

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED  
AUG 04 2011  
PUBLIC SERVICE  
COMMISSION

IN THE MATTER OF:

APPLICATION OF KENTUCKY )  
POWER COMPANY FOR A CERTIFICATE OF )  
PUBLIC CONVENIENCE AND NECESSITY ) Case No. 2011-00018  
AUTHORIZING THE APPLICANT TO OBTAIN A )  
FRANCHISE IN THE CITY OF ASHLAND, BOYD )  
COUNTY, KENTUCKY )

\*\*\*\*\*

Notice of Filing of Franchise Ordinance

Pursuant to KRS 278.020 and the Commission's January 18, 2011 Order in this proceeding, Kentucky Power Company files two copies of City of Ashland Ordinance 84, 2011 granting Kentucky Power Company a franchise to own, operate and maintain its electric facilities upon, along, over, and under the public ways of the City of Ashland.

Section 8 of the Ordinance imposes a fee equal to three percent of the revenues collected within the limits of the City of Ashland. That same section prohibits Kentucky Power Company from collecting as a "separate item" from its customers within the boundaries of the City of Ashland the three per cent franchise fee levied by the city. A copy of the Ordinance is enclosed as EXHIBIT 1.

Kentucky Power Company Tariff F.T. (Franchise Tariff) (Original Sheet 20-1) provides that:

Where a city or town within Kentucky Power's service territory requires the Company to pay a percentage of revenues from certain customer classifications collected within such city or town of the right to erect the Company's poles, conductors or other apparatus along, over, under, or across such city's or town's streets, alleys, or public grounds, the Company shall increase the rates and charges to such customer classifications within such city or town by a like percentage. The aforesaid

charge shall be separately stated and identified on each affected customer's bill.

In conformity with Tariff F.T., Kentucky Power Company's sample bill forms (P.S.C. Electric No. 9) (2<sup>nd</sup> Revised Sheet No. 2-11 and 2<sup>nd</sup> Revised Sheet 2-13) show the itemization and imposition of a "Franchise Tax" on customer bills. Copies of Tariff F.T. and 2<sup>nd</sup> Revised Sheet No. 2-11 and 2<sup>nd</sup> Revised Sheet 2-13 are attached as **EXHIBIT 2** and **EXHIBIT 3** respectively.

Kentucky Power Company's bid for the franchise was made in conformity with its tariffs. The Company's bid specifically notified the city that its bid did not "include the condition prohibiting it from collecting as a separate item on the periodic bills of its customers within the City of Ashland an amount equal to the total of each customer's proportionate part of the franchise fee." A copy of Kentucky Power Company's bid is attached as **EXHIBIT 4**.

KRS 278.160(2) prohibits Kentucky Power Company from "charg[ing], demand[ing], collect[ing], or receive[ing] from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules...." Conversely, the same provision prohibits the customers of Kentucky Power Company from "receive[ing] any service from any utility for a compensation greater or less than that prescribed in such schedules."

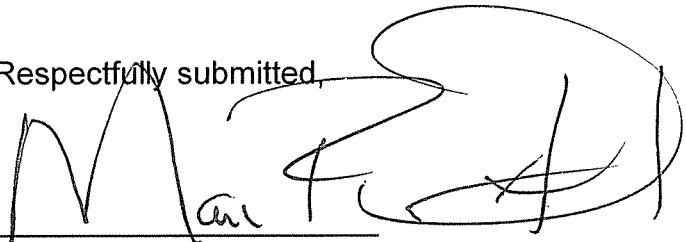
To the extent Section 8 of City of Ashland Ordinance 84, 2011 prohibits Kentucky Power Company from collecting the City of Ashland franchise fee in accordance with the company's Commission-approved tariffs, the ordinance provision conflicts with KRS 278.160(2) and would require Kentucky Power Company, and those of its customers receiving service within the boundaries of the City of Ashland, to violate KRS

278.160(2).

Kentucky Power Company is aware of the unpublished Kentucky Court of Appeals opinion in *Columbia Gas of Kentucky, Inc. v. City of Ashland*, No. 95-CA-2127-MR (Ky. App. July 19, 1996). That decision, which may not be used as binding precedent in any case in any court in Kentucky, CR 76.28(4)(c), did not address KRS 278.160(2) and thus is inapposite. A copy of the opinion in *Columbia Gas of Kentucky, Inc. v. City of Ashland* is attached as **EXHIBIT 5**.

Kentucky Power Company brings this conflict to the Commission's attention in view of the Commission's approval of the above tariff provisions, its exclusive jurisdiction under KRS 278.040(2) over the rates and services of all utilities, and its past enforcement of the requirements of KRS 278.160(2).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark R. Overstreet", written over a horizontal line. The signature is stylized and somewhat cursive.

