

**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  
BRIEF ON THE MERITS**

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 on the legal issues pertaining to claims raised by both Louisville Metro and the Louisville Gas and Electric Co. (“LG&E”).

**SUMMARY OF ISSUES**

This action places before the Commission two issues related to the practice of collecting franchise fees, which the Commission has never before had an opportunity to directly consider. As the Commission will soon discover, just because a practice has been in place for years does not make that practice either lawful or equitably just. The two issues now before the Commission are best summarized as following:

1. LG&E violates the Kentucky Constitution through its practice of recovering franchise fees as a line item on customer bills.
2. LG&E, through its practice of collecting the Louisville Metro Gas Franchise Fee from only a select portion of the Louisville Metro LG&E gas customers, fails to comply with 1) LG&E Tariff No. 90 and the filed-rate doctrine, 2) Commission precedent and other applicable law, and 3) the principles of fair, just, and reasonableness.

The second issue is in alternative to the first; meaning if the Commission rules affirmatively for Louisville Metro on the constitutional violations issue, then the second issue regarding collecting the franchise fee throughout Louisville Metro is rendered moot.

### **STATEMENT OF FACTS**

The Louisville Metro Council, via ordinance No. 132, Series 2016, created a franchise for the transmission, distribution, transportations and sale of gas. On June 6, 2016, the Commission granted a Certificate of Public Convenience and Need authorizing LG&E to bid on the franchise offered by Louisville Metro for natural gas transmission and distribution service.<sup>1</sup> On August 25, 2016, the Louisville Metro Council passed Ordinance No 214, Series 2016, accepting the bid submitted by LG&E for a gas franchise. The Franchise Agreement between Louisville Metro and LG&E (hereinafter the “Franchise Agreement”) was executed on behalf of the parties by Louisville Mayor Greg Fischer, and LG&E V.P. of Customer Services, John Malloy, on August 30, 2016.

Section 11(b) of the Franchise Agreement provides for a fee of “six percent (6%) of forty-three cents (\$0.43) per thousand cubic feet (mcf) of gas as described in Section 11(a) above.” Section 11(a) further explains the calculation of mcf as “each thousand cubic foot (mcf) of gas utilizing the company's pipe, pipeline, main, pumping stations or other means to transport, whether for transmission or distribution, for the purpose of proving natural gas service to customers as a local distribution company within the Franchise Area (using the measured mcf of gas delivered to customers as a substitute).” In short, the franchise fee is \$0.0258 per mcf.

Louisville Metro is unique in the Commonwealth in that dozens of municipalities are located within the geographic and jurisdictional borders of Louisville Metro. This situation is a result of

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<sup>1</sup> Application Of Louisville Gas And Electric Company For A Certificate Of Public Convenience And Necessity Authorizing LG&E To Bid On A Gas Franchise Established By The Legislative Council Of Louisville/Jefferson County Metro Government, Case No. 2016-00193.

the 2003 merger of the City of Louisville and Jefferson County, whereby the pre-merger municipalities within Jefferson County retained their status following the merger. Prior to the merger of the City of Louisville and Jefferson County, eighty-four municipalities existed within Jefferson County, other than the City of Louisville. Currently, eighty-two of those municipalities remain within the jurisdictional borders of Louisville Metro. The citizens located throughout Jefferson County, including those citizens in the eight-two municipalities, regularly vote to elect representatives to a legislative council and a Mayor of Louisville Metro. Thus, the residents of the eight-two municipalities have elected representation on the legislative council that voted to approve the franchise fee and in the Mayor who ultimately executed the agreement.

LG&E Tariff Sheet No. 90, which pertains to franchise agreements with municipalities, states, “A surcharge shall be calculated and added to the total bill for gas service for all customers located within local governmental jurisdictions which currently or in the future impose municipal franchise fees or other local taxes on the Company by ordinance, franchise, or otherwise.” Despite LG&E’s tariff, and the discriminatory impact of the practice, LG&E intends to exempt gas customers located within the eight-two municipalities from collection of the Louisville gas franchise fee.

