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HENDERSON, KENTUCKY 42420

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NOV 01 2013

PUBLIC SERVICE  
COMMISSION

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October 31, 2013

VIA FEDEX

Mr. Jeff Derouen  
Executive Director  
Public Service Commission of Kentucky  
211 Sower Boulevard  
Frankfort, Kentucky 40601

Re: Application of Kenergy Corp. for  
a Certificate of Convenience and  
Necessity to Apply for a Franchise  
From the City of Owensboro

Dear Mr. Derouen:

We enclose for filing the original and 10 copies of application  
pertaining to the above.

Thank you for your assistance in this matter.

Very truly yours,

DORSEY, GRAY, NORMENT & HOPGOOD

By



J. Christopher Hopgood  
Attorney for Kenergy Corp.

JCH/cds

Encls.

COPY/w/encls.: Mr. Gregory Starheim

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NOV 01 2013

BEFORE THE  
KENTUCKY PUBLIC SERVICE COMMISSION

PUBLIC SERVICE  
COMMISSION

APPLICATION OF KENERGY CORP. )  
FOR A CERTIFICATE OF CONVENIENCE )  
AND NECESSITY TO APPLY FOR A ) CASE NO. \_\_\_\_\_  
FRANCHISE FROM THE CITY OF )  
OWENSBORO )

The petition of KENERGY CORP. ("Kenergy") respectfully shows:

(a) Applicant Kenergy Corp. is a nonprofit electric cooperative organized under KRS Chapter 279 and is engaged in the business of distributing retail electric power to member consumers in the Kentucky counties of Daviess, Hancock, Henderson, Hopkins, McLean, Muhlenberg, Ohio, Webster, Breckinridge, Union, Crittenden, Caldwell, Lyon, and Livingston.

(b) The post office address of Kenergy is Post Office Box 18, Henderson, Kentucky 42419-018.

(c) Kenergy's Articles of Consolidation are on file with the Commission in Case No. 99-136.

(d) Applicant is and for many years has been the owner of a franchise granted by the City of Owensboro to erect along, over, under or across the public ways and grounds thereof electric utility facilities used and owned by applicant in its distribution of retail electric service in and to said city and the inhabitants thereof, which current franchise expired December 4, 2012, and since that time the parties have been operating under the terms of the franchise on a month-to-month basis.

(e) Applicant owns sources of supply of electric power and energy now being furnished to customers in said city and has distribution facilities in said city, now used for the furnishing of retail electric service in said city.

(f) There is and will continue to be a demand and need for retail electric service in and to said city and the inhabitants thereof and applicant desires to apply for and obtain from said city a new franchise to replace applicant's existing franchise from said city when it expires.

(g) That if applicant is successful in acquiring such franchise a copy of same will be filed with the Commission.

(h) The attached ordinance is set for first reading on Tuesday, November 5, 2013.

**WHEREFORE**, applicant asks that the Public Service Commission of the Commonwealth of Kentucky make its order granting to applicant a certificate of convenience and necessity to bid for and acquire the aforementioned franchise from the City of Owensboro and applicant further requests all proper relief.

Dated at Henderson, Kentucky, this 31<sup>st</sup> day of October, 2013.

**DORSEY, GRAY, NORMENT & HOPGOOD**  
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Henderson, Kentucky 42420  
Telephone 270 - 826-3965  
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counsel for Kenergy Corp.

By J. Christopher Hopgood  
J. Christopher Hopgood  
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ORDINANCE \_\_-2013

AN ORDINANCE OF THE CITY OF OWENSBORO, KENTUCKY, PROVIDING FOR THE CREATION AND SALE OF A FRANCHISE FOR THE PRIVILEGE OF DISTRIBUTING AND SELLING ELECTRICITY ON, ABOVE, ALONG AND BELOW PUBLIC RIGHT-OF-WAY WITHIN THE CITY OF OWENSBORO, KENTUCKY, FOR A TERM OF TEN (10) YEARS, IN CONSIDERATION FOR WHICH THE SUCCESSFUL FRANCHISEE SHALL PAY TO THE CITY AN ANNUAL SUM EQUAL TO A MINIMUM OF TWO PERCENT (2%) OF THE GROSS REVENUES DERIVED FROM THE FRANCHISE AWARDED HEREIN; AND FURTHER ESTABLISHING A PROCESS BY WHICH THE SUCCESSFUL FRANCHISEE SHALL BE PERMITTED TO EXCAVATE, DISTURB AND RESTORE PUBLIC RIGHT-OF-WAY WITHIN THE CITY IN ORDER TO CONSTRUCT, INSTALL, MAINTAIN AND/OR REPAIR ITS ELECTRICAL DISTRIBUTION SYSTEM, FIXTURES AND OTHER INFRASTRUCTURE ON TERMS AND CONDITIONS SET FORTH HEREIN; AND FURTHER ESTABLISHING A BID PROCEDURE FOR THE AWARD OF SAID FRANCHISE TO THE SUCCESSFUL BIDDER.

