

ORDINANCE NO. 140 -2003

AN ORDINANCE CREATING AND ESTABLISHING A NON-EXCLUSIVE ELECTRIC FRANCHISE AND PROVIDING FOR: THE PLACEMENT OF FACILITIES FOR THE GENERATION, TRANSMISSION, DISTRIBUTION AND SALE OF ELECTRICAL ENERGY WITHIN THE PUBLIC RIGHTS-OF-WAY; THE INCORPORATION OF THE PROVISIONS OF THE PUBLIC RIGHT-OF-WAY ORDINANCE (CHAPTER 17C OF THE CODE OF ORDINANCES); DEFINITIONS; CONSTRUCTION, INSTALLATION, MAINTENANCE AND FACILITY STANDARDS; ADDITIONAL PERFORMANCE GUARANTEES ON PROJECTS WITH CONSTRUCTION COSTS EXCEEDING \$100,000; AN INDEMNIFICATION AND HOLD HARMLESS PROVISION; COMMERCIAL GENERAL LIABILITY INSURANCE POLICY IN THE AMOUNT OF AT LEAST \$1,000,000; ACCESS, INSPECTION AND AUDITING BY THE GOVERNMENT; A FIVE YEAR DURATION; NO VESTED RIGHTS FOR EMPLACEMENT OF FACILITIES; PENALTIES IN THE AMOUNT OF \$100 PER DAY FOR INTENTIONAL FAILURE TO PAY FRANCHISE OR OTHER FEES, OR INTENTIONAL FAILURE TO COMPLY WITH A COUNCIL RESOLUTION DIRECTING COMPLIANCE WITH THIS ORDINANCE; CONTINUED ENFORCEMENT UPON THE GOVERNMENT'S FAILURE TO INSIST ON PERFORMANCE; THE PAYMENT OF PENALTIES NOT AN EXCUSE FOR NON-PERFORMANCE; THE RESERVATION OF THE GOVERNMENT'S CURRENT AND FUTURE RIGHTS TO REGULATE RATES AND SERVICES; TERMINATION UPON WILLFUL VIOLATIONS OF THE FRANCHISE, WILLFUL EVASION OF PROVISIONS OF THE FRANCHISE, FRAUD AND DECEIT UPON THE GOVERNMENT, OR KNOWINGLY MAKING MATERIAL MISREPRESENTATIONS, AND PROCEDURES FOR TERMINATING THE FRANCHISE; RIGHT TO CANCEL FRANCHISE THIRTY DAYS AFTER THE APPOINTMENT OF A RECEIVER OR TRUSTEE UNLESS CERTAIN CONDITIONS ARE MET; SALE AT PUBLIC AUCTION OF THE FRANCHISE AND DUE ADVERTISEMENT REQUIREMENTS THEREON; WRITTEN BIDS, RIGHT TO REJECT, PAYMENT OF FIVE PERCENT OF THE ESTIMATED COST OF THE SYSTEM UNLESS THE COMPANY ALREADY HAS SUFFICIENT FACILITIES TO PROVIDE THE FRANCHISE SERVICES, AND PAYMENT OF \$500 FOR ADVERTISEMENT AND ADMINISTRATIVE COSTS; PAYMENT OF THE SUM OF THREE PERCENT OF THE COMPANY'S GROSS ANNUAL REVENUES FROM THE SALE OF ELECTRICITY WITHIN FAYETTE COUNTY BEGINNING WITH THE FIRST BILLING PERIOD FOLLOWING TARIFF APPROVAL BY THE KENTUCKY PUBLIC SERVICE COMMISSION; PAYMENT OF PERMITTING FEES; THE FILING OF AN APPLICATION OR TARIFF WITH THE KENTUCKY PUBLIC SERVICE COMMISSION WITHIN TEN DAYS OF ACCEPTANCE OF THE BID; PAYMENT SUSPENSION OF THE FRANCHISE FEE IF NO FINAL DETERMINATION REGARDING TARIFF APPROVAL IS MADE AND ALLOWING THE GOVERNMENT TO TERMINATE THE FRANCHISE UPON SUCH CONDITION; ALL PAYMENTS TO BE MADE QUARTERLY; PAYMENT IS NOT AN ACCORD AND SATISFACTION, RIGHT TO AUDIT AND TO PAYMENT OF COSTS IF THE COMPANY IS FOUND TO HAVE INTENTIONALLY WITHHELD FIVE PERCENT OR MORE; INTEREST OF EIGHT PERCENT ON ANY LATE OR RECOMPUTED PAYMENTS; BIDS MUST ACCEPT THE CONDITIONS OF THIS ORDINANCE AND MAY INCLUDE ADDITIONAL CONSIDERATION PAYMENTS; VIOLATIONS OF THE FRANCHISE SHALL BE CONDITIONS FOR FORFEITURE, AND FRANCHISE EFFECTIVE WHEN THE COUNCIL ACCEPTS THE BID(S); ALL EFFECTIVE ON DATE OF PASSAGE.

