

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

BRIEF OF LOUISVILLE GAS AND ELECTRIC COMPANY

Pursuant to the order of the Kentucky Public Service Commission (“Commission”) dated August 9, 2017, Louisville Gas and Electric Company (“LG&E” or the “Company”) files this brief addressing the legal issues presented by the parties in this case.

INTRODUCTION

This case involves the unprecedented attempt by the Louisville/Jefferson County Metro Government (“Louisville Metro”) to require LG&E to collect Louisville Metro’s franchise fee from gas service customers in other cities of Jefferson County or in other counties in Kentucky. In the alternative, Louisville Metro argues that LG&E’s shareholders should absorb the costs associated with Louisville Metro’s franchise fee. Consistent with the express terms in LG&E’s current gas franchise with Louisville Metro (the “2016 Franchise”), *no franchise fee will be due if this Commission determines LG&E should follow its tariff and collect Louisville Metro’s fees only from customers in its franchised area.*¹

Louisville Metro’s demands directly contradict the clearly delineated statutory and constitutional limits on Louisville Metro’s jurisdiction, LG&E’s tariff, Commission precedent, and LG&E’s statutory right to collect and receive fair, just and reasonable rates for the services it renders. The Commission should reject these efforts and reaffirm LG&E’s franchise rider to its

¹ See Section 11(b) of the Franchise Agreement attached as Ex. 5 to LG&E’s Verified Application (cited hereinafter as the “2016 Franchise Agreement”).

gas tariff (the “Franchise Rider”), which, in accordance with applicable law, requires LG&E to collect Louisville Metro’s franchise fees only from customers receiving gas service within the Louisville Metro franchise area.²

STATEMENT OF THE CASE

a. Louisville Metro and Jefferson County Home Rule Cities

In November 2000, the voters of Jefferson County approved a referendum for the merger of Jefferson County and the City of Louisville. The resulting new consolidated local government, Louisville/Jefferson County Metro Government, came into being January 6, 2003 when the merger took effect.”³

The City of Louisville’s consolidation with Jefferson County did not affect the eighty-three (83) second through sixth class cities located in Jefferson County (the “Home Rule Cities”).⁴ One of the reasons citizens of Jefferson County organized and formed the Home Rule Cities was to protect their neighborhoods or property from being annexed by the City of Louisville for tax purposes.⁵ The 2014 General Assembly changed Kentucky’s municipal classification regime and reclassified these cities as “home rule” class cities.⁶ The statutes governing the consolidation of the City of Louisville and Jefferson County expressly recognize that the Home Rule Cities remain incorporated and retain all powers and functions previously

² LG&E Rates, Terms and Conditions for Furnishing Natural Gas Service, P.S.C. Gas No. 10, Original Sheet No. 90 (a copy is included in Appendix A to this brief).

³ The 2000 General Assembly enacted KRS Chapter 67C authorizing the voters of any county containing a city of the first class to approve the consolidation of the governmental and corporate functions vested in any city of the first class with those of the county.

⁴ Testimony of Lonnie Bellar, Exhibit LEB-2

⁵ The Encyclopedia of Louisville, *Suburbs* 861 (2015) (In the 1950s and 1960s “[t]he city [of Louisville] attempted to keep pace with the county’s growth through annexation... When Louisville attempted to annex the business areas along Lexington and Shelbyville Roads, St. Matthews incorporated as a city in 1950. During this time, other smaller communities, fearing annexation and a desire to lower taxes, began to incorporate as sixth-class cities... When the city moved to annex Shively, the distillery companies in the area encouraged the community to fight annexation. The community wanted the municipal status to maintain independence... Numerous other communities followed Shively’s example. In the 1950s twenty-nine municipalities incorporated, followed by twenty-two in the 1960s.”).

⁶ See KRS 81.005 (enacted by 2014 Ky. Acts 92, § 1, eff. Jan. 1, 2015).

held before the consolidation of the city and county governments.⁷ Necessarily, the eighty-three Home Rule Cities retain the constitutional power to grant franchises for the use of their rights-of-way and to charge franchise fees for that use.⁸

b. Gas Franchise Negotiations

On October 1, 2014, Louisville Metro awarded LG&E a gas franchise (the “2014 Franchise”) for a term of sixteen months beginning December 1, 2014. The 2014 Franchise required LG&E to pay Louisville Metro a franchise fee of 2% of gross receipts from gas services provided within Louisville Metro. Pursuant to the Franchise Rider, LG&E collected the 2014 Franchise Fee by calculating and adding a surcharge to the total bill for gas service for only those customers located within the franchise area of Louisville Metro. LG&E collected the franchise fee through March 31, 2016 when the term of the 2014 Franchise expired.

Prior to and following expiration of the 2014 Franchise, LG&E and Louisville Metro negotiated and ultimately entered into the 2016 Franchise.⁹ The 2016 Franchise is for a term of five years and authorizes LG&E to lay its facilities in the public rights-of-way of the “Franchise Area.”¹⁰ The Franchise Area is defined as “the public streets, avenues, alleys and other public ways of Louisville Metro, but not within the jurisdiction of any other city located in Jefferson County, Kentucky.”¹¹

⁷ KRS 67C.111(1). (“All cities other than those of the first class located within the territory of the consolidated local government, upon the successful passage of the question to consolidate a city of the first class and its county, shall remain incorporated unless dissolved in accordance with KRS 81.094 and shall continue to exercise all powers and perform the functions permitted by the Constitution and general laws of the Commonwealth of Kentucky applicable to the cities of the class to which they have been assigned.”)

⁸ Sections 163 and 164 of the Kentucky Constitution require the Home Rule Cities and other cities to grant franchises for the use of their public rights-of-way. The Kentucky Supreme Court recently held in *Ky. CATV Ass’n v. City of Florence*, 520 S.W.3d 355 (Ky. 2017) that Sections 163 and 164 provide cities a constitutionally-protected right to charge and collect franchise fees.

⁹ The details of the process are fully explained in LG&E’s declaratory order application *In the Matter of: Application of Louisville Gas and Electric Company for a Declaratory Order Regarding the Proper Method of Municipal Franchise Fee Recovery*, Case No. 2016-00317, Application at 6-8 (Ky. PSC Aug. 30, 2016).

¹⁰ See 2016 Franchise Agreement, Section 1.

¹¹ 2016 Franchise Agreement, Section 1 (Emphasis added to quoted text in body of the brief).

The 2016 Franchise, like the 2014 Franchise, allows Louisville Metro to require a franchise fee.¹² The franchise fee provision of the 2016 Franchise is noteworthy because Louisville Metro can choose between five alternative methods of calculation (i.e., four methods or a combination of the methods) and may continue to change its choice throughout the 2016 Franchise's term.¹³ The fee cannot exceed 3% of LG&E's gross receipts from providing gas service within the Louisville Metro franchise area.¹⁴ Upon 60 days' notice to LG&E, Louisville Metro can increase the fee (estimated to be approximately \$1 million based on the method currently selected by Louisville Metro)¹⁵ by using any of the other calculation options in the 2016 Franchise, including requiring the 3% fee that could raise the annual amount of franchise fees to nearly \$6.5 million.¹⁶ As a consequence, LG&E would need to collect and remit a \$5.5 million annual increase over the expected \$1 million in fees due.¹⁷ Moreover, if Louisville Metro is successful in limiting LG&E's recovery of the franchise fee through base rates only, any increases in the franchise fee between rate cases would be borne by LG&E's shareholders until base rates could be changed again. Conversely, LG&E's customers would similarly be harmed if LG&E's recovery of the franchise fee is limited to base rates and Louisville Metro decreases the franchise fee between rate cases.