WHEREAS, federal law, the Constitution of the Commonwealth of Kentucky, Sections 163 and 164, and Chapter 96 of the Kentucky Revised Statutes, authorize municipal corporations to require public utilities, including providers of electric power and energy, within their boundaries, to operate under franchise agreements and to grant utilities the right to use public right-of-way on such terms and conditions as are deemed reasonable and necessary; and furthermore, KRS 82.082 authorizes the City to exercise any and all powers within its boundaries that are not in conflict with the Kentucky Constitution or state statutes; and

WHEREAS, electric utility services to industrial, commercial and residential customers within the City of Owensboro are currently provided by the Utility Commission for the City of Owensboro (Owensboro Municipal Utilities), a municipally owned and operated utility established under KRS 96.520, et seq., and Kenegy Corp., a member-owned electric

cooperative, within their respective territories as agreed upon and certified by the Kentucky Public Service Commission; and

WHEREAS, the existing electric utility franchise between the City of Owensboro, Kentucky, and Kenergy Corp. expired December 31, 2012

WHEREAS, the Board of Commissioners of the City of Owensboro, Kentucky has found and determined that the construction, operation, maintenance and utilization of a franchise over, across and under public right-of-way in the City of Owensboro, is a valuable property right and benefits said utility to the extent it would be required to invest capital and incur right-of-way acquisition costs without the use thereof; and the Board has further found and determined that the construction, installation, operation, removal, maintenance and/or repair of utility owned facilities and other infrastructure necessarily and unavoidably results in the damage and degradation of the City's streets and sidewalks, for which the City is entitled to reasonable compensation in order to offset and recover the cost of reconstructing, removing, repairing or resurfacing damaged public right-of-way; and

WHEREAS, in order to protect the health, safety and welfare of the citizens of Owensboro, Kentucky, to protect and preserve the City's public right-of-way and infrastructure and to provide for the orderly administration of the franchise contemplated herein, it is necessary and appropriate to require the successful franchisee to conduct its business and operations in a lawful manner in compliance with the terms and conditions set forth herein below.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY OF OWENSBORO, KENTUCKY, AS FOLLOWS:

**Section 1. DEFINITIONS:**

As used in this Ordinance, the following words and phrases shall have the following meanings:

(A) “Electrical Distribution System” shall mean the system of poles, pipes, wires, conduits, facilities, fixtures, lines, machinery, equipment, appliances, structures, transformers, junction boxes, switch boxes, traffic signal controls, telecommunications facilities and related appurtenances and other infrastructure reasonably necessary for the distribution, storage and sale of electrical energy to industrial, commercial and residential customers and the public generally, located within public right-of-way within the corporate boundaries of Owensboro, Kentucky.

(B) “Force Majeure” shall mean any and all causes beyond the control and without the fault or negligence of franchisee. Such causes shall include but are not limited to, acts of God, acts of the public enemy, insurrections, riots, labor disputes, boycotts, labor and material shortages, fires, explosions, flood, breakdowns of or damage to equipment or facilities, interruptions to transportation, embargoes, acts of military authorities, or other causes of a similar nature whether or not foreseen or foreseeable, which wholly or partly prevent franchisee from performing one or more of its obligations hereunder.

(C) “Franchise” shall mean the rights and privileges granted by the City of Owensboro to the successful bidder under the terms and provisions of this Ordinance.

(D) “Franchisee” shall mean the person, proprietorship, partnership, cooperative, company, corporation or other entity to which the franchise created herein, is awarded by separate ordinance.

(E) “Gross Revenues” shall mean all gross cash receipts from the sale of electrical energy for industrial, commercial or residential consumption (for light, heat, power and other purposes) within the corporate limits of the City of Owensboro, Kentucky.

(F) “New Construction” shall mean installation of poles, wires, conduits, lines, transformers, junction boxes, switch boxes, facilities or other equipment, apparatus or related infrastructure by franchisee in a new location as opposed to maintenance or repair or work on existing facilities and appurtenances.

(G) “Public Right-of-Way” shall mean the surface, the airspace above the surface and area below the surface of any street, highway, alley, avenue, boulevard, sidewalk, pedestrian/bicycle lane or trail, driveway, bridge, public utility easement or any other public ways owned, dedicated by plat, occupied or used by the public for vehicular or pedestrian transportation or access. Public right-of-way does not include dedicated (platted) utility or privately acquired easements located outside public right-of-way.

**Section 2. CREATION OF FRANCHISE:**

(A) There is hereby created and established an exclusive franchise in franchisee’s certified territory to enter upon, acquire, construct, install, operate, maintain, repair and replace in the public right-of-way of the City of Owensboro, Kentucky, an electrical distribution system within the corporate boundaries of Owensboro, Kentucky, subject to the provisions of this ordinance. However, the franchise granted hereunder shall be limited to the boundaries of the franchisee’s territorial service area as certified by the Public Service Commission under KRS

278.017 et seq., as presently certified and as it may be amended in the future, but within such boundaries, shall be extended to territories that are subsequently annexed within the City of Owensboro subject to KRS 96.538 and, subject to the approval of state regulatory authorities, if any such approval is required.(B) The franchise granted herein by the City of Owensboro, Kentucky, shall only be exclusive in franchisee's certified territory and the City reserves the right to grant a similar franchise to any other person or entity outside franchisee's exclusive territory at any time, as permitted by law. Additionally, any such new/additional franchisee shall have no right to use any portion of the electrical distribution system of any franchisee that is awarded by this Ordinance, without said franchisee's written consent.

**Section 3. TERM OF FRANCHISE:**

The franchise created herein shall be for a term of ten (10) years, which franchise shall commence on the date set forth in Section 14 of this Ordinance. No terms of any franchise created by this Ordinance shall survive beyond the termination date of any franchise created by this Ordinance, with the exception of the indemnification provisions contained in Section 8, which shall survive beyond the term of any franchise created by this Ordinance .