## **DISUCSSION**

### *1. LG&E’s Practice Of Recovering Franchise Fees As A Line Item On Customer Bills Violates The Kentucky Constitution.*

In 1890, delegates from across the Commonwealth of Kentucky met for the purpose of drafting significant revisions to the Kentucky Constitution.<sup>2</sup> The current Constitution is the one revised in 1891. A key motivation for gathering a Constitutional Convention in 1890 was to restore much of the lost power to the people of the Commonwealth. Elected officials and

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<sup>2</sup> For additional background, see the Citizens’ Guide to the Kentucky Constitution, Legislative Research Commission Research Report No. 137, Revised June 2013. Available at <http://www.lrc.ky.gov/lrcpubs/RR137.pdf>.

corporations were no longer to be trusted. Much of that distrust is reflected in the 1890 constitution. It is from this scenario that Kentucky Constitution Sections 163 and 164 (hereinafter “Section 163” and “Section 164”) were enacted. These two Sections pertain directly to municipal franchise fees and will guide much of the analysis on this matter. As the Commission will likely conclude, this case presents an opportunity to review with a fresh perspective these relevant Kentucky Constitution Sections and how best to insure the intent and plain language of those Sections are recognized in today’s framework for collecting municipal franchise fees.

a) Kentucky Constitution Sections 163 and 164

Kentucky Constitution Sections 163 and 164 (hereinafter “Section 163” and “Section 164”) were enacted following the Constitutional Convention of 1890. These two Sections pertain directly to the grant of franchises by municipalities to utilities and “must be read together, as the right to occupy the streets and public ways conferred by section 163 can only be granted in the manner provided in section 164.”<sup>3</sup> Section 163 provides, in relevant part:

No ...gas... company, within a city or town, shall be permitted or authorized to... lay its pipes or mains... along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained.

Section 164 provides, in relevant part:

Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefore publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids.

Since 1890, Sections 163 and 164 have guided the Kentucky Courts analysis of franchise fees and the associated authority of municipalities.

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<sup>3</sup> Rural Home Tel. Co. v. Ky. & Ind. Tel. Co., 107 S.W. 787, 790 (Ky. 1908); Cumberland Tel. & Tel. Co. v. Calhoun, 151 S.W. 659, 661-662 (Ky. 1912).

b) Early Analysis of Sections 163 and 164 by Kentucky's Highest Courts

While Tariff No. 90 allows LG&E to collect franchise fees as a line-item from customers, Tariff No. 90 is clearly contrary to the intent of the Framers and the decisions of highest courts of Kentucky, which are charged with interpreting the Constitution. Ample discussion of Section 164 by the Constitutional framers and by Kentucky Courts exists to verify this fact. In one instance, we actually have one of the Framers of the Kentucky Constitution (“Framers”) writing the majority opinion for the Kentucky Court of Appeals, which, at the time, was the highest court in Kentucky.

The 1907 decision in the case of Hilliard v. George G. Fetter Lighting & Heating Co. was written by Kentucky Court of Appeals Judge Carroll, who had himself been a member of the 1890 Constitutional Convention, where Sections 163 and 164 were drafted.<sup>4</sup> In discussing the purpose of requiring a franchise to be granted for a “term of years” Judge Carroll reasoned that:

“[t]he value to the owners of the right granted would keep pace with the growth, wealth, and population of the city, and unless at some future time the city had the right to obtain additional compensation for the privilege it would give the grantees of the franchise undue advantage, and deny to the city the right to exact a consideration in keeping with the value of the privilege bestowed.”<sup>5</sup>

Thus, the intent was to allow a city to extract a fair price from the recipient of the franchise. A term of years would allow the franchise to be negotiated at regular intervals, thus allowing the city to increase the franchise fee in proportion to the growth of the population and wealth of the city.

The term of years not only protects the economic interests of cities and citizens, but it also protects the economic interests of utilities. A term of years was required to give a utility bidding on the franchise both the amount of the franchise fee to be collected and the term of

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<sup>4</sup> Hilliard v. George G. Fetter Lighting & Heating Co., 105 S.W. 115 (Ky. 1907).