Mark R. Overstreet  
STITES & HARBISON PLLC  
421 West Main Street  
P.O. Box 634  
Frankfort, Kentucky 40602-0634  
Telephone: (502) 223-3477  
Facsimile: (502) 223-4387  
moverstreet@stites.com

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served by United States Mail, Postage Pre-paid, upon:

Richard Martin  
Corporation Counsel  
City of Ashland  
1700 Greenup Avenue # 301  
Ashland, Kentucky 41101

on this the 4<sup>th</sup> day of August, 2011.

A handwritten signature in black ink, consisting of a stylized 'M' followed by 'an' and a large, circular flourish.

Mark R. Overstreet



ORDINANCE NO. 84, 2011

AN ORDINANCE OF THE CITY OF ASHLAND, KENTUCKY, GRANTING FOR A TERM OF TEN (10) YEARS TO KENTUCKY POWER COMPANY, A DIVISION OF AMERICAN ELECTRIC POWER, ITS SUCCESSORS AND ASSIGNS, A FRANCHISE, PRIVILEGE, RIGHT AND AUTHORITY TO ACQUIRE, MAINTAIN, CONSTRUCT AND OPERATE IN, ABOVE, UNDER, ACROSS AND ALONG THE STREETS, THOROUGHFARES, ALLEYS, BRIDGES AND PUBLIC PLACES OF THE CITY OF ASHLAND, KENTUCKY AND ITS SUCCESSORS AND ASSIGNS, LINES, POLES AND EQUIPMENT FOR THE TRANSPORTATION, TRANSMISSION AND DISTRIBUTION OF ELECTRIC ENERGY TO THE CITY OF ASHLAND AND THE INHABITANTS THEREOF, AND THE PERSONS AND CORPORATIONS BEYOND THE LIMITS THEREOF FOR LIGHT, HEAT, POWER AND ANY OTHER PURPOSES, AND FOR THE TRANSMISSION, TRANSPORTATION AND DISTRIBUTION OF SAME WITHIN, THROUGH OR ACROSS SAID CITY AND REPEALING ORDINANCE NO., 69, SERIES OF 2002.

\* \* \* \* \*

WHEREAS, there is now existing a franchise for an electric power company to own, maintain and operate its electric power lines upon, along, over and under the streets, alley, sidewalks and public ways of the City of Ashland, Kentucky, which present franchise expires on July 10, 2011, and

WHEREAS, there is a continuing public necessity for adequate service of electric power and energy to the citizens of the City of Ashland, Kentucky, and

WHEREAS, it appears that it is to the interest of the public that a franchise be advertised and sold granting and entitling the grantee to use the public ways, streets, alleys and other public places for the erection, operation and maintenance of lines for the transmission and distribution of electric power to the citizens and to persons, firms and corporations beyond the limits of the City of Ashland, Kentucky, and

WHEREAS, Kentucky Power Company, a division of American Electric Power, a corporation organized and existing under the laws of the State of Kentucky, offers to purchase the right, privilege, franchise and authority to erect and operate an electric light and power system in the City of Ashland, Kentucky, and

WHEREAS, a copy of the Certificate of Convenience and Necessity has been issued by the order of the Public Service Commission of Kentucky, Case No. 2011-00018, dated January

18, 2011, authorizing Kentucky Power Company, a division of American Electric Power to bid, and

WHEREAS, Kentucky Power Company, a division of American Electric Power, owns and operates in the City of Ashland, plant and equipment sufficient to render the services required, and is now furnishing adequate service to the City and its inhabitants.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF ASHLAND, KENTUCKY:

SECTION 1. The Kentucky Power Company, a division of American Electric Power, its successors and assigns, hereinafter called the "GRANTEE", are granted the right, privilege and authority to acquire, maintain, construct and operate in, above, under, across and along the streets, thoroughfares, alleys, bridges and public places (as the same now exist or may hereafter be laid out) of the City of Ashland, Boyd County, Kentucky, lines, poles and equipment for the transportation, transmission and distribution of electric energy, either by means of overhead or underground conductors, with all the necessary or desirable appurtenances for the purpose of supplying electric energy to said City and the inhabitants thereof and persons and corporations beyond the limits thereof for light, heat, power and any other purpose or purposes for which electric energy is now or may hereafter be used, and for the transmission of the same within, through or across said City.

SECTION 2. Said lines and appurtenances shall be constructed so as to interfere as little as possible with the traveling public in its use of the streets, thoroughfares, alleys, bridges and public places. The location of all poles and conduits shall be made under the supervision of the City government.

