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	**)**	

REPLY BRIEF OF LOUISVILLE GAS AND ELECTRIC COMPANY

Pursuant to the order of the Kentucky Public Service Commission (the "Commission") dated August 9, 2017, Louisville Gas and Electric Company ("LG&E" or the "Company") files this brief in reply to Louisville/Jefferson County Metro Government's Brief on the Merits.

INTRODUCTION

This case is about the rates that LG&E must charge its customers – a matter soundly within the core jurisdiction of the Commission. LG&E seeks a declaratory order that under its Commission-approved tariff, LG&E must collect Louisville Metro's gas franchise fee only from gas customers receiving gas service within Louisville Metro's Franchise Area.[1] Louisville Metro objects to LG&E's position.

Ignoring applicable constitutional, statutory, and case law and Commission precedent, Louisville Metro claims this Commission should either prohibit LG&E from collecting Metro's gas franchise fee as a line item on customer bills or require LG&E to collect the fee not only from customers within the Franchise Area but also those within the Home Rule Cities.[2] As LG&E explained in its initial brief, those 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.

[1] Unless otherwise noted, all defined terms are as defined in LG&E's opening brief.
[2] Louisville Metro Brief at 15.

Equally erroneous is Louisville Metro's newest claim that Sections 163 and 164 of the Kentucky Constitution vest it with authority to prevent LG&E from recovering the franchise fee as a line-item on customer bills.[3] The former City of Louisville's claim that Sections 163 and 164 limit the Commission's jurisdiction was soundly rejected by Kentucky's highest court over eighty years ago.[4] Louisville Metro's identical claim here, too, fails.

Louisville Metro's claims do not raise issues "which the Commission has never before had an opportunity to directly consider."[5] The constitutionality of the Commission's exclusive jurisdiction over rates and service was confirmed by the Kentucky courts immediately after the enactment of the Public Service Commission Act of 1934 ("PSC Act"). The courts have since reaffirmed the Commission's exclusive jurisdiction numerous times and repeatedly held that Sections 163 and 164 neither inform nor limit that jurisdiction. A careful review of the enactment of the PSC Act, the Commission's statutory jurisdiction, and case law upholding the constitutionality of both confirms that the issues Louisville Metro raises are neither new nor unconsidered and that its superficial analysis of the law is wholly flawed.

Equally well-settled is the Commission's longstanding practice, embodied in numerous orders, that franchise fees should be recovered through rates as a line item on the bills of customers within the jurisdiction imposing the franchise fee. That practice comports with the statutory mandates that rates be fair, just, and reasonable.[6]

The Commission had and has clear statutory authority to approve LG&E's tariff. Consistent with Commission precedent, that tariff expressly limits collection of Louisville Metro's franchise fee to the Franchise Area. The Commission should follow the law, reaffirm

[3] Louisville Metro Brief at 11.
[4] *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 96 S.W.2d 695 (Ky. 1936).
[5] Louisville Metro Brief at 1.
[6] *See* KRS 278.030(a); and KRS 96.010(1); *see also* KRS 278.200.

LG&E's tariff, and issue a declaratory order that Louisville Metro's franchise fee must be collected only from LG&E's gas service customers within Louisville Metro's Franchise Area.

ARGUMENT

A. The method of recovery of franchise fees is a rate squarely within the exclusive jurisdiction of the Public Service Commission.

Although Louisville Metro claims the method of collection or recovery of franchise fees is an issue of first impression,[7] Louisville Metro overlooks the bedrock law that such collection or recovery is a "rate" subject to the exclusive jurisdiction of the Commission. The Commission was established in 1934 by the PSC Act[8] and granted exclusive jurisdiction over rates and service.[9] The Commission's exclusive jurisdiction has been affirmed multiple times by the Kentucky Courts.[10] In doing so, the Kentucky Courts have held the Commission's jurisdiction

[7] Louisville Metro Brief at 1.

[8] 1934 Ky. Acts ch. 145; *see Smith v. Southern Bell Tel. & Tel. Co*., 104 S.W.2d 961, 963 (Ky. 1937) ("[T]he authority to regulate rates and modes conducting the business of public utilities is primarily a legislative function of the state, and the right is a police power.") (citing *Home Tel. & Tel. Co. v. Los Angeles*, 211 U.S. 265 (1908) and *Milwaukee Electric R. & Light Co. v. Railroad Com. of Wisconsin*, 238 U.S. 174 (1915)).

[9] KRS 278.040(2) ("The jurisdiction of the commission shall extend to all utilities in this state. The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions."). In light of the complexity and difficulties of services, rates, practices, rules, and regulations, Kentucky Courts found it "wise for the Legislature to enact [the PSC Act] prescribing a system of regulation and supervision of public utilities… making it necessary to give the [C]ommission the primary authority and jurisdiction to hear complaints, receive and hear testimony of witnesses, and the power to fix reasonable regulations…" *Smith*, 104 S.W.2d at 962.

[10] *Simpson Cty. Water Dist. v. City of Franklin*, 872 S.W.2d 460, 462 (Ky. 1994) ("[T]he PSC has only such authority that is granted to it by the legislature and it is clear that the legislature vested the PSC with exclusive control of rates and service of utilities."); *Florence v. Owen Electric Coop., Inc.*, 832 S.W.2d 876 (Ky. 1992); *South Cent. Bell Tel. Co. v. Utility Regulatory Com*., 637 S.W.2d 649, 652 (Ky. 1982) ("The Commission is given the power to regulate utilities, which includes the power to set rates and service requirements."); *Benzinger v. Union Light, Heat & Power Co*., 170 S.W.2d 38 (Ky. 1943); *Smith*, 104 S.W.2d at 963 ("The court is of the opinion that the primary jurisdiction and authority to fix rates, establish reasonable regulation of service, and to alter and make changes to said regulations and to make investigation as to any change in service as is sought by appellant in the case at bar, is exclusively and primarily in the commission, but is subject, however, to review or a rehearing as provided by [statute]."); *Southern Bell Telephone*, 96 S.W.2d 695; *Kentucky CATV Assoc. v. Volz*, 675 S.W.2d 393, 396 (Ky. App. 1983) ("The Public Service Commission has exclusive jurisdiction over the rates and services of the regulated utilities in this State.").

does not offend Section 163 and 164 of the Kentucky Constitution as Louisville Metro erroneously contends.[11]

Consistent with this exclusive jurisdiction, KRS 278.200 empowers the Commission to regulate rates and services of utilities notwithstanding inconsistent provisions of contracts, including franchise agreements:

