

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter Of:

APPLICATION OF KENTUCKY)
POWER COMPANY FOR A CERTIFICATE OF)
PUBLIC CONVENIENCE AND NECESSITY)
AUTHORIZING THE APPLICANT TO OBTAIN A)
FRANCHISE IN THE CITY OF ASHLAND, BOYD)
COUNTY, KENTUCKY)

Case No. 2011-00018

Kentucky Power Company (“Kentucky Power” or the “Company”), files this Reply to the City of Ashland’s Response to Kentucky Power’s August 4, 2011 “Notice of Filing of Franchise Ordinance.” In its Response, the City of Ashland (“City”) asserts the Public Service Commission lacks jurisdiction to determine the legality of Kentucky Power’s adherence to its PSC-approved Tariff F.T. [EXHIBIT 1].

Background

A. City of Ashland’s Franchise Ordinance.

The City adopted Ordinance 44, 2011 on April 7, 2011 authorizing the solicitation of bids for the sale of “a franchise for an electric power company to own, maintain, construct and operate its electric transmission and distribution lines upon, along, over and under the streets, thoroughfares, alleys, sidewalks, bridges, public weighs and other public places of the City of Ashland, Boyd County, Kentucky” City of Ashland, Kentucky Ordinance 44, 2011 [EXHIBIT 2]. Section 8(a) of the bid ordinance purports in pertinent part to prohibit the pass-through of the franchise fee as a line item on a customer’s bill: “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...." (The ordinance fixes the franchise fee at 3% of the revenues collected within the City. As such, the fee represents more than a **1,100%** increase in the fee imposed by the prior franchise.)

The Section 8(a) prohibition against the pass-through of franchise fees would require Kentucky Power to violate its Tariff F.T. as well as KRS 278.160(2). Tariff F.T.¹ provides that:

Where a city or town within Kentucky Power's service territory requires the Company to pay a percentage of revenues ... the Company shall increase the rate 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.

On June 2, 2011, Kentucky Power bid on the franchise. **[EXHIBIT 3.]** With single exception, Kentucky Power's bid was in conformity with all provisions prescribed in the ordinance. The exception was that, as required by its Tariff F.T, and KRS 278.160, Kentucky Power's bid expressly excluded the prohibition against the pass-through of the franchise fee. Kentucky Power's bid for the franchise stated that the Company would collect 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. *Id.* at 1-2.

On July 16, 2011, the City of Ashland adopted Ordinance 84, 2011 accepting Kentucky Power's bid and granting the franchise ("Franchise Ordinance.") **[EXHIBIT 4.]** However, the ordinance purports to prohibit the Company from passing-through the franchise fee as a separate line item. That is, the City sought to shift the burden of the franchise fee to Kentucky Power initially, and then, following the Company's next general rate case, ultimately to the more than 100,000 Kentucky Power customers who do not live within the confines of the City of Ashland,

¹ Kentucky Power's sample bill forms (P.S.C. Electric No. 9) (Second Revised Sheet No. 2-11 and 2nd Revised Sheet 2-13)

or enjoy the city's services.

B. P.S.C. Case No. 2011-00018.

Prior to the City's enactment of Ordinance 44, 2011 soliciting bids for the franchise, Kentucky Power on January 12, 2011 filed an application with the Commission pursuant to KRS 278.020(1) seeking a certificate of public convenience and necessity authorizing Kentucky Power to bid for the franchise. On January 18, 2011, the Commission granted Kentucky Power the requested authority to bid. The January 18, 2011 Order also directed Kentucky Power to file two copies of the franchise ordinance if it was the successful bidder. Order, *In the Matter of: Application of Kentucky Power Company For A Certificate Of Public Convenience And Necessity Authorizing Applicant To Obtain A Franchise In The City Of Ashland, Boyd County, Kentucky*, Case No. 2011-00018 (Ky. P.S.C. January 18, 2011).

In conformity with the Commission's January 18, 2011 Order in this proceeding, Kentucky Power on August 4, 2011 filed the City of Ashland franchise ordinance, along with a "Notice of Filing of Franchise Ordinance" in which it indicated the conflict between the Company's Tariff F.T. and KRS 278.160(2) on the one hand, and the franchise ordinance on the other. On September 9, 2011, the City filed a "Response Of Ashland To The Notice Of Filing Of Franchise Ordinance By Kentucky Power Company." In its Response, the City seeks a determination by the Commission that the Commission "lacks jurisdiction to rule on the effect of City Ordinance No. 84, 2011, Section 8 on the Commission Tariff which Kentucky Power believes exempts it from compliance with the Franchise requirements." City of Ashland Response, *In the Matter of: Application of Kentucky Power Company For A Certificate Of*

likewise show the itemization and imposition of a "Franchise Tax" on customer bills.

