zi is Assistant Professor of Public Law and Government at the School of Government. She specializes in
l county finance law, special assessments, utility finance law, solid waste finance law, and public school

OOL OF GOVERNMENT PUBLICATIONS

n of a North Carolina Town

2007

ce and Kara A. Millonzi

edition discusses the reasons that communities incorporate, some alternatives to incorporation, the
corporation, and what it means to be a town. It includes sample budgets to give some understanding of
al services cost and is designed for anyone interested in incorporating a town in North Carolina.
also available as a free, downloadable PDF from the School's website at www.sog.unc.edu.

***e Bulletin No. 33*, "Lawful Discrimination in Utility Ratemaking,**
fying Customers within Territorial Boundaries"

zi

is the first of a two-part series examining constraints on the power of local government–owned utilities
ir customers for the purposes of charging different rents, rates, fees, and penalties for utility services.
s the ability to discriminate among various types of customers whose properties lie within the local
territorial boundaries.
available exclusively as a free, downloadable PDF from the School's website at www.sog.unc.edu.

***e Bulletin No. 34*, "Lawful Discrimination in Utility Ratemaking,**
fying Extraterritorial Customers"

zi

is the second of a two-part series examining constraints on the power of local government–owned utilities
ir customers for the purposes of charging different rents, rates, fees, and penalties for utility services.
on the classification of utility customers whose properties lie outside the local government's territorial

available exclusively as a free, downloadable PDF from the School's website at www.sog.unc.edu.

oes Clean Water Cost? 2006: The Story Behind the Revenue: An Analysis of the
te-Setting Practices that Fund Water and Sewer Services in North Carolina

ee M. Mandell, Owen Franklin, Shadi Eskaf, Rich Thorsten, Glenn Barnes

ve research effort between the North Carolina League of Municipalities and the Environmental Finance
University of North Carolina at Chapel Hill, this study provides information on water and sewer rates,
policies of North Carolina utilities providers. It presents analysis of data from several interrelated surveys
ion sources and identifies important factors influencing water and sewer rate-setting. It also includes
g estimated water and sewer billing totals for 333 utilities.
available for sale as both a print book and a downloadable PDF from the School's website at
.edu.

Municipal Government in North Carolina, Article 39: Solid Waste Services

and Richard B. Whisnant

d available for purchase is Article 39 of the complete reference book on North Carolina county and
vernment. The book provides a comprehensive treatment of the legal foundations, organization, and
n of the state's counties and cities.
nformation, see the *County and Municipal Government in North Carolina* website at www.sog.unc.edu/