<sup>5</sup> Id. at 118.

years over which the utility would have an opportunity to recover its investment. On this point, Judge Carroll explains:

It was not contemplated that any person or corporation would desire to purchase or obtain a franchise for the purpose of establishing a permanent and valuable improvement that would expire in one year, or be for a less period than a "term of years;" and these words were inserted merely to give expression to this thought, rather than for any other purpose. Indeed, it does not seem either reasonable or probable that a corporation such as appellee would desire a privilege authorizing it to expend large sums of money in establishing a plant from which no profit could be gained until it was completed and put in operation, unless the right to enjoy it extended over "a term of years."<sup>6</sup>

Thus, as Judge Carroll explained, and later decisions by the same court recognized, the term of years was included to allow a municipality to reap a portion of the economic benefits realized by utilities serving the population within the municipality's jurisdiction.<sup>7</sup>

c) The Intent Of The Franchise Fee Is To Secure Valuable Consideration From Utilities

Conveniently, we need not only rely on hundred year old decisions in conducting this analysis. The Kentucky Supreme Court issued a decision just this summer that examines the Proceedings and Debates in the Constitutional Convention of 1890 ("Debates") and the Constitutional Framers ("Framers") intent with regards to Sections 163 and 164. Obviously, the discussion and findings therein should bare considerable weight in the current analysis.

In the Kentucky Supreme Court's recent decision, the Court found it "abundantly clear that the framers of our Constitution intended that the municipalities shall have both the power to grant franchises as well as the power to collect fees in exchange for granting those franchises"<sup>8</sup> and that "the guiding themes behind the enactment of Sections 163 and 164 were: 1) municipal control; and 2) municipal benefit via the sale of franchises."<sup>9</sup> The Court further emphasized that

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<sup>6</sup> Id.

<sup>7</sup> Stites v. Norton, 101 S.W. 1189 (Ky. 1907); Kentucky Utilities Co. v. Board of Comm'rs, 71 S.W.2d 1024, 1028 (Ky. 1933); Kentucky CATV Association, Inc. v. City of Florence, 2015-SC-000178-DC (July 6, 2017) (Exhibit 1).

<sup>8</sup> Kentucky CATV, at 7.

<sup>9</sup> Id. at 9; *citing* Debates at 2849. (Attached as Exhibits 1 and 2 respectively).

“[i]t is clear the framers of our Constitution intended to delegate to municipalities...the right to reap the long-term profits of that control [of the rights of way] through consideration paid by private franchises to the municipality, i.e., franchise fees.”<sup>10</sup> The Kentucky Court of Appeals has additionally ruled that “[t]hrough enactment of Section 164, the drafters of our Constitution envisioned that local governments would receive valuable consideration in exchange for the granting of the utility franchises.”<sup>11</sup>

LG&E asserts that the policy of the Commission supports LG&E’s practice of placing the franchise fee as a line-item on customer bills.<sup>12</sup> However, the current practice of LG&E would allow the municipalities to benefit from the franchise fee, but would rob the actual public, those individuals that constitute the municipalities, from reaping the benefit of the franchise fee. Thankfully, decisions by Kentucky Courts and the Debates make clear that the purpose of a franchise fee is not simply to benefit the municipality, but the public as well.

d) Benefits of Franchise Should be Enjoyed by The Public, Not Utilities

Section 163 and Section 164 serve to ensure that the public receives the financial benefit of the sale of franchises, not just the municipality. As the Court of Appeals explained in 1907:

The evident purpose of [Section 164] was to prevent councils of cities from giving away or selling at an inadequate price the rights and privileges belonging to the citizens, and compel the disposition of such valuable rights to be made publicly, to the end that the citizen might obtain the greatest price possible.<sup>13</sup>

In highlighting the dual importance of Sections 163 and 164 – municipal control and economic benefit to the public via the sale of franchises – the Court recited a passage from a previous decision, stating:

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<sup>10</sup> Id., at 11.

<sup>11</sup> City of Florence, Kentucky v. Flanery, No. 2013-CA-001112-MR, (Ky. App. Nov. 7, 2014) (unpublished) (Exhibit 3), *aff’d* Kentucky CATV (2017): Exhibit 1.

<sup>12</sup> Verified Application at 11.

<sup>13</sup> Stites v. Norton, 125 Ky. 672, 101 S.W. 1189 (1907).

[T]he main purpose behind this section 164 was to insure that every so often the municipality should have the opportunity of revising the terms of the franchise which it had granted as to *rates*, quality, service, and the like, and to have the advantage of *obtaining from time to time for the franchise its value* which most likely would be enhanced by the growth of population and business. (Emphasis added by Kentucky Supreme Court).<sup>14</sup>

Clearly demonstrated by these two passages and the emphasis added by the Kentucky Supreme Court is the economic value available to municipalities via the grant of a franchise is of paramount importance in granting a franchise.