SECTION 3. The right, privilege and franchise shall be in full force and effect for a period of ten (10) years from the effective date of this ordinance.

SECTION 4. The GRANTEE of this franchise shall save the City harmless from any and all liability rising in any way from negligence in the erection, maintenance or operation of said lines and appurtenances.

SECTION 5. The GRANTEE of this franchise shall have the right and privilege to take up such portion or part of any pavement and make such excavation in the streets, thoroughfares, alleys, sidewalks, bridges, public ways and public places of the City of Ashland as may be deemed necessary for the construction and maintenance of its lines, wires or cables,

but whenever the GRANTEE of this franchise shall begin the erection of any lines or other equipment, it shall promptly and diligently prosecute the work to completion and leave the streets, thoroughfares, alleys, bridges and public places where such work is done in as good condition of repair as before such work was commenced and consistent with the then current standards of the City of Ashland.

SECTION 6. Wherever in this franchise either the City of Ashland or the GRANTEE thereof is referred to, it shall be deemed to include the respective successors and assigns of either and all rights, privileges and obligations contained in this franchise shall be binding upon and inure to the benefit of the respective successors and assigns of said City and said GRANTEE, whether so expressed or not.

SECTION 7. The GRANTEE of this franchise may make such rules and regulations covering the furnishing of said electric energy as may be fair and reasonable and consistent with the standard practice of the GRANTEE. Said GRANTEE may charge such rates for electrical service as shall be fair and reasonable. The said GRANTEE shall render service under said franchise of like quality, that is adequate, efficient and reasonable, to that now being rendered to said City.

SECTION 8. As consideration for the rights conferred by the granting of this franchise, and to compensate the City for its superintendence of the franchise, the successful bidder shall pay to the City a fee, the minimum of which shall be equal 3% of revenues collected within Ashland city limits. The successful bidder shall not collect, as a separate item on the periodic bills of its customers, an amount equal to the total of each customer's proportionate part of the franchise fee set forth above. Any effort to collect the 3% from the GRANTEE's Ashland customers will result in the filing of a declaration of rights in Boyd Circuit Court by the City.

The Company shall remit to the City, quarterly, all amounts due under this franchise within forty-five (45) days after each three (3) month period.

SECTION 9. The consideration paid by the successful bidder for the franchise, privilege, right and authority provided for herein, shall be complete compensation and consideration for said franchise, privilege, right and authority, and for the use and occupancy of the streets, thoroughfares, alleys, sidewalks, bridges, public ways and other public places of the City, in lieu of any street or alley rental or of any charge for the use or occupancy of said



streets, thoroughfares, alleys, sidewalks, bridges, public ways and other public places of said City, and in lieu of any pole tax or meter tax.

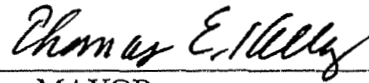
SECTION 10. The City shall have the right, during the life of this franchise, to use, at its own risk and cost for the purpose of fire alarm and traffic control systems, sufficient room upon the poles and sufficient room on the conduits hereafter constructed in underground work to carry the necessary wires for the above purposes and it shall use the same so as not to interfere with the use thereof by the purchaser and the City agrees to indemnify the purchaser against any liability or damage to any person or property for which it may become liable or which it may sustain by reason of any such use of said poles or conduits.

SECTION 11. That Ordinance No. 69, series of 2002, is hereby repealed.

SECTION 12. All ordinances and parts of ordinances in conflict herewith, to the extent of such conflict only, are hereby repealed.

SECTION 13. This ordinance shall be in full force and effect from and after its adoption, readoption and publication, as required by law.

SECTION 14. It is hereby authorized that publication of this ordinance shall be in summary form.



MAYOR

ATTEST:

  
CITY CLERK

ADOPTED BY THE BOARD OF COMMISSIONERS:

READOPTED BY THE BOARD OF COMMISSIONERS:

PUBLISHED:

JUN 16 2011

JUL 21 2011

REQUESTED/SPONSORED BY: STEPHEN W. CORBITT, CITY MANAGER



KENTUCKY POWER COMPANY

Original Sheet No. 20-1  
Canceling Sheet No. 20-1

P.S.C. ELECTRIC NO. 9

Tariff F.T.  
(Franchise Tariff)

AVAILABILITY OF SERVICE.

Where a city or town within Kentucky Power's service territory requires the Company to pay a percentage of revenues from certain customer classifications collected within such city or town of the right to erect the Company's poles, conductors, or other apparatus along, over, under, or across such city's or town's streets, alleys, or public grounds, the Company shall increase the rates and charges to such customer classifications within such city or town by a like percentage. The aforesaid charge shall be separately stated and identified on each affected customer's bill.