of North Carolina: A Guide to a State's Environmental Cleanup Laws

snant

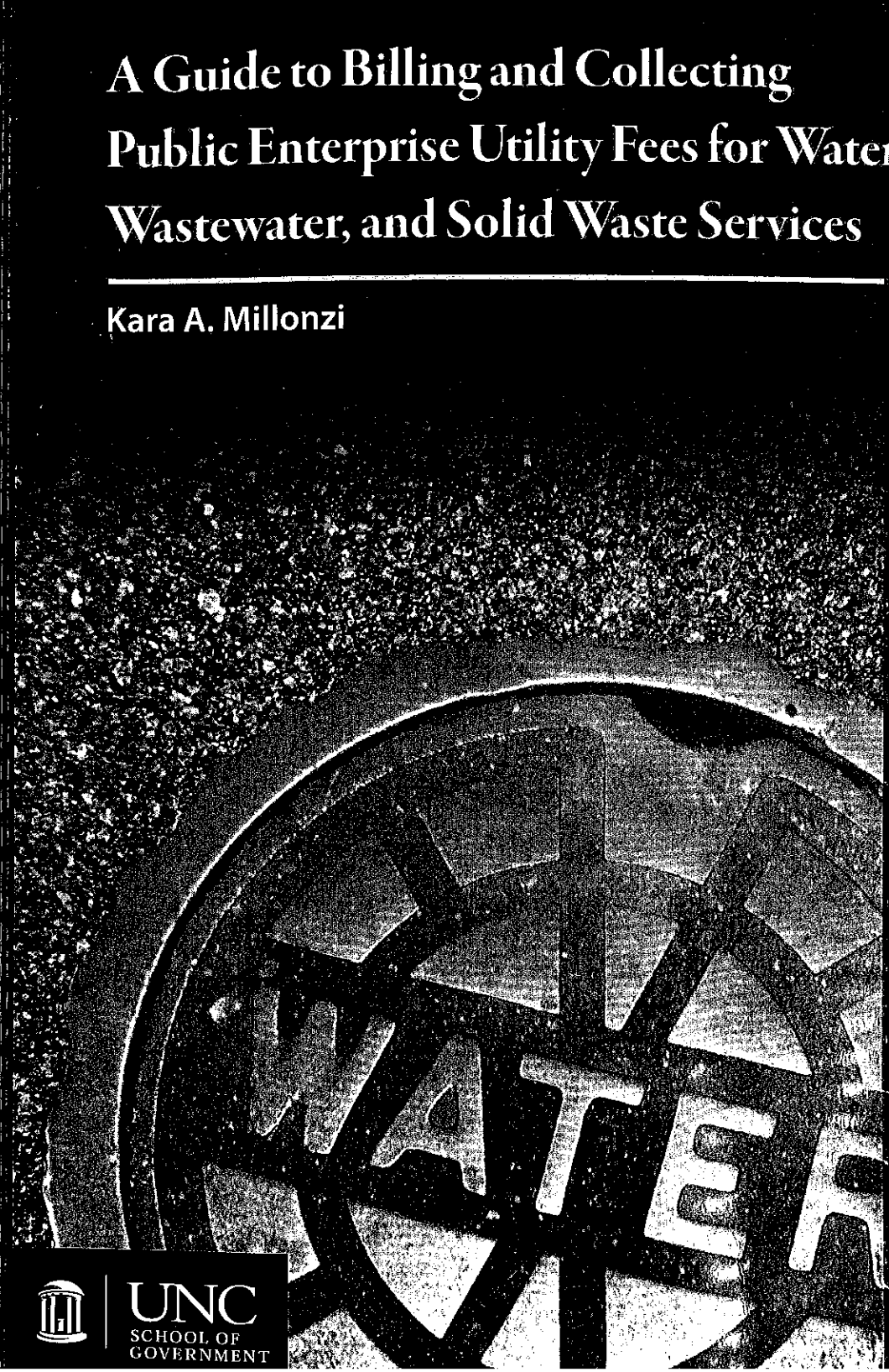
and discussing the laws that govern the cleanup of property contaminated by some form of pollution, this
yond statutes and appellate decisions to the actual administrative programs that put these laws in place.
for people who want to know how cleanup laws really work, including owners, buyers, sellers, neighbors,
involved with property that may be contaminated.

l of Government publications online: www.sog.unc.edu
Sales Office: sales@sog.unc.edu or 919.966.4119

Millonzi — A Guide to Billing and Collecting Public Enterprise Utility Fees for Water, Wastewater, and Solid Waste Services — School of Government

A Guide to Billing and Collecting Public Enterprise Utility Fees for Water, Wastewater, and Solid Waste Services

Kara A. Millonzi



UNC SCHOOL OF GOVERNMENT

may be waived by statute. It also is implicitly waived when a government entity enters into a valid contract. It is not waived, however, if there is no explicit contractual agreement.[18]

44. May a local government recover payment for public enterprise utility services provided to a government entity (that is, a state or federal entity) if it does not have a contract with the government entity to which it is providing services?

No. Although a local government likely may recover payment for the provision of public enterprise utility services without a contract from an individual or nongovernment entity, it may not recover from the state or a state agency, absent a contractual agreement. In *Whitfield, P.A. v. Gilchrist*,[19] the North Carolina Supreme Court held that sovereign immunity bars recovery in an action against the state on a theory of quasi contract or contract implied-in-law. According to the court, "[o]nly when the State has implicitly waived sovereign immunity by expressly entering into a valid contract through an agent of the

functions absent waiver of immunity.' These immunities do not apply uniformly. The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Id.* at 53, 602 S.E.2d at 670 (internal citations omitted); *see also* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 131, at 1051 (5th ed. 1984 & Supp. 1988) ("The traditional rule was that [local governments] held a governmental immunity in tort, but one different both in origin and scope from the 'sovereign' or governmental immunity of the state. Since [local governments] exhibited a corporate or proprietary face as well as a governmental face, the traditional immunity was narrower than the full range of [local government] activities, protecting only the governmental activities and not the proprietary ones."). The distinction between sovereign and governmental immunity has important implications for a local government acting in a proprietary capacity. For example, despite the language in *Data General*, a county or municipality likely could be held liable on a quasi-contract or contract implied-in-law theory if it received services from another entity absent an explicit contractual agreement in its capacity as owner or operator of a public enterprise utility. The distinction likely is not relevant in the situation presented by the question above, however, because when a local government receives public enterprise utility services, such as water, wastewater, or solid waste services, it is not acting in a proprietary capacity; it thus would be immune from suit under the governmental immunity doctrine.