> The commission may, under the provisions of this chapter, originate, establish, change, promulgate and enforce any rate or service standard of any utility that has been or may be fixed by any contract, **franchise** or agreement between the utility and any city, and all rights, privileges and obligations arising out of any such contract, franchise or agreement, regulating any such rate or service standard, shall be subject to the jurisdiction and supervision of the commission ….[12]

LG&E's Franchise Rider is an adjustment clause in its tariff to recover the franchise fee imposed by municipalities. As an adjustment clause or rider, it is a "rate" as defined under KRS 278.010(12).[13] Under these statutes, LG&E's method of collection of Louisville Metro's franchise from customers is a "rate" soundly within the exclusive jurisdiction of this Commission. Because the Commission's jurisdiction is exclusive and plenary, Louisville Metro does not, as Louisville Metro claims, "possess the authority to prevent LG&E from recovering the franchise fee as a line-item on customer bills."[14]

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[11] *Southern Bell Telephone*, 96 S.W.2d at 697 ("[I]t was the intention of the Legislature to clothe the Public Service Commission with complete control over rates and services of the utilities enumerated in the act" and "[t]he act does not contravene any of the constitutional provisions to which the defendant has directed my attention [Ky. Const. §§ 52, 201, 163, and 164)]."); *Owen Electric Coop., Inc.*, 832 S.W.2d at 881 ("No language is discerned in either Section 163 or 164 of the Constitution indicating that the state has been deprived of the right to exercise police power and the right to implement control of rates and services of the utilities enumerated in the [PSC] Act.").

[12] KRS 278.200 (emphasis added).

[13] KRS 278.010(12). LG&E's Franchise Rider constitutes a "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." *Id.*

[14] Louisville Metro Brief at 11.

B. Neither Ky. Const. §§ 163 and 164 nor the Debates of the Framers in 1890 limit the rate-making jurisdiction of the Commission

1. Sections 163 and 164 of the Kentucky Constitution do not inform or limit the Commission's exclusive jurisdiction over utility rates

In the face of the clear statutory authority outlined above, Louisville Metro claims that Sections 163 and 164 of the Kentucky Constitution limit the Commission's statutory jurisdiction to determine the method to recover municipal franchise fees. According to Louisville Metro, for the Commission "[t]o allow LG&E to directly recover the cost of the franchise from Louisville Metro's citizens is contrary to both the letter and intent of the Kentucky Constitution."[15] But neither Section 163 nor Section 164 mentions rates or services, and any claim that Sections 163 and 164 somehow limit the exclusive jurisdiction of the Commission over utility rates was soundly rejected by Kentucky's highest court in 1936 in *Southern Bell Telephone & Telegraph Co. v. City of Louisville*.[16]

In *Southern Bell*, the former City of Louisville challenged the constitutionality of the PSC Act and argued, as Louisville Metro does here, that Sections 163 and 164 limit the jurisdiction of the Commission. Kentucky's highest court rejected the City's claims. Enjoining the City of Louisville from enforcing an ordinance which required a reduction in Southern Bell's rates, the Court held that while Sections 163 and 164 allow cities to issue franchises they do not deprive the state of the authority to regulate utility rates after a franchise has been issued:

> Sections 163 and 164 have no application. Section 163 merely prohibits a telephone company from erecting its poles or other apparatus along, over, under, or across the streets, alleys, or public grounds of a city without first obtaining the consent of the proper legislative body of such city. Section 164 provides that no city shall grant a franchise or privilege for a term exceeding 20 years, and requires it to receive bids therefor publicly, after due advertisement, and to award same to the

[15] *Id.* at 8.
[16] 96 S.W.2d 695 (Ky. 1936).

> highest and best bidder. It provides for restrictions on a municipality in granting a franchise or privilege, though it has been held that by implication power is conferred upon a municipality to contract with the public utility at the time the franchise is granted. **The power conferred upon municipalities to enter into contracts fixing rates in the first instance for public utility service does not deprive the state of its right to exercise its police power of regulating rates.** The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a police power.[17]

The Court confirmed that while cities had the legal right to regulate utility rates prior to the enactment of the PSC Act, the General Assembly had withdrawn that power and vested the Commission with exclusive jurisdiction over rates:

> The power to regulate rates had been delegated to the city by the Legislature, and what it had given it could take away. The act of 1934 which created the Public Service Commission divested the city of the power to regulate rates and reposed that power in the commission.[18]

Shortly after *Southern Bell*, the Kentucky courts addressed the powers that cities **retained** under Sections 163 and 164. In *Benzinger v. Union Light, Heat & Power Co.*,[19] Kentucky's highest court held that the PSC Act did not prevent the City of Covington from enacting an ordinance requiring certain public utilities in the city to remove their poles from the rights-of-way and place their facilities underground. The Court explained that Section 163 "gives constitutional authority to municipalities to control the manner whereby a utility may occupy its public streets and other owned property with required facilities for distribution of its product" and the city had "constitutional authority to control the manner whereby a utility may occupy its public streets and other owned property."[20] As to *Southern Bell*, the Court found

[17] *Id.* at 697 (emphasis added).
[18] *Id.* at 698.
[19] 170 S.W.2d 38 (Ky. 1943).
[20] *Id.* at 40.

"there is nothing said in that opinion militating against the rights of a municipality with reference to utility furnishers, **except as to the regulation of rates which that opinion determined was exclusively lodged by the [PSC Act] with the utility commission**."[21] The Court distinguished *Southern Bell's* holding from the requirements of Sections 163 and 164 because they dealt with wholly different matters: "An examination of the [*Southern Bell*] case reveals that the only question there involved was one relating to *rates* to which section 163 of the Constitution makes no reference whatever, nor does section 164 refer thereto."[22]

The Kentucky courts have uniformly reaffirmed the Commission's plenary authority over utility rates since *Southern Bell*.[23] In *Florence v. Owen Electric Coop.* for example,[24] the Kentucky Supreme Court rejected a claim by the City of Florence and its franchisee that "Sections 163 and 164 totally eliminate legislative authority regarding franchising."[25] The Court held the Framers intended in Sections 163 and 164 to prevent the legislature from authorizing the indiscriminate use of city streets without the city being able to control the decision as to what streets and public ways were to be occupied by the utility:

> A franchise inheres in the sovereignty of the state, and save to the extent it has been delegated by the constitution to some local subdivision, it is subject to the control of the legislature. The Debates of the Constitutional Convention bearing upon Section 163 disclose that the actuating purpose of the framers of that instrument was to prevent the legislature from authorizing the indiscriminate use of the streets of the city by utilities without the