KENTUCKY  
PUBLIC SERVICE COMMISSION

JEFF R. DEROUEN  
EXECUTIVE DIRECTOR

TARIFF BRANCH

DATE OF ISSUE July 16, 2010 DATE EFFECTIVE Service rendered on and after June

ISSUED BY E.K. Wagner DIRECTOR OF REGULATORY SERVICES FRANKFORT, KY  
NAME TITLE ADDRESS

Brent Hatley  
EFFECTIVE

6/29/2010

Issued by authority of an Order of the Public Service Commission in Case No. 2009-00159 dated June 28, 2010 KAR 5:011 SECTION 9 (1)





TERMS AND CONDITIONS OF SERVICE (Cont'd)

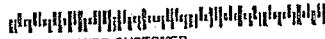
Large Commercial and Industrial Bill Form - Page 1



Send Inquiries To:  
 PO BOX 24401  
 CANTON, OH 44701-4401  
 R-00-99999999

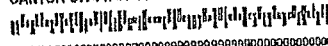
Account Number  
 030-999-999-9-9  
 CY XX  
 XXXXXX

\$X,XXX.XX	\$
Total Amount Due	Amount Enclosed
Due MM/DD, Add \$XX.XX After This Date	



LARGE POWER CUSTOMER  
 123 ANY STREET  
 AEP CITY, KY 99909-9999

Make Check Payable and Send To:  
 KENTUCKY POWER COMPANY  
 PO BOX 24410  
 CANTON OH 44701-4410



9999999900000000000000009999999900

Please tear on dotted line Return top portion with your payment

Service Address:  
 LARGE POWER CUSTOMER  
 123 ANY STREET  
 AEP CITY, KY 99909-9999

Account Number	Total Amount Due	Due Date
030-999-999-9-9	\$X,XXX.XX	MM/DD/YY
Meter Number	Cycle/Route	Bill Date
999999999	XX-XX	MM/DD/YY

Questions about Bill or Service, Call:  
 Call: 1-888-710-4237  
 Pay By Phone: 1-800-611-0984

Previous Charges:

Total Amount Due At Last Billing	\$	X,XXXX.XX
Payment MM/DD/YY - Thank You		X,XXX.XX
Previous Balance Due	\$	X,XXX.XX

KPCo Messages:  
 Got a new dog in your yard? Let us know about it. Call the number on your bill so we can note it on your account.

Current KPCo Charges:

Tariff 244 - Large General Service MM/DD/YY	\$	X,XXXX.XX
Rate Billing		-XXXX.XX
Load Management Credit		XXX.XX
Fuel Adj @ 0.XXXXXXX Per KWH		XX.XX
DSM Adj @ 0.XXXXXXX Per KWH		XX.XX
Capacity Charge @ 0.XXXXXXX Per KWH		XXX.XX
Environmental Adj X.XXXXX%		XXX.XX
Green Pricing XXX Blocks		XX.XX
School Tax		XX.XX
Franchise Tax		XXX.XX
State Sales Tax		X,XXX.XX
Current Electric Charges Due	\$	X,XXX.XX

You can now reach our customer service representatives 24 hours a day, 7 days a week. Please help us by having your account number when you call.

Total Amount Due

Total Amount Due	\$	X,XXX.XX
Due MM/DD, Add \$XX.XX After This Date		

Flip the Switch and turn off your paper bill. You will gain the benefit of receiving an email when your bill is ready to be viewed and the security of viewing it safely anytime, anywhere.

13 Month Usage History

Meter Number	Service Period From	Service Period To	Previous	Code	Current	Code
999999999	MM/DD	MM/DD	XXXXX	Actual	XXXXX	Actual
Multiplier XXX,XXX	Metered Usage		XXXXX	KWH		
999999999	MM/DD	MM/DD	XXXXX	Actual	XXXXX	Actual
Multiplier XXX,XXX	Metered Usage		XXXXX	KW		
999999999	MM/DD	MM/DD	XXXXX	Actual	XXXXX	Actual
Multiplier XXX,XXX	Metered Usage		XXXXX	KVARH		

Stealing copper is illegal and can have deadly consequences. Reporting copper theft could save a life. If you have any information, please call 1-866-747-6845.