BE IT ORDAINED BY THE COUNCIL OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT:

Section 1 - There is hereby created a non-exclusive franchise to acquire, lay, maintain and operate in the public streets, alleys, avenues, public roads, highways, sidewalks and other public ways of the Lexington-Fayette Urban County Government, a system or works for the generation, transmission and distribution of electrical energy from

points either within or without the corporate limits of this Urban County, to this Urban County and the inhabitants thereof, and from and through this Urban County to persons, corporations and municipalities beyond the limits thereof, and for the sale of same for light, heat, power and other purposes; to erect and maintain poles or other structures, wires and other apparatus necessary for the operation of said system in, upon, over, under, across and along each and all of the streets, avenues, alleys, rights-of-way and public places (not including parks, greenways, and other public areas not traditionally used for public egress) within the present and future corporate limits of this Urban County, subject to all the provisions of this Ordinance and the terms and provisions of Chapter 17C of the Code of Ordinances, Lexington-Fayette Urban County Government (the "Public Right-of-way Ordinance"), which are incorporated herein by reference, and shall apply as if fully set forth herein to the extent that there is no express conflict with the terms or provisions of this Ordinance, or a direct conflict with federal or state law. This franchise does not include the right or privilege to provide for the operation of a telephone communication system, including telephone exchange service (as defined by 47 USC Section 153(47)) and exchange access (as defined by 47 USC Sec. 153 (16)), data transmission, cable service (as defined by 47 USC Section 522(6)) or open video service (as defined by 47 USC Section 76.1500(a)), unless such services are used exclusively within the Company and not for revenue.

Section 2 - The person, firm or corporation that shall become the purchaser of said franchise, or any successor or assignee of such person, shall hereinafter be referred to as the "Company" herein. The definitions and terminology contained in the provisions of the Public Right-of-way Ordinance are hereby incorporated herein by reference.

Section 3 - The Company acquiring this franchise shall have the right and privilege of laying, maintaining and operating a system or works for the generation, transmission and distribution of electrical energy for the sale of same for light, heat, power and other purposes, to erect and maintain poles or other structures, wires and other apparatus necessary for the operation of said system in, along and under the Rights-of-way within the corporate boundaries of the Government as they now exist or may hereafter be extended; subject to the provisions hereof and to all powers (including police power)

inherent in, conferred upon, or reserved to the Government, including but not limited to those contained in the Public Right-of-way Ordinance.