¹² 2016 Franchise Agreement, Section 9.

¹³ 2016 Franchise Agreement, Sections 9 and 11(a).

¹⁴ 2016 Franchise Agreement, Section 11(a).

¹⁵ LG&E's Response to Question No. 3 of the Commission Staff's Initial Request for Information Dated March 24, 2017 ("LG&E believes Louisville Metro is basing calculation of the Franchise Fee upon the amount of gas delivered to all LG&E customers because The Courier-Journal reported in an August 26, 2016 article that the amount of the "expected Franchise Fee" would be \$1.05 million. That figure is consistent with calculating the Franchise Fee based on the total volume of gas delivered to all LG&E customers, as opposed to the volume delivered to customers within the Franchise Area. (The total volume delivered to all LG&E customers for the 12-month period ending May 2016 was 41,021,512 Mcf, which when multiplied by \$0.0258 yields \$1,058,355.02.)").

¹⁶ 2016 Franchise Agreement, Section 11(a). In 2015, LG&E's gross receipts in the franchise area were \$216,298,687. Based on these receipts, if the franchise fee is 3.0%, the annual fees would be \$6,488,960.61. This amount could increase due to demand, growth, and weather.

¹⁷ 2016 Franchise Agreement, Section 11(a)(2).

c. Explanation of the Dispute

During the 2016 Franchise negotiations, Louisville Metro demanded that LG&E collect the 2016 Franchise Fee from *all* LG&E gas ratepayers, whether or not they received service within Louisville Metro. Louisville Metro insisted the franchise fee should either be recovered in base rates, or collected as a line-item on bills from *all* LG&E gas ratepayers.¹⁸ LG&E rejected these demands, taking the position that Louisville Metro has no authority to require LG&E to collect its franchise fees from customers outside of its jurisdictional limits and that the franchise fee may thus only be collected from ratepayers within the Louisville Metro franchise area. Through the negotiations it became clear that Louisville Metro is seeking to expand its authority to include how and from whom franchise fees are to be collected, including from customers who receive services outside of Louisville Metro -- all in an apparent effort to avoid the consequences from collecting the fee solely from the customers within the Louisville Metro Franchise Area.

The terms of the 2016 Franchise reflect the parties' disagreement. Each side reserved the right to seek further review with the Commission.¹⁹ Pending the resolution of this issue, under the terms of the 2016 Franchise, no franchise fee is due from LG&E; and no liability for the franchise fee is accruing.²⁰ Indeed, if this Commission determines that LG&E should continue to comply with its Franchise Rider, and collect the franchise fee only from customers in the

¹⁸ Louisville Metro's Amended Complaint, Claims 1-3.

¹⁹ 2016 Franchise Agreement, Section 12 ("The Company and Louisville Metro, separately, reserve the right to seek all administrative relief from the Kentucky Public Service Commission or any other court of competent jurisdiction, including appeals of any final orders as permitted by law.").

²⁰ 2016 Franchise Agreement, Section 11(b) ("LG&E will not collect or remit any Franchise Fee during the time period in which the action is pending, including any appeals therefrom, and LG&E will have no retroactive obligation to remit payment of the Franchise Fee following of the conclusion of the adjudication and any appeals therefrom.").

Louisville Metro Franchise Area, then under the terms of the 2016 Franchise, no franchise fee will be due.²¹

No material facts are in dispute. Louisville Metro's reliance upon the placement of LG&E's gas distribution and transmission lines, as well as the directional flow of gas to ratepayers is irrelevant to the disposition of the clear legal issue in this case, namely, the proper method of collecting franchise fees.

d. Procedural History

On August 30, 2016, LG&E filed a petition²² requesting a declaratory order confirming that (1) LG&E must abide by its tariff and (2) consistent with longstanding Commission policy, LG&E's Franchise Rider requires recovery of municipal franchise fees as a line-item charge on the bills of the ratepayers receiving service within the jurisdiction imposing the franchise fee.²³ On September 19, 2016, Louisville Metro filed a complaint against LG&E asserting its gas franchise rider tariff was unjust and unreasonable.²⁴ Louisville Metro also filed a motion to dismiss Case No. 2016-00317 or, in the alternative, consolidate it with Case No. 2016-00347. The Commission rejected Louisville Metro's initially filed complaint in Case No. 2016-00347 due to its failure to include sufficient facts and to state a *prima facie* case. Louisville Metro filed an amended complaint on November 9, 2016, and an addendum to that amended complaint on December 5, 2016. By its order dated January 25, 2017, the Commission dismissed Louisville Metro's complaint for failing to state a *prima facie* case. By that same order, the Commission consolidated the issues raised in the complaint into Case No. 2016-00317. The Commission

²¹ 2016 Franchise Agreement, Section 11(b) ("Should the adjudication and any appeals therefrom, conclude that the franchise fee should be recovered from the Company's ratepayers as a line item on the bills of customers only in the franchise area, the amount of the fee will automatically revert to zero and no fee will be due from the Company.").

²² Ky. PSC Case No. 2016-00317.

²³ LG&E Rates, Terms and Conditions for Furnishing Natural Gas Service, P.S.C. Gas No. 10, Original Sheet No. 90.

²⁴ Ky. PSC Case No. 2016-00347.

denied Louisville Metro's request for rehearing by its order dated February 27, 2017. Subsequently, LG&E and Louisville Metro filed testimony and took discovery in Case No. 2016-00317. The Commission entered its scheduling order on August 9, 2017, requesting briefs on the issues presented and scheduling oral argument.

ARGUMENT

The question before the Commission is from whom LG&E should collect Louisville Metro's franchise fee. If the Commission determines that LG&E should collect Louisville Metro's franchise fee only from customers in Louisville Metro's Franchise Area in accordance with LG&E's Gas Franchise Rider tariff, not only will such a determination be in agreement with prior Commission orders, but it will obviate, by operation of the 2016 Franchise terms, any obligation for LG&E to collect and remit a franchise fee to Louisville Metro.²⁵ Louisville Metro's objections to the pass-through of its franchise fees to only Louisville Metro gas customers and demand that LG&E collect those fees from customers outside Louisville Metro are contrary to Kentucky law. Accordingly, the Commission should hold that (1) LG&E must follow its Commission-approved Franchise Rider, and in doing so, (2) LG&E should calculate and assess any fee through a surcharge on bills for gas service for customers located only within the Franchise Area of Louisville, in accordance with applicable law.