[21] *Id.*(emphasis added)
[22] *Id.* (italics in original).
[23] *See, e.g., Simpson Cty. Water Dist.*, 872 S.W.2d 460, 462 ("[T]he PSC has only such authority that is granted to it by the legislature and it is clear that the legislature vested the PSC with exclusive control of rates and service of utilities."); *Owen Electric Coop., Inc.*, 832 S.W.2d 876; *South Cent. Bell Tel. Co.*, 637 S.W.2d 649, 652 ("The Commission is given the power to regulate utilities, which includes the power to set rates and service requirements."); *Smith*, 104 S.W.2d 961, 963 ("The court is of the opinion that the primary jurisdiction and authority to fix rates, establish reasonable regulation of service, and to alter and make changes to said regulations and to make investigation as to any change in service as is sought by appellant in the case at bar, is exclusively and primarily in the commission[.]"); *Volz*, 675 S.W.2d 393, 396 ("The Public Service Commission has exclusive jurisdiction over the rates and services of the regulated utilities in this State.").
[24] 832 S.W.2d 876 (Ky. 1992).
[25] *Id.* at 881.

> city being able to control the decision as to what streets and public ways were to be occupied by the utility.[26]

As in *Benzinger* however, the Court was careful to note that Sections 163 and 164 do not speak to rates, and the authority to regulate rates was vested in the state, not cities:

> No language is discerned in either Section 163 or 164 of the Constitution indicating that the state has been deprived of the right to exercise police power and the right to implement control of rates and services of the utilities enumerated in the Act.[27]

The Courts have similarly confirmed that the Commission's exclusive jurisdiction to regulate rates extends to the regulation of rate-related provisions in municipal franchise agreements. In *Peoples Gas Co. v. Barbourville,*[28] Kentucky's highest court rejected the City of Barbourville's claims that Sections 163 and 164 prevented the Commission from regulating rates provided in a franchise agreement. The City objected to the Commission's authority under the statutory predecessor to KRS 278.200 to change any rate fixed in a franchise agreement between a utility and a city. The Court held that while a municipality may impose conditions, even to the extent of fixing rates, in its franchise or other ordinances, those conditions are subject to regulation by the Commission to the extent they involve rates or services. The Court explained that the grant of the franchise was controlled by the city and the Commission's jurisdiction "attaches only *after* the franchise has been acquired, either before operations have commenced under it, or thereafter throughout the life of the franchise."[29]

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[26] *Id.*
[27] *Id.* (citing *Southern Bell Telephone,* 96 S.W.2d 695).
[28] 165 S.W.2d 567, 572 (Ky. 1942).
[29] *Id.* at 571 (emphasis in original). *See similarly, Louisville Water Co. v. Public Service Comm'n,* 38 S.W.2d 537, 540 (Ky. 1958)("If, as is the case here, the rates and service of a public utility are subject to regulation by a body such as the Public Service Commission, it is beyond question that the utility cannot by contract abrogate the regulatory power.").

The authorities cited by Louisville Metro do not undermine the Commission's jurisdiction under the PSC Act and are no longer controlling or even persuasive authority.[30] Most egregious is Louisville Metro's quote from *Kentucky Utilities Co. v. Board of Commissioners*[31] implying a municipality has control over utility rates.[32] *The law changed.* **All** of these authorities were decided **before** the 1934 enactment of the PSC Act and its creation of the Commission. **All** were similarly decided prior to the holdings in *Southern Bell* and its progeny. To the extent cities could control utility rates prior to the enactment of the PSC Act, *Southern Bell, Benzinger*, and *City of Florence* conclusively establish that the PSC Act vested the Commission with exclusive jurisdiction over utility rates and that Sections 163 and 164 do not limit that jurisdiction.

Nor does the recent decision in *Kentucky CATV Association, Inc. v. City of Florence*[33] change the analysis as Louisville Metro erroneously implies.[34] That case involved right of cities under Sections 163 and 164 to collect franchise fees *from utilities*, not whether the Commission could approve the utility's method of recovering franchise fees through rates.

The Commission's exclusive jurisdiction and plenary authority to regulate LG&E's rates under KRS Chapter 278 is unmistakably clear. That jurisdiction and authority is not restricted in any way by Sections 163 and 164. Louisville Metro's claim that it "possess[es] the authority to prevent LG&E from recovering the franchise fee as a line-item on customer bills"[35] wholly fails.

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[30] See *Kentucky Utilities Co. v. Board of Comm'rs*, 72 S.W.2d 1024 (Ky. 1933); *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 (Ky. 1908); *Stites v. Norton*, 101 S.W. 1189 (Ky. 1908); and *Hilliard v. George G. Fetter Lighting & Heating Co*., 105 S.W. 116 (Ky. 1907) cited in Louisville Metro Brief at 4-6.
[31] 71 S.W.2d 1024 (Ky. 1933).
[32] Louisville Metro Brief at 8.
[33] 520 S.W.3d 277 (Ky. 2017).
[34] Louisville Metro Brief at 6-8.
[35] *Id.* at 11.

2. Louisville Metro's authorities provide no basis to ascribe an intent to the Framers to prohibit recovery of franchise fees as a line-item on customer bills

Louisville Metro similarly misses the mark by arguing that selective quotes from various outdated cases and the 1890 constitutional debates "make clear that the purpose of a franchise fee is not simply to benefit the municipality, but the public as well."[36] Louisville Metro claims that the Framers intended for the public to benefit from the grant of franchises, and the public do not benefit if the fee is collected from customers. Louisville Metro reasons the Framers did not consider Louisville Metro's receipt of franchise fees as benefitting the public: "the current practice of LG&E would allow the municipalities to benefit from the franchise fee, but would rob the actual public … from reaping the benefit of the franchise fee."[37]

As noted above, the Kentucky courts have repeatedly held that the language in Sections 163 and 164 make no reference to rates.[38] "The basic rule … is to interpret a constitutional provision according to what was said and not what might have been said; according to what was included and not what might have been included."[39] When the intent and meaning of the Constitution is clear from the document itself, "it is unnecessary to search extraneous authority for the intent."[40] These rules of constitutional construction are cardinal.[41] Because Sections 163 and 164 make no reference to rates, the comments of various debaters at the Constitutional

[36] *Id.* at 7.
[37] *Id.*
[38] *City of Florence*, 832 S.W.2d at 881("No language is discerned in either Section 163 or 164 of the Constitution indicating that the state has been deprived of … the right to implement control of rates and services of the utilities enumerated in the [PSC] Act."); *Benzinger*, 170 S.W.2d at 40 (noting that the question involved in *Southern Bell* "was one relating to *rates* to which sections 163 of the Constitution makes no reference whatever, nor does sections 164 refer thereto")(emphasis in original).
[39] *Pardue v. Miller*, 206 S.W.2d 75, 78 (Ky. 1947).
[40] *Harrod v. Meigs*, 340 S.W.2d 601, 606 (Ky. 1960).
[41] *See Ky. Cty. Judge/Exec. Ass'n v. Justice Cabinet*, 938 S.W.2d 582, 585 (Ky. App. 1996)(quoting *Pardue*'s rules of constitutional construction and characterizing them as cardinal).