Section 4 - In addition to the requirements contained in the Public Right-of-way Ordinance:

(a) all working facilities and conditions used during construction, installation and maintenance of Facilities shall comply with the standards of the Occupational Safety and Health Administration;

(b) the Company shall construct and operate the system and related Facilities in accordance with all generally accepted related industry codes and standards that are applicable;

(c) all construction shall be performed in a workmanlike manner, and all materials, equipment, and/or Facilities used or installed shall be in compliance with industry standards;

(d) in the construction or reconstruction or maintenance or removal of any of said Facilities, the Company shall have due regard for the rights of the Government and others, and shall not unduly interfere with, or in any way damage the property of the Government or others under, on, or above the ground. The Company shall comply with all the laws of the Commonwealth of Kentucky and ordinances of the Government as to placing lights, danger signals or warning signs and shall be liable for any and all damage that may arise by reason of its failure or neglect to comply with such ordinances and laws.

Work by the Company hereunder shall be done in a workmanlike manner and so as not to unnecessarily interfere with public use of the Rights-of-way.

Section 5 – The Company shall comply with all of the requirements of Section 17C-19 of the Public Right-of-way Ordinance pertaining to Government construction and/or street projects.

Section 6 – In addition to any performance bond(s) required pursuant to Section 17C-23 of the Public Right-of-way Ordinance, the Company may be required to provide a performance guarantee for significant projects with construction costs of one hundred thousand (\$100,000.00) or more involving the Rights-of-way. This performance guarantee shall be set in an amount and duration to be determined by the Director upon discussing

and verifying the scope of such a project with the Company, and shall be in favor of the Government to be issued by an entity subject to jurisdiction and venue in Fayette County, Kentucky. In no event shall the total cumulative amount of such performance guarantee exceed two hundred thousand dollars (\$200,000.00).

Section 7 – The Company agrees it shall defend, indemnify, and hold harmless the Government consistent with the indemnification and hold harmless provisions as set forth in Section 17C-17 of the Public Right-of-way Ordinance, or as it may be amended in the future. This obligation to defend, indemnify, and hold harmless does not include defending, indemnifying and holding harmless the Government for its own negligent acts.

Section 8 - The Company shall maintain in full force and effect a commercial general liability insurance policy reasonably acceptable to the Government's Division of Risk Management with a minimum policy limit of one million dollars (\$1,000,000) per occurrence and shall provide the Government with a certificate of insurance evidencing the insurance policy required by this section. The certificate shall state that the insurance policy shall not be canceled, materially changed or non-renewed until after thirty (30) days written notice has been provided to the Government; however, insurance may be canceled and replaced with a policy that continues to meet or exceed the requirements of this section. The Company may satisfy the insurance requirements and conditions of this section under a self-insurance plan that is acceptable to the Government's Division of Risk Management.

Section 9 – (a) The Government, through its Chief Administrative Officer or designee or through such assistants as the Government may employ or designate, may, at all reasonable times, and at the Government's expense, have the right to inspect such books and records of the Company as are necessary for the Government to verify the accuracy of the amounts paid by the Company to the Government under this franchise. This provision shall survive the term of any franchise agreement awarded pursuant to this Ordinance for a period of one (1) year. In the event that the Government determines that it desires an audit of this franchise, the Company agrees to comply with all reasonable requests of the Government pertaining to obtaining any necessary information or documentation from the Company.

(b) The Company agrees further to furnish the Government's Chief Administrative Officer timely written notice of its filing an application with the Public Service Commission for an increase in general base rates concurrent with said filing.

Section 10 - (a) The franchise hereby created shall be a period of five (5) years from the date of acceptance by the Urban County Council. This franchise is not exclusive and the Government reserves the right to grant similar franchises to more than one Company.

(b) This franchise creates no vested rights in the Company and any installation or emplacements of Facilities by the Company in the Rights-of-way is at the Company's risk.

Section 11 - (a) If, after the Company is provided the opportunity to appear and present evidence before the Chief Administrative Officer (the "CAO") or his designee, the Government finds that the Company has violated either or both of the following provisions of this Ordinance, the following penalties shall be recoverable. The decision of the CAO shall be the final administrative decision and shall be in writing and provide the basis for the decision. The decision may be appealed to a court of competent jurisdiction.