The Kentucky Supreme Court advanced this analysis, highlighting a passage from a Framers who stated unequivocally that “the actual value of a franchise, [] ought to go to the public, to whom alone it is due.”<sup>15</sup> Both the Constitutional Framers and the Kentucky Supreme Court are clear on this point, “if there is a valuable franchise or privilege given, that the public shall get the benefit of it and that the profit from it shall go to the public treasury, and not into the pockets of individuals.”<sup>16</sup> The “individuals” referenced therein are the shareholders of the private enterprises bidding on the franchises. To allow LG&E to directly recover the cost of the franchise fee from Louisville Metro’s citizens is contrary to both the letter and intent of the Kentucky Constitution. To be sure, this exact scenario was intended to be prevented by Section 164. In reviewing the Constitutional Framers debates and the decisions of the Kentucky Supreme Court, no other conclusion is reasonable.

e) Protection From Undue Influence of the General Assembly

In conducting its analysis, the Kentucky Supreme Court was struck by how keenly aware the Framers were of the potential for corporations to infiltrate city councils as well as the General Assembly in ways harmful to the public at large. The Court explained:

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<sup>14</sup> Id. at 9; *citing Kentucky Utilities Co. v. Board of Comm'rs*, 71 S.W.2d 1024, 1028 (Ky. 1933).

<sup>15</sup> Kentucky CATV, at 9.

<sup>16</sup> Id. at 10.



[T]he framers' concern was not solely limited to those who would infiltrate the municipalities city councils, it was also directed toward those who would infiltrate the municipalities city councils, it was also directed toward those who would infiltrate the General Assembly and, thereby, take from the citizens of municipalities not only control over their franchises but also the financial benefit such franchises would produce.<sup>17</sup>

Such infiltration, the framers feared, could lead to the loss of "control over the franchises [and] the financial benefit such franchises would produce."<sup>18</sup>

LG&E has previously made the argument in this matter that the Kentucky General Assembly's failure to pass legislation specifically granting the cities authority to prohibit utilities from recovering franchise fees by adding a surcharge means cities currently do not possess this right.<sup>19</sup> First, no legislation needs passage to grant a right previously given to municipalities by the Kentucky Constitution. As the relevant court decisions and notes from the framers demonstrate, this was the intent of Sections 163 and 164. Second, as demonstrated by the language above, the Constitutional Framers aimed to insulate the public from legislative decisions limiting the right of the public and municipalities to benefit from franchises. LG&E's ability to sway the Kentucky General Assembly and city councils was exactly why Sections 163 and 164 were crafted. As evidence of this, we need only review the discussion of the framers as Sections 163 and 164 pertain to Louisville:

The fifteenth section of the report is also designed to correct a very grievous and widening evil. In this State most valuable municipal franchises have been bestowed upon favorites or schemers, and the municipal treasury robbed of millions of dollars. The Franchises in the city of Louisville, given away or secured by an improper influence over its council, would to-day pay over one-half of its ten millions of debt.<sup>20</sup>

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<sup>17</sup> *Id.* at 8; *citing* Debates at 2845 (Exhibit 4).

<sup>18</sup> *Id.* at 8.

<sup>19</sup> Verified Application at 14.

<sup>20</sup> Debates at 2131; Exhibit 5.

Thus, the Constitutional Framers found it necessary to make a municipalities ability to benefit economically from the sale of franchises sacrosanct, and therefore, protected from interference by the General Assembly.

f) LG&E's Tariff No. 90 Violates the Intent of the Kentucky Constitution and Numerous Kentucky Court Decisions.

LG&E's current practice of simply collecting the franchise fee as a line item on the bill of its customers essentially treats the fee as a pass-through cost. LG&E's tariff No. 90 actually requires this process to be implemented.<sup>21</sup> In considering this method of collecting the franchise fee directly from utility customers, one Kentucky Court astutely recognized 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."<sup>22</sup> As previously demonstrated herein, that process is not right, and it was not the intent of the Framers. However, LG&E proposes to continue utilizing that unreasonable and unlawful process.

g) Kentucky Precedent Directly On-Point

Only one Kentucky court decision has dealt directly with the question of whether a City has the right to prevent a utility from placing the franchise fee as a line-item on customers' bills; in that instance, both the Circuit Court and the Court Of Appeals agreed with Louisville Metro's position. The Circuit Court initially wrestled with the notion that if the franchise fee was not recovered as a line-item, then the utility may seek permission from the Commission to recover the fee through base rates.<sup>23</sup> However, the court ultimately found:

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

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<sup>21</sup> As noted previously, Tariff No 90 states "A surcharge shall be calculated and added to the total bill for gas service for all customers located within local governmental jurisdictions which currently or in the future impose municipal franchise fees or other local taxes on the Company by ordinance, franchise, or otherwise."