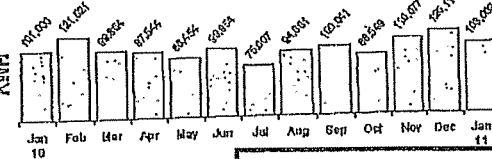
Next Scheduled read date should be between MM/DD and MM/DD

Month	Usage (KWH)
Jan	10
Feb	10
Mar	10
Apr	10
May	10
Jun	10
Jul	10
Aug	10
Sep	10
Oct	10
Nov	10
Dec	10
Jan	10

Having a phone number for this address can help us serve you better, especially when storms cause service interruptions.

Total KWH for Past 12 Months is X,XXX,XXX

Visit us at [www.KentuckyPower.com](http://www.KentuckyPower.com)  
 Rates available on request.  
 See other side for important information.



(Cont'd on Sheet No. 2-14)

KENTUCKY PUBLIC SERVICE COMMISSION

JEFF R. DEROUEN EXECUTIVE DIRECTOR

TARIFF BRANCH

DATE OF ISSUE June 24, 2011 DATE EFFECTIVE Service rendered on and after

ISSUED BY LILA P MUNSEY NAME MANAGER REGULATORY SERVICES TITLE

Signature: *Burt Kirtley*

ADDRESS EFFECTIVE

Issued by authority of an Order of the Public Service Commission in Case No. 2010-00198 dated October 5, 2010 PURSUANT TO 807 KAR 5:011 SECTION 9 (1)

7/29/2011





Kentucky Power  
12333 Kevin Ave.  
Ashland, KY 41102  
KentuckyPower.com

To: The Honorable Thomas E. Kelley, Mayor  
Ashland City Commission  
City of Ashland  
Ashland, KY 41101

Dear Mayor Kelley and Commissioners:

The undersigned, Kentucky Power Company, a corporation organized and existing under the laws of the Commonwealth of Kentucky, hereby offers to purchase the right, privilege, franchise and authority to erect and operate an electric light and power system in the City of Ashland, Boyd County, Kentucky, such franchise to contain all rights and privileges prescribed by Ordinance No. 44, 2011 directing the sale of the same and adopted by the City Commission on April 7, 2011. This bid is in accordance with all conditions prescribed by said Ordinance except for a portion of the conditions set forth in Section 8(a). Specifically, Kentucky Power Company's bid does not include the condition prohibiting it from collecting as a separate item on the periodic bills of its customers within the City of Ashland an amount equal to the total of each customer's proportionate part of the franchise fee.

As consideration for this franchise, Kentucky Power Company offers to pay to the City of Ashland a sum equal to three percent (3%) of the revenues collected within the Ashland City Limits. This same percentage will be added to the electric bills of customers within the City of Ashland, separate from and exclusive of any local or state tax, effective thirty (30) days after passage of said Ordinance. This additional amount on customers' bills will be shown in accordance with the Kentucky Power Company Schedule of Tariffs, Terms and Conditions of Service Governing Sale of Electricity, P.S.C. Electric No. 9, Sheet 20-1 (issued by authority of an Order of the Kentucky Public Service Commission in Case No. 2009-00459 dated June 28, 2010) or as subsequently revised. The addition of the three percent (3%) franchise fee on customers' electric bills within the City of Ashland is in accordance with and is required by the above-referenced Tariff, which states:

#### **AVAILABILITY OF SERVICE**

Where a city or town within Kentucky Power's service territory requires the Company to pay a percentage of revenues from certain customer classifications collected within such city or town of the right to erect the Company's poles, conductors, or other apparatus along, over, under, or across such city's or town's streets, alleys, or public grounds, the Company shall increase the rates and charges to such customer classifications within such city or town by a like percentage. The aforesaid charge shall be separately stated and identified on each affected customer's bill.



The Honorable Thomas E. Kelley  
Ashland City Commission  
Page Two

Kentucky Power Company is prohibited by KRS 278.160 from deviating from the terms of the Tariff approved by the Kentucky Public Service Commission.

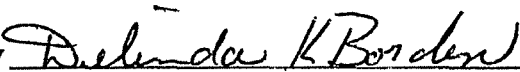
Payment of total fees billed in the prior month's billing shall be made to the City within forty-five (45) days following close of such month. Any such fees paid to the City which are included in electric bills charged off as uncollectible shall be allowed as a credit to Kentucky Power Company in the determination of the payment due the City for the month in which such charge off occurred. In the event the City Commission changes the percentage of the franchise fee by ordinance, the percentage applied to customers' bills will be changed accordingly by Kentucky Power Company.

We attach and file herewith, as part of this bid and purchase offer, a copy of the Certificate of Convenience and Necessity issued by the order of the Public Service Commission of Kentucky, Case No. 2011-00018, entered January 18, 2011, authorizing Kentucky Power Company to bid.