(1) For intentional failure to pay the franchise fee when due pursuant to Section 17 or any itemized bill presented by the Government pursuant to Section 5 or this section, the Company shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues.

(2) For intentional failure to comply within thirty (30) days of any Council resolution directing compliance with any other provisions of this Ordinance, Company shall forfeit one hundred dollars (\$100.00) per day or part thereof that the violation continues.

(b) The Company shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Company's performance or to seek the Company's compliance with any one or more of such terms or conditions. Payment of penalties shall not excuse non-performance under this Ordinance. The right of the Government to seek and collect penalties as set forth in this section are in addition to its right to terminate and cancel as set forth in Section 13.

Section 12 – The Government reserves all rights it might presently have, or which it may hereafter acquire, to regulate the Company's rates and services.

Section 13 - (a) In addition to all other rights and powers pertaining to the Government by virtue of the franchise or otherwise, the Government, by and through its Council, reserves the right to terminate and cancel the franchise and all rights and privileges of the Company hereunder in the event that the Company:

(1) Willfully violates any material provision of the franchise or any material rule, order, or determination of the Government made pursuant to the franchise, except where such violation is without fault or through excusable neglect;

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

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

(b) Prior to attempting to terminate or cancel this franchise pursuant to this section, the Government shall make a written demand that the Company do or comply with any such provision, rule, order or determination. If the violation, found in Section 13(a), by the Company continues for a period of thirty (30) days following such written demand without written proof that the corrective action has been taken or is being actively and expeditiously pursued, the Government may place its request for termination of the franchise as early as the next regular Council meeting agenda. The Government shall cause to be served upon Company, at least ten (10) days prior to the date of such Council meeting, a written notice of intent to request such termination and the time and place of the meeting, legal notice of which shall be published in the Lexington Herald-Leader, or

another newspaper of general circulation published in Lexington, Fayette County, Kentucky.

(1) It shall be a defense to any attempt to terminate and cancel the franchise that the Company was relying on federal law, state law, or a valid tariff in acting or not acting on the issue in dispute.

(2) The Council shall consider the request of the Government and shall hear any person interested therein, and shall determine in its discretion, whether or not any violation by the Company was with just cause.

(3) If such violation by the Company is found to have been with just cause, the Council shall direct the Company to comply therewith within such time and manner and upon such terms and conditions as are just and reasonable.

(4) If the Council determines such violation by the Company was without just cause, then the Council may, by resolution, declare that the franchise of the Company shall be terminated and forfeited unless there is compliance by the Company within such period as the Council may fix.

Section 14 – The Council shall have the right to cancel this franchise thirty (30) days after the appointment of a receiver, or trustee, to take over and conduct the business of the Company, whether in receivership, reorganization, bankruptcy, or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said thirty (30) days, unless:

(a) Within thirty (30) days after his election or appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and remedied all defaults thereunder; and,

(b) Such receiver or trustee, within said thirty (30) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the franchise granted to the Company.

Section 15 - It shall be the duty of the Mayor or his or her designated subordinate as soon as practicable after the passage of this Ordinance to offer for sale at public auction said franchise and privilege. Said franchise and privilege shall be sold to the highest and

best bidder or bidders at a time and place fixed by the Mayor after he or she has given due notice thereof by advertisement in at least one (1) issue of the Lexington Herald-Leader, or another newspaper of general circulation published in Lexington, Fayette County, Kentucky. This advertisement shall appear not less than seven (7) days nor more than twenty-one (21) days before the date of bid opening.

