suit when the county threatened to lien the customer's property for a failure to pay a bill for 126,200 gallons of water provided during a three-month period. The customer testified that he did not use an unusual amount of water and he produced evidence that the meter reading was 200 or 300 percent in excess of any previous bill. The court shifted the burden to the county to show the accuracy of the meter. The court stated that in a contract action, the county "would have to prove that it delivered 126,200 gallons of water." *Id.*, 233 Ill.App.3d at 82.

A similar line of reasoning was followed in the case of *Brooks v. Village of Wilmette,* 72 Ill.App.3d 753, 28 Ill.Dec. 934, 391 N.E.2d 133 (1st Dist. 1979). In the *Village of Wilmette* case. The village adopted an ordinance that placed responsibility for repair or replacement of the service pipe from the main to the curb shut-off upon the owners of the abutting property. The plaintiffs alleged that the ordinance constituted a breach of the village's contract with the plaintiffs to provide water service. The appellate court found that the plaintiffs properly alleged a cause of action because the village's relationship to its water customers was one of contract. At the time the plaintiffs began receiving water services, the ordinance then in effect placed the burden of repair for damaged water pipes on the village. The plaintiffs argued that the village's new ordinance violated the contract because the village unilaterally altered its obligation without the knowledge and consent of the plaintiffs.

Pursuant to these courts' holdings, either the ten (10) year statute of limitations for written contracts, 735 ILCS 5/13-206, or the five (5) year statute of limitations for unwritten contracts, 735 ILCS 4/13-205, would be applicable to a claim for overpayment of utility charges. A court that is inclined to find that the relationship is one of contract would also probably find that the contract is written when ordinances are in existence at the time utility service is provided that govern the relationship between the customer and the municipality and if a written application is required to be made by a customer in order to receive service.

This being said, the concept of laches would come into play. Laches is defined as "the neglect or omission to assert a right, which, taken in conjunction with a lapse of time and circumstances causing prejudice to the opposite party, will operate as a bar to a suit." *Lee v. City of Decatur*, 256 Ill.App.3d 192, 195 (4th Dist. 1994). A guideline to be followed as to how far back a municipality must go in providing a refund for overcharges is the two year time period set forth above for public utilities.

Provision of Water and Sewer Utility Services are an Exercise of Police Power

The cases cited above finding a contractual relationship between municipalities and their utility customers was distinguished in the case of *Mack Industries, Ltd. v. Village of Dolton,* 2015 IL App (1st) 133620, 391 Ill.Dec. 248, 30 N.E.3d 518. A landlord in the Village of Dolton claimed that the village had a duty to shut off water service to the landlord's tenants that left the landlord responsible for the unpaid charges and a fee for reconnection of service. The village had in place an ordinance which prohibited private companies and individuals from supplying water to any building, structure or premises in the village. The landlord alleged a breach of contract action against the village. The court held that the provision of water service represented an exercise of the village's police power and not the establishment of a voluntary contractual relationship under the *Village of Algonquin* case cited above.

Pursuant to this line of reasoning, a municipality can adopt its own ordinance establishing a statute of limitations period for the overpayments of utility charges by its customers similar to the statute of limitations provided in the Public Utilities Act and by ICC regulation. The municipality would be exercising its authority to make a "needful" regulation in adopting such a limitations period and could defend the need under similar arguments that are brought forth to defend statutes of limitations for other actions, such as the need to protect municipal coffers if a municipality is forced to go back so far in time as to deplete its revenues. Several municipalities have adopted such ordinances, including the one I represent, the Village of Oak Park, in line with the limitations period set forth in the Public Utilities Act and the ICC regulation above of two (2) years.

Conclusion

There is no statutory limitations period applicable to a claim for repayment of overcharges for water and sewer utility services provided by municipalities. There is also no case directly on point where a limitations period was either challenged or set by a court. Thus, a municipality can fill this void in the law by adopting its own limitations rule under its authority to adopt all needful rules and regulations to provide such services, albeit such a rule may be challenged at some point under a breach of contract theory.