Public Convenience And Necessity Authorizing Applicant To Obtain A Franchise In The City Of Ashland, Boyd County, Kentucky, Case No. 2011-00018 (Filed September 9, 2011) (“City Response.”) Although ostensibly limited to the question of the Commission’s jurisdiction to adjudicate the conflict between Kentucky Power’s Tariff F.T and the Franchise Ordinance, the City’s Response addresses both the Commission’s jurisdiction and the merits² of the City’s claim that the Franchise Ordinance trumps Franchise F.T. and KRS 278.160. This Reply will do likewise.

Argument

Relevant Kentucky statutory, constitutional and case law show that the Commission has jurisdiction in this matter, and that the City’s position on the merits is without basis in law or fact.

- A. The Commission Enjoys Jurisdiction To Adjudicate The Conflict Between Section 8(a) Of The Franchise Ordinance And Kentucky Power’s Tariff F.T.
 1. KRS 278.040(2) And KRS 278.260 Provide The Commission With Jurisdiction To Resolve The Dispute Between The City and Kentucky Power.

KRS 278.040(1) provides that “[t]he Public Service Commission shall regulate utilities and enforce the provisions of ...” Chapter 278 of the Kentucky Revised Statutes. Section (2) of the same statute further vests the Commission with jurisdiction of “all utilities,” and, most importantly, grants the Commission “exclusive jurisdiction over the regulation of the rates and service of utilities....” The term “rate” as used in KRS 278.040(2) is broadly defined by KRS 278.010(2) to include:

² See e.g., City Response at 3 (“Under Section 164, cities ‘have the right to reject any and all bids.’ Obviously included within that right is the right to reject a bid which the franchisor deems inadequate.”); *id.* (“To allow Kentucky Power to reject

any individual or joint fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof.

This definition “is quite comprehensive,” *Kentucky CATV Association v. Volz*, 675 S.W.2d 393, 396 (Ky. Ct. App. 1983), and extends to the Company’s recovery of the cost of the new Ashland franchise fee from its customers living in the City of Ashland (“fare, toll, charge, rental, or other compensation”), the identification of the amount of the franchise fee being recovered by Kentucky Power from its customers as a line item on Kentucky Power’s bill (“practice, act, [or] requirement ... relating to such fare, toll, charge, rental or other compensation...”), and Tariff F.T. itself (“any schedule or tariff...”) Thus, on their face KRS 278.010(12) and KRS 278.040(4) grant the Commission exclusive jurisdiction over any questions regarding Kentucky Power’s right to recover the franchise fee from its customers, the contents of Kentucky Power’s bills, and the validity of the Company’s Tariff F.T.

Although KRS 278.040(2) reserves to cities their police power and contract rights, the language of the statute makes the reservation expressly subject to the exclusive jurisdiction of the Commission over utility rates. First, by placing the statement of the Commission’s exclusive jurisdiction over utility rates at the beginning of the provision, the General Assembly made clear that such jurisdiction was the general rule absent an express statutory exception to the contrary. Second, and more fundamentally, the General Assembly expressly made the reservation of municipal police power and contract rights in KRS 278.040(2) subject to the Commission’s exclusive jurisdiction: “*but with that exception* nothing in this chapter is intended nothing in

such a condition allows it the right to use the City rights-of-way without any cost.”)

this chapter is intended to limit....” (emphasis supplied).

Further underscoring the Commission’s jurisdiction over the merits of the controversy is KRS 278.260(1). It grants the Commission “original jurisdiction over complaints as to rates or service of any utility....” KRS 278.260(1). In its Response, the City unambiguously challenges the reasonableness of Kentucky Power’s pass-through of the City’s franchise fee. *See*, City Response at 3 (“To permit Kentucky Power to reject such condition allows it the right to use the City rights-of-way without any cost”); *id.* at 3 (“Kentucky Power’s actions [in passing through the franchise fee] are repugnant to both the statutory scheme and case law.”); *id.* at 2 (characterizing the Franchise Ordinance’s prohibition of the pass-through of the franchise fee as a “fair and reasonable” term); *id.* (“Section 8 of Ordinance No. 84, 2011 is neither ambiguous or unreasonable nor is it arbitrary and capricious.”) The Commission thus may treat the City’s Response as a complaint, or the Commission may act on its own motion to resolve the dispute. KRS 278.260(1) (“The commission may also make such an investigation on its own motion.”)