**Section 4. FRANCHISEE'S RIGHTS IN AND TO PUBLIC RIGHT-OF-WAY:**

The franchisee shall have the right and privilege of constructing, installing, erecting, laying, operating, maintaining, replacing, removing and/or repairing its electrical distribution system above, through, along, across and under the public right-of-way within the corporate boundaries of the City of Owensboro as it now exists or may hereafter be extended, subject to the

boundaries of the franchisee's territorial service area as certified by the Public Service Commission under KRS 278.017 et seq., the inherent police powers conferred upon or reserved unto the City of Owensboro and the provisions of this ordinance. The franchisee shall not construct, install, erect, lay, operate, maintain, remove, replace or repair any part or all of its electrical distribution system above or below ground level on any public right-of-way or other public property within the corporate boundaries of the City of Owensboro without the expressed authorization of the City Engineer as provided hereinbelow and any other authorization required under federal or state regulatory authority.

**Section 5. USE AND EXCAVATION OF PUBLIC RIGHT-OF-WAY:**

(A) The electrical distribution system shall be designed, installed, constructed and replaced in locations and at depths (if below ground) which comply with all applicable federal and state laws and regulations regarding minimum safety standards for design, construction, maintenance and operation of electrical distribution systems.

The franchisee of the franchise created hereunder shall provide customer service in accordance with accepted standards in the industry and as authorized and directed by the Public Service Commission of the Commonwealth of Kentucky. At all times and under all circumstances the franchisee shall be obligated to do everything reasonably within its power to ensure that its customers in the City of Owensboro receive uninterrupted service, unless such customer has elected interruptible service or is disconnected in accordance with the franchisee's terms of service. The franchisee agrees to have facilities available in Daviess County to accept

payments from customers and have sufficient Daviess County based personnel to reasonably provide customer services and emergency response to Owensboro customers.

(B) The franchisee shall have the right to disturb, break and excavate in the public right-of-way of the City of Owensboro as may be reasonable and necessary to provide the service authorized by this Ordinance , provided, however, that no new construction within public right-of-way (including pavement, green space, sidewalks, curbs, gutters, drainage facilities or other street installations) shall be commenced and no excavation in any public right-of-way shall be made for such new construction, except with the prior approval of the City Engineer as defined under current City ordinances and regulations and procedures approved by the City and franchisee. All new construction within public right-of-way shall comply with the undergrounding requirements set forth in Ordinance 67-2000, as may be amended from time to time. Franchisee shall give the City Engineer prior notification on all other excavations in public right-of-way for maintenance and repair work on existing electrical distribution system facilities. Components of the electrical distribution system shall be located in such portion of said public right-of-way as is specifically designated and approved in advance by the City Engineer.

(C) Franchisee shall submit plans for review by the City Engineer prior to the commencement of new construction, or the relocation of existing sections of the electrical distribution system located in public right-of-way (including streets, sidewalks, curbs, gutters, drainage facilities or other street installations) that will necessarily involve the cutting of any blacktop or concrete on a public right-of-way, or any other excavation in a public right-of-way that is reasonably expected to interrupt the flow of traffic on the public right-of-way. In the event a street, sidewalk, curb or gutter is to be cut, the franchisee agrees to obtain a “cut permit”

from the City.

The City assumes no responsibility, liability or risk of loss associated with the electrical distribution system existing or hereafter placed by the franchisee in public right-of-way within the City of Owensboro.

(D) **Schedule of Installation/Repairs:** Franchisee shall schedule and coordinate construction, installation, maintenance, replacement or repairs of its electrical distribution system known to be necessary, and which involves the excavation or disturbance of streets, in advance, with proposed improvements to City public right-of-way that has been designated (and which franchisee has been advised of) for improvements, resurfacing or repairs prior to the commencement thereof. In the event franchisee has implemented, or in the future may implement a written program for the systematic replacement of its electrical distribution system, or any part thereof, located in the public right-of-way that have exhausted their useful life, franchisee shall make a copy of same available to the City Engineer for inspection and shall to the extent practical, follow same. Any replacement program shall, to the extent feasible, be scheduled to coincide with the City's annual right-of-way pavement program.

(E) **Emergency Exception:** When an emergency arises which requires immediate attention, franchisee is authorized to disturb, break or excavate public right-of-way without first obtaining written permission from the City Engineer, provided the City Engineer is notified of the work performed by the end of the next regularly scheduled work day. This notification shall include, but is not limited to, the date, location, time and description of the excavation or any other significant information which describes the remedial work performed by

franchisee. Any restoration of disturbed or excavated public right-of-way shall be completed in accordance with Section 6 below.

**Section 6. DEGRADATION/RESTORATION OF PUBLIC RIGHT-OF- WAY:**

(A) When the franchisee shall enter upon any public right-of-way for the purpose of constructing, installing, erecting, operating, maintaining, repairing and/or removing any part of its electrical distribution system, it shall promptly and diligently prosecute the work to completion at no cost to the City and shall repave, cover and restore all trenches and exposed areas as quickly as circumstances permit; and shall leave all public right-of-way in as good a condition as existed when franchisee entered upon same for the purpose of commencing the work. All restoration or repairs of public right-of-way shall be maintained by the franchisee for a minimum period of one year, in as good a condition as exists with regard to the remainder of the affected public right-of-way. However, notwithstanding the foregoing restoration requirements, franchisee shall upon request by the City Engineer and at its sole expense, repave all street pavement located within an entire street-block if franchisee, its employees, contractors or agents, have undertaken an authorized excavation of street right-of-way that has been repaved within six (6) months of the excavation. Provided, however, the provisions of the foregoing sentence shall not apply to the extent the excavation was necessitated by an act of the City or a third party with whom franchisee is not in privity of contract or over whom franchisee has no control. In the event franchisee is required to repave an entire street-block of pavement right-of-way, the City shall, once the City Engineer has inspected and approved the completed project, assume responsibility for the maintenance of the improved right-of-way. All restorations or

repairs of public right-of-way shall be performed in accordance with the City's Public Improvement Specifications and approved by the City Engineer. All restoration or repairs performed by the franchisee may be subject to inspection at any time by the City Engineer or his designee. In the event franchisee fails, refuses or neglects to comply with this provision, the City shall have the right, after franchisee is first given notice and an opportunity to comply with the foregoing provisions, to repair or restore the affected public right-of-way, and the costs and expenses incurred by the City as a result thereof, shall be paid to the City by franchisee within ten (10) days from the date on which an itemized bill is submitted to the franchisee.