Convention cannot be used more than 125 years later to imply an intent other than that expressed in the plain language of those provisions.

In any event Louisville Metro's quoted language does not sustain its strained distinction between benefit to Louisville Metro and its residents. The language merely confirms that the public sale of franchises allows "municipal benefit"[42] and "municipalities … to reap long-term profits"[43] such that the "citizen might obtain the greatest price possible."[44] The "rights and privileges belonging to the citizens"[45] that are the subject of a franchise are those owned by Louisville Metro for the benefit of the citizens, not the citizens themselves. Not even Louisville Metro can dispute that the public benefits from any revenues a municipality receives, including those received directly or indirectly from the city's citizens.[46]

Indeed, the Framers themselves recognized that public revenues and public benefit were directly correlated. Michigan Supreme Court Justice Thomas Cooley, in the seminal treatise on constitutional law at the time of the 1890 Constitutional Convention, summed up the classical view that government exactions on citizens are based on the citizen's receipt of a commensurate public benefit:

> When taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the

[42] Louisville Metro Brief at 6 (quoting *City of Florence*, 520 S.W.3d 355 (quoting Debates at 2849)).
[43] *Id.* at 7 (quoting *City of Florence*, 520 S.W.3d 355).
[44] *See* Louisville Metro Brief at 7 (quoting *Stites v. Norton*, 101 S.W. 1189 (1907)).
[45] *Id.*
[46] That citizens receive a benefit where citizens pay for those benefits through government-imposed charges was early recognized by the Kentucky courts and firmly established prior to the 1890 Constitution Convention. Where taxpayers "contribute in the form of taxation, direct or indirect, to burdens from the administration of the government and its laws[, *t*]*he tax-payer's compensation is in his reciprocal benefit*." *County Judge of Shelby County v. Shelby R. Co.*, 68 Ky. 225 (1868) (emphasis added).

> government applies the money raised by the tax; and these **benefits** amply support the individual burden.[47]

Convention Delegate H.H. Smith quoted J. Cooley's treatise and explained this concept as follows:

> Now sir, when taxation takes money for the public use, the tax-payer receives, or is supposed to receive, his just compensation in the protection which government affords this life, liberty and property, and in the increase in value of his possessions, by the use to which the Government applies the money raised by the tax; and either these **benefits** will support the burden.[48]

Convention Delegate W. R. Ramsey noted that "Judge Thomas M. Cooley … is known by every lawyer in this body to be one of the highest authorities on Constitutional law in this country."[49]

Accordingly, Louisville Metro's claim that LG&E's Franchise Rider "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"[50] ignores the commensurate benefit the public receives from the payment of its franchise fee. If, as Louisville Metro claims, "the purpose of the franchise fee is not simply to benefit the municipality, but the public as well,"[51] the Framers clearly recognized that the public benefitted from Louisville Metro's franchise fee, regardless of how that franchise fee is recovered by the

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[47] Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (6th ed. 1890)(Alexis C. Angell, ed.) at 613 (emphasis added)(excerpted copy is included in Appendix A to this brief).

[48] Official Report of the Proceedings and Debates in the Convention (1890), Vol. II at 2417 (excerpted copy is included in Appendix B to this brief). J. Cooley and his treatises on constitutional law and taxation were frequently discussed during the Convention. *See Id.*, Vol. I at 199, 449, 555, 586, 710, 712, 726, 732, 740, 914-15, 934-35, 940, 943, 1153-54, and 1193; Vol. II at 1634, 1798-99, 1808, 2029, 2162-63, 2170, 2172-73, 2461, and 2463; Vol. III at 3103, 3311, 3648, 3686, 3688; and Vol. IV at 4743, 5013, 5023, 5133, 5664, 5771, 5776-77, 5837, 5838 and 6006. J. Cooley's works also have been frequently cited as authoritative by the Kentucky courts. *See, e.g., Rawlings v. Butler*, 290 S.W.2d 801, 803 (Ky. 1956); *Smith v. Kincaid*, 235 S.W.2d 62, 65 (Ky. 1950); *Harrod v. Hatcher*, 137 S.W.2d 405, 406 (Ky. 1940); *Wallbrecht v. Ingram*, 175 S.W. 1022, 1027 (Ky. 1915)("And the mere fact alone that Judge Cooley has given expression to this opinion entitles it to great weight.").

[49] *Id.*, Vol. III at 3617.

[50] Louisville Metro Brief at 7.

[51] *Id.*

utility. Louisville Metro's quoted authorities provide no basis to ascribe an intent to the Framers to prohibit LG&E's recovery of Louisville Metro's franchise fee as a line item on customer bills.

C. The proper method of recovery of the Louisville Metro franchise fee is through a line-item charge on customer bills.

Louisville Metro argues the well-established Commission policy requiring recovery of franchise fees as a line-item on customer bills violates the Kentucky Constitution.[52] The Commission's policy is founded on fundamental principles of fairness and based on the rights of LG&E and other utilities to collect and receive fair, just and reasonable rates for the services they render. Louisville Metro has not challenged those principles or the prior Commission orders; they are not even mentioned in Louisville Metro's initial brief. Nor has Louisville Metro clearly stated in its brief what it believes should be the proper ratemaking treatment of franchise fees. It is not even clear whether Louisville Metro is claiming the fee instead should be absorbed by shareholders or recovered in base rates. Regardless, both are inappropriate and in the case of absorption by shareholders, patently unlawful.

1. Franchise fees cannot be required to be absorbed by shareholders

It is unlawful to compel shareholders to absorb the cost of the franchise fee. Louisville Metro argues that "The Intent of the Franchise Fee Is To Secure Valuable Consideration From Utilities,"[53] but the absorption of the franchise fee by shareholders would represent a taking under the United States and Kentucky Constitutions and amounts to a confiscatory rate.[54] Because the franchise fee is a prudent and reasonable operating expense, it cannot be absorbed by shareholders without the government taking their private property without compensation.