2. The City’s Jurisdictional Arguments Are Without Merit.

Although acknowledging the Commission’s exclusive jurisdiction over Kentucky Power’s rates, the City nevertheless argues that the final clause of the statute reserves to cities “the[ir] police jurisdiction, contract rights or powers....” City Response at 2. The City makes this argument only by eliding the first half of the clause upon which it relies. Indeed, the sentence in its entirety provides that:

The Commission shall have exclusive jurisdiction over the regulation of the rates and services of utilities, **but with that exception**, *nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights, or powers of cities or political subdivisions.*

(emphases supplied). The City cites only the italicized portion of the statute. But as the bolded text makes clear, the reservation to cities of their police power and contract rights is expressly subject to the exclusive jurisdiction of the Commission over the rates and services of utilities. Nothing in KRS 278.040(2), or Chapter 278 of the Kentucky Revised Statutes in its entirety, supports the City's contention that the Commission is divested of its exclusive jurisdiction over the rates charged by Kentucky Power within the boundaries of the City of Ashland. In fact, the statute unambiguously provides to the contrary.

The City also argues that although the Commission has jurisdiction, the matter is not ripe: “[t]he conclusion from these authorities is that the Commission does not have jurisdiction over the matter *until after the City awards the franchise.*” City Response at 2-3 (emphasis supplied). Whatever the merits of the authority cited by the City (and as discussed below the cases upon which the City rely do not support its position), the Franchise Ordinance awarded Kentucky Power the franchise, and thus by the terms of the City's own argument this Commission now has jurisdiction over the dispute:

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 ... [use the public streets and rights-of-way] ... for the purpose of supplying energy to said City and the inhabitants thereof

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

Franchise Ordinance, §§ 1, 13. The ordinance was adopted by the City Board of Commissioners on June 16, 2011, readopted on by the Board on July 21, 2011 and published on July 25, 2011. *See, **EXHIBIT 5.*** Indeed, the City's Response seeks a declaration by the Commission that the Franchise Ordinance is “in effect pending action by the courts to determine the validity of the

City's action." City Response at 3.

3. The Cases Relied Upon By The City Offer No Support For Its Contention That The Commission Lacks Jurisdiction Over This Dispute.

The City cites three cases in support its argument that the Commission lacks jurisdiction to determine whether Kentucky Power may pass-through the City's franchise fee by means of a line item on the Company's customers' bills. The City's case law is no more availing than its reliance upon the truncated language of KRS 278.040(2).

First, none of the decisions limned the Commission's jurisdiction in light of KRS 278.040(1) (as currently constituted), or the requirements of KRS 278.160(2). As such, all three are inapposite. Indeed, *Groover v. City of Irvine*, 300 S.W. 904 (1927) was decided seven years before the General Assembly created the Public Service Commission through the enactment of the Kentucky Public Service Commission Act of 1934. *See*, 1934 KY. ACTS ch. 145.

Second, neither *Groover* nor *Berea College Utilities v. City of Berea*, 691 S.W.2d 235 (Ky. App. 1985) address the ability of a utility to pass through a franchise fee to its customers by means of a line item on the utility's bills, or the authority of the Commission to approve a tariff providing for such a pass-through and line item. At issue in *Groover*, for example, was the authority of the judicial branch – not an Executive Branch agency granted exclusive jurisdiction over a utility's rates – to enjoin the City's repeal of an ordinance granting a franchise. *Groover*, 300 S.W. at 905 (“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.”) Likewise, although the court's decision in *Berea College Utilities* addressed a city's authority to impose a minimum bid amount to be paid by the utility, nothing in

the decision even hints at the city's authority to set the rates to be charged by the utility. That is, *Berea College Utilities* addresses the franchise fee charged the utility by the city, not the rates to be charged the utility's customers, or the city's ability to set those rates.