The undersigned, Kentucky Power Company already owns and operates in the City of Ashland plant and equipment sufficient to render the services required under the terms and provisions of the Ordinance directing the sale, and is now furnishing adequate service to the City and its inhabitants.

Respectfully submitted this 2nd day of June, 2011.

KENTUCKY POWER COMPANY

By   
Delinda K. Borden  
Customer & Distribution Services Manager

Attachment



RENDERED: July 19, 1996; 2:00 p.m.  
NOT TO BE PUBLISHED

Commonwealth Of Kentucky  
Court Of Appeals

NO. 95-CA-2127-MR

COLUMBIA GAS OF KENTUCKY, INC.

APPELLANT

V.  
APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 93-CI-458

CITY OF ASHLAND, KENTUCKY,  
A CITY OF THE SECOND CLASS

APPELLEE

OPINION AFFIRMING

\* \* \* \* \*

BEFORE: WILHOIT, Chief Judge, DYCHE, and GUDGEL, Judges.

GUDGEL, JUDGE: This is an appeal from a declaratory judgment entered by the Boyd Circuit Court. The issue is whether the court erred by finding that appellee City of Ashland (City) was entitled to reject as unresponsive the bid of appellant Columbia Gas of Kentucky, Inc. (Columbia Gas) because Columbia Gas proposed to charge back to its customers on their bills the amount which was bid for the franchise. We are of the opinion that it did not. Hence, we affirm.

The relevant facts are uncomplicated and undisputed. Columbia Gas has provided natural gas service to the City and its

residents since 1913 although its franchise to do so expired in 1922. Despite the provisions of KRS 96.010(1), the City never undertook to sell a new franchise until after it enacted Ordinance No. 155, providing for the advertisement and sale of a gas company franchise, in December 1992. That ordinance states in pertinent part as follows:

SECTION 12. As consideration for the rights conferred by the granting of this franchise, and to compensate the City for its superintendence of the franchise, the successful bidder shall pay to the City a fee, the minimum of which shall be equal to 36% of the charges paid for gas services by the City of Ashland upon the following conditions:

- (a) Such fees shall be initially fixed by separate ordinance which shall state the City's acceptance of the Company's bid.
- (b) The Company shall remit to the City, quarterly, all amounts due under this franchise. The first such remittance shall be based upon revenues received by the Company during the first three (3) months following the effective date of the franchise as set forth in Section 19 hereof, and shall be paid within forty-five (45) days following such period. Thereafter, payments shall be made within forty-five (45) days after each subsequent three (3) month period. The final payment shall be paid within forty-five (45) days following the expiration of this franchise.
- (c) In the event the City of Ashland makes no payments to a company as defined by this ordinance, the bid for a ten

(10) year franchise shall be a minimum of \$3,000.00 payable within forty-five (45) days of the granting of a franchise.

SECTION 15. (1) Bids and proposals for the purchase and acquisition of the franchise and privileges hereby created shall be in writing and shall be delivered to the City Clerk or designated subordinate upon the date and at the time fixed in said advertisement for the receipt of such.

(2) Bids offered for purchase of this franchise shall state the bidder's acceptance of the conditions set forth in this ordinance.

(3) Any cash or check remitted by an unsuccessful bidder shall be returned.

SECTION 16. At the first regular meeting of the City Commission following the receipt of such bids, the City Manager shall report and submit to the City Commission all bids and proposals for acceptance of bids. Acceptance of a bid shall be expressed by an ordinance. The City Commission reserves the right, for and in behalf of the City, to reject any and all bids for said franchise and privilege. In case the bids reported by the City Manager shall be rejected by the City Commission, it may direct, by resolution or ordinance, that said franchise and privilege be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and accepted.

Columbia Gas thereafter submitted two bids for the franchise, each of which stated in relevant part as follows:

Section 12 In consideration of the granting of this franchise to distribute gas within the City of Ashland, Columbia Gas of Kentucky, Inc. will pay an annual franchise fee equal

to two percent (2%) of the annual gross service revenues received by Columbia Gas of Kentucky, Inc. from the sale of gas within the corporate limits of the City of Ashland, Kentucky. Columbia Gas of Kentucky, Inc. will collect, as a separate item on the periodic bills of its customers served within the corporate limits of the City of Ashland, Kentucky, and pay over to the Ashland municipal government, an amount equal to the total of each customers' proportionate part of the franchise fee set forth above. In the event Columbia Gas of Kentucky, Inc. is prohibited by any regulatory body or court from collecting such proportionate amounts from customers receiving service within the corporate limits of Ashland, Kentucky, then to that extent, Columbia Gas of Kentucky, Inc. shall be relieved from any obligation under this Section. For the purposes of the foregoing paragraph, the franchise shall be effective March 1, 1993, and calculation of amounts payable hereunder shall commence with all bills tendered to customers by the Company on and after said date. Payment of said amount to the City of Ashland, after approval by the Kentucky Public Service Commission, shall be made quarterly on the 15th day after the end of each quarter without certification of the amount of gross service revenues by a public accountant.<sup>1</sup>