<sup>22</sup> *City of Ashland v. Columbia Gas of Ky., Inc.*, No. 93-CI-458, (Boyd Cir. July 7, 1995) (unpublished), *aff'd*, (Ky. App. 1996), *disc. review denied* (Ky. 1997); Exhibit 6.

<sup>23</sup> *Id.*

item charge in order to protect its taxpayers from the additional charge does not make it unreasonable, arbitrary, or capricious.<sup>24</sup>

The decision was then appealed to the Kentucky Court of Appeals. The Court of Appeals first acknowledged the role the Commission plays in the regulation of utility rates, and then affirmed the lower court's decision. In explaining its rationale, the Court of Appeals states:

[W]e 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 possess 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.<sup>25</sup>

The holding in that case perfectly mirrors the position Louisville Metro has taken in this matter. Does Louisville Metro have the authority to make a franchise agreement contingent on LG&E not placing the franchise fee as a line-item on Louisville Metro Customer bills? According to the holding by the Kentucky Court of Appeals, the answer is yes.

h) Louisville Metro Has the Authority to Prevent LG&E From Collecting the Franchise Fee as a Line-Item on Customer Bills.

The list of cases provided herein and the references to the 1890 Debates point to one undeniable conclusion, Louisville Metro possess the authority to prevent LG&E from recovering the franchise fee as a line-item on customer bills. In a rare review of the authority granted to a city under Section 164, the U.S. Court of Appeals for the Sixth Circuit held that a city council “enjoys considerable discretionary authority.”<sup>26</sup> The use of that discretionary authority by Louisville Metro to limit the method of recovery of the franchise fee by LG&E is well within its authority.

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<sup>24</sup> Id. at 2.

<sup>25</sup> Columbia Gas of Ky., Inc. v. City of Ashland, No. 95-CA-2127-MR, (Ky. App. July 19, 1996) (unpublished), *disc. review denied* (Ky. 1997); Exhibit 7.

<sup>26</sup> Communications Systems, Inc. v. Danville, 880 F.2d 887 (6<sup>th</sup> Cir. 1989).

2. LG&E's Franchise Fee Collection Practices Fail To Comply With 1) LG&E's Filed Tariff And The Filed-Rate Doctrine, 2) Commission Precedent And Other Applicable Law, And 3) Unfair, Unjust, And Unreasonable.

Should the Commission allow LG&E to collect the Louisville Metro Franchise Fee directly from LG&E gas customers located in Louisville Metro, LG&E intends to collect the fee from only a select group of gas customers located in Louisville Metro. LG&E argues it is not required to collect the franchise fee from Louisville Metro gas customers who also happen to reside within the smaller municipalities within the Louisville Metro jurisdictional borders. This practice violates Commission precedent, federal and state law, and LG&E's own tariff.

a) Violation of LG&E Tariff

LG&E Tariff Sheet No. 90 states, "A surcharge shall be calculated and added to the total bill for gas service for all customers located within local governmental jurisdictions which currently or in the future impose municipal franchise fees or other local taxes on the Company by ordinance, franchise, or otherwise." In the matter at hand, Louisville Metro is the "local governmental jurisdiction." The plain language of LG&E's tariff requires LG&E to collect the franchise fee from "all customers" located within the Louisville Metro Jurisdiction. LG&E itself has acknowledged that "any deviation from LG&E's tariff filed without Commission approval would violate the filed-rate doctrine, which the Commission has called the 'bedrock of utility regulation.'"<sup>27</sup> Thus, LG&E has violated, and without Commission action would continue to violate, its tariff and the filed-rate doctrine.

b) Violation of KRS 278.160(2)

Per KRS 278.160(2), "No utility shall... collect... a greater or less compensation... than that prescribed in its filed schedules." Where the franchise fee is based on consumer consumption, as

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<sup>27</sup> Verified Application at 11 (internal citations omitted).

is the Louisville Metro gas franchise fee, failing to collect the franchise fee from customers located in the smaller municipalities within Louisville Metro effectively violates this statute.<sup>28</sup> By failing to collect the franchise fee from all LG&E gas customers located within Louisville Metro, LG&E is collecting less compensation than that prescribed in its filed schedules, and violating its tariff, the filed-rate doctrine, and KRS 278.160(2).

c) Violation of Commission Precedent.