18. *Data General*, 143 N.C. App. at 100, 545 S.E.2d at 246.

19. 348 N.C. 39, 497 S.E.2d 412 (1998).

State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach."[20]

Courts have allowed quasi-contractual claims against the federal government or a federal agency only where Congress has waived sovereign immunity by statute.[21]

45. May a local government collect the full amount from a customer if it discovers that it underbilled for the public enterprise utility services provided?

Yes. In *City of Wilson v. Carolina Builders of Wilson, Inc.*,[22] the North Carolina Court of Appeals held that even if a local government inadvertently or negligently fails to properly bill for the services, it may collect the full amount for the services it provided.[23] In that case, the city had adopted an ordinance authorizing it to collect any deficiencies in utility payments due to underbillings for a maximum period of twelve months. Subsequently, the city billed one of its electricity customers at one-half the appropriate rate. Upon discovering the error, the city forwarded a corrected bill to the customer that the customer refused to pay. The city sued the customer to recover the unpaid charges and the customer counterclaimed, alleging that the city should be prevented from collecting the fees owed because it negligently failed to properly bill for them. The district court granted summary judgment for the customer on its counterclaim, but the court of appeals reversed, holding that because government-owned utilities may not discriminate in the distribution of enterprise services or the setting of rates, they may not be prevented from collecting the correct amount for the services provided even if they inadvertently or negligently fail to properly bill for the services.

20. *Id.* at 43, 497 S.E.2d at 415. *See generally* City of Gainesville v. State of Florida Dep't of Transportation, 920 So. 2d 53 (Fla. Dist. Ct. App. 2005) (holding that waiver of sovereign immunity will not be implied; thus, in order to sue to collect a utility fee, the local government must have a written contract with the state agency).

21. *See* Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, N.A, 791 F.2d 242 (2d Cir. 1986).

22. 94 N.C. App. 117, 379 S.E.2d 712 (1989).

23. *Id.* at 121, 379 S.E.2d at 715 (noting that "a majority of jurisdictions which have considered the issue of underbilling by utilities have held that to disallow recovery for underbilling would amount to discriminatory charges").

In fact, a local government likely has an obligation, rooted in general utility law, to collect any moneys owed. Several courts have held that "the statutory policy against rate discrimination not only permits but requires a utility to collect undercharges."[24]

24. Hous. Auth. of the County of King v. Northeast Lake Washington Sewer & Water Dist., 784 P.2d 1284, 1287 (Wash. Ct. App. 1990) (holding that statutory provision requiring water and sewer district to impose uniform charges for the same class of customer or service embodied a policy against rate discriminations and preferences and "bars application of equitable defenses in a utility's claim for inadvertent or negligent undercharges"); Sigal v. City of Detroit, 362 N.W.2d 886 (Mich. Ct. App. 1985) (same); *see also* Roger D. Colton, Protecting Against the Harms of the Mistaken Utility Undercharge, 39 Wash. U. J. Urb. & Contemp. L. 99 (1991) (noting that public utilities assume a statutory and common law duty to provide service at rates that are not discriminatory, which prohibits a utility from providing service at a rate less than its published rates); *cf.* Holloway v. Alabama Power Co., 568 So. 2d 1245 (Ala. Civ. App. 1990) (holding that a customer of a public utility has no defense—either of estoppel or accord and satisfaction—to charges for services that were actually furnished but which had previously been negligently underbilled); Consol. Edison Co. of N.Y. Inc. v. Jet Asphalt Corp., 522 N.Y.S.2d 124 (N.Y. App. Div. 1987) (same); Corp. de Gestion Ste-Foy, Inc. v. Florida Power & Light Co., 385 So. 2d 124 (Fla. Dist. Ct. App. 1980) (same); Chesapeake and Potomac Tel. Co. of Va. v. Bles, 243 S.E.2d 473 (Va. 1978) ("[I]t is apparent that to permit an undercharge, whether intentionally or inadvertently made, is to grant a [prohibited] preferential rebate to a customer. . . ."); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957) (same). *But see* Brown v. Walton Elec. Membership Corp., 531 S.E.2d 712 (Ga. 2000) (rejecting rationale that it is a contravention of public policy to estop the utility from collecting the full amount due for utilities consumed where the customer has been negligently underbilled and holding that customer can assert accord and satisfaction, equitable estoppel, or statute of limitation defenses when a utility sues to recover the correct billing amount); West Penn Power Co. v. Piatt, 592 A.2d 1306 (Pa. Super. Ct. 1991) (holding that a utility customer can raise a defense of detrimental reliance when the customer is mistakenly undercharged by the utility). Although North Carolina courts have not addressed this issue directly, the court in *Carolina Builders* cited a North Carolina Supreme Court decision, *Atlantic Coast Line Railroad v. West Paving Co.*, 228 N.C. 94, 44 S.E.2d 523 (1947), in which the court stated