[52] *Id.* at 1 and 3.
[53] *Id.* at 6 (emphasis removed).
[54] U.S. Const. amend. V; Ky. Const. §§ 13 and 242.

The authorities cited by Louisville Metro do not support the proposed constitutional violation of the shareholders' lawful rights.

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." Sections 13 and 242 of the Kentucky Constitution provide similar protections. In reviewing a Commission order concerning rates, the Kentucky Supreme Court explained that "[t]he federal and state constitutions protect against the confiscation of property."[55] A rate is confiscatory if it is "unjust and unreasonable" and does not "enable the utility to operate successfully, to maintain its financial integrity, to attract capital and to compensate its investors for the risks assumed[.]"[56] A utility cannot earn its authorized return when it must absorb a prudent expense imposed by the government.

The Kentucky Supreme Court similarly has held that the Commission's unreasonable disallowance of an expense "amounts to a confiscatory governmental policy."[57] In *Dewitt Water District*, the Kentucky Supreme Court considered whether the Commission's disallowance of depreciation expense on contributed property was unreasonable.[58] Reversing the Commission, the Supreme Court held that "[d]epreciation expense on contributed plant property may be considered as an operating expense for rate-making purposes in matters involving publicly held water districts[.]"[59] The court explained that disallowance of the depreciation expense was unreasonable and confiscatory, and further explained:

> Unreasonable has been construed in a rate-making sense to be the equivalent of confiscatory. This Court has equated an unjust and

[55] *Commonwealth ex rel. Stephens v. South Cent. Bell Tel. Co*., 545 S.W.2d 927, 930 (Ky. 1976).
[56] *Id.*
[57] *Pub. Serv. Comm'n v. Dewitt Water Dist.*, 720 S.W.2d 725, 730 (Ky. 1986).
[58] *Id.* at 727 and 730. The opinion defines contributed property as "property obtained by the water district either through government grants or directly from customer contributions."
[59] *Id*. at 728.

> unreasonable rate to property. We have declared that rates established by a regulatory agency must enable the utility to operate successfully and maintain its financial integrity in order to meet the just and reasonable nonconfiscatory tests.[60]

Courts from other jurisdictions have similarly held that an uncompensated taking occurs "when the balance between investor and ratepayer interests – the very function of utility regulation – is struck unjustly. Although the agency has broad latitude in striking the balance, the Constitution nonetheless requires that the end result reflect a reasonable balancing of the interests of investors and ratepayers."[61]

Additionally, as a matter of law and recognized by the United States Supreme Court, 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.[62] To disallow recovery of the cost of the franchise fee, the Commission must determine that the cost was imprudently incurred or unreasonable.[63] Counsel has searched every available source and has found no case, nor has Louisville Metro cited to such a case, in which the Commission found franchise fees imprudent or unreasonable.

These constitutional protections against takings and confiscatory rates are incorporated into the Commission's statutory mandate. KRS 278.030 permits a utility to charge its customers

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[60] *Id.* at 730.

[61] *Jersey Cent. Power & Light Co. v. Federal Energy Regulatory Com.*, 810 F.2d 1168, 1191 (D.C. Cir. 1987); *see also Richardson v. City & County of Honolulu*, 802 F. Supp. 326, 337 (D. Haw. 1992) (noting that a taking occurs where "the formula does not provide the lessor with a fair rate of return" and as such "there is no meaningful mechanism for obtaining relief when the . . . formula results in a confiscatory rate.").

[62] *See, e.g., La. Public Serv. Comm'n v. Fed. Commc'n Com.*, 476 U.S. 355 (1986); *Consol. Edison Co. v. Public Serv. Com.*, 447 U.S. 530 (1980) ("The rates authorized by the Public Service Commission may reflect only the costs of providing necessary services to customers plus a reasonable rate of return to the utility's shareholders.");; *In the Matter of: Not. of Adj. of Rates of Green River Elec. Corp.*, Case No. 7706 (Ky. PSC July 25, 1980) ("The general rate making philosophy for utilities dictates that rates be established to recover the overall cost of service with an allowance for a reasonable rate of return."). *See also Missouri ex rel. Southwestern Bell Tel. Co. v. PSC of Mo.*, 262 U.S. 276 (1923); KRS 278.030 (authorizing every utility to receive "fair, just and reasonable rates").

[63] *In the Matter of: City of Newport v. Campbell Cnty. Kentucky Water Dist. and Kenton Cty. Water Dist. 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.").

fair, just, and reasonable rates. In setting such rates, the Commission has explained that it "must balance the interests of the utility and its customers."[64]

Louisville Metro's demand for shareholders to unlawfully absorb the franchise fee tilts the ratemaking scale, violates KRS 278.030, and takes the property of LG&E's shareholders in violation of the United States and Kentucky Constitutions. Louisville Metro has cited no relevant authority to support this constitutional violation. Nor could it. Accordingly, if Louisville Metro is demanding that LG&E's shareholders absorb Louisville Metro's franchise fee, the Commission should reject it.

2. The Commission's policy that franchise fees should not be recovered in base rates is based on sound rate-making principles and consistent with KRS 278.030 and KRS 96.010

Requiring recovery of the franchise fee in the proposed form in base rates is equally inappropriate. Although Louisville Metro stridently argues that it "has never alleged that all customers should pay for the franchise fee in base rates,"[65] this issue requires a determination because of Louisville Metro's broad demand that "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."[66] Because absorption of the franchise fee by shareholders violates the U.S. and Kentucky Constitutions, the only constitutionally viable alternative to collecting the fee as a line item is collecting the fee in base rates.[67]

LG&E explained in its Application and initial brief that the Commission's policy, with limited exceptions, is that franchise fees imposed by a municipality are to be recovered as a

[64] *In the Matter of: Rate Adj. of Kenton Cty. Water Dist.*, Case No. 8572, Order at 12 (Ky. PSC Mar. 22, 1983).
[65] Louisville Metro Reply to LG&E Objection to Motion for Oral Argument and Withdrawal of Pending Claim at 3 (filed July 5, 2017).
[66] Louisville Metro Brief at 15.
[67] As a matter of law, a utility is entitled to recover the reasonable and prudent costs of providing service. *See, e.g.*, *Consol. Edison Co. v. Public Serv. Com.*, 447 U.S. 530 (1980) ("The rates authorized by the Public Service Commission may reflect only the costs of providing necessary services to customers plus a reasonable rate of return to the utility's shareholders.").

separate line-item assessed only to the customers who reside in the municipality imposing the fee.[68] LG&E similarly explained that the Commission has consistently found that franchise fees in the form proposed are not an "ordinary" cost of business, but rather a special cost warranting a line-item charge.[69] Aside from its flawed claim that Sections 163 and 164 limit the Commission's exclusive jurisdiction over utility rates, Louisville Metro in its initial brief does not otherwise challenge the Commission's policy or the sound principles on which that policy based. Here again, it could not.