Third, the City's reliance upon the nearly seventy year old decision in *Peoples Gas Co. of Kentucky v. City of Barbourville*, 165 S.W.2d 567 (Ky. 1942), is unfounded. There, the city ordinance soliciting bids for a gas franchise in Barbourville imposed a number of conditions, including "specified rates for the beginning of operations under the new franchise." *Id.* at 569. Peoples Gas filed a declaratory judgment action when Barbourville rejected the utility's bid containing different terms. *Id.* On appeal from the trial court's dismissal of the utility's action, the Court examined whether Section 3952-27 of Carroll's Code³ divested the city of the authority to prescribe through a franchise the initial rates to be charged by the utility. *Id.* at 370. Based upon Section 3952-27, *id.*, the Court concluded that the city retained the authority in granting a franchise to fix *the initial rates* charged by the utility:

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 the power and authority to enact and prescribe the beginning terms and conditions, but which nevertheless might thereafter be regulated as applicable to both *rates* and *services* performed.

Id. at 371. Even this authority was limited by the requirement that the initial rates must be reasonable. *Id.* Moreover, the *Peoples Gas* Court recognized the Commission possessed the

³ Carroll's Code, including Section 3952-27 upon which the *Peoples Gas* Court premised its decision, was repealed in 1942 as part of the creation of the Kentucky Revised Statutes. KRS 447.025. The pertinent portion of Section 3952-27 was enacted as part of KRS 278.040(2). In enacting KRS 278.040(2), the General Assembly modified the former Section 3952-27 to provide as it presently reads. The effect of the 1942 repeal and concurrent re-enactment in a different form was to change the law. *Fidelity & Columbia Trust Co. v. Meek*, 171 S.W.2d 41, 44-45 (Ky. 1943) (Kentucky Revised Statutes became "the law itself, replacing all former statutes.... former statute publications are deemed repealed and changed thereby....") As discussed above, KRS 278.040(2) now unambiguously reserves to the Commission the right to fix Kentucky Power's rates to the exclusion of the City.

authority to modify the initial rates fixed by the city.⁴ *Id.*

More recently, the Kentucky Supreme Court in *City of Florence v. Owen Elec. Co-op., Inc.*, 832 S.W.2d 876 (Ky. 1992) made clear that the Commission's exclusive jurisdiction over utility rates trumps a city's franchise authority. At issue in *City of Florence* was an attempt by the city to award a franchise to Union Light, Heat and Power Company in contravention of the certified territory statutes under which Owen Electric had the exclusive right to provide electric service in the disputed area. On appeal from an adverse decision, the city argued that Section 163 and Section 164 of the Kentucky Constitution vested it with the exclusive authority to fix the terms of any franchise awarded by it, and that its exercise of its franchise rights were not subject to limitation by the General Assembly or the Commission. *Id.* at 879.

Rejecting the city's arguments, the Kentucky Supreme Court first explained the limited nature of cities' franchise authority:

“it is clear that the framers of the [Kentucky] Constitution meant to vest a municipality with *only* the right and power to control the original occupation of its public ways and streets.... It is a misconception to characterize Sections 163 and 164 as eliminating total legislative authority regarding franchising. In effect, municipalities have only the right to grant street franchises.”

Id. (emphasis supplied). Even this limited authority is subject to the police power of the General Assembly and its delegatee (the Commission), including the right to fix rates:

No language is discerned in either Section 163 or 164 of the Constitution indicating that the state has been deprived of the right to exercise police power and the right to implement control of rates and services of the utilities....A franchise... granted by a municipality is granted subject to the right of the state to exercise its police power.... the authority to regulate rates and modes of

⁴ Even if *Peoples Gas* remained good law, and it does not, the Commission's ability under *Peoples Gas* to modify the initial rate established by the City means that the Commission's approval of Tariff F.T., even though prior to the City's adoption of the Franchise Ordinance, coupled with KRS 278.160, worked such a modification.

conducting business of public utilities *has been held to be primarily a legislative function of the state.*

Id. at 881.

In short, the language of KRS 278.040(2), and recent precedent make clear that the Commission has jurisdiction to determine Kentucky Power's right to pass through the City's franchise fee through a line item on its customers bills.