> [u]nder well settled principles of law and in accord with the statutes enacted to prevent . . . discrimination among shippers, and to provide equal and impartial service to all alike, it was the duty of the plaintiff as a common carrier of freight to collect the full amount at the correct rate for transportation, and where a lawful charge therefore was negligently omitted, or rate misquoted, charge therefore was negligently omitted, or rate misquoted, resulting in undercharge, the carrier was equally bound to exhaust all legal remedies to require payment in full of the proper charge.

Id. at 97, 44 S.E.2d at 525.

Courts in other jurisdictions have considered whether a consumer of a public utility's service may assert the defense of equitable estoppel to preclude the utility from collecting the full amount due when the consumer has been underbilled. (Under the doctrine of equitable estoppel, an individual or entity is held to a representation made or a position assumed where, otherwise, inequitable consequences would result to another who has, in good faith, relied on the representation or position.) The majority of courts have concluded that the public policy of maintaining equality among consumers does not permit the inequality of rates to arise indirectly through the application of estoppel. Thus, where a statute requires a public utility to charge similarly situated customers according to the same rate schedule, "it contravenes public policy to preclude a public utility from collecting the full amount due for its services, even where the public utility has negligently underbilled its customer."[25] Courts similarly have rejected defenses based on the legal doctrine of accord and satisfaction. A successful claim of accord and satisfaction requires that (1) there is a bona fide dispute between two or more parties, (2) there is an agreement to settle that dispute, and (3) there is performance of the agreement. When a utility inadvertently or negligently underbills a customer and later seeks to collect undercharges, there is no accord and satisfaction because there was no dispute at the time the bills were rendered and paid.[26]

A local government likely is subject to a three-year statute of limitations for collecting underpaid wastewater[27] and solid waste utility charges[28] that are billed along with other public enterprise service fees, and a four-year statutory

25. Cincinnati Gas & Elec. Co. v. Joseph Chevrolet Co., 791 N.E.2d 1016, 1022 (Ohio Ct. App. 2003); *see also* Boone County Sand & Gravel Co., Inc. v. Owen County Rural Elec. Coop. Corp., 779 S.W.2d 224 (Ky. Ct. App. 1989) (holding also that a customer cannot assert a counterclaim for damages resulting from negligent underbilling in an action by a utility to recover the amount underbilled). Some courts in other jurisdictions have distinguished between mistakes of fact and mistakes of law for purposes of applying the doctrine of equitable estoppel. For example, if there is a mistake in the rate charged, the customer is presumed to have knowledge of the rate. Thus a utility can collect the full amount owed even if it underbilled the customer. On the other hand, if the billing error involved a misread meter or defective meter, which was uniquely within the province of the utility to reasonably discover or prevent, a court might allow a claim of equitable estoppel. *See* Illinois Power Co. v. Champaign Asphalt Co., 310 N.E.2d 463 (Ill. Ct. App. 1974).

26. *See, e.g.*, Consolidated Edison Co. of N.Y. Inc. v. Jet Asphalt Corp., 522 N.Y.S.2d 124 (N.Y. App. Div. 1987).