The Commission has previously stated, and LG&E quoted in its Verified Application, that “[S]ince the fees to the municipalities in question there is no justification to assess residents outside of the political boundaries of the franchise area. Such a policy is tantamount to taxation without representation and therefore not in the best interest of the consumer....”<sup>29</sup> The situation at hand is the exact opposite. Here, the populations residing within the smaller municipalities have the exact same political representation in Louisville Metro as those residents located outside the smaller municipalities, but still within Louisville Metro. Each and every citizen in Louisville Metro is able to vote for a city council representative and the Mayor, and those votes count the exact same regardless of which part of the Louisville Metro jurisdiction those residents reside. Thus, the LG&E gas customers residing within the smaller municipalities had representation on the city council, which passed the ordinance offering the franchise agreement, and the Mayor, who executed the agreement between Louisville Metro and LG&E.

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<sup>28</sup> As described in the Statement of Facts, section 11(b) of the Franchise Agreement provides for a fee of “six percent (6%) of forty-three cents (\$0.43) per thousand cubic feet (mcf) of gas as described in Section 11(a) above.” Section 11(a) further explains the calculation of mcf as “each thousand cubic foot (mcf) of gas utilizing the company's pipe, pipeline, main, pumping stations or other means to transport, whether for transmission or distribution, for the purpose of providing natural gas service to customers as a local distribution company within the Franchise Area (using the measured mcf of gas delivered to customers as a substitute).”

<sup>29</sup> Case No. 7804, Order at 11.

Furthermore, the Commission has taken the position that those receiving the benefit of the services financed by the franchise fee should contribute to the franchise fee.<sup>30</sup> As previously established by Louisville Metro, the smaller municipalities receive numerous services and benefits from Louisville Metro, which are paid for in part by the Louisville Metro franchise fee.<sup>31</sup> Therefore, the Commission dictates that where a population has both political representation on the decision to institute a franchise fee and receives the benefit of the franchise fee, that population should contribute to the franchise fee.

d) Discriminatory and Disparate Impact

As deftly asserted by the Metropolitan Housing Coalition (“MHC”), a Louisville-based nonprofit organization advocating on behalf of fair, safe, and affordable housing in the Louisville Metro area, the LG&E practice raises serious concerns regarding compliance with the Kentucky Civil Rights act and the Federal Fair Housing Act. According to the MHC calculation of U.S. Census data, the minority populations in the smaller municipalities are roughly half that of the full Louisville Metro population. Additionally, there appears to be a roughly \$40,000 gap in median household income from the smaller municipalities to the full Louisville Metro population. These impacts, regardless of intent by LG&E, appear to create discriminatory and disparate impacts that negatively impact minority and less economically advantaged populations. The simple solution is to collect the franchise fee from all LG&E gas customers within Louisville Metro, not just a select group.

e) Violation of “Fair, Just and Reasonable” Principles

The Kentucky Court of Appeals has previously ruled that “we must look more to whether the result is fair, just and reasonable rather than at the particular methodology used to reach the

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<sup>30</sup> Id.

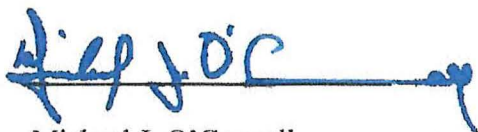
<sup>31</sup> Louisville Metro Amended Complaint, Affidavit of Doug Hamilton.

result.”<sup>32</sup> Surely, the Commission cannot find reasonable the practice proposed by LG&E. As demonstrated here, LG&E wishes to implement a practice that violates numerous laws, Commission precedent, and basic principles of equity. Under KRS 278.270, the Commission shall prescribe a just and reasonable rate to be followed in the future upon a finding that any rate is unjust, unreasonable, or unjustly discriminatory. Thus, any finding by the Commission that the net result of the LG&E practice is unjust, unreasonable, or unfairly discriminatory, the Commission must require LG&E to file an amended tariff, in which it will collect the franchise fee from all of the Louisville Metro gas customers.

### CONCLUSION

For the reasons contained herein, 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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<sup>32</sup> National-Southwire Aluminum Co. v. Big Rivers Elec. Corp., 785 S.W.2d 503 (Ky. App. 1990).