The Louisville Metro franchise fee can fluctuate from approximately $1 million to $6 million annually on 60-days' notice at Louisville Metro's discretion. It is also subject to further changes due to customer demand and weather. Costs subject to increases and decreases for these reasons over time are typically recovered through separate line item charges[70] in order to avoid overcharging or undercharging customers. But that is exactly what could occur if Louisville Metro's franchise fee is recovered in base rates. Under the terms of the 2016 Franchise, Louisville Metro may unilaterally change the method of calculation and amount of the franchise fee. If Louisville Metro increased the fee between rate cases, shareholders would be forced to absorb the increased cost of the fee until the next rate case. Likewise, if Louisville Metro decreased the franchise fee in between rate cases, customers would be overcharged. Both scenarios result in rates that are not fair, just, or reasonable and violate KRS 278.030.

The Commission has held that its policy requiring pass-through of the franchise fee is consistent with the requirements of KRS 96.010 that any franchise agreement be fair and

[68] LG&E's Verified Application at 11-12; LG&E Opening Brief at 11.
[69] LG&E's Verified Application at 12; LG&E Opening Brief at 11. *See, e.g.*, *The Local Taxes and/or Fees Tariff Filing of Columbia Gas of Ky., 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.").
[70] *See, e.g.*, 807 KAR 5:056 (providing a mechanism for electric utilities to immediately recover increases in fuel costs as a surcharge on customer bills); LG&E Rates, Terms and Conditions for Furnishing Natural Gas Service, P.S.C. Gas No. 11, First Revision of Original Sheet No. 85 Adjustment Clause GSC Gas Supply Clause

reasonable, protects ratepayers by ensuring political accountability for Louisville Metro and other municipalities imposing franchise fees and is a matter of basic fairness.[71] If LG&E was required to recover its franchise fee in base rates, Louisville Metro would have no incentive to charge a reasonable franchise fee, as Louisville Metro voters would be unaware of the portion of their gas rates attributable to the Louisville Metro franchise fee. The Commission has agreed, stating that separately listing the amount attributable to franchise fees on customer bills "ensures that affected consumers will be fully aware of the local taxing authority's actions and their effects."[72] Accordingly, the Commission's longstanding policy of requiring recovery of franchise fees as a line item on customer bills is entirely appropriate, and Louisville Metro has offered no legal basis or other good reason to revisit or change that policy.

D. The unpublished *City of Ashland* cases are neither binding precedent nor persuasive authority but are completely consistent with the Commission's exclusive jurisdiction to regulate rates after a franchise has been granted

Louisville Metro invites this Commission to consider unpublished decisions of the Boyd Circuit Court and Court of Appeals involving a franchise dispute between the City of Ashland and Columbia Gas as "Kentucky ***Precedent*** Directly On-Point" that "a City has the right to prevent a utility from placing the franchise fee as a line-item on customer's bills."[73] But those decisions are not precedent; nor do they support Louisville Metro's position. Should the Commission accept Louisville Metro's invitation, the Commission must also consider a more recent unpublished decision of the Boyd Circuit Court which, unlike the Columbia Gas dispute, is directly on point and unequivocally rejects Louisville Metro's claims here.

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[71] *In the Matter of: Gen'l Adj. of Rates of Kentucky Utilities Co.*, Case No. 7804, Order at 10-12 (Ky. PSC Oct. 1, 1980).

[72] *In the Matter of: Taylor Cnty. Rural Electric Coop. Corp. Not. of Tariff Revision*, Case No. 89-054, Order at 2 (Ky. PSC Apr. 10, 1989).

[73] Louisville Metro Brief at 10-11 (emphasis added), citing and quoting from *City of Ashland v. Columbia Gas of Ky., Inc.*, Div. II, No. 93-CI-458 (Boyd Cir. Ct. July 7, 1995)(unpublished), *aff'd*, Ky. Ct. App. Case No. 95-CA-2127 (July 19, 1996), *disc. rev. den.*, Ky. Sup. Ct. Case No. 1997-SC-194 (Oct. 22, 1997) (a copy of each is included in Appendices C and D, respectively, to this brief).

First, Kentucky Civil Rule 76.28(4)(c) provides that unpublished decisions "shall not be cited or used as binding precedent" and unpublished Kentucky appellate decisions rendered after January 1, 2003 may only be cited for consideration if there is no published opinion that adequately addresses the issue before the court.[74] As explained below, the holding in *City of Ashland v. Columbia Gas of Ky., Inc.* is completely consistent with and governed by the numerous published cases and Commission orders addressing when the Commission's exclusive jurisdiction over rates attaches and the Commission-approved method of franchise fee collection. Accordingly, *Columbia Gas* is not precedential (that is likely why the Court of Appeals chose not to publish its decision). Louisville Metro inappropriately cited *Columbia Gas* as "Kentucky precedent directly on point" and the Commission should not consider it for this reason.

Second, *Columbia Gas* is not "directly on point" and does not support Louisville Metro's contention here that, after having granted the 2016 Franchise, Louisville Metro can "prevent [LG&E] from placing the franchise fee as a line-item on customers' bills."[75] Louisville Metro inappropriately relies upon language in the Boyd Circuit Court's decision in *Columbia Gas* that states: "[I]f 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."[76] But as Louisville Metro conveniently fails to note, this language was not adopted or approved by the Court of Appeals on subsequent appeal. More importantly, Louisville Metro fails to explain the facts in *Columbia Gas* or to acknowledge that the final disposition of *Columbia Gas* and its more recent companion case are completely consistent with

[74] Although the civil rules are not binding on the Commission, the Commission has often consulted the civil rules for guidance. *See, e.g., In the Matter of: Ballard Rural Telephone Cooperative Corporation, Inc. v. Jackson Purchase Electric Corporation*, Case No. 2004-00036, Order at 8 (Ky. PSC Mar. 23, 2005).
[75] Louisville Metro Brief at 10.
[76] *Id.*, quoting *Columbia Gas*, Boyd Cir. Ct., Div. II, Case No. 93-CI-458 (July 7, 1995) (unpublished).