(B) **Due Regard for Public Safety:** In the construction, installation, maintenance, repair or removal of any of its electrical distribution system, or any part thereof, franchisee shall exercise due regard for the rights of the City of Owensboro, pedestrians and motorists, and shall not interfere with, or in any way injure, City property, or the private property of others, below, on, above, or across the ground. Franchisee shall comply with all laws of the Commonwealth of Kentucky and ordinances of the City of Owensboro with respect to signalization, placement of lights, danger signals or warning signs. All work performed by franchisee hereunder shall be done in a workmanlike manner and shall not unnecessarily interfere with public use of the City's right-of-way or property.

(C) **Public Improvement Projects:** Franchisee shall, upon request by the City, remove, move, modify, relocate, reconstruct, improve or adjust any of its electrical distribution system located within public right-of-way, at its own expense, if the City of Owensboro, in its sole discretion, constructs, reconstructs, widens, alters, excavates, paves, repaves, repairs, changes or improves any public right-of-way as part of any public improvement project, and

such work requested by the City shall be accomplished by franchisee within thirty (30) days after notice thereof by the City; provided, however, that the City Engineer is authorized to extend the thirty (30) day completion deadline if the work requested of franchisee cannot reasonably be completed within the prescribed time period due to exigent circumstances or an emergency for which franchisee is not responsible and over which it had no control. In this event, franchisee shall complete its work within the time frame and in the manner mutually agreed upon between franchisee and the City Engineer, in writing.

(D) If the City requires the franchisee to adapt or conform its electrical distribution system, or to in any way construct, reconstruct, remove, alter, relocate, adjust or change its system to enable any other person, firm, corporation or entity, whether public or private, other than the City, to utilize public right-of-way, franchisee shall be reimbursed for all costs incurred by the person, firm, franchisee, corporation or entity requesting or required by the City to perform such change, construction, removal, repair, maintenance, alteration or relocation.

**Section 7. COMPENSATION FOR USE OF PUBLIC RIGHT-OF-WAY AND CONSIDERATION FOR FRANCHISE:**

(A) In consideration for the granting and exercise of the rights and privileges created under this Ordinance, and in further consideration of the grant to the franchisee of the right to make use of public right-of-way within the City, since such right-of-way is valuable property acquired and maintained at great expense to the taxpayers of the City of Owensboro and the grant to franchisee of the right to use same is a valuable property right without which franchisee would be required to invest substantial capital in right-of-way costs and acquisitions, the

franchisee shall pay to the City, during the term of the franchise, a sum equal to a minimum of two percent (2%) of its gross revenues as defined in Section 1(E), derived from the sale of its electrical energy through its electrical distribution system above, on, below and across public right-of-way within the corporate limits of the City of Owensboro. The franchisee fee prescribed herein shall be paid to the City quarterly, on or before the 15<sup>th</sup> day after the end of each quarter, and the franchisee shall furnish to the City quarterly, a certified copy of franchisee's gross revenues received. Said form may only be changed upon agreement of both parties. Franchisee may account for, and reflect the franchise fee on the customer's bill in the manner authorized by franchisee's tariffs on file with the Kentucky Public Service Commission. Any franchise payments to the City by the franchisee shall not be in lieu of any occupational, income, license or property tax, or similar levy, assessment, fee, or charge which would otherwise apply to and be payable by, franchisee

(B) If during the term of any franchise created by this Ordinance the boundaries of the City are expanded, the City will promptly notify franchisee in writing of any geographic areas annexed by the City during the term hereof ("Annexation Notice"). Any such Annexation Notice shall be sent to franchisee by certified mail, return receipt requested, and shall contain the effective date of the annexation, maps showing the annexed area and such other information as franchisee may reasonably require in ascertaining whether there exist any customers of franchisee receiving electric service in said annexed area. To the extent there are such customers therein, then the revenue of franchisee derived from the sale of electricity to such customers shall become subject to the franchise fee provisions hereof effective within 90 days of notice received by the City. The failure by the City to advise franchisee in writing through proper Annexation

Notice of any geographic areas which are annexed by the City shall relieve franchisee from any obligation to remit any franchise fees to City based upon revenues derived by franchisee from the sale of electricity to customers within the annexed area prior to City delivering an Annexation Notice to franchisee in accordance with the terms hereof.

(C) No acceptance of any franchise fee payment by the City shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount nor shall acceptance be deemed a release to any claim the City may have for future or additional sums pursuant to any franchise created by this Ordinance.

(D) The City shall have the right to inspect the franchisee's income, financial, and records relating to gross revenues in order to audit, and to re-compute any amounts determined to be payable under any franchise created by this Ordinance. Any additional amount due to the City as a result of the audit shall be paid within ten (10) days following written notice to the franchisee by the City which notice shall include a copy of the audit report. If as a result of such audit or review the City determines that the franchisee has underpaid its franchise fee by five percent (5%) or more for any six (6) month period then in addition to making full payment of the relevant obligation it shall reimburse the City for all of the reasonable costs associated with the audit or review as per local area standards. If such audit or review is performed in connection with the granting of a new franchise, and extension of the terms of any franchise created by this Ordinance , a sale or transfer of control of the franchisee, or a substantive modification of the terms to, or an assignment of any franchise created by this Ordinance, the franchisee shall reimburse the City for all of the reasonable costs associated with the audit or review including all out-of-pocket costs for attorneys, accountants and other consultants.

