

**Commonwealth of Kentucky
Before the Public Service Commission**

In the Matter of:

ELECTRONIC APPLICATION OF LOUISVILLE GAS)	
AND ELECTRIC COMPANY FOR A DECLARATORY)	
ORDER REGARDING THE PROPER METHOD OF)	Case No.
MUNICIPAL FRANCHISE FEE RECOVERY)	2016-00137

AND

In the Matter of:

Louisville/Jefferson County Metro Government)	
)	
Complainant,)	Case No.
)	2016- 00347
v.)	
)	
Louisville Gas and Electric Company)	
)	
Defendant.)	

**LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT
REPLY TO LOUISVILLE GAS AND ELECTRIC COMPANY’S RESPONSE TO
MOTION TO DISMISS OR IN THE ALTERNATIVE INCORPORATE**

Comes now The Louisville/Jefferson County Metro Government (“Louisville Metro”), and replies to the Louisville Gas and Electric Company (“LG&E”) Response to the Louisville Metro Motion to Dismiss Case No. 2016-00137, or in the Alternative Incorporate the Record into Case No. 2016-00347, and in support thereof states as follows:

1) The Franchise Agreement Anticipated the Louisville Metro Action

The plain language of the Franchise Agreement clearly indicates both parties’ anticipation and contemplation that issues related to the gas franchise would be explored in

an action *filed by Louisville Metro with the Commission.*¹ It makes logical and legal sense to allow LG&E to file a case with the Commission if for some reason Louisville Metro did not. Curiously, that is not the circumstance at hand. It appears the reasonableness Louisville Metro exhibited in agreeing to a reservation of LG&E's rights is now being used against Louisville Metro, despite the parties' clear intent and the plain language of the Franchise Agreement.

2) **KRS § 278.260 Governs Adjudication of the Issues at Hand**

While LG&E argues that *Southern Bell Telephone & Telegraph co. v. City of Louisville* does not mandate the use of the complaint procedure, it appears to Louisville Metro that the Commission considers this to be settled law.² In the 2013 Edition of "Laws Affecting Public Utilities in the Commonwealth of Kentucky Annotated," which is distributed by the Commission, the KRS § 278.260 (Jurisdiction over Complaints) Notes to Decisions number five (5), is titled "Cities."³ The "Cities" Note only references one case and provides "When cities seek a change in public utility rates for franchised utilities, they **MUST** follow the procedure prescribed by this section, the same as others permitted to file complaints. *Southern Bell Tel. & Tel. Co. v. Louisville.*"⁴ (Emphasis added). According to this Commission Publication, and contrary to LG&E's assertion, the complaint procedure is the **ONLY** procedure available to Louisville Metro to challenge LG&E's franchise fee recovery

¹ "This Franchise Agreement contemplates that Louisville Metro reserves the right to challenge the Company's method of recovery of the Franchise Fee at the Kentucky Public Service Commission or any other court of competent jurisdiction."

² *Id.* (citing *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 96 S.W.2d 695 (Ky. 1936)).

³ Laws Affecting Public Utilities in the Commonwealth of Kentucky Annotated (Matthew Bender & Company 2013).

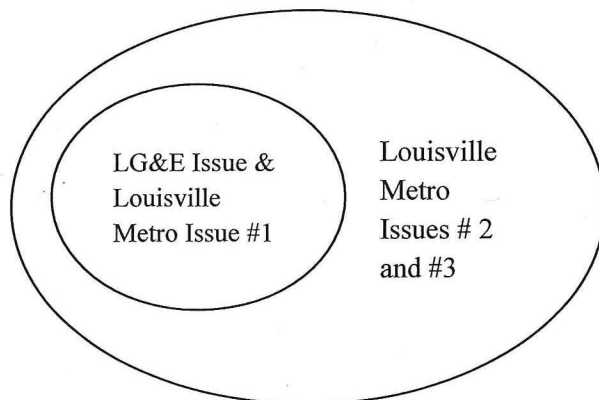
⁴ *Id.* at 145.

methods. Thus, the Commission should exercise its authority under 807 KAR 5:001, Section 19(7), and dismiss the LG&E application.