B. Section 8 Of The Franchise Ordinance Is Contrary To The Law, Including KRS 278.160, And Commission Policy.

KRS 278.160(2) imposes a double obligation. First, it requires Kentucky Power to charge its tariffed rates, and only its tariffed rates: "No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service to be rendered or to be rendered than that prescribed in its filed schedules...." Second, it imposes on Kentucky Power's customers the obligation to pay the Company's tariffed rates, and only its tariffed rates: "no person shall receive any service from any utility for compensation greater or less than that prescribed in such schedules." *Id.*

The Franchise Ordinance and Kentucky Power's PSC-approved Tariff F.T. are irreconcilable. The ordinance prohibits the Company from collecting the franchise fee as a separate line item on the bill of each customer within the City. By contrast, the franchise tariff for Kentucky Power approved by the Commission unequivocally requires the Company to collect the franchise fee as a separate line item on each customer's bill within the City. Accordingly, the City is requiring the Company as a condition of receiving the franchise to violate the PSC-approved franchise tariff. The City likewise has arrogated unto itself the authority to dictate to Kentucky Power when it may and when it may not comply with its Commission-approved tariffs.

In so doing, the City's Franchise Ordinance directly contravenes the provisions of KRS 278.160(2).

Kentucky law dictates that any conflict between a statute and an ordinance must be resolved in favor of the statute. *City of Ashland v. Ashland Supply Company*, 7 S.W.2d 833, 835 (Ky. 1928). Likewise, because an approved tariff has the effect of law, it too trumps a conflicting ordinance. *See Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) ("a tariff, required by law to be filed, is not a mere contract. It is the law.") As a result, Section 8 of the Franchise Ordinance must yield to KRS 278.160(2) and Kentucky Power's Franchise F.T.

The Franchise Ordinance also is contrary to the Commission's thirty-year policy governing the recoupment of franchise fees. To recoup the Ashland franchise fee, the ordinance requires Kentucky Power to seek a rate increase from the Commission which will (if granted) increase the rates paid by all customers throughout the Company's service area. Thus, by enacting Section 8 of the Franchise Ordinance the City of Ashland seeks to shift the cost of the City's franchise fee (that is, a cost that is limited to its operations in Ashland) onto the shoulders of Kentucky Power's customers who reside in Greenup County, the City of Hazard, and other locations throughout the Company's service territory. As such, the Franchise Ordinance dictates to the Company not only how it must recoup the franchise fee (*i.e.*, an across-the-board rate increase as opposed to a line item charge on the bills of Kentucky Power's customers within the City of Ashland) but also from whom Kentucky Power must recoup the franchise fee (*i.e.*, from all customers in the Company's service area as opposed to Kentucky Power's customers within the City of Ashland).

This cost-shifting by the City is contrary to the Commission's longstanding recognition

that it is unfair and discriminatory to require customers who do not reside within the city levying the franchise fee to pay the costs of the franchise. *See The Matter of: The Local Taxes And/Or Fees Tariff Filing of General Telephone Company Of Kentucky*, Case No. 7843 (Ky. P.S.C. October 6, 1980). The Commission in *The Matter of: Taylor County Rural Electric Cooperative Corporation Notice of Tariff Revision*, Case No. 89-054 (April 10, 1989) explained the rationale for the policy:

Most jurisdictions have held that a rate is unjust when it does not impose the burden of franchise payments on users in the community which receives the payments.... The Commission is in agreement with this view.... The rationale for this position is based on notions of equity and public policy. Franchise fees are a clearly identifiable cost of doing business only in the community which imposes it. Imposing this cost on utility customers who are located outside the community and who receive no benefit from the community services supported by such fees is discriminatory.

See also The Matter of: The Local Taxes and/or Fees Tariff Filing of General Telephone Company of Kentucky, Case No. 7843 (Ky. P.S.C. October 6, 1980) (noting that “the fairest and best way to accomplish [the fair recovery of franchise costs across a customer base] is [for the utility] to recover franchise fees as a separate item on the bills of customers receiving service within a municipality requiring such a fee.”)

The Commission should reject the City’s unilateral efforts to amend this thirty-year Commission policy.