Section 16 – 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 Mayor or his or her designated subordinate upon the date and at the time fixed by him or her in said advertisement for receiving same. Thereafter, the Mayor shall report and submit to the Urban County Council, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval. The said Urban County Council reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise and privileges; and, in case the bids reported by the Mayor shall be rejected by the Urban County Council, it may direct, by resolution or ordinance, said franchise and privilege 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 cash or a certified check drawn on a bank of the Commonwealth of Kentucky, or a national bank, equal to five percent (5%) of the fair estimated cost of the system required to render the service, which check or cash shall be forfeited to the Government in case the bid should be accepted and the bidder should fail, for thirty (30) days after the confirmation of the sale, to pay the price and to give a good and sufficient bond in a sum equal to one-fourth (1/4) of the fair estimated cost of the system to be erected, conditioned that it shall be enforceable in case the purchaser should fail, within sixty (60) days, to establish and begin rendering the service in the manner set forth in this Ordinance. Bids shall include such documentation as is necessary to support the bidder's determination of the fair estimated cost of the system required to render the service. Government reserves the right to review any of bidder's supporting documentation which justifies bidder's determination of said estimated cost. Such deposit need not be made by a corporation or person already owning within the territorial limits of Fayette County a plant, equipment, and/or Facilities sufficient to render the service required by this Ordinance. In addition, each bid shall be

accompanied by a non-refundable payment to the Government in the amount of five hundred dollars (\$500.00) to cover the Government's cost of advertising and other administrative expenses incurred.

Section 17 - (a) In consideration for the granting of the franchise the Company agrees to pay to the Government a franchise fee in a sum equal to three percent (3%) of the gross annual revenues received by the Company from electric service provided by the Company within Fayette County. The term gross annual revenues is intended to include revenue received from customers within Fayette County supplied under residential, commercial, industrial, public street and highway lighting, and other public authorities classifications. Within ten (10) working days after the acceptance of the franchise by the Government, the Company shall file a tariff with the Kentucky Public Service Commission authorizing the recovery of these franchise fees assessed under this Section 17(a) from its customers within Fayette County. The Company may also choose to file a tariff with the Kentucky Public Service Commission for the permit fees assessed pursuant to Section 17(d) and the Public Right-of-way Ordinance. The Company shall provide Government with copies of the tariffs it files with the Kentucky Public Service Commission related to the franchise in order to satisfy the obligations created by this subsection. The Company is otherwise required to continue submitting payments to the Government under the terms of its existing tariff and/or franchise until such time as this tariff approval is obtained.

(b) If, after a period of sixty (60) days from the filing of Company's application or tariff, the Kentucky Public Service Commission has made no final determination concerning the prompt and satisfactory recovery of amounts payable under this Section by the Company, then the Company's obligation to pay the amount specified in Section 17(a) shall be suspended, provided the Company shall first give the Government ten (10) days written notice of its intention to suspend payment pending the decision of the said Commission. In the event of suspension of the Company's obligation as herein provided, the Government shall have the option to terminate this franchise within thirty (30) days of receipt of said written notification from the Company.

(c) In the event the sale of electricity is deregulated within the Commonwealth of Kentucky, and deregulation results in a material shortfall of revenue to

the Government, the Government shall have the option of terminating the franchise agreement with the Company. If the franchise agreement is terminated by the Government pursuant to this provision, the Government and the Company shall have a duty to negotiate in good faith with respect to offering a mutually acceptable franchise agreement to the Company..

(d) In addition to the franchise fees in Section 17(a), the Company is also required to pay the Government an additional amount intended to adequately compensate the Government for the Company's anticipated level of annual permitting under Section 17C-22 of the Public Right-of-way Ordinance. This amount is to be separately paid to the Government at the same time and under the same terms as its franchise fees, except for the amount of the Annual General Permit as set forth in the Public Right-of-way Ordinance, which is immediately due and payable to the Government. These permitting fees may be calculated as an appropriate percentage of gross annual revenues at the option of the Company, and the Company may seek tariff approval from the Kentucky Public Service Commission for the recovery of such payments as set forth in Section 17(a). Notwithstanding the foregoing, the Company may elect to pay for its permit fees upon application for each respective permit upon approval of the Director. These permitting fees are subject to change for the future term of the franchise based upon an audit of the actual level of permitting of the Company or a change in the amount of the respective permitting fees found in Section 17C-22 of the Public Right-of-way Ordinance. In the event of such a change, the Company shall be provided at least sixty (60) days advance written notice.