(E) In the event that any franchise payment or recomputed amount is not made on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of the prime rate plus two percent (2%). Overpayments discovered by the City or the franchisee shall be an adjustment on the next monthly payment without interest.

(F) The franchisee shall have the right to respond to the audit report and refute any additional amount due to the City as a result of the audit, subject to the dispute resolution provisions contained in Section 15(G).

**Section 8. INSURANCE, PERFORMANCE BOND AND INDEMNIFICATION REQUIREMENTS:**

(A) **Insurance:** The franchisee shall file with the City of Owensboro, Kentucky, and shall thereafter during the entire term of any franchise created by this Ordinance, maintain in full force and effect a single-limit, comprehensive liability policy of insurance with limits of not less than \$1,000,000.00 per occurrence and \$3,000,000.00 aggregate and an excess liability policy with a limit of not less than \$5,000,000.00; both of which shall insure franchisee, name the City as an additional insured and provide primary coverage for the City, its officials, officers, employees and agents against liability for loss or damage for personal injury, death, or property damage occasioned by any activity or operation of franchisee under such franchise.

(B) **Performance Bond:** The franchisee shall abide by all performance bond requirements of the City as governed by the City's ordinances, regulations and permitting processes. Notwithstanding the above-mentioned bonding requirements, the franchisee shall be

required to provide a performance guarantee for significant projects with construction costs of two hundred thousand dollars (\$200,000) or more involving the public right-of-way. This performance guarantee shall be set in an amount and duration as reasonably determined by the City upon discussing and viewing the scope of such a project with the franchisee, and shall be in favor of the City to be issued by an entity subject to jurisdiction and venue in Davies County, Kentucky.

(C) **Indemnification:**

(1) Franchisee shall indemnify and hold harmless the City of Owensboro, Kentucky, its officials, officers, employees, contractors, and agents from and against any and all claims, demands, causes of action, actions, suits, proceedings, damages, costs or liabilities (including costs or liabilities of the City with respect to its employees) of every kind and nature whatsoever, including, but not limited to, damages for injury or death or damage to persons or property, regardless of the merit of same, against all liability to others and against any loss, costs and expenses resulting or arising out of same, including attorney fees, accountant fees, expert witness or consultant fees, court costs, expenses or other costs which the City, its officials, officers, employees, contractors or other costs which the City, its officials, officers, employees, contractors or agents may suffer or incur or which may be legally obtained against the City, for or by reason of the negligent use, excavation, degradation, alteration, repair, or occupation of any public right-of-way within the corporate limits of the City of Owensboro by the franchisee pursuant to and under the terms of this ordinance or resulting from negligent acts or omissions of the franchisee in the exercise of any of the rights and privileges granted by any franchise created by this Ordinance or by reason of franchisee's business within the City. Franchisee shall, at its

sole risk and expense, upon demand of the City of Owensboro, by and through its City Attorney, appear in and defend any and all suits, actions, or other legal proceedings, whether judicial, quasi-judicial, administrative, legislative or otherwise, brought or instituted or initiated by third persons or duly-constituted authorities against or affecting the City, its officials, officers, employees, contractors or agents, and arising out of or pertaining to the negligent acts or omissions of franchisee in the exercise of the enjoyment of the franchise created and granted by the City under this ordinance. Franchisee shall be liable for and shall pay or satisfy, or shall cause to be paid or satisfied, any judgment, decree, order, directive or demand rendered, made or issued against franchisee, the City, its officials, officers, employees, contractors or agents in any of these premises and such indemnity shall exist and continue without reference to or limitation by, the amount of any bond, policy of insurance, deposit, undertaking or other assurance required hereunder or otherwise; provided, however, that neither franchisee or the City shall make or enter into any compromise settlement of any claim, demand, cause of action, action, suit or other proceeding without first obtaining the written consent of the other. Provided further, none of the provisions of this Section 8 shall be applicable to the extent the acts of omissions of the City, its officials, officers, employees, contractors, or agents, were the sole or contributing factor in bringing about the damages sued upon. Accordingly, any judgment and all of the costs of defense, including attorney fees, provided for above shall be apportioned between the City and the franchisee based upon the percentage of fault assigned to each by a court of competent jurisdiction. Franchisee shall abide by all provisions of this Ordinance and any franchise created by this Ordinance and shall further agree that it will not at any future time set up as against the

City, the claim that the provisions of this Ordinance or any franchise created by this Ordinance are unconstitutional, unlawful, unreasonable, arbitrary or void.