27. See Question 69.

28. See Question 70.

period for collecting underpaid water utility fees,[29] although it may set shorter limitations periods by ordinance.[30] The statute of limitations period begins to run at the time of the breach of contract; and the breach likely occurs at the end of each billing cycle in which the customer was underbilled.[31] If solid waste utility fees are billed along with property taxes, the unit may recover for an underbilling as an immaterial irregularity under G.S. 105-394 if it resulted from a clerical or administrative error.[32] The statute of limitations likely is ten years from the date the fees became due.[33]

29. See Question 68.

30. In *Wilson v. Carolina Builders of Wilson, Inc.*, 94 N.C. App. 117, 379 S.E.2d 712 (1989), the North Carolina Court of Appeals held that an ordinance allowing the City of Wilson to collect any deficiencies in utility payments due to underbillings for a maximum period of twelve months was valid on its face.

31. A few courts in other jurisdictions have held that the breach occurs and the statutory period begins at the time the utility presents an adjusted bill to reflect the true costs of service and actual amount owed and the customer refuses to pay. Their rationale is that the statutory period does not begin to run when the underbilling occurred because billing errors by a utility are foreseeable and adjusted billing is a foreseeable method of correcting the errors. *See* City of Akron v. Rogers Industrial Products, Inc., 1997 WL 665719, at *3 (Ohio Ct. App. Oct. 8, 1997); *cf.* Holloway v. Alabama Power Co., 568 So. 2d 1245 (Ala. Civ. App. 1990) (holding that three-year statute of limitations on open accounts serves as a bar to bringing the action, not as a limitation on the amount of recovery once the action has been properly filed). Other courts have rejected this rationale, stating that "[u]nder such a rule, there would be no limit to how long parties could extend the limitations period for an unbilled debt." City of Snohomish v. Seattle-Snohomish Mill Co., Inc., 2003 WL 22073066 (Wash. Ct. App. Sept. 8, 2003); *see, e.g.*, City of Colorado Springs v. Timberlane Assocs., 807 P.2d 1177 (Colo. Ct. App. 1991), *aff'd*, 824 P.2d 776 (Colo. 1992) (holding that general statute of limitations applicable to "actions of debt founded upon any contract or liability in action" ran against city as provider of gas service and prohibited city from collecting unpaid utility charges arising from continuing error in billing procedure dating farther back than six years from when suit filed). Instead, a utility's cause of action for undercharges accrues when it has a right to collect the undercharges. Because North Carolina courts have not addressed this issue, the safest assumption for a North Carolina local government is that the right to collect the undercharges arises at the end of each billing cycle in which the customer was underbilled.

32. *See In re* Morgan, ___ N.C. App. ___, 652 S.E. 2d 655 (2007); Catawba County Tax Collector Against Nuzum-Cross Chevrolet, Inc., 59 N.C. App. 332, 296 S.E.2d 499 (1982). G.S. 105-394 states that "[i]mmaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax . . . shall not invalidate the tax . . . or any process of . . . collection . . . ."

33. See Question 70.

46. May a local government recover payment for public enterprise utility services provided to a customer if the unit failed to send a timely bill for the fees owed?

Likely yes. In *City of Wilson v. Carolina Builders of Wilson, Inc.*,[34] the North Carolina Court of Appeals held that a municipal electric supplier could collect the correct amount for the services it provided even if it inadvertently or negligently failed to bill for the services. Although the court in that case was addressing a slightly different issue—namely, what happens when the bill for public enterprise utility services does not reflect the full amount owed for the services actually provided—the case may be read to stand for the broader principal that a local government may collect all amounts owed, even if it fails to send a bill.[35] To ensure this result, a local government may wish to include language in its initial contract for service stating that the customer is responsible for payment regardless of whether the customer receives a bill.

A local government likely is subject to a three-year statute of limitations for collecting wastewater[36] and solid waste[37] utility charges that are billed along with other public enterprise service fees and a four-year statutory period for collecting water utility fees,[38] although it may set shorter limitations periods by ordinance.[39] The statute of limitations period begins to run at the time of the breach of contract; and the breach likely occurs at the end of each billing cycle in which the customer was provided service.[40] If solid waste utility fees

34. 94 N.C. App. 117, 379 S.E.2d 712 (1989).

35. See Question 45.

36. See Question 69.

37. See Question 70.

38. See Question 68.

39. In *Wilson v. Carolina Builders of Wilson, Inc.*, 94 N.C. App. 117, 379 S.E.2d 712 (1989), the North Carolina Court of Appeals held that an ordinance allowing the City of Wilson to collect any deficiencies in utility payments due to underbillings for a maximum period of twelve months was valid on its face.