1. Louisville Metro May Not Require the Collection of Its Franchise Fee Beyond Its Jurisdictional Limits

All powers of Louisville Metro are confined to its territorial limits. Kentucky's highest court has declared that as a "general rule... a city possesses only those powers expressly granted by the Constitution and statutes plus such powers as are necessarily implied or incident to the expressly granted powers and which are *indispensable* to enable it to carry out its declared

²⁵ 2016 Franchise Agreement, section 11(b).

objects, purposes and expressed powers.”²⁶ Any doubt about the existence of a particular municipal power is resolved against its existence.²⁷ By statute Louisville Metro has the power to levy and collect taxes “within the territorial limits of the consolidated local government...”²⁸ Additionally, Louisville Metro has the power to license, tax, and regulate privileges and occupations “throughout the jurisdiction.”²⁹ But a local government generally may not exercise its powers beyond its jurisdictional limits.³⁰ “[U]nless a statute expressly provides otherwise, the exercise of a police power by a municipality is limited to its territorial boundaries.”³¹

Louisville Metro’s right to require franchises and to impose franchise fees is delegated by Sections 163 and 164 of the Kentucky Constitution. Those provisions expressly limit franchising authority to the public rights-of-way of the political subdivision granting the franchise. Section 163 requires that a utility obtain a franchise to place its facilities “along, over, under or across the streets, alleys or public grounds *of* a city or town.”³² As the Kentucky Supreme Court recently reaffirmed, “[i]t is clear that the framers of our Constitution intended to delegate to municipalities: control over the placement of utilities within *their* public spaces and rights-of-way,”³³ not the public spaces and rights-of-way of other jurisdictions. If there could be any doubt that Louisville Metro lacks authority to extend its franchising powers beyond its own public spaces and right-of-way, that doubt must be resolved against the existence of such power.

²⁶ *City of Bowling Green v. T & E Elec. Contractors*, 602 S.W.2d 434, 435 (Ky. 1980) (emphasis added); see also *Lexington-Fayette Urban Cnty. Bd. of Health v. Bd. of Trs. of the Univ. of Ky.*, 879 S.W.2d 485 (Ky. 1994).

²⁷ *City of Horse Cave v. Pierce*, 437 S.W.2d 185, 186 (Ky. 1969); see also *Griffin v. City of Paducah*, 382 S.W.2d 402, 404 (Ky. 1964).

²⁸ KRS 67C.101(3)(a).

²⁹ KRS 67C.101(3)(b).

³⁰ See *Earle v. Latonia Agricultural Ass’n*, 106 S.W. 312 (1907) (holding a city could not enact an ordinance prohibiting liquor sales beyond its corporate limits).

³¹ *Smeltzer v. Messer*, 225 S.W.2d 96, 97 (Ky. 1949)(citing 37 Am. Jur., Municipal Corporations, Section 284).

³² (Emphasis added).

³³ *Ky. CATV Ass’n*, 520 S.W.3d at 355.

While Louisville Metro may reach beyond its own boundaries for proper purposes (i.e., land ownership), its special status and powers as a government and franchising authority does not extend with it. “[W]hen a city operates beyond its boundaries it carries with it none of the prerogatives of sovereignty, but functions in its extraterritorial setting simply as a private corporation.”³⁴ For example, in *Rieser v. Ward*,³⁵ the Court acknowledged that while the City of Louisville had authority to own a land outside its corporate limits, the Louisville police court did not have jurisdiction to try traffic offenses occurring on such property.

A city cannot exercise its municipal powers over its own lands outside its boundaries. Necessarily Louisville Metro may not extend its franchising authority beyond its boundaries. The Commission should find that Louisville Metro may not infringe upon the jurisdiction of other localities and may not require the collection of its franchise fee beyond its jurisdictional boundaries.

2. Collecting the Cost of the Louisville Metro Gas Franchise Fee From Gas Customers Residing Within Louisville Metro as a Line-Item on Their Utility Bills is Fair, Just and Reasonable.

Louisville Metro seeks an impermissible expansion of its authority by demanding the collection of its franchise fee from all LG&E customers. Kentucky law and Commission precedent clearly permit the pass-through to, and collection of, franchise fees from only those customers receiving service in the jurisdiction imposing the fee.

a. A Franchise Fee is a Special Charge Warranting Distinct Treatment.

Louisville Metro’s assertion that the franchise fee is merely “rent” for the occupancy of the right-of-way (and thus an ordinary cost of business) conflicts with well-established law. Indeed, Kentucky law is clear that a franchise fee is a special legal fee.

³⁴ *Norvell v. City of Danville*, 355 S.W.2d 689, 691 (Ky. 1962).

³⁵ 193 Ky. 368, 236 S.W. 255 (1922).

Kentucky courts have held for more than a century that a franchise is different and distinct from a lease or license, and that any arrangement purporting to be a lease must comply with franchise requirements or it is invalid.³⁶ Kentucky's highest court has repeatedly stated that, where utilities are involved, Sections 163 and 164 of the Kentucky Constitution 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."³⁷ Kentucky courts have long distinguished between municipalities' rights to act in governmental versus proprietary capacities. When acting in a proprietary capacity, a municipality stands in the shoes of any proprietor and exercises rights available to all in the same capacity, including the right to lease property without needing to issue a franchise.³⁸ However, where, as here, a municipality acts in its governmental capacity to grant rights or privileges not otherwise available to individuals, it must issue a franchise.³⁹ Accordingly, a franchise fee is no mere rental payment, but a fee paid in consideration for a specific form of governmental permission to use the public right-of-way – a franchise.

The Kentucky League of Cities ("KLC"), of which Louisville Metro is a member, similarly acknowledges that franchise fees are distinctive charges warranting special treatment. The KLC has stated that "franchise fees are not ad valorem taxes nor license taxes or fees" but rather are a "contractual amount paid for the alienation over a period of years of the rights the

³⁶ See, e.g., *Inland Waterways Co. v. City of Louisville et al.*, 13 S.W.2d 283 (Ky. 1929); *Cumberland Tel. & Tel. Co. v. Calhoun*, 151 S.W. 659, (Ky. 1912); *Rural Home Tel. Co. v. Ky. & Ind. Tel. Co.*, 107 S.W. 787, 790 (Ky. 1908).

³⁷ *Cumberland Tel.*, 151 S.W. at 661.

³⁸ See, e.g., *Inland Waterways Co.* 13 S.W.2d. at 287 ("A municipal corporation may be the owner of land and may control, use, lease, and dispose of it as other proprietors may do."); *Bd. of Councilmen v. Pattie et al.*, 12 S.W.2d 1108, 1109 (Ky. 1928).

³⁹ *Inland Waterways Co.*, 13 S.W.2d at 285.

city has to its streets and rights-of-way.”⁴⁰ As a contractual fee for alienation of rights in the public right-of-way, a franchise fee is not mere rent.

Applying this legal reasoning, the Commission has found that a franchise fee “is not regarded... as an ordinary expense of the utility” and there is “no justification in... treating these franchises as ordinary utility expenses.”⁴¹ The franchise fee “amount... is basically between the citizens within the franchise area and their local government” and is properly recovered as a line-item so that residents are aware of what their government is charging.⁴² Accordingly, the Commission has articulated a clear policy requiring the pass-through and collection of franchise fees as a line-item charge to the customers within the franchising authority.