(2) To the extent permitted by law, the City shall indemnify and hold harmless the Franchisee, its officers and employees from and against any and all claims, demands, causes of action, actions, suits, proceedings, damages, costs or liabilities (including costs or liabilities of the Franchisee with respect to its employees) of every kind and nature whatsoever, including, but not limited to, damages for injury or death or damage to persons or property, regardless of the merit of same, against all liability to others and against any loss, costs and expenses resulting or arising out of same, including attorney fees, accountant fees, expert witness or consultant fees, court costs, expenses or other costs which the Franchisee, its officers or employees or other costs which the Franchisee, its officers or employees may suffer or incur or which may be legally obtained against the Franchisee, resulting from negligent acts or omissions of the City related to this Ordinance or any franchise created by this Ordinance . The City shall, at its sole risk and expense, upon demand of the Franchisee , appear in and defend any and all suits, actions, or other legal proceedings, whether judicial, quasi-judicial, administrative, legislative or otherwise, brought or instituted or initiated by third persons or duly-constituted authorities against or affecting the Franchisee, its officers and employees and arising out of or pertaining to the negligent acts or omissions of the City in the exercise of the enjoyment of the franchise created and granted by the City under this ordinance. The City shall be liable for and shall pay or satisfy, or shall cause to be paid or satisfied, any judgment, decree, order, directive or demand rendered, made or issued against the Franchisee, and its officers and employees, in any of these premises and such indemnity shall exist and continue without reference to or limitation by, the

amount of any bond, policy of insurance, deposit, undertaking or other assurance required hereunder or otherwise; provided, however, that neither Franchisee or the City shall make or enter into any compromise settlement of any claim, demand, cause of action, action, suit or other proceeding without first obtaining the written consent of the other. Provided further, none of the provisions of this Section 8 shall be applicable to the extent the acts of omissions of the Franchisee, its officials, officers, employees, contractors, or agents, were the sole or contributing factor in bringing about the damages sued upon. Accordingly, any judgment and all of the costs of defense, including attorney fees, provided for above shall be apportioned between the City and the Franchisee based upon the percentage of fault assigned to each by a court of competent jurisdiction. City shall abide by all provisions of this Ordinance and any franchise created by this Ordinance and shall further agree that it will not at any future time set up as against the Franchisee, the claim that the provisions of this Ordinance or any franchise created by this Ordinance are unconstitutional, unlawful, unreasonable, arbitrary or void.

**Section 9.     TRANSFER OR ASSIGNMENT OF FRANCHISE:**

(A)     No assignment or transfer of control of any franchise created by this Ordinance or the electric distribution system subject to this Ordinance or any franchise created by this Ordinance shall take place without at least sixty (60) days advance written notice to the City.

(B)     Any entity operating the electric distribution system in the City of Owensboro as a result of an assignment or transfer of control of any franchise created by this Ordinance or the

electric distribution system shall assume and be responsible for all of the following obligations and liabilities under:

- (1) This Ordinance and any franchise created by this Ordinance and
- (2) All federal, state and local statutes, ordinances, codes and/or regulations.

(C) The franchisee shall not object to the City's intervention in any action before the Public Service Commission involving the assignment or transfer of control of the franchisee.

(D) Franchisee may transfer or assign the franchise created by this Ordinance to any other person, proprietorship, partnership, firm or corporation without the consent of the City, upon approval of the Kentucky Public Service Commission.

**Section 10. CITY'S RIGHT OF INSPECTION AND ACCESS TO ELECTRICAL DISTRIBUTION SYSTEM OF FRANCHISEE:**

(A) The City, through its City Manager, City Engineer, City Attorney, or such other assistants as it may employ or designate, at all times reasonable, shall have access to, and the right to inspect, the electrical distribution system permitted within public right-of-way under this Ordinance and any franchise created by this Ordinance and may inspect, examine or verify all or any of franchisee's non-confidential (as determined from time to time by the Kentucky Public Service Commission) books, records, contracts, documents or papers that are necessary to confirm the accuracy of the amount of franchise fees being paid by franchisee to the City. In like manner, the City's above-mentioned officers and assistants may at all reasonable times and under reasonable conditions with prior notice, inspect, examine or verify all or any of the accounts, books, records, contracts, documents or papers of the franchisee (other than "confidential information" as determined from time to time by the Kentucky Public Service Commission)

relating to gross revenues in the City of Owensboro in order to audit and recompute any amounts determined to be payable under this Ordinance consistent with the provisions of Section 7 of this Ordinance. In the event that the City determines that it desires an audit of any franchise created by this Ordinance the franchisee agrees to comply with all reasonable requests of the City pertaining to obtaining any necessary information or documentation from the franchisee reasonably necessary to the administration of any franchise created by this Ordinance.

(B) Prior to inspection of the electrical distribution system, the franchisee shall be notified, and franchisee shall be allowed to have a representative present during inspection.

(C) The franchisee agrees to provide City and/or its Council with information pertaining to its provision of services pursuant to this Ordinance and any franchise created by this Ordinance upon reasonable request. This may include, but is not necessarily limited to attending public meeting(s) involving some or all of the Council in order to provide such information upon reasonable advance notice and providing an annual update to the council upon its request.

**Section 11. BREACH OF FRANCHISE AND REMEDIES:**

(A) If the City believes that the franchise has violated any of the following provisions of this Ordinance or any franchise created by this Ordinance , then the City shall serve written notice to the franchisee of that determination via the U.S. Postal Service, certified mail, return-

receipt requested. Within fourteen (14) calendar days of receipt of notice, the franchisee shall provide written notice to the City (via the U.S. Postal Service, certified mail, return-receipt requested) as to whether it agrees with the determination by the City and, in the event of franchisee agrees that there has been a violation, franchisee shall, within thirty (30) calendar days of receipt of the written notice from the City provide the City a reasonable plan to remedy the violation which shall include a timetable for curing the violation.. If the franchisee fails to submit a reasonable plan to the City within thirty (30) calendar days of receipt of the written notice from the City or fails to cure the violation within the time period set out in the franchisee's plan to remedy the violation, the following penalties shall be paid by the franchisee to the City within fourteen (14) calendar days (subject to the dispute resolution provisions provided in Section 15(G)):

(1) For failure to complete any construction project in the public right-of way within the time allowed under its permit from the City, the franchisee shall pay five hundred dollars (\$500.00) per day or part thereof that the violation continues; in lieu of a penalty, the franchisee may post a performance bond, letter of credit or other surety acceptable to the City in an amount sufficient to complete such construction projects. This section shall not apply to any projects for which performance bonds or other surety is already pledged. This section is subject to the force majeure provision contained in Section 12

(2) For failure to provide data and reports which are required to be provided under Sections 7(D) and 10(A) by the terms of the franchise within thirty (30) days after being

requested by the City, the franchisee shall pay one hundred dollars (\$100.00) per day or part thereof that the violation continues.