Kentucky law, well-settled by *Peoples Gas Co. v. Barbourville*,[77] that this Commission's exclusive jurisdiction over rates and services "attaches only ***after*** the franchise has been acquired."[78]

In *Columbia Gas*, the City rejected two separate bids by Columbia for a gas franchise and Columbia filed suit. The City claimed the bids were nonconforming because they included a condition requiring the recovery of the franchise fee from customers. Upholding the City's rejection of Columbia's bid, the Court of Appeals affirmed and held that "a city possesses 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."[79] Although the Court of Appeals quoted from the Boyd Circuit Court's opinion, it did not adopt the lower court's reasoning. The Court of Appeals acknowledged that the Commission had "exclusive jurisdiction over the regulation of utility rates" but, quoting *Peoples Gas* at length, found the law "well settled" that the Commission's jurisdiction did not attach until after a franchise had been awarded: "[I]t is clear that the PSC's jurisdiction does not attach until ***after*** a city awards a utility franchise. ***Until then***, the city has sole jurisdiction to determine the franchise's terms regarding both rates and services."[80]

More recently, in *City of Ashland v. Kentucky Power Co.*,[81] J. Hagerman of the Boyd Circuit Court, the very same judge who issued that Circuit Court's opinion in *Columbia Gas*, again addressed whether the City of Ashland could mandate the absorption of a franchise fee by a utility. There, the City of Ashland had offered an electric franchise, but included a provision

[77] 165 S.W.2d 567, 572 (Ky. 1942).
[78] *Id.* at 571 (emphasis in original).
[79] *Columbia Gas*, Ky. Ct. App. Case No. 95-CA-2127 at 6 (unpublished) (emphasis added).
[80] *Id.* at 7-8 (emphasis added).
[81] *City of Ashland v. Kentucky Power Co.*, Boyd Cir. Ct., Div. II, Case No. 11-CI-00902 (Sept. 25, 2013) (unpublished) (a copy is included in Appendix E to this brief).

prohibiting the franchisee from collecting the franchise fee "as a separate item on the periodic bills to customers."[82] Kentucky Power Company ("KPC") submitted a bid offering instead to recover the franchise fee from customers. Unlike in *Columbia Gas* and just as Louisville Metro has done here, the City ***accepted*** the bid and granted the franchise. Like Louisville Metro here, the City reserved in the franchise agreement the right to file suit to challenge any recovery of its franchise fee from KPC's customers. When KPC began recovering the fee under its tariff, the City filed a declaratory judgment action.

In *Kentucky Power Co.*, the Circuit Court held the Commission had exclusive jurisdiction over rates and services and KPC was required by its Commission-approved tariff to recover the fee from customers. The court stated that "[w]hen in conflict, state law prevails over municipal ordinances."[83] Because the Commission had exclusive jurisdiction over rates and utility bills, the franchise agreement and local ordinance must give way to the "method of recoupment" required by KPC's Commission-approved tariff pursuant to KRS 278.160.[84] The Court further found that the City could not modify or rescind the franchise agreement because "KRS 278.160 and the regulatory scheme created thereunder became a part of the contract by operation of law at it's [sic] inception."[85] Therefore, the court held once the franchise had been granted, the City had no authority to dictate that KPC cannot recoup the fee from its customers under its tariff. Louisville Metro's brief conveniently fails to disclose to the Commission the *Kentucky Power Co.* opinion.

[82] *Id.* at 1.
[83] *Id.* at 3, ¶¶ 6 and 8.
[84] *Id.* at 2-3, ¶¶ 2-5, 8, 12, and 13.
[85] *Id.* at 3, ¶ 11.

These decisions are completely consistent with well-settled law[86] and LG&E's request for declaratory relief here. As established in *Peoples Gas*, both *Columbia Gas* and *Kentucky Power Co.* recognize that the Commission has exclusive jurisdiction over utility rates and service "*after* the franchise has been acquired."[87] In *Columbia Gas*, the City of Ashland filed suit ***during*** franchise negotiations and ***before*** the Commission's jurisdiction attached. As Louisville Metro has done here, the City of Ashland in *Kentucky Power Co.* filed suit ***after*** awarding a franchise and ***after*** the jurisdiction of the Commission attached. Far from supporting Louisville Metro's claims, these decisions wholly refute them. Once Louisville Metro granted the 2016 Franchise, the Commission's exclusive jurisdiction attached and like KPC, LG&E is required by KRS 278.160 to recoup Louisville Metro's fee from its customers under its Commission-approved tariff.

E. Louisville Metro has failed to present any legal authority to impose the collection of its gas franchise fee upon the gas customers outside of Jefferson County

Like its attempt to eviscerate the authority of the Commission, Louisville Metro seeks to undermine the rightful jurisdiction of the other counties and municipalities by imposing its franchise fee beyond its borders into other counties.[88] Once again, precedent makes clear that Louisville Metro has no such authority.

[86] *Owen Electric Coop., Inc.*, 832 S.W.2d 876, 881 ("A franchise thus granted by a municipality is granted subject to the right of the state to exercise its police power… The granting of a franchise on proper terms and the award of it to the highest and best bidder is held not to prevent the Public Service Commission from regulating rates and services of the enumerated utilities stated in the Acts of 1934."); *Southern Bell*, 96 S.W.2d 695; *Peoples Gas Co.*, 165 S.W.2d 567, 571 (The statutes establishing the Commission do not "strip and take from the municipality, in the granting of such franchise, the power and authority to enact and prescribe beginning terms and conditions…" But the Commission's authority to regulate service "as well as the authority to regulate rates by it, attaches only after the franchise has been acquired, either before operations have commenced under it, or thereafter throughout the life of the franchise.").

[87] *Peoples Gas Co.*, 165 S.W.2d at 571 (emphasis in original).

[88] Louisville Metro's Amended Complaint, ¶ 50.

As LG&E explained in its initial brief, the Commission has rejected the proposition that a jurisdiction may collect a franchise fee beyond its borders.[89] The Commission previously held that "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."[90] The Commission has repeatedly held that franchise fees should only be assessed upon those customers within the municipal boundaries of the municipality imposing the fee.[91] Examining the law of other jurisdictions, the Commission found that "[m]ost jurisdictions have held that a rate is unjust when it does not impose the burden of franchise payments on users in the community which receives the payments" and agreed with that analysis.[92] The evidence presented by LG&E in the instant case reinforces the Commission's findings that its policy is consistent with the policies of other states.[93] Louisville Metro has not contested that Kentucky follows the majority approach, and the Franchise Rider approved by the Commission is in accordance with the policies previously pronounced by the Commission.