Because a franchise fee is not simply “rent,” the Commission correctly requires utilities to collect the fees from customers as a separate line-item on bills. Louisville Metro’s objection to such a line-item charge would prevent its citizens from knowing the amount Louisville Metro is charging, thus conflicting with the policies of the Commission. Therefore, the Commission should deny Louisville Metro’s request and affirm its long-standing policy requiring the line-item charge for franchise fees to customers within the Franchise Area.

⁴⁰ Kentucky League of Cities, *City Officials Legal Handbook* 429 (2017 Edition) (A copy is included in Appendix B to this brief).

⁴¹ *General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, Order at 10-12 (Ky. PSC Oct. 1, 1980). See also *The Local Taxes and/or Fees Tariff Filing of Columbia Gas of Kentucky, Inc.*, Case No. 7906 (Ky. PSC Oct. 10, 1980) (“Such itemization is further justified by the fact that this charge is not, regarded by the commission as an ordinary expense of the utility.”); *The Local Taxes and/or Fees Tariff Filing of General Telephone Company of Kentucky*, Case No. 7843 (Ky. PSC Oct. 3, 1980); *The Franchise Fee Tariff Filing of Continental Telephone Company of Kentucky*, Case No. 7891 (Oct. 10, 1980); *An Adjustment by the Union Light, Heat and Power Company to Include in Its Gas and Electric Tariffs, E.R.C. KY. No. 2 and E.R.C. KY. No. 3, Respectively, a Local Franchise Fee Applicable to All Schedules*, Case No. 8154 (Ky. PSC June 24, 1981); *Taylor County Rural Electric Cooperative Corporation Notice of Tariff Revision*, Case No. 89-054 (Ky. PSC Apr. 10, 1989).

⁴² *Id.*

b. The Commission Lacks the Legal Authority to Expand the Legal Rights of Louisville Metro.

The Commission is without authority to expand the legal rights of Louisville Metro’s franchising authority to extend to other cities and counties. As an administrative agency, the Commission is a creature of statute and is limited to the power granted by those statutes.⁴³ Although the Commission has exclusive jurisdiction over the regulation of rates and service of utilities, the General Assembly has explicitly constrained that authority to prevent the Commission from limiting or restricting the “police jurisdiction, contract rights or powers of cities or political subdivisions.”⁴⁴ Similarly, the scope of power conferred upon a municipal corporation is subject to *legislative* discretion.⁴⁵ As a creature of statute, a municipality only has the power explicitly granted or necessarily implied by statute.⁴⁶ Thus, it is for the legislature to expand or reduce the scope of the authority of each political subdivision. Accordingly, the Commission has no jurisdiction over the franchising power of Louisville Metro, other cities or other counties.⁴⁷ Louisville Metro must look to the General Assembly if it seeks to impose its franchise fees in other municipalities and counties.⁴⁸ An order of the Commission effectively permitting Louisville Metro to exercise its franchise authority within another city or county violates the jurisdictional statutes of the Commission and Louisville Metro and is *ultra vires*.

⁴³ *In the Matter of: Joint Application of Kentucky Utilities Company and Louisville Gas and Electric Company for a Declaratory Order*, Case No. 2017-00038, Order at 5 (Ky. PSC Aug. 1, 2017) (Citing *Public Service Comm’n v. Jackson County Rural Electric Cooperative, et al.*, 50 S.W.3d 764, 767 (Ky. App. 2000)); *Boone County Water & Sewer Dist. v. Pub. Service. Comm’n*, 949 S.W.2d 588, 591 (Ky. 1997).

⁴⁴ KRS 278.040(2).

⁴⁵ *Dist. of Clifton in Campbell Cnty. v. Cummins*, 177 S.W. 432, 432-33 (Ky. 1915) (emphasis added).

⁴⁶ *City of Lebanon v. Goodin*, 436 S.W.3d 505, 511 (Ky. 2014).

⁴⁷ The Commission does have the express authority to award utilities certificates of convenience and necessity to apply for and obtain franchises from cities upon a showing that there is a demand and need for the service. KRS 278.020(5).

⁴⁸ As discussed *infra* in Section 1.e., the General Assembly’s decision not to amend KRS 96.010 in light of the Commission’s policies and existing tariffs evidences legislative agreement with the Commission’s policies.

c. LG&E's Collection Practices are Required by Its Gas Tariff and KRS Chapter 278.

LG&E's rates and services are governed by its tariff as approved by the Commission. In that tariff, the Commission requires that franchise fees be passed through exclusively to the ratepayers located in the jurisdiction of the franchising authority. The Franchise Rider to LG&E's tariff provides in part:

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... ***The amount calculated shall be applied exclusively to the bills of customers receiving service within the territorial limits of the authority imposing the fee or tax. The fee or tax shall be added to the customer's bill as a separate item.***⁴⁹

This Commission-approved language mandates that franchise fees imposed by a municipality “shall” be recovered as a separate line-item assessed only to the customers who receive service in the municipality imposing the fee.

The Franchise Rider is a filed rate under KRS 278.160.⁵⁰ Pursuant to the filed-rate doctrine, embodied in KRS 278.160, a utility may not “charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed [by the Commission] in its filed schedules...”⁵¹ Accordingly, LG&E may only proceed as it has proposed by separately stating the franchise fee as a line-item on the bills of customers located within Louisville Metro’s franchise area. Louisville Metro’s demand violates LG&E’s gas tariff and should be rejected.

⁴⁹ LG&E Rates, Terms and Conditions for Furnishing Natural Gas Service, P.S.C. Gas No. 10, Original Sheet No. 90. (emphasis added) (included in the Appendix).

⁵⁰ *General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, Order at 11-12 (Ky. PSC Oct. 1, 1980). See also KRS 278.010(12) (“Rate” means 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.*) (Emphasis added); KRS 278.010(13) (“Service” includes any practice or requirement in any way relating to the service of any utility.).

⁵¹ KRS 278.160(2).

d. LG&E's Collection Practices are in Conformity With the Commission's Policies.

The Commission has articulated a policy corresponding to that contained in the Franchise Rider. The Commission's policy,⁵² with limited exceptions,⁵³ is that franchise fees imposed by a municipality are to be recovered as a separate line-item assessed only to the customers in the municipality imposing the fee. The recovery of the type of franchise fees proposed by Louisville Metro from all customers through general rates would unreasonably prejudice or disadvantage customers outside the fee-imposing municipality who typically receive no benefit from the fee and remove any transparency of, scrutiny over and check-and-balance to the imposition of franchise fees by municipal governments.⁵⁴ And, in doing so, unlawfully expand the authority of the municipality.

