

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| ELECTRONIC APPLICATION OF |) | |
| LOUISVILLE GAS AND ELECTRIC |) | |
| COMPANY FOR A DECLARATORY ORDER |) | CASE NO. 2016-00317 |
| REGARDING THE PROPER METHOD OF |) | |
| MUNICIPAL FRANCHISE FEE RECOVERY |) | |

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

Louisville Gas and Electric Company (“LG&E”), by counsel, requests that the Kentucky Public Service Commission (“Commission”) deny Louisville/Jefferson County Metro Government’s (“Louisville Metro”) Motion to Dismiss this proceeding. LG&E further requests the Commission deny Louisville Metro’s alternative relief of incorporating the record of this case into the complaint Louisville Metro tendered to the Commission on September 19, 2016.¹

In support of this Response, LG&E states as follows:

I. No Term in the Franchise Agreement Provides a Basis to Dismiss This Case

On August 30, 2016, LG&E initiated this action by requesting the Commission issue a declaratory order confirming that LG&E must abide by its tariff. Pursuant to Commission policy, LG&E’s tariff requires recovery of municipal franchise fees as a line-item charge on the bills of the ratepayers residing within the jurisdiction imposing the franchise fee. The Company filed the application because legal questions regarding the method of recovery arose during the negotiation of the gas franchise agreement with Louisville Metro that was executed on August

¹ To date, the Commission has not determined whether the tendered complaint establishes a *prima facie* case as required by 807 KAR 5:001, Section 20. Through a letter from the Executive Director, the Commission acknowledged the filing and assigned it Case No. 2016-00347 on September 27, 2016.

30, 2016 (“the Franchise Agreement”). The express terms of the Franchise Agreement reflect the difference of opinion between Louisville Metro and LG&E on the method of recovery issue.²

On September 19, 2016, Louisville Metro responded to LG&E’s application by filing a motion to intervene and requesting the Commission dismiss this case, or in the alternative, consolidate this case into the complaint that Louisville Metro also filed on September 19. Louisville Metro bases its request for dismissal primarily on the assertion that the Franchise Agreement contemplated that Louisville Metro, instead of LG&E, would file the initial pleading requesting that the Commission determine the proper method of recovery.³ This argument is factually erroneous and legally irrelevant.

The Franchise Agreement does not state whether Louisville Metro or LG&E would first seek clarification on the proper method of recovery from the Commission. Instead, it merely memorializes either party’s existing rights to seek the legal remedies available to them: “The Company [LG&E] and Louisville Metro, separately, reserve the right to seek all administrative relief from the Kentucky Public Service Commission or any other court of competent jurisdiction, including appeals of any final orders as permitted by law.”⁴ This provision immediately follows the language on which Louisville Metro relies, which simply notes that Louisville Metro reserves the ability to challenge the method by which the franchise fees are recovered.⁵ Thus, under the plain terms of the parties’ agreement, either party remained free to

² Franchise Agreement at Sections 11 and 12. A copy of the Franchise Agreement was filed with LG&E’s application in this case.

³ Louisville Metro Motion at 1-2.

⁴ Franchise Agreement at Section 12.

⁵ *Id.*

seek relief from the Commission.⁶ Moreover, that language does not *limit or create* either party's right to seek legal redress. Absent such language in the Franchise Agreement, LG&E nonetheless has the ability, pursuant to 807 KAR 5:001, Section 19 to file the application initiating this action. Nothing in the Franchise Agreement waived LG&E's right to seek legal remedies. To the contrary, the parties saw fit to recognize their existing rights of redress in the Franchise Agreement because they contemplated an action to resolve the proper method of recovery. And the Franchise Agreement is silent on which party might file first.

At bottom, LG&E's application complies with the Commission's requirements set forth in 807 KAR 5:001, Section 19 and nothing in the Franchise Agreement provides a basis to dismiss this proceeding.

II. KRS 278.260 Does Not Provide a Basis to Dismiss This Case

LG&E's and Louisville Metro's pleadings make clear that the parties both request the Commission's guidance on the method by which LG&E recovers franchise fees from customers. LG&E and Louisville Metro agree that the Commission has jurisdiction over the method by which LG&E recovers franchise fees from its ratepayers. And the determination of the proper method of recovery of franchise fees is purely a legal question.

⁶ Kramer, Kevin. Statement at Metro Council Budget Committee Meeting (Aug. 18, 2016). Available http://louisville.granicus.com/ViewPublisher.php?view_id=2; Accessed Sep. 28, 2016. Councilmember Kramer's statement begins at approximately 00:20:10 (Councilmember Kevin Kramer – "The Ordinance is very clear that if they decide to adjudicate this at the PSC, which they've suggested that they would, that we will insist at the PSC that this is a fair and reasonable rent and not a fee that is simply passed on to the end user."); Golden, Matt. Statement at Metro Council Budget Committee Meeting (Aug. 18, 2016). Available http://louisville.granicus.com/ViewPublisher.php?view_id=2; Accessed Sep. 28, 2016. County Attorney Golden's statement begins at approximately 00:25:15 (County Attorney Matt Golden – "We would anticipate that the County Attorney's Office would be a participant in any litigation regarding how this issue is resolved at the PSC."); Woolridge, Mary. Statement at Metro Council Budget Committee Meeting (Aug. 18, 2016). Available http://louisville.granicus.com/ViewPublisher.php?view_id=2; Accessed Sep. 28, 2016. Councilmember's Woolridge statement begins at approximately 00:27:15 (Councilmember Mary Woolridge – "LG&E, if they object to the method of collection of the fee, they have an opportunity to seek a ruling through the Public Service Commission, PSC.")