The City both rejected Columbia Gas's bids as unresponsive and filed a civil action seeking a declaration of rights to that effect. Columbia Gas responded with a counterclaim, seeking an

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<sup>1</sup>Columbia Gas's bids also requested other provisions or conditions relating to subjects besides those set forth in the City's bid documents. However, as the parties did not address these differences in either their pleadings or their arguments to the court below, we assume they can be resolved amicably.

adjudication that the City's rejection of its bids was arbitrary and void.

Eventually, the case was submitted to the court for decision on the parties' briefs. On July 7, 1995, the court entered a judgment which stated in relevant part as follows:

The main hang up appears to be that the Defendant wants to include a line item on the bills of customers in the City of Ashland for collection of the franchise fee back from those who receive the service. The City takes the position that if Columbia can pass the cost of the franchise onto the customers of Ashland, then Columbia has essentially received the valuable privilege of using the City's rights-of-way for free which would be unfair to city taxpayers. The City feels that the utility must absorb the cost of the franchise as a part of doing business since it is receiving something valuable for it.

The Defendant on the other hand argues that the bids submitted were responsive in that they would generate more revenue for the City than the ordinances would have and that the City's interpretation of the ordinance is arbitrary, capricious and oppressive. The Defendant makes a strong argument that if utilities have to go to the Public Service Commission and seek rate increases to offset the cost of franchise fees, the net effect will be that customers in our area of the state will be paying higher rates because of a franchise fee in a different area of the state. . . .

The Defendant is probably correct as to where the current course is leading, that being the request to the PSC for a rate increase to offset the franchise fee. However, the fact remains that if the Defendant is allowed to pass the cost of the franchise along to the customers then it will have

gotten the valuable privilege of using the city's rights-of-way for free. Surely, this cannot be right. Section 164 of the Kentucky Constitution empowers the City to reject any and all bids. The fact that the City selected an ordinance that does not provide for a line item charge in order to protect its taxpayers from the additional charge does not make it unreasonable, arbitrary or capricious.

This appeal followed.

Given the relevant factual background and the court's ruling, we believe the posture of this case on appeal raises a single narrow issue regarding the sale of utility franchises by cities, i.e. whether a city possesses the legal right to force a utility, when submitting a bid for the purchase of a franchise, to contractually agree to absorb the cost of the franchise as a normal operating expense. We conclude that a city does possess such a right. Hence, we affirm.

Sections 163 and 164 of the Kentucky Constitution and KRS 96.010(1) authorize cities such as Ashland to sell utility franchises. Specifically, Section 163 of the constitution in effect provides that no utility shall be permitted or authorized to construct facilities along, over, under, or across a city right-of-way without the consent of the proper legislative body, while Section 164 forbids any city from granting a franchise for a term exceeding twenty years and directs that the award of such a franchise must occur only after there has been public advertisement and the receipt of bids therefor. Moreover, although Section 164 states that a franchise shall be awarded "to



the highest and best bidder," the section also authorizes a city "to reject any or all bids." In addition, KRS 96.010(1) provides that the sale of a new franchise to the highest and best bidder shall be on "terms that are fair and reasonable to the city," to the purchaser, and to the utility's customers, and that such "terms" shall specify the quality of the service which is to be rendered.

Having reviewed the applicable constitutional and statutory provisions, it is immediately apparent that nothing in the language of those provisions expressly authorizes a city to dictate the source of the funds which must be utilized by a utility to pay a franchise fee. Indeed, KRS 278.040(2) expressly states that the Public Service Commission (PSC) possesses exclusive jurisdiction over the regulation of utility rates. Nevertheless, it does not follow that the City's actions herein are illegal and void, as the law to the contrary is well settled.