⁵² See, e.g., *In the Matter of: General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, Order (Ky. PSC Oct. 1, 1980); *In the Matter of: The Local Taxes and/or Fees Tariff Filing of General Telephone Company of Kentucky*, Case No. 7843, Order (Ky. PSC Oct. 3, 1980); *In the Matter of: The Local Taxes and/or Fees Tariff Filing of Columbia Gas of Kentucky, Inc.*, Case No. 7906, Order (Ky. PSC Oct. 10, 1980); *In the Matter of: The Franchise Fee Tariff Filing of Continental Telephone Company of Kentucky*, Case No. 7891, Order (Ky. PSC Oct. 10, 1980); *In the Matter of: General Adjustment in Electric Rates of Kentucky Power Company*, Case No. 7900, Order (Ky. PSC Dec. 17, 1980); *An Adjustment by the Union Light, Heat and Power Company to Include in Its Gas and Electric Tariffs, E.R.C. KY. No. 2 and E.R.C. KY. No. 3, Respectively, a Local Franchise Fee Applicable to All Schedules*, Case No. 8154, Order (Ky. PSC June 24, 1981); *In the Matter of: Taylor County Rural Electric Cooperative Corporation Notice of Tariff Revision*, Case No. 89-054, Order (Ky. PSC Apr. 10, 1989); *Tariff of Kentucky Utilities Company to Implement a Franchise Fee Rider*, Case No. 2003-00265, Order (Ky. PSC Oct. 16, 2003); *Tariff of Louisville Gas and Electric Company to Implement a Franchise Fee Rider*, Case No. 2003-00267, Order (Ky. PSC Oct. 16, 2003).

⁵³ See, e.g., *In the Matter of: The Filing by Kenergy Corp. for Approval of a Franchise Billing Plan and for Permission to Deviate from the Public Notice Requirements of 807 KAR 5:011*, Case No. 2002-00402 (Ky. PSC June 13, 2003) (finding that "a franchise fee of \$5,000 or less will have a *de minimis* effect on Kenergy's customers.").

⁵⁴ *In the Matter of: The Local Taxes and/or Fees Tariff Filing of General Telephone Company of Kentucky*, Case No. 7843, Order (Ky. PSC Oct. 3, 1980) ("[I]t is unfair to customers not residing within a municipality to be forced to pay part of the costs of a utility's franchise agreement with that municipality. Accordingly, tariff provisions which perpetuate such an arrangement are unfair and unreasonable. The fairest and best way to accomplish this is to recover franchise fees as a separate item on the bills of customers receiving service within a municipality requiring such a fee."); *In the Matter of: Taylor County Rural Electric Cooperative Corporation Notice of Tariff Revision*, Case No. 89-054, Order (Ky. PSC Apr. 10, 1989) ("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... Customer bills should separately state the amount which is attributable to franchise fees...") (Emphasis in original text).

The Commission's policy also rests upon sound ratemaking principles of cost-causation. The Commission has held that the ratepayers receiving the benefit of the fee should pay the fee and those that receive no benefit of the fee should not pay:

[S]ince the fees go 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.⁵⁵

In addition, the Commission has found franchise fees are an identifiable part of the cost of providing service *within the city or municipality* and therefore only those residents in that jurisdiction should be subject to the associated cost.⁵⁶

The Commission has held that consumers have a right to know and understand the charges collected from them for the government's use.⁵⁷ The Commission's findings are based upon "[b]asic fairness [which] dictates that these revenues be raised in the area in which they are spent, and that customers are aware of this in the same manner as the school tax and the fuel adjustment charges or credits are presented on the customer bill..."⁵⁸ Ultimately, the Commission found that to do otherwise would unfairly hide the charge from the consumer, inappropriately treat franchises as ordinary utility expenses, and be akin to taxation without representation.

Louisville Metro's demand that LG&E collect Metro's franchise fees from customers who are not receiving service within Louisville Metro is exactly the type of unfair and unreasonable collection method prohibited by KRS 278.170 and which the Commission has sought to prevent. Ultimately, Louisville Metro seeks to impose the franchise fee on customers

⁵⁵ *In the Matter of: General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, Order at 10-12 (Ky. PSC Oct. 1, 1980).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

not receiving benefits from the fee and hide the true amount of the fee from the citizens of Louisville Metro. Therefore, the Commission should uphold LG&E's collection method as in conformity with Kentucky law and the Commission's policies and reject the demand of Louisville Metro.

e. The General Assembly Has Declined to Change the Commission's Policies.

In addition to prior consideration by Kentucky courts and the Commission, the General Assembly has declined to legislatively change the Commission's policy of the pass-through of franchise fees as a line-item charge. Each year since 2011, the General Assembly has declined to enact bills that would amend KRS 96.010 to either prohibit the pass-through of franchise fees or grant permission to cities to prohibit such pass-through.⁵⁹ The General Assembly when considering those bills is presumed to have been aware of the Commission's practice of permitting recovery of franchisee fees by a line-item charge to ratepayers within the franchising jurisdiction.⁶⁰ In determining the General Assembly's intent in crafting statutes, "[b]ills presented but not passed may have some bearing."⁶¹ Where the General Assembly is aware of an interpretation of a statute and takes no action to alter it, it is presumed the existing interpretation controls.⁶² Accordingly, the General Assembly's decision not to amend KRS 96.010 in light of the Commission's policies and existing tariffs evidences legislative agreement with the Commission's policies.

⁵⁹ 2016 H.B. 446 (proposing to amend KRS 96.010 to allow cities to deny utility franchisees the ability to recover franchise fees from ratepayers); 2015 H.B. 325 (same); 2014 H.B. 443 (same); 2013 H.B. 40 (proposing to amend KRS 96.010 to prohibit franchisees from recovering franchise fee from ratepayers); 2012 H.B. 41 (same); 2011 H.B. 456 (same).

⁶⁰ "A universally accepted rule of statutory construction is that the General Assembly is presumed to know the status of the law and the constructions placed on it by the courts." *Butler v. Groce*, 880 S.W.2d 547, 550 (Ky. 1994).

⁶¹ *Jefferson County Bd. of Educ. v. Fell*, 391 S.W.3d 713, 719-720 (Ky. 2012) (finding that the legislature's failure to pass a bill to amend a statute supported a conclusion that the current interpretation was correct).

⁶² *Commonwealth v. Blakely*, 223 S.W.3d 107, 108-109 (Ky. 2007).

3. Only Those LG&E Gas Customers Residing Within Louisville Metro’s Jurisdictional Boundaries Should Pay the Louisville Metro Gas Franchise Fee.

In addition to circumventing the Commission’s policies, Louisville Metro seeks to infringe upon the jurisdiction of other counties of the Commonwealth. Louisville Metro demands that its franchise fees be collected outside its borders from customers in surrounding counties.⁶³ Louisville Metro couches its argument in unclear terms of “benefits received,” but cites to no legal authority for such an overreach. The Commission should reject this unsupported claim.

a. It is Unreasonable to Collect the Franchise Fee From Ratepayers Residing in Other Counties.

