

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

In the Matter of:

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

**LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT’S
REPLY BRIEF**

Comes now the Louisville/Jefferson County Metro Government (“Louisville Metro”), and pursuant to the Kentucky Public Service Commission (“the Commission”) order dated August 8, 2017, submits this brief in reply to the Louisville Gas and Electric Co. (“LG&E”) legal brief.

SUMMARY OF LOUISVILLE METRO’S REPLY

LG&E’s Brief noticeably fails to address the clear intent of the Kentucky Constitution or the most recent, and very clearly on-point, decision by the Kentucky Supreme Court regarding the intent of Kentucky Constitution Sections 163 and 164. In addition, the LG&E Brief failed to provide any justification for why customers receiving the benefit of the franchise fee should not be required to pay a portion of that franchise fee. In truth, LG&E actually supported Louisville Metro’s argument. In replying to the points raised by LG&E, Louisville Metro will cover these three points:

1. LG&E conceded in its Brief that Commission precedent and basic fairness mandates the collection of the Louisville Metro franchise fee from within the smaller cities.
2. State law requires collection of the Louisville Metro franchise fees in the smaller cities.
3. Prohibiting LG&E from placing the franchise fee as a line item on customers’ bills is well within Louisville Metro’s authority, and LG&E is unable to contradict this fact.

DISUCSSION

1. *By LG&E's Own Admission, the Franchise Fees Should be Collected from the Smaller Cities Within Louisville Metro's Borders.*

If the Commission determines that the franchise fee may be placed as a line-item on customers' bills, then it must be placed on all bills collected throughout Louisville Metro, including the smaller cities. LGE's Brief provides no argument that should dissuade the Commission from concluding that collecting the Louisville Metro franchise fees from within the smaller cities is the just, legal and correct course of action. In fact, it appears that LG&E agrees with Louisville Metro's position. Louisville Metro witness Doug Hamilton presented evidence demonstrating that the customers residing in the smaller cities receive numerous benefits stemming from collection of the franchise fee; a fact which LG&E readily concedes in its Brief.¹ Following this concession, LG&E astutely makes the point that "the ratepayers receiving the benefit of the fee should pay the fee."² If the franchise fee is placed on customer bills as a line-item, the only logical conclusion is that the smaller cities, which receive the benefits of the franchise fee, should help pay the franchise fee. Requiring individuals to help pay for the benefits they enjoy comports with basic tenants of fairness that even children would recognize.

2. *State Law Pertaining to Consolidated Local Governments Requires the Franchise Fee to be Collected within the Smaller Cities.*

a. *Louisville Metro Ordinances Commonly Apply Within the Smaller Cities.*

Having a Louisville Metro ordinance that is equally effective throughout Louisville Metro, including in the smaller cities, is commonplace. Indeed, by statute, any type of criminal or civil penalty passed by the Louisville Metro City Council is equally effective in the smaller cities as it

¹ LG&E Brief at 6. ("No material facts are in dispute.")

² LG&E Brief at 15.

is throughout Louisville Metro.³ While the smaller cities maintain a certain degree of independence, when a question is raised as to where the greater authority lies, the answer is always with Louisville Metro. The Legislature ensured this would be the result by mandating that “[t]he powers of the consolidated local government shall be construed broadly in favor of the consolidated local government.”⁴ In considering this statutory provision, along with the uncontrovertibly fact that customers within the smaller cities have elected representation throughout Louisville Metro, it becomes clear that the franchise fee should be collected from the smaller cities as well as the rest of Louisville Metro.

b. KRS 67C Requires Collection of the Franchise Fee Throughout Louisville Metro

Finally, Louisville Metro takes seriously its obligations to underrepresented populations, as required by KRS 67C.117. That statute requires that “[m]inority citizens and business shall be represented in all actions of the consolidated government.”⁵ Ensuring the franchise fee is collected throughout Louisville Metro is in keeping with this provision. As previously established by the Metro Housing Coalition, an overwhelming number of Louisville Metro’s minority population resides outside of the smaller cities. Thus, in order avoid any disparate impact on Louisville’s minority residents, the franchise fee must be collected throughout Louisville Metro.