Yet, without statutory or precedential support, Louisville Metro claims that KRS 278.260, which provides the Commission jurisdiction over complaints regarding a utility's rates or service, is the "controlling law" to resolve this dispute. Nothing in KRS 278.260 requires that this dispute be resolved pursuant to that statute, or the complaint process set forth in 807 KAR 5:001, Section 20. And nothing about the dispute requires the matter be resolved by a proceeding under KRS 278.260.

While Louisville Metro contends the *Southern Bell Telephone & Telegraph Co. v. City of Louisville* decision mandates use of the Commission's complaint procedure, that opinion merely references the Commission's complaint procedure in the context of rejecting the City of Louisville's argument that "section 199 of the Constitution by implication excludes telephone companies from legislative control." In doing so, the Court held: "[a]s heretofore stated, the presumption that the state has surrendered its power of regulation by a constitutional provision will not be indulged unless such intention is clearly expressed in the instrument or is necessarily implied. Section 6 of the 1934 act prescribed the procedure to be followed when a change in rates is sought, and this procedure must be followed by municipalities as well as others who are permitted by the act to file complaints."

The declaratory order process set forth in 807 KAR 5:001, Section 19 that LG&E utilized in initiating this proceeding is an appropriate mechanism for resolving this dispute. Louisville Metro's motion fails to demonstrate how the declaratory order application process cannot resolve this dispute or how only the complaint procedure can provide the relief sought by the parties. Pursuant to the declaratory order process, the Commission has the discretion to hold oral arguments and require the production of additional documents and materials.⁷ As such, the

⁷ 807 KAR 5:001, Section 19(8).

process for this proceeding is more than sufficient for the Commission to use to resolve the disputed issues regarding the method of recovery of franchise fees.

III. The Allegations in the Complaint Are Duplicative of the Issues in LG&E's Application

Louisville Metro also argues that because LG&E's application raises a "single issue," and Louisville Metro's tendered complaint raises "three issues," this proceeding should be dismissed. As an initial matter, LG&E asked the Commission to make two legal determinations: (1) that LG&E must abide by its tariff, (2) and that, pursuant to Commission policy, LG&E's tariff requires recovery of municipal franchise fees as a line-item charge on the bills of the ratepayers residing within the jurisdiction imposing the franchise fee.

Louisville Metro's complaint, which is unverified and did not include affidavits to authenticate its exhibits, raises three duplicative concerns: (1) whether it is improper for LG&E to pass the cost of a franchise fee onto its gas customers as a line item on their bills; (2) whether all LG&E gas customers can be assessed Louisville Metro's franchise fee; and (3) whether the franchise fee can be collected throughout Jefferson County. All three of these issues, as well as those raised in LG&E's application, address the same essential legal questions regarding cost recovery of franchise fees. Louisville Metro's portrayal of LG&E's application as a "solitary issue" that is narrower than the "three issues explored by the Louisville Complaint,"⁸ is belied by the actual allegations in the respective documents. Regardless of how styled in the pleadings, the legal questions are the same.

⁸ Louisville Metro Motion at 3.

IV. Judicial Economy is Not a Basis to Dismiss This Action

Finally, Louisville Metro argues that litigating parallel issues in two different cases wastes the Commission's resources.⁹ Even if this is true, it was Louisville Metro that tendered a separate complaint nearly three weeks after LG&E instituted this action regarding identical legal issues. Under Louisville Metro's theory, a party could obtain dismissal of an action merely by filing a second action. Equity does not support such an outcome. To the extent judicial economy is best served through dismissal of an action, the Commission may find that Louisville Metro's unverified complaint does not constitute a *prima facie* case as required by 807 KAR 5:001, Section 20 or the Commission may stay the assessment of whether the complaint constitutes a *prima facie* case pending the disposition of the application for declaratory order.

V. This Action Should Survive If the Cases Are Consolidated

Louisville Metro alternatively requests that if this proceeding is not dismissed, the record of this case be consolidated into the complaint Louisville Metro tendered, with this case then dismissed. The Commission's Rules of Procedure permit the consolidation of cases.¹⁰ If the Commission elects to consolidate the actions, the complaint (if it is found to establish a *prima facie* case) should be consolidated into this action. Given the similar legal issues and the sufficiency of the declaratory order process, there is no legal or factual reason for the first-filed action to be consolidated into the second-filed action. The rights of the parties or the public interest will not be prejudiced by such a consolidation.

⁹ *Id.* at 4-5.

¹⁰ 807 KAR 5:001 Section 4(14) Consolidation of cases.

WHEREFORE, LG&E respectfully requests the Commission deny both Louisville Metro's Motion to Dismiss this case, and its alternative relief of consolidating the record of this proceeding into the complaint Louisville Metro tendered to the Commission. LG&E further requests that if the Commission consolidates this proceeding with Louisville Metro's complaint filed in Case No. 2016-00347, that the complaint be consolidated into this action for the purpose of facilitating the timely and efficient disposition of the issues in controversy.

Dated: September 29, 2016

Respectfully submitted,

By: 

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Company*

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, this is to certify that the foregoing electronically filed September 29, 2016 Response to Motion to Dismiss is a true and accurate copy of the same document being filed in paper medium; that the electronic filing has been transmitted to the Commission on September 29, 2016; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original and six copies, in paper medium, of the Response to Motion to Dismiss are being mailed by first class U.S. Mail, postage prepaid, to the Commission September 29, 2016.

A handwritten signature in blue ink, appearing to read "Harold R. Rigns", is written over a horizontal line.

Counsel for Louisville Gas and Electric Company