In addition to the legal restrictions discussed above, Louisville Metro’s demand that the franchise fee be imposed upon ratepayers in other counties is unlawful and unreasonable. Residents of other counties have no representation on the Louisville Metro Council and have no redress against Louisville Metro. Additionally, Louisville Metro’s franchise fees are used to fund services and improvements within Louisville Metro. Residents of other counties receive no direct benefit from the fee paid. As the Commission has found, “since the fees go 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.”⁶⁴

Impositions of this kind have been soundly rejected by Kentucky courts. “[T]he fundamental and ancient principle in our governmental policy that taxation and representation must go together as nearly as practicable... taxation without representation... [is] entirely

⁶³ Louisville Metro’s Amended Complaint, para. 50.

⁶⁴ *In the Matter of: General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, Order at 10 (Ky. PSC Oct. 1, 1980).

inconsistent with our whole scheme of local self-government.”⁶⁵ Accordingly, Louisville Metro’s proposal is unreasonable and discriminatory against ratepayers located outside Louisville Metro. Therefore, the Commission should deny Louisville Metro’s demand and affirm LG&E’s franchise fee practices.

b. Imposing the Franchise Fee Based Upon a Nebulous and Subjective “Benefits Received” Standard is Subject to Manipulation and Result-Oriented Exercises of Power.

Louisville Metro’s demands are founded upon a highly impractical and subjective standard of “benefits received.” But the imposition of an exaction beyond jurisdictional limits based on benefits received has been rejected as a matter of law.

In *City of Somerset v. Bell*,⁶⁶ a group of city taxpayers successfully established that the City of Somerset failed to properly annex their properties into the city. Because the taxpayers’ properties were never within the city jurisdictional boundaries, the court held the taxpayers were entitled to a refund of property taxes previously paid to the city. In doing so, the Court squarely rejected the city’s argument that no refund was owed because the properties outside the city’s jurisdictional limits nevertheless had received the benefit of city services. The Court reasoned that “[n]o community could withstand a system of taxation which allowed for the collection of taxes, or the refunding of improperly collected taxes, based upon the degree to which one benefitted [sic] from government services.”⁶⁷ So too here. As a matter of law, the *City of Somerset* decision squarely rejects Louisville Metro’s claim that customers outside of its jurisdictional limits can be required to pay Metro’s franchise fee on the basis of “benefits received.”

⁶⁵ *Campbell County v. Newport*, 193 S.W. 1, 3 (Ky. 1917).

⁶⁶ 156 S.W.3d 321 (Ky. App. 2005).

⁶⁷ *Id.* at 327.

The *Somerset* Court’s reasoning applies equally here. No community could withstand a system of franchises and franchise fees which allowed for the collection of franchise fees based upon the degree to which one benefitted from government services. Louisville Metro premises its argument upon the proposition that surrounding counties and cities rely upon and benefit from Louisville Metro rights-of-way. But under Louisville Metro’s reasoning, it also benefits from the rights-of-way of other localities. Testimony has shown the benefit analysis is more complex than Louisville Metro presents.⁶⁸ Approximately forty-five percent of LG&E’s gas supply in 2016 was received by LG&E within the Louisville Metro franchise area, and approximately fifty-five percent of LG&E’s gas supply was received by LG&E outside the Louisville Metro franchise area.⁶⁹ Approximately seventy-two percent of LG&E’s total gas deliveries (both sales and transport volumes) were made to customers located *within* the Louisville Metro franchise area in 2016.⁷⁰ Therefore, deliveries to customers located within the Louisville Metro franchise area are dependent on gas supplies received by LG&E outside the Louisville Metro franchise area. Necessarily, Louisville Metro greatly benefits from the rights-of way in adjacent counties and towns. Under Louisville Metro’s flawed “benefits received” analysis, customers within and without Louisville Metro could be forced to pay franchise fees imposed by Louisville Metro, surrounding counties, and cities within surrounding counties. The *Somerset* decision correctly rejected such a system as inherently unworkable and fundamentally flawed.

The unreasonableness of Louisville Metro’s benefits received standard becomes clear by considering the result if it were implemented. As discussed above, gas moves throughout LG&E’s distribution system such that it must pass through the rights-of-way of various jurisdictions. Accordingly, the gas used by ratepayers likely has been transported through

⁶⁸ Testimony of Lonnie E. Bellar, Case No. 2016-00317, 4-5.

⁶⁹ *Id.*

⁷⁰ *Id.*

multiple jurisdictions before it reaches customers' homes. Under Louisville Metro's franchise fee standard, every jurisdiction would have the opportunity to spread its franchise fees amongst all ratepayers in other jurisdictions by claiming the customers benefited from the use of the particular city's right-of-way or due to "benefits received." With franchise fees spread across larger groups of ratepayers, jurisdictions would have complete and unrestrained power to increase their franchise fees without political accountability to their constituents. Ultimately, each jurisdiction would seek to maximize the amount of the fee it could collect from ratepayers in other jurisdictions to whom they are not politically accountable in a never ending cycle. This absurd result would lead to a sizeable increase in utility bills and be to the detriment of all ratepayers.

The Commission should reject Louisville Metro's demand that LG&E collect its franchise fee from ratepayers residing in other counties based upon a "benefit received" analysis. Such a proposal is prohibited because (a) Kentucky law prohibits Louisville Metro from exercising its authority beyond its boundaries, (b) LG&E's tariff prohibits such an exercise and requires the fee be only imposed within Louisville Metro, (c) such an imposition is inequitable where such ratepayers are unrepresented in Louisville Metro and receive no benefit of the fee, and (d) such a system would create chaos in the imposition of franchise fees subjecting ratepayers to various fees causing an increase in utility bills.

4. Louisville Metro Has No Authority to Impose Its Gas Franchise Fee Upon the Citizens of Other Cities Within Louisville Metro.

The reasons Louisville Metro may not demand its franchise fee be collected within other counties, or cities within those counties, equally prevent it from demanding the collection of its franchise fee within the Home Rule Cities. Louisville Metro will make much of the fact the Home Rule Cities are geographically circumscribed by Louisville Metro, but such

circumscription in no way affects the legal authority of the Home Rule Cities or preempts their legal jurisdictions. Nor does such circumscription give Louisville Metro ownership of the Home Rule Cities' rights-of-ways. The Home Rule Cities, not Louisville Metro, retain franchising authority within their borders which may not be infringed upon or preempted by other municipalities (including Louisville Metro).⁷¹ Louisville Metro's demand seeks to usurp the authority of the Home Rule Cities under the Kentucky Constitution. The Commission should reject Louisville Metro's abuse of authority and disregard for the constitutional franchise authority of the Home Rule Cities.

It is clear that under the statutes governing consolidated local governments, Louisville Metro lacks franchising authority within separately incorporated municipal areas within its boundaries. As a consolidated local government, Louisville Metro is neither a city nor a county.⁷² Louisville Metro has the greater powers and lesser restrictions of a county government and a city of the first class.⁷³ Unlike cities, counties possess no franchising authority as regards the use of the county rights-of-way for the provision of gas services.⁷⁴ Thus, Louisville Metro's franchising powers as they relate to gas utilities is coequal with those of a city of the first class.⁷⁵ It is axiomatic that a city's authority to issue a franchise and collect a franchise fee is limited to

⁷¹ KRS 67.101(2)(d); Ky. Const. § 163.