Conclusion

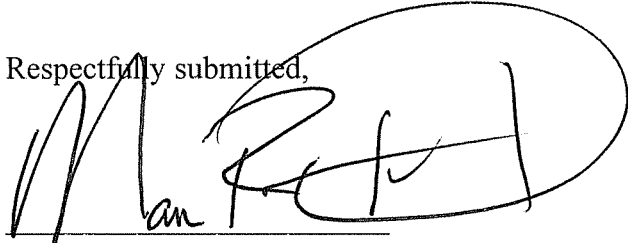
Kentucky Power Company respectfully requests that the Commission enter an Order:

(a) Finding that the Commission has jurisdiction to determine the legality of Kentucky Power's adherence to its PSC-approved Tariff F.T. in the face of the City of Ashland Franchise Ordinance prohibiting the Company from passing through the cost of the City's franchise fee by means of a line item on the bills rendered to the Company's customers receiving service with the City boundaries;

(b) Establishing a proceeding to determine the legality of Kentucky Power's adherence to its PSC-approved Tariff F.T. in the face of the City of Ashland Franchise Ordinance prohibiting the Company from passing through the cost of the City's franchise fee by means of a line item on the bills rendered to the Company's customers receiving service with the City boundaries; and

(c) Granting Kentucky Power Company all other relief to which it may be entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark R. Overstreet', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

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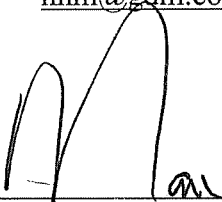

CERTIFICATE OF SERVICE

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

Richard Martin
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Holland N. McTyeire V
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3500 National City Tower
101 South Fifth Street
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on this the 20th day of September, 2011.

Mark R. Overstreet

EXHIBIT 1

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 <u>July 16, 2010</u>	DATE EFFECTIVE <u>Service rendered on and after June</u>
ISSUED BY <u>E.K. Wagner</u> E.K. WAGNER	DIRECTOR OF REGULATORY SERVICES
FRANKFORT, KENTUCKY	ADDRESS
6/29/2010	EFFECTIVE
Issued by authority of an Order of the Public Service Commission in Case No. 2009-00159 dated June 28, 2010	
7 KAR 5:011 SECTION 9 (1)	

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

ISSUED BY E.K. Wagner
E.K. WAGNER DIRECTOR OF REGULATORY SERVICES

FRANKFORT, KENTUCKY

ADDRESS

6/29/2010

Issued by authority of an Order of the Public Service Commission in Case No. 2009-00159 dated June 28, 2010

7 KAR 5:011 SECTION 9 (1)

EXHIBIT 2

ORDINANCE NO. 144, 2011

AN ORDINANCE OF THE CITY OF ASHLAND, KENTUCKY, PROVIDING FOR THE ADVERTISEMENT AND SALE OF A FRANCHISE AUTHORIZING THE OWNER THEREOF TO OWN, MAINTAIN, CONSTRUCT AND OPERATE ELECTRIC POWER TRANSMISSION AND DISTRIBUTION LINES UPON, ALONG, OVER AND UNDER THE STREETS, THOROUGHFARES, ALLEYS, SIDEWALKS, BRIDGES, PUBLIC WAYS AND OTHER PUBLIC PLACES OF SAID CITY.

WHEREAS, the City of Ashland, Boyd County, Kentucky is incorporated under the provisions of the Kentucky Revised Statutes, and desires to grant a franchise for an electric power company to own, maintain, construct and operate its electric power transmission and distribution lines upon, along, over and under the streets, thoroughfares, alleys, sidewalks, bridges, public ways and other public places of the City of Ashland, Boyd County, Kentucky, and

WHEREAS, there exists a public necessity for adequate service of electric power and energy to the citizens of the City of Ashland, Boyd County, 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 streets, thoroughfares, alleys, sidewalks, bridges, public ways and public places for the erection, operation and maintenance of lines for the transmission and distribution of electric power to the citizens of the City of Ashland, Boyd County, Kentucky, and to persons, firms and corporations beyond the limits of the City of Ashland, Boyd County, Kentucky;

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

SECTION 1. That there be sold by sealed bids to the highest and best bidder, the franchise, privilege, right and authority to acquire, maintain, construct and operate in, above, under, across and along the streets, thoroughfares, alleys, sidewalks, bridges, public ways and other 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 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, sidewalks, bridges, public ways and other public places.

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

SECTION 4. The grantee of this franchise shall save the City harmless from any and all liability arising 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 other 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, sidewalks, bridges, public ways and other public places where such work is done in as good condition of repair as before such work was commenced.

SECTION 6. Whenever 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 the 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 electric 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.

(a) 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.

(b) 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.