3. *The Recent Kentucky Supreme Court Decision and the Intent of the Constitutional Drafters is Clear: the Franchise Fee Should Not be Placed as a Line-Item on Customer Bills.*

LG&E’s contention that Louisville Metro simply seeks to hide the amount of the franchise fee from customers is a transparent attempt by LG&E to distract the Commission from the abundance of legislative and legal precedent concluding that 1) such a request is wholly within

³ KRS 67C.103(11).

⁴ KRS 67C.101(4).

⁵ KRS 67C.117 (1)(b).

the discretionary authority of Louisville Metro, and 2) such action is consistent with the intent of the Kentucky Constitution.⁶

It is well established law that in any challenge to a city's council's exercise of its discretion it is presumed that the council did not abuse its discretion and acted with reason and in good faith for the benefit of the public.⁷ It is evident that the Louisville Metro City Council acted in good faith and for the benefit of the public. To ensure the public was protected from an unjust outcome of this matter, the franchise fee will reset to zero should the Commission rule that it must be placed as a line-item on the bill.⁸ Immediate recovery of the franchise fee from the public was clearly not the intent of the Kentucky Constitutional drafters, and is not the intent of the Louisville Metro City Council. Furthermore, with respect to franchises, the act of "awarding a franchise cannot be set aside in the absence of fraud, collusion or dishonesty."⁹ Here no such circumstances exist. As a result, prohibiting LG&E from placing the franchise fee as a line item on customers' bills is an appropriate use of Louisville Metro's discretionary authority.

While KRS 278.040 gives the Commission jurisdiction of the regulation of rates and services, that authority is not without limitations. In fact, the Legislature saw fit to specifically state that "nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions."¹⁰ Thus, the franchising powers of Louisville Metro, as provided for by the Constitution in Sections 163 and 164, cannot be limited by this Commission. Even LG&E concedes this point in its brief.¹¹

A recent decision by the Kentucky Supreme Court supports the conclusion that Louisville Metro may prohibit the inclusion of the franchise fee as a line-item on customer bills. The Court held:

"By granting cities the ability to enter into a franchise agreement, the Constitution afforded them the benefit of the full range of contract law. Inherent in contract law is the ability to contract for and receive consideration in exchange for performance of the contract, i.e., granting the franchise."¹²

⁶ LG&E Brief at 15-16.

⁷ Hatcher v. Kentucky & West Virginia Power Co., 133 S.W.2d 910 (Ky. 1939).

⁸ Franchise Agreement, Section 11, Paragraph b; Exhibit 2.

⁹ Communication Systems Inc. v. City of Danville, 880 F.2d 887 (6th Cir 1989) (citing HealthAmerica Corp. V. Humana Health Plan, Inc., 697 S.W.2d 956 (Ky. 1985)).

¹⁰ KRS 278.040(2).

¹¹ LG&E Brief at 12. ("[T]he Commission has no jurisdiction over the franchising power of Louisville Metro.")

¹² Kentucky CATV Association, Inc. v. City of Florence, 2015-SC-000178-DC, at 10 (July 6, 2017); Exhibit 1.

This point is essentially settled law. As far back as 1907 Kentucky Courts have recognized a municipality's ability to place lawful conditions into franchise agreements, which are mandatory following the acceptance of the agreement by a utility.¹³ Therefore, requiring specific performance of a contract term, i.e. prohibiting the placement of the franchise fee as a line item on customer bills, is well within the rights of Louisville Metro.

CONCLUSION

For the reasons contained herein, and those stated previously, Louisville Metro requests the Commission require LG&E to amend its tariff and cease collection of the Louisville Metro gas franchise fee as a line item on customer bills, or in the alternative, collect the franchise fee from the entirety of LG&E gas customers located within Louisville Metro.

Respectfully submitted,

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¹³ Moberly v. Richmond Tel. Co., 103 S.W. 714 (Ky. 1907).