(3) For failure to pay the franchise fee within fifteen (15) days after City has notified franchisee that the franchise fee was not received when due pursuant to Section 7 of this Ordinance, the franchisee shall pay one hundred dollars (\$100.00) per day or part thereof that the violation continues.

(B) If the franchisee fails to comply within thirty (30) days of receipt by franchisee of any City Commission resolution directing compliance with any other provisions of this Ordinance or any franchise created by this Ordinance, the franchisee shall pay one hundred dollars (\$100.00) per day or part thereof that the violation continues. The decision of the City Commission may be appealed to a court of competent jurisdiction.

(C) The franchisee shall not be excused from complying with any of the terms and conditions of this Ordinance or any franchise created by this Ordinance by any failure of the City, upon any one or more occasions, to insist upon the franchisee's performance or to seek the franchisee's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Ordinance or any franchise created by this Ordinance. The right of the City to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel any franchise created by this Ordinance.

(D) In addition to all other rights and powers pertaining to the City by virtue of the franchise or otherwise, the City, by and through its City Commission, reserves the right to terminate and cancel any franchise awarded pursuant to this Ordinance and all rights and privileges of the franchisee hereunder in the event that the franchisee:

(1) Willfully violates any material provision of the franchise or any material rule, order, or determination of the City made pursuant to the franchise, except where such violation is without fault or through excusable neglect, including but not limited to cases of force majeure;

(2) Willfully attempts to evade any material provision of the franchise or practices any fraud or deceit upon the City;

(3) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the franchise; or

(4) Fails to begin service restoration efforts within forty-eight (48) consecutive hours of interrupted electrical service to any of franchisee's consumers within the City limits, except as may be prohibited or constrained by actions of the City. It is recognized, that during severe outage situations, restoration efforts may first occur outside the City limits. In cases of force majeure or acts beyond the franchisee's control, the franchisee shall maintain communications with appropriate personnel of the City to provide updates on restoration status consistent with emergency response procedures.

(E) If the franchisee breaches any of the terms or conditions of this Ordinance or any franchise created by this Ordinance and fails to cure same within the time period set out in Section 11(A), the City shall have the right to terminate any franchise created by this Ordinance on the basis of non-performance by the franchisee, at which time the franchisee shall forfeit all rights, titles, interest and privileges it was otherwise entitled to under this ordinance, and franchisee shall proceed without unreasonable delay, to promptly remove its electrical distribution system from the public right-of-way over or in which it is located; provided (i) if the

default cannot reasonably be cured within the time specified in the notice, the franchisee will not be deemed to be in default if the franchisee commences curing such default within said time and thereafter diligently pursues such cure to completion, and (ii) if the franchisee is regulated by the Kentucky Public Service Commission removal of the electric distribution system will be with the approval and consent of said Commission. Following a default which is not cured as aforesaid, the City may pursue any and all legal and/or equitable remedies reasonable and necessary to protect and prevent the unauthorized use of the City's public right-of-way and the health, safety and welfare of the citizens of Owensboro, including claims for special and compensatory damages, specific performance, mandatory injunctive relief or any other remedy to which the City may be entitled. The provisions of this Section shall not impair or abrogate any statutory or common law rights franchisee has as to its electrical distribution system.

**Section 12. FORCE MAJEURE:**

(A) An obligation to perform hereunder by franchisee shall be suspended during a period of force majeure.

(B) If, because of a condition of force majeure, franchisee is unable to carry out any of its obligations under this Ordinance, franchisee shall promptly give the City written notice. The obligation of giving notice shall be suspended to the extent made necessary by said force majeure during its continuance. However, franchisee shall use commercially reasonable efforts to eliminate the force majeure with a minimum of delay.

**Section 13. SEVERABILITY:**

If any section, subsection or provision of this ordinance or any part thereof is for any reason found unconstitutional or held to be in conflict with any applicable statute or rule of law, or is otherwise held to be unenforceable, the invalidity of any such section, subsection or provision shall not affect any or all other remaining sections and provisions of this ordinance, which shall remain in full force and effect.

**Section 14. EFFECTIVE DATE OF FRANCHISE:**

The franchise created by this Ordinance shall become effective on January 1, 2014.

**Section 15. GENERAL PROVISIONS**

(A) Franchisee shall remove all or any part of its electrical distribution system upon the termination of the franchise and rights granted hereby. Franchisee shall have a reasonable period of time to effectuate such removal following the termination of any franchise created by this Ordinance.

(B) Any franchise created pursuant to this Ordinance shall extend to, be binding upon, and inure to the benefit of, the parties hereto, and their respective successors and assigns.

(C) In the event of a conflict between the provisions of any Ordinances of the City or portions thereof, and any of the terms and provisions of any franchise created pursuant to this Ordinance, the terms of said franchise shall prevail.

(D) The City, by granting of any franchise created by this Ordinance, does not surrender to any extent, lose, waiver, imperil, or lessen the lawful powers and rights now or

hereinafter vested in the City under the constitution and statutes of the Commonwealth of Kentucky; provided, however, that no ordinance, law, regulation or rule adopted or enacted by the City shall in any way impair, alter, lessen, modify or restrict the rights of the franchisee under and established by any franchise created pursuant to this Ordinance including, but not limited to, the use of the public right-of-way in connection with franchisee's acquisition, construction, ownership, installation, laying, operation, maintenance, repair or removal of the electric distribution system.