(e) To the extent the Company actually incurs other reasonable incremental costs in connection with its compliance with the Government's ordinances, the Government agrees that the Company may recover such amounts from its customers pursuant to the terms of a tariff filed with and approved by the Kentucky Public Service Commission, if otherwise permitted by law.

Section 18 - (a) Payment of any amount due under this Ordinance shall be made quarterly, within thirty (30) days of the end of the preceding quarter. In the event of suspension of the Company's obligation pursuant to Section 17(b) herein, said

suspension shall not have application to any amount due hereunder for the preceding calendar month, and the gross income received by the Company during any such suspension period shall be excluded from the Company's annual gross revenues for the purpose of calculating amounts due under Section 17(a) herein.

(b) No acceptance of any franchise fee payment by the Government shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount nor shall acceptance be deemed a release to any claim the Government may have for future or additional sums pursuant to this Ordinance. Any additional amount due to the Government as a result of the Government's audit pursuant to Section 9(a) shall be paid within ten (10) days following written notice to the Company by the Government which notice shall include a copy of the audit report. If as a result of such audit or review the Government determines that the Company has intentionally underpaid its franchise fee by five percent (5%) or more for any calendar month then in addition to making full payment of the relevant obligation, the Company shall reimburse the Government for all of the reasonable costs associated with the audit or review, including all out-of-pocket costs for attorneys, accountants and other consultants.

(c) In the event that any franchise payment or recomputed amount is not made on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of eight percent (8%). Overpayments discovered by the Government or the Company shall be an adjustment on the next monthly payment without interest.

Section 19 – Bids offered for purchase of this franchise shall state the bidder's acceptance of the conditions set forth in this Ordinance. If any bid shall include an offer of payment over and above the terms of the franchise, then a certified check for said amount, payable to the Lexington-Fayette Urban County Government, shall be deposited with the Government. This amount shall be in addition to the provision for payments contained in Sections 16 and 17, which shall be considered as a condition of this franchise. Any check deposited by an unsuccessful bidder shall be returned when the Urban County Council shall have accepted the bid or bids, which in its judgment is or are the highest and best.

Section 20 – Any violation by the Company, its vendee, Lessee, or successor of the material provisions of this franchise or any material portions thereof, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of this franchise and all rights hereunder after written notice to the Company and continuation of such violations, failure or default, as set forth in Section 12.

Section 21 - The Company shall have the authority to trim trees that are located within or overhang the Rights-of-way so as to prevent the branches of such trees from coming in contact with the wires, cables, or other Facilities of the Company. Any trimming, removal or other disturbance of trees shall conform to all lawful ordinances, requirements and directives of the Government, including but not limited to the Government's Street Tree Ordinance (Chapter 17B of the Code of Ordinances), and the Company shall make available upon reasonable request of the Government, information regarding its tree trimming practices. In the event that the Company fails to timely and sufficiently respond to a legitimate and reasonable complaint regarding its failure to trim such trees, and such complaint is made known to the Government, the Government shall contact the Company with respect to such matter and attempt to reach a satisfactory result. Notwithstanding the foregoing, this provision in no way limits any existing or future lawful rights that the Government may have with respect to such trees.

Section 22 - The franchise created by this Ordinance shall become effective when the Urban County Council accepts the bid(s) for it.

Section 23 - This Ordinance shall become effective on the date of its passage.

PASSED URBAN COUNTY COUNCIL: June 12, 2003

/s/ Teresa Ann Isaac
MAYOR

ATTEST:

/s/ Liz Damrell
CLERK OF URBAN COUNTY COUNCIL

PUBLISHED: June 16, 2003-1t