⁷² KRS 67C.101(2)(d).

⁷³ *Id.*

⁷⁴ KRS 416.140(1) (the Kentucky General Assembly granting franchises to certain utilities, including gas utilities, to use state and county rights-of-way located outside the boundaries of cities); *see also Warfield Natural Gas Co. v. Lawrence County*, 189 S.W.2d 357, 359 (Ky. 1945); OAG 71-538; OAG 79-346 (holding that Counties and their subdivisions have been statutorily denied franchise authority over the gas utilities).

⁷⁵ Even if counties have such authority, such power would not extend Louisville Metro's franchising authority into the municipal boundaries of other cities. OAG 77-111 ("[S]ince a city has exclusive jurisdiction over city streets or ways, the [County] cannot impinge upon such exclusive authority to be exercised by the city over such ways within its boundaries.").

its own corporate limits.⁷⁶ Thus, a city's authority to issue a franchise may not extend into the limits of another incorporated city which is exactly what Louisville Metro seeks in this case.

Although geographically located within Louisville Metro, the Home Rule Cities retain all their powers and authorities of separately incorporated cities.⁷⁷ Pursuant to Ky. Const. §§ 163 and 164, each Home Rule City has the authority to issue franchises for the use of their public rights-of-way and collect franchise fees within their own corporate boundaries. Because Louisville Metro's franchise powers with respect to gas utilities as a matter of law are those of only of a first class city, Louisville Metro does not have the power to grant a franchise in the Home Rule Cities.⁷⁸ In other words, Louisville Metro's franchising authority arises only from the former City of Louisville's franchising authority and did not expand in any way as a result of the consolidation of the City of Louisville with Jefferson County.

Requiring LG&E to collect Louisville Metro's franchise fee from customers in the Home Rule Cities would expose those customers to the possibility of having to pay for at least two franchise fees: (1) Louisville Metro's franchise fee; and (2) the franchise fee required by each Home Rule City. This stacking of franchise fees upon customers who reside in Home Rule Cities, but not on other customers in Louisville Metro, amounts to an unreasonable prejudice or disadvantage under KRS 278.170(1). If adopted, this practice would also provide an unreasonable preference or advantage to customers who reside in Louisville Metro but not within a Home Rule City because they would pay only one franchise fee.

⁷⁶ Ky. Const. § 156b ("The General Assembly may provide by general law that cities may exercise any power and perform any function *within their boundaries* that is in furtherance of a public purpose of a city and not in conflict with a constitutional provision or statute." (Emphasis added)); Ky. Const. § 163 ("No [utility], *within a city or town*, shall be permitted or authorized to [use the rights-of-way] of a city or town, without the *consent of the proper legislative bodies or boards of such city or town being first obtained.*" (emphasis added)).

⁷⁷ KRS 67C.111(1) ("All cities other than those of the first class located within the territory of the consolidated local government... shall remain incorporated... and shall continue to exercise all powers and perform the functions permitted by the Constitution and general laws of the Commonwealth of Kentucky applicable to the cities of the class to which they have been assigned.").

⁷⁸ KRS 67C.111(1).

Louisville Metro clearly has no franchising authority in the Home Rule Cities.⁷⁹ The Commission has exclusive power to regulate rates and service⁸⁰ and, in exercising that power has held as a matter of policy that franchise fees should be passed on as a line-item directly to the customers in the franchise jurisdiction imposing the fee.⁸¹ For Louisville Metro, that franchise jurisdiction does not extend to the Home Rule Cities.

5. The Louisville Metro Gas Franchise Fee is a Cost of Providing Service and Recoverable From Customers.

As a final attempt to avoid the authority of the Commission, Louisville Metro apparently has suggested that LG&E be prevented from recovery of the franchise fees as a cost of business resulting in shareholders absorbing the cost.⁸² As discussed above, the Commission has dictated the proper treatment of franchise fees and their recovery as special expenses. There is no basis to divert from the Commission’s authoritative rulings on this issue.

Municipalities generally have broad discretion to set the terms under which they will offer franchises.⁸³ But, that discretion, is not unlimited; “[M]unicipal ordinances must be in harmony with the general laws of the State”⁸⁴ and “where the state has occupied the field of prohibitory legislation on a particular subject, a municipality lacks authority to legislate with respect thereto.”⁸⁵ Any attempt by Louisville Metro to prevent recovery of the franchise fee as a cost of providing service conflicts with KRS Chapter 278 and is prohibited.

⁷⁹ KRS 67.101(2)(d); Ky. Const. § 163.

⁸⁰ *Peoples Gas Co. v. City of Barbourville*, 165 S.W.2d 567 (Ky. 1942).

⁸¹ See e.g., *In the Matter of General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, , Order (Ky. PSC Oct. 1, 1980); *In the Matter of the Local Taxes and/or Fees Tariff Filing of Columbia Gas of Kentucky, Inc.*, Case No. 7906, Order (Ky. PSC Oct. 10, 1980).

⁸² “These two cases [Case Nos. 2016-00317 and 2016-00347] also touch upon legal issues as to whether a utility's shareholders can constitutionally be required to absorb an operating expense in the nature of a franchise fee.” *In the Matter of Louisville/Metro Jefferson County Government vs. Louisville Gas & Electric Company*, Case No. 2016-00347, Order (Ky. PSC Jan. 25, 2017)

⁸³ *Kentucky Utilities Co. v. Board of Comm’rs*, 71 S.W.2d 1024, 1027 (Ky. 1933); *Peoples Gas Co.*, 165 S.W.2d at 572 (Ky. 1942).

⁸⁴ *Harlan v. Scott*, 162 S.W.2d 8, 9 (Ky. 1942).

⁸⁵ *Id.*

Kentucky's highest court has held that the power to regulate rates rests with the Commission and municipalities have no such authority.⁸⁶ Thus, Louisville Metro is preempted from regulating LG&E's rates, including the recovery of Louisville Metro's franchise fees, by the General Assembly's codification of the filed-rate doctrine requirements in KRS 278.160 and the Commission's approval of LG&E's Gas Franchise Rider. Accordingly, any attempt by Louisville Metro to require LG&E's shareholders to absorb the franchise fee exceeds Louisville Metro's authority, would be *ultra vires* and should be rejected.

Furthermore, pursuant to KRS 278.030, LG&E is permitted to charge its customers fair, just and reasonable rates. Utilities are entitled to charge rates that cover their operating expenses and provide an opportunity to earn a reasonable rate of return on the property devoted to the operation of the utility.⁸⁷ To disallow recovery of the cost, the Commission must determine that the cost was imprudently incurred or unreasonable.⁸⁸ But paying a government-mandated fee to occupy Louisville Metro's rights-of-way, the occupation of which is required to provide service to customers residing Louisville Metro, is a cost the Commission has never found to be unreasonable or imprudent.⁸⁹ Louisville Metro's apparent suggestion to prevent recovery of its franchise fee, a cost incurred by LG&E in conducting business, directly conflicts with LG&E's rights under KRS 278.030 to recover its cost of providing service.