In Peoples Gas Co. of Kentucky v. City of Barbourville, 291 Ky. 805, 165 S.W.2d 567 (1942), our highest court was asked to interpret and harmonize the constitutional and statutory provisions regarding a municipality's authority to sell utility franchises in light of certain newly-enacted statutes (now embodied, substantially unchanged, in KRS Chapter 278) which created the PSC. The court resolved the issues relating to the attachment and extent of the PSC's jurisdiction as follows:

That language is an express limitation upon the powers of the Commission, with a like preservation of the power and authority of municipalities theretofore

possessed by them, from the time our state was admitted into the Union. Such power and authority was and is the right of municipalities upon installing a utility within its borders to prescribe for the character of service to be rendered by it and the rates to be charged therefor at the beginning. The statute nowhere indicates a purpose to entirely take from municipalities such authority or to diminish their power in such respects, but only to modify it by prescribing that from time to time thereafter the "regulation" of rates and service was conferred upon the Public Service Commission. The language itself assumes that there were already existing provided rates, facilities and terms of service to be regulated by the Commission in the exercise of the jurisdiction conferred upon it by the act; but nowhere in the statute, either in the section referred to or any other part of it, is there any intimation that it was the purpose of the legislature to strip and take away from the municipality, in the granting of such franchise, the power and authority to enact and prescribe beginning terms and conditions, but which nevertheless might thereafter be regulated as applicable to both rates and services performed.

165 S.W.2d at 570-71. Hence contrary to Columbia Gas's contention, it is clear that the PSC's jurisdiction does not attach until after a city awards a utility franchise. Until then, the city has sole jurisdiction to determine the franchise's terms regarding both rates and services. Moreover, it is of no significance herein that Columbia Gas was previously awarded a franchise and that it has been conducting its business without a franchise for many years, as any rights Columbia Gas acquired under the old franchise have long since expired. Hence, the City is entitled to offer the new franchise on different terms and

conditions if it wishes. Cf. Kentucky Utilities Co. v. Board of Commissioners of City of Paris, 254 Ky. 527, 71 S.W.2d 1024 (1933).

Further, in a case such as this where a city has exercised its constitutional authority in rejecting a bid, the courts may not interfere in the city's exercise of its discretion absent very limited circumstances. Indeed, the applicable rule is well stated in Groover v. City of Irvine, 222 Ky. 366, 300 S.W. 904, 905 (1927), as follows:

Here there is presented for the first time the question whether the discretion vested in the board of council of the municipality is subject to the control of the courts in the circumstances presented. In granting franchises for the public benefit, a city council acts in a legislative capacity. In the exercise of this power a discretion is vested, which cannot be taken away by the courts. Inasmuch, however, as the members of the city council act as trustees for the public to the end that the latter may obtain such conveniences as telephones, electric lights, and the like, they may not, after the sale of a franchise, arbitrarily or corruptly reject all bids and thereby escape the obligation to award the franchise to the highest and best bidder. However, when the exercise of the power and discretion to reject bids is attacked in the courts, the presumption will be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public. To proceed upon any other theory would be to substitute the judgment and discretion of the courts for the judgment of the members of the council with whom the lawmakers have seen fit to lodge the power. Little Rock Railway & Electric Company v. Dowell, 101 Ark. 233, 142 S.W. 165, Ann.

Cas. 1913D, 1086. Hence it is incumbent on one who calls in question the discretion of the council to allege and prove facts showing that the council acted arbitrarily or corruptly, and was therefore guilty of a clear and palpable abuse of discretion.

Here, Columbia Gas urges that the City's rejection of its bids was arbitrary because, although a municipality may set a reasonable fee for granting a franchise, nothing in the applicable constitutional or statutory provisions authorizes a municipality to dictate how a utility company raises the necessary funds for purchasing a franchise. We disagree.

As noted above, KRS 96.010(1) dictates that the sale of any new franchise, even to a utility such as Columbia Gas which held a previous but now expired franchise, must be on terms which are fair and reasonable "to the city, to the purchaser of the franchise and to the patrons of the utility." Here, the record shows that the City requested a minimum bid for the franchise of \$18,810. Columbia Gas in response offered to pay approximately \$123,000 for the franchise, disclosing that it would recoup this sum from its customers through line item charges added to their monthly bills. The City objected to the plan as being unfair and unreasonable to the customers of Columbia Gas, especially since the amount bid for the franchise was significantly higher than the minimum amount which the City had indicated it would accept. Nothing in the record establishes that the City's efforts to protect its residents from additional monthly charges by exercising its constitutionally-authorized discretion to reject

Columbia Gas's bid was not done "with reason and in good faith for the benefit of the public." Groover v. City of Irvine, 300 S.W. at 905. Absent any showing that the City's conduct constituted a clear and palpable abuse of discretion, it follows that the City did not act arbitrarily by rejecting Columbia Gas's bid. Hence, the court did not err by denying Columbia Gas's request for relief.

The court's judgment is affirmed.

ALL CONCUR.

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