(E) Any franchise created by this Ordinance shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. In the event of a conflict between the terms of any franchise created by this Ordinance and the laws of the Commonwealth of Kentucky, the laws of the Commonwealth shall prevail and be controlling. The venue for any litigation related to any franchise created by this Ordinance shall be in the court of competent jurisdiction in Daviess County, Kentucky

(F) Any franchise awarded by this Ordinance does not create a contractual relationship with or right of action in favor of a third party against either the City or the Franchisee.

(G) Should any dispute arise between the City and the franchisee concerning the terms or conditions of this ordinance, the duties or obligations of the City or franchisee thereunder, or the implementation or breach of this ordinance, the parties shall act in good faith and either party may request in writing a meeting between an authorized representative of each of the parties to discuss and attempt to reach a resolution of the dispute. The monetary penalties in Section 11

shall not continue to accrue if the City receives the above-mentioned notice from the franchisee. Such meeting shall take place within ten (10) calendar days (or such shorter or longer time as agreed upon by the parties) of the request. Any resolution mutually agreed upon by the parties shall be reduced to written form and signed by each party, and thereafter shall be binding. Additionally, either party may request mediation to resolve any dispute. Absent such resolution, the City and franchisee shall be entitled to pursue all rights and remedies that they may have at law, in equity or pursuant to this ordinance.

(H) Where approval of the City Engineer is required hereunder, and the franchisee has delivered a written request for said approval, the City Engineer shall render a decision regarding said approval in a reasonable amount of time. Liquidated damages in Section 11 are tolled when the City Engineer has failed to act within a reasonable time.

**Section 16. SALE OF FRANCHISE BY SEALED BID PROCESS:**

(A) Offer of Sale; Sealed Public Bid:

It shall be the duty of the City Manager or his designated representative, as soon as practical after the passage of this ordinance, to offer for sale under sealed public bids, the franchise and privileges created herein. Said franchise and the privileges attendant thereto shall be sold to the highest and best bidder at the time and place fixed by the City Manager or his designee after the City Clerk has given notice by advertising pursuant to KRS Chapter 424, of request for bids and the time for receipt of same.

(B) Bid Requirement and Opening:

Sealed bid proposals for the purchase and acquisition of the franchise and privileges established under this ordinance shall be in writing and delivered to the City Manager or his designee, upon the date and at the time fixed in said advertisements for receiving same. Thereafter, the City Manager shall report and submit to the Board of Commissioners, at the time of its next regularly scheduled meeting, said bids and proposals for its approval. The City reserves the right to reject any and all bids for said franchise and privileges not in conformity with the requirements of this ordinance; and in the event the bids reported by the City Manager are rejected by the Board of Commissioners, the Board may direct by municipal order or ordinance that said franchise and associated privileges again be offered for sale, from time to time, until a satisfied bid therefor shall be received and approved. Each such bid shall be accompanied by a deposit and each bidder shall post bond in accordance with the provisions of KRS 96.020; provided, however, that such deposit and bond need not be made by any bidder which currently owns and operates within the corporate limits of the City of Owensboro, facilities and equipment sufficient to render the service or services required by this ordinance.

(C) Bids to Include Acceptance of Terms of Franchise:

Sealed bids offered for purchase of this franchise shall state the bidder's acceptance of the terms and conditions set forth in this ordinance. In addition to the highest and best bid, the successful bidder, in consideration of the terms and award of this franchise, agrees to pay to the City a sum equal to the cost of the advertising and selling of this franchise, upon proper billing by the City to the franchisee.

(D) In the event that no bids are received for the franchise created under this ordinance, the

bids submitted are unresponsive or in the event the City does not accept any bids received hereunder, then commencing on the date of the bid opening if no bid is received, or commencing on the date that a submitted bid is rejected, and continuing thereafter until modified by ordinance, that public utility currently owning and operating an electrical distribution system within the corporate limits of the City of Owensboro which does not hold a valid, current franchise from the City of Owensboro to continue the operation of its business within the corporate limits of the City, shall nevertheless, continue to operate under the terms of the most recent franchise agreement until a new franchise is awarded.

**Section 17. CONFLICTING ORDINANCES; MUNICIPAL ORDERS REPEALED:**

All prior ordinances, municipal orders, or policies or parts thereof, in conflict herewith, are to the extent of such conflict, hereby repealed.

**Section 18. EFFECTIVE DATE OF ORDINANCE:**

This Ordinance shall become effective upon its legal adoption and publication in the manner prescribed by statute.

INTRODUCED AND PUBLICLY READ ON FIRST READING, this the \_\_\_ day of November, 2013.

INTRODUCED, PUBLICLY READ AND FINALLY APPROVED ON SECOND READING, this the \_\_\_ day of November, 2013.

/s/ \_\_\_\_\_  
Ron Payne,

Mayor

ATTEST:

/s/ \_\_\_\_\_  
Beth Cecil,  
City Clerk

CERTIFICATION

I, Beth Cecil , City Clerk of the City of Owensboro, Kentucky, do hereby certify that the foregoing is a true and correct copy of Ordinance No. \_\_-2013, duly adopted by the Board of Commissioners of the City of Owensboro, Kentucky, on \_\_\_\_, 2013, the original of which is on file in the Office of the City Clerk, this the \_\_\_ day of \_\_\_\_\_, 2013.

/s/ \_\_\_\_\_  
Beth Cecil,  
City Clerk