⁸⁶ *Southern Bell Tel. & Tel. Co. v. Louisville*, 96 S.W.2d 695, 698 (Ky. 1936).

⁸⁷ KRS 278.030.

⁸⁸ *In the Matter of City of Newport v. Campbell County Kentucky Water District and Kenton County Water District No. 1*, Case No. 89-014 (Ky. PSC Jan. 31, 1990) ("Where costs associated with a management decision are found to be unreasonably and imprudently incurred, the only available remedy to protect a utility's ratepayers from that management decision is to disallow the cost in excess of that found reasonable when establishing new rates.").

⁸⁹ *See, e.g., In the Matter of General Adjustment of Rates of Kentucky Utilities Company*, Case No. 7804, Order at 12 (Ky. PSC Oct. 1, 1980).


CONCLUSION

The laws of the State specifically permit LG&E to recover the reasonable costs of conducting its business and earn a reasonable rate of return. The Commission properly requires LG&E to recover the franchise fee as a line-item only from the customers residing in Louisville Metro's franchise jurisdiction -- the Franchise Area. Louisville Metro's franchise authority does not extend beyond its borders, nor does it extend to Home Rule Cities. Louisville Metro's proposal seeks to circumvent state law and regulate that which is beyond its control.

Accordingly, LG&E requests the Commission deny Louisville Metro's requests on the grounds they conflict with state law. Further, LG&E requests the Commission affirm that (1) LG&E must follow its Commission-approved Franchise Rider, and in doing so, (2) LG&E must calculate and bill any franchise fee as a line item on bills for gas service for customers receiving service within the Franchise Area as defined in the 2016 Franchise, in order to recover the costs of any franchise fee.

Dated: August 31, 2017

Respectfully submitted,

By: 

Kendrick R. Riggs
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202-2828
Telephone: (502) 333-6000
Facsimile: (502) 627-8722
kendrick.riggs@skofirm.com

Allyson K. Sturgeon
Senior Corporate Attorney
LG&E and KU Energy LLC
220 West Main Street
Louisville, KY 40202
Telephone: (502) 627-2088
Facsimile: (502) 627-3367
allyson.sturgeon@lge-ku.com

*Counsel for Louisville Gas and Electric
Company*

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, this is to certify that the foregoing electronically filed August 31, 2017 Brief of Louisville Gas and Electric Company is a true and accurate copy of the same document being filed in paper medium; that the electronic filing has been transmitted to the Commission on August 31, 2017; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that an original and six copies, in paper medium, of the Brief of Louisville Gas and Electric Company are being mailed by first class U.S. Mail, postage prepaid, to the Commission August 31, 2017.



Counsel for Louisville Gas and Electric Company

Adjustment Clause

Franchise Fee

APPLICABILITY

All gas rate schedules.

MONTHLY CHARGE

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. Such fees or taxes shall be net of any corresponding fees or taxes which are currently included in the base charges of each rate schedule.

The amount calculated shall be applied exclusively to the bills of customers receiving service within the territorial limits of the authority imposing the fee or tax. The fee or tax shall be added to the customer's bill as a separate item. Where more than one such fee or tax is imposed, each of the fees or taxes applicable to each customer shall be added to the bills as separately identified items.

DATE OF ISSUE: July 7, 2017

DATE EFFECTIVE: February 6, 2009

ISSUED BY: /s/ Robert M. Conroy, Vice President
State Regulation and Rates
Louisville, Kentucky

**Issued by Authority of an Order of the
Public Service Commission in Case No.
2009-00549 dated July 30, 2010**

- i. Patrolling and ensuring safety on city streets.
- ii. Repairing and maintaining city streets.
- iii. Administering and enforcing the motor vehicle license sticker fee.
- d. The fee may be imposed on anyone regularly utilizing city streets, including nonresidents.
- e. The amount of the fee must bear some reasonable relationship to the cost of regulating. In most cities, the annual fee ranges from \$6 up to \$35 per vehicle per year.
- f. Motor vehicle license fees cannot be required of the following:
 - i. Any intrastate taxicab, limousine, disabled persons vehicle, or TNC vehicle operated under a certificate, except for the annual license fee allowed by KRS 281.631(6). KRS 281.830.
 - ii. Any interstate or intrastate commercial private or for-hire motor carrier for loading or unloading property. KRS 281.830.
 - iii. Any vehicle which has a common carrier certificate from another state with which Kentucky has a reciprocal agreement. KRS 281.835.
 - iv. Any vehicle which is owned by a disabled veteran. KRS 186.041; KRS 189.4595.
 - v. Vehicles used solely for governmental purposes.
- g. KRS 186.270 authorizes cities to impose, by ordinance, license taxes on trucks, truck-tractors, semitrailers and trailers.

IX. FRANCHISE FEES

A. Authority, Nature, and Restrictions

1. A franchise is a right or special privilege granted by a governmental entity to a party to do some act which the party could not legally do without a grant from the government.
2. Section 163 of the Kentucky Constitution requires public utilities to acquire a franchise before operating within a city.
3. Section 164 of the Kentucky Constitution specifies that franchises or special privileges are subject to bidding and advertising requirements. A request for

Chapter 16

TAXES AND FEES

bids must be duly advertised. Bids must be opened publicly and the franchise must be awarded to the highest and best bidder. The terms of a franchise cannot exceed 20 years.

4. KRS 96.010 requires cities to provide for the sale of franchises at least 18 months before the expiration of any existing franchise.
5. Franchise fees are not ad valorem taxes nor license taxes or fees. Franchise fees are the contractual amount paid to a city for the alienation over a period of years of the rights the city has in its streets and rights-of-way. The city may bargain for an amount of money in payment for its release of a portion of those exclusive rights so that a utility may conduct its business. In essence, franchise fees are contractual payments.
6. With limited exceptions, every city may franchise the public utilities that operate within the city and may exact franchise fees from such public utilities. Normally, the fee is two or three percent of gross revenues. In 2005, the General Assembly enacted telecommunications tax reform that eliminates the ability of cities to collect franchise fees from telephone companies, cable television providers, and direct broadcast satellite companies. Instead, the state collects excise and gross revenues tax on the communications service providers and multi-channel video programming service providers. A portion of the funds collected by the state is distributed to local governments based on their historical collections of franchise fees. The legislation is intended to completely replace any revenues previously collected by local governments under these types of franchises. In addition, local governments are authorized to receive distributions from a growth fund based upon the taxing effort of the local government if sufficient tax revenue is collected by the state. KRS 132.825; KRS 136.600 to 136.660. Although local governments may not impose a fee directly upon the franchise, local governments may still franchise or control their public rights-of-way and negotiate other collateral benefits such as pole attachment fees, certain types of placement fees, and PEG channel capacity.
7. The case of *Berea College Utilities v. City of Berea*, 691 S.W.2d 235 (Ky. App. 1985), established the authority of cities to set a minimum franchise fee bid requirement in their franchise ordinances and to reject a utility's bid which included a lesser franchise fee. Thus, a utility may be forced to pay a reasonable minimum franchise fee.