3) LG&E's Legal Issue is Best Addressed by the Louisville Metro Complaint Proceeding

LG&E's assertion that the issues in the Louisville Metro Complaint and LG&E Application are duplicative is without grounds. The plain reading of the issues clearly illustrates the opposite interpretation than the one offered by LG&E. LG&E asserts that the application raises two issues: 1) "LG&E must abide by its tariff," and 2) "LG&E's tariff requires recovery of municipal franchise fees as a line-item charge."⁵ Louisville Metro makes three claims in its Complaint: 1) "It is Improper to Allow LG&E to Directly Pass the Cost of a Franchise Fee Onto LG&E Gas Customers as a Utility Bill Line Item," 2) "If the Commission allows LG&E to Pass the Cost of a Franchise Fee Directly to Customers, then All LG&E Gas Customers Receiving the Benefit of the Louisville Rights-of-Way Should Pay the Franchise Fee," and 3) "If the Commission Allows LG&E to Pass the Cost of a Franchise Fee Directly to Customers, then the Franchise Fee Should be Collected Throughout Louisville." The first claim by Louisville Metro clearly encompasses the legal issue raised by LG&E. However, the second and third claims are separate and distinct arguments that LG&E did not raise in its application. This point is best illustrated by the Venn diagram provided below. In summary, LG&E's issue regarding the inclusion of the fee as a line item on customer's bills is clearly non-duplicative of the second and third claims made by Louisville Metro.

⁵ LG&E Response at 5.



4) **Judicial Economy is Best Served by Dismissal of Case No. 2016-00137**

LG&E's Response completely fails to address the fact that judicial economy is best served by dismissal of the LG&E Application. Nowhere in the LG&E response does it address the fact that "litigating the same issue on two different procedural tracks and in two different cases before the Commission is a waste of the Commission's time and resources."⁶ Instead, they launch a collateral attack claiming "a party could obtain dismissal of an action merely by filing a second action."⁷ LG&E knows that argument is completely without merit. The Commission has sole jurisdiction to dismiss or consolidate any action, a party can merely request these actions of the Commission, not command them.⁸ The fact remains undisputed by LG&E, that judicial economy is best served by dismissing the declaratory action and allowing all the issues raised by both LG&E and Louisville Metro to be adjudicated simultaneously in Case No. 2016-00347.

⁶ Motion to Dismiss at 4.

⁷ LG&E Response at 6.

⁸ KRS § 278.040(3) ("The Commission may adopt... reasonable regulations to implement the provisions of KRS Chapter 278); 807 KAR Section 4(14)(a) ("The Commission may order two (2) or more proceedings involving similar question of law or fact to be consolidated where rights of the parties or fact to be consolidated where rights of the parties or the public interest will not be prejudiced").

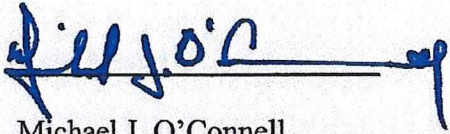
5) LG&E Will Not be Prejudiced by Dismissal of Case No. 2016-00137

LG&E asserts that if the Commission elects to consolidate the actions, the complaint should be consolidated into the declaratory action. As support for this request, LG&E argues that the cases have “similar legal issues.”⁹ However, as discussed above, only one of the legal issues is similar. Two of the issues put forward by Louisville Metro are distinctly different from the issue put forward by LG&E. 807 KAR 5:001, Section 4(14) allows for consolidation of cases “where rights of the parties or the public interest will not be prejudiced.” Significantly, LG&E does not argue that its rights will be prejudiced by consolidation of the cases into the LG&E complaint. The only real argument LG&E puts forth regarding this issue seems to be “we were first,” which is irrelevant. Denying Louisville Metro the right to bring a complaint action against LG&E (which the terms of the Franchise Agreement clearly contemplated) in the manner and timing Louisville Metro sees fit to bring the action would undoubtedly prejudice Louisville Metro. The differences in the procedures controlling a complaint proceeding and an application for a declaratory order proceeding are significant, including the opportunity for a Hearing. As such, Case No. 2016-00317 should either be dismissed, or incorporated into Case No. 2016-00347 and then dismissed.

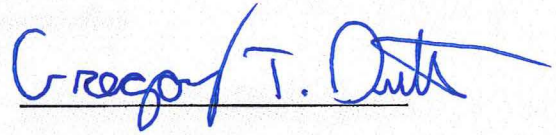
WHEREFORE, Louisville moves the Commission to dismiss the LG&E Application filed in Case No. 2016-00137, or in the alternative, to incorporate the record of Case No. 2016-00137 into Case No. 2016-00347, and then dismiss Case No. 2016-00137.

⁹ LG&E Response at 6.

Respectfully submitted,



Michael J. O'Connell
Jefferson County Attorney's Office
Brandeis Hall of Justice
600 West Jefferson Street, Suite 2086
Louisville, KY 40202
Telephone: 502-574-5772
Mike.OConnell@louisvilleky.gov



Gregory T. Dutton
Goldberg Simpson, LLC
9301 Dayflower Street
Prospect, Kentucky 40059
Telephone: 502-589-4440
gutton@goldbergsimpson.com