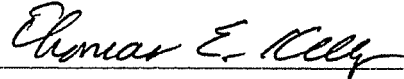
SECTION 10. Stephen W. Corbitt, City Manager, City of Ashland, Boyd County, Kentucky, is directed to have the City Clerk accept sealed bids for the said of said franchise until 3:00 PM on Thursday, May 26, 2011, which shall be opened at a regular bid opening on Thursday, May 26, 2011, at 3:15 PM in the Commission Chambers of the City Building in Ashland, Kentucky, after the City has advertised the time, terms, conditions and place of sale, pursuant to law, by inserting a notice of sale in *The Daily Independent*, Ashland, Kentucky, a newspaper of general circulation in Ashland, Boyd County, Kentucky, once a week for three (3) consecutive weeks prior to the date of said sale, said advertisement to include this Ordinance.

SECTION 11. The sealed bids for the purchase and acquisition of the franchise, privilege, right and authority hereby granted shall be made in writing and shall be delivered to the City Clerk of the City of Ashland, Kentucky, on or before the date and at the time fixed by the City Manager in said advertising for receiving such sealed bids. Thereafter, the City Manager shall report and submit to the Board of City Commissioners at a regular meeting his evaluation and recommendation of such sealed bids for its approval, and said City Commission reserves the right for and on behalf of the City of Ashland to refuse any and all bids for said franchise, privilege, right and authority. In the event the sealed bids reported by the City Manager shall be refused by the said Board of City Commissioners, it may direct, by resolution or ordinance, said franchise, privilege, right and authority to be again offered for sale from time to time until a satisfactory bid therefore shall be received and approved. Each bid shall be accompanied by a deposit and each bidder shall post bond in accordance with the provisions and requirements of KRS 96.020. However, such deposit and bond need not be made by a corporation or person already owning, in or adjacent to the City of Ashland, Boyd County, Kentucky, a plant and equipment sufficient to render the service required by this Ordinance.

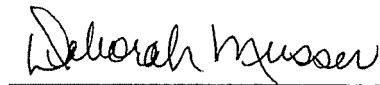
SECTION 12. Each bidder for said franchise, privilege, right and authority shall file, as a part of his bid, a certified copy of a Certificate of Convenience and Necessity from the Public Service Commission of Kentucky, issued under the authority of KRS 278.020(3).

SECTION 13. The Ordinance granting this franchise shall be accepted by the grantee thereof within sixty (60) days from the date of its passage.

SECTION 14. This Ordinance shall be in full force and effect from and after its adoption, readoption and publication, as required by law.


MAYOR

ATTEST:


CITY CLERK

ADOPTED BY THE BOARD OF COMMISSIONERS: MAR 29 2011
READOPTED BY THE BOARD OF COMMISSIONERS: APR 07 2011
PUBLISHED: _____

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

ORDINANCE\Franchise.Electric 2011 Advertistment final

EXHIBIT 3



**KENTUCKY
POWER**

A unit of American Electric Power

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

To: The Honorable Thomas B. 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.

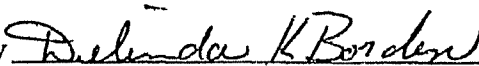
Payment of total fees billed in the prior month's billing shall be made to the City within forty-five (45) days following close of such month. Any such fees paid to the City which are included in electric bills charged off as uncollectible shall be allowed as a credit to Kentucky Power Company in the 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

EXHIBIT 4

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.

Thomas E. Kelly

MAYOR

ATTEST:

Deborah Neuser

CITY CLERK

ADOPTED BY THE BOARD OF COMMISSIONERS: JUN 16 2011
READOPTED BY THE BOARD OF COMMISSIONERS: JUL 21 2011
PUBLISHED: _____

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

EXHIBIT 5

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.

/s/THOMAS E. KELLEY
MAYOR

ATTEST:

/s/DEBORAH MUSSER
CITY CLERK

ADOPTED BY THE BOARD OF
COMMISSIONERS: June 16,
2011

READOPTED BY THE BOARD OF
COMMISSIONERS: July 21,
2011

PUBLISHED: July 25, 2011

CERTIFICATION

This is to certify that the title of Ordinance Nos. 79 and 84, 2011 are true, and accurate summaries of the contents of the ordinances prepared by the Legal Department of the City of Ashland, Kentucky, consisting of attorneys licensed to practice law in the Commonwealth of Kentucky.

/s/Richard W. Martin
Corporation Counsel

Subscribed and sworn to before me by Richard W. Martin this 22nd day of July, 2011. My commission as a Notary Public will expire May 3, 2015.

/s/SUSAN WEBB MADDIX
NOTARY PUBLIC
STATE OF KENTUCKY AT
LARGE

ID #441498