40. A few courts in other jurisdictions have held that the breach occurs and the statutory period begins at the time the utility presents an adjusted bill to reflect the true costs of service and the actual amount owed and the customer refuses to pay. Their rationale is that the statutory period does not begin to run when the underbilling occurred because billing errors by a utility are foreseeable and adjusted billing is a foreseeable method of correcting the errors. *See* City of Akron v. Rogers Industrial Products, Inc., 1997 WL 665719, at *3 (Ohio Ct. App. Oct. 8, 1997); *cf.* Holloway v. Alabama Power Co., 568 So. 2d 1245 (Ala. Civ. App. 1990) (holding that three-year statute of limitations

are billed along with property taxes, the unit may recover any unbilled charges under the immaterial irregularity provisions in G.S. 105-394 if the failure to bill for the fees resulted from a clerical or administrative error.[41] The statute of limitations likely is ten years from the date the fees became due.[42]

Note: Although a local government probably may recover fees for public enterprise services provided if it fails to send a bill, it may not be able to collect any late fee penalties for nonpayment. If the ordinance establishing the late fee penalties or the contract establishing service states that the late fee penalty applies to all amounts billed that are not timely paid, a local government likely may not assess the penalty if it fails to send a bill. On the other hand, if the ordinance or contract states that the late fee penalty applies to all amounts owed during the normal billing period, even if not billed, then the penalty likely may be assessed.[43]

on open accounts serves as a bar to bringing the action, not as a limitation on the amount of recovery once the action has been properly filed). Other courts have rejected this rationale, stating that "[u]nder such a rule, there would be no limit to how long parties could extend the limitations period for an unbilled debt." City of Snohomish v. Seattle-Snohomish Mill Co., Inc., 2003 WL 22073066 (Wash. Ct. App. Sept. 8, 2003); *see, e.g.*, City of Colorado Springs v. Timberlane Assocs., 807 P.2d 1177 (Colo. Ct. App. 1991), *aff'd*, 824 P.2d 776 (Colo. 1992) (holding that general statute of limitations applicable to "actions of debt founded upon any contract or liability in action" ran against city, as provider of gas service, and prohibited city from collecting unpaid utility charges arising from continuing error in billing procedure dating farther back than six years from when suit filed). Instead, a utility's cause of action for undercharges accrues when it has a right to collect the undercharges. Because North Carolina courts have not addressed this issue, the safest assumption for a North Carolina local government is that the right to collect the undercharges arises at the end of each billing cycle in which the customer was underbilled.

41. *See In re* Morgan, ___ N.C. App. ___, 652 S.E.2d 655 (2007); Catawba County Tax Collector Against Nuzum-Cross Chevrolet, Inc., 59 N.C. App. 332, 296 S.E.2d 499 (1982). G.S. 105-394 states that "[i]mmaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax . . . shall not invalidate the tax . . . or any process of . . . collection . . . ."

42. See Question 70.

43. *See* Capital Props. Co. v. Pub. Serv. Comm'n, 457 N.Y.S.2d 635, 91 A.D.2d 726 (Supr. Ct. Appellate Div. 3d Dep't 1982).

47. Does a customer have a remedy against a local government if the unit overbills for public enterprise utility services?

Yes. In providing public enterprise utility services, a local government is acting in a proprietary capacity and is not insulated from suit under governmental or sovereign immunity.[44] A customer may bring an action for breach of contract and may have other remedies under tort law.[45]

The statute of limitations for recovering against a local government for overbilling for water or wastewater utility services is two years.[46] G.S. 1-53(1). The same statute of limitations applies to any suit against the local government arising from the contractual relationship with the public enterprise utility services customer. The statute of limitations for recovering against a local government for overbilling for solid waste services billed along with other public enterprise services fees also is two years. If the fees for solid waste services are included on the property tax bill, however, the statute of limitations for recovering against a local government likely is five years after the fees are due or six months after payment of the fees, whichever is later. G.S. 105-381.

44. *See, e.g.*, Town of Spring Hope v. Bissette, 305 N.C. 248, 287 S.E.2d 851 (1982).

45. There is, however, no fundamental right to accurate utility bills entitling a customer to substantive due process protections. *See* Chun v. New York City Dep't of Envtl. Protection, 989 F. Supp. 494 (S.D.N.Y. 1998).

46. *See* Jones v. Town of Angier, ___ N.C. App. ___, 638 S.E.2d 607 (2007).