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[89] LG&E Opening Brief at 7-9 and 14-16.

[90] *In the Matter of: Gen'l Adj. of Rates of Kentucky Utilities Co.*, Case No. 7804, Order at 10 (Ky. PSC Oct. 1, 1980).

[91] *See, e.g., Tariff of Louisville Gas and Elec. Co. to Implement a Franchise Fee Rider*, Case No. 2003-00267, Order (Ky. PSC Oct. 16, 2003); *Tariff of Kentucky Utilities Co. to Implement a Franchise Fee Rider*, Case No. 2003-00265, Order (Ky. PSC Oct. 16, 2003); *In the Matter of: Taylor Cty. Rural Elec. Coop. Corp. Not. of Tariff Revision*, Case No. 89-054, Order (Ky. PSC Apr. 10, 1989); *An Adj. by the Union Light, Heat and Power Co. 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: Gen'l Adj. in Elec. Rates of Kentucky Power Co.*, Case No. 7900, Order (Ky. PSC Dec. 17, 1980); *In the Matter of: The Franchise Fee Tariff Filing of Continental Tel. Co. of Ky.*, Case No. 7891, Order (Ky. PSC Oct. 10, 1980); *In the Matter of: The Local Taxes and/or Fees Tariff Filing of Columbia Gas of Ky., Inc.*, Case No. 7906, Order (Ky. PSC Oct. 10, 1980); *In the Matter of: The Local Taxes and/or Fees Tariff Filing of Gen'l Tel. Co. of Ky.*, Case No. 7843, Order (Ky. PSC Oct. 3, 1980); *In the Matter of: Gen'l Adj. of Rates of Kentucky Utilities Co.*, Case No. 7804, Order (Ky. PSC Oct. 1, 1980).

[92] *In the Matter of: Taylor Cty. Rural Elec. Coop. Corp. Not. of Tariff Revision*, Case No. 89-054, Order (Ky. PSC April 10, 1989) (citing *Village of Maywood v. Illinois Commerce Com.*, 178 N.E.2d 345, 348 (Ill. 1961); *City of Newport News v. Chesapeake & Potomac Tel, Co.*, 96 S.E.2d 145 (Va. 1957); *Missouri ex rel. City of West Plains v. Missouri Public Service Com.*, 310 S.W.2d 925 (Mo. 1958)).

[93] Conroy Direct Testimony at 5.

Unable to refute the clearly established law, Louisville Metro appears to concede that it lacks authority to impose its franchise fee outside of Jefferson County. Louisville Metro even attempted to formally withdraw the claim.[94] Louisville Metro bears the burden of proof to establish this claim[95] and has wholly failed to provide any valid legal authority to support it. In the absence of contrary law or evidence presented by Louisville Metro, the Commission should make a determination against Louisville Metro and for LG&E on this issue.

F. Louisville Metro has no authority to impose the collection of its gas franchise fee upon the gas customers of the Home Rule Cities within Jefferson County

Ignoring its limited franchise jurisdiction and the equivalent jurisdiction of other cities, Louisville Metro contends LG&E is required by its tariff to collect Louisville Metro's franchise fee from customers located outside of the Franchise Area and within each of the eighty-three Home Rule Cities.[96] Doubling down, Louisville Metro claims collection of its fee should not be limited to customers in the Franchise Area because it would "negatively impact minority and less economically advantaged populations."[97] But, as explained in LG&E's initial brief, Louisville Metro's jurisdiction to require a gas franchise is that of any other city and, as conceded in the express language of the 2016 Franchise, its municipal franchise jurisdiction extends only to the Franchise Area.[98] Each of the Home Rule Cities in Jefferson County retains its constitutionally-mandated franchise rights. LG&E's tariff no more requires LG&E to collect Louisville Metro's

[94] Louisville Metro Motion for Oral Argument and Withdrawal of Issue, Case No. 2016-00317 (Ky. PSC June 16, 2017). The Commission denied Louisville Metro's request stating that "all of the claims raised by Louisville Metro are interrelated and should be fully adjudicated in this proceeding…" Case No. 2016-00317, Order (Ky. PSC Aug. 9, 2017).
[95] Louisville Metro Reply to LG&E Objection to Motion for Oral Argument and Withdrawal of Pending Claim, Case No. 2016-00317 (Ky. PSC June 27, 2017).
[96] Louisville Metro Brief at 12-14.
[97] *Id*. at 14 (noting concerns regarding compliance with the Kentucky Civil Rights Act and the Federal Fair Housing Act).
[98] LG&E Opening Brief at 20-23. *See also* Section 1 of the 2016 Franchise Agreement attached as Ex. 5 to LG&E's Verified Application defining the "Franchise Area" 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."** (emphasis added)**.**

franchise fee from customers within a Home Rule City than it requires LG&E to collect a Home Rule City's franchise fee from customers within the Franchise Area. Nor is there any disparate impact amongst these co-equal franchising authorities.

1. LG&E's collection of Louisville Metro's franchise fee within the Franchise Area is completely consistent with the Franchise Rider

Louisville Metro superficially claims that "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 [sic]."[99] Louisville Metro supports this claim by disingenuously arguing that gas customers within the Home Rule Cities are "within the Louisville Metro jurisdictional borders."[100] But as explained in LG&E's initial brief, Louisville Metro's jurisdiction to grant a franchise does not extend within the Home Rule Cities.[101] Indeed, Louisville Metro admitted its franchise jurisdiction did not extend to the Home Rule Cities by granting the 2016 Franchise for the Franchise Area.[102] LG&E's collection of Louisville Metro's franchise fee only from gas service customers in the Franchise Area is completely consistent with Louisville Metro's limited franchise jurisdiction and authority and therefore the Franchise Rider to its gas tariff.[103]

LG&E's Franchise Rider requires LG&E to collect a franchising authority's franchise fee through a surcharge on the bill of "all customers located within local governmental *jurisdictions*" that impose the fee.[104] The Franchise Rider also requires that the amount calculated "shall be applied *exclusively* to the bills of customers receiving service within the *territorial limits <u>of the authority</u>* imposing the fee or tax."[105] Under this plain language, LG&E's obligation to collect

[99] Louisville Metro Brief at 12.
[100] *Id.*
[101] *See* KRS 67C.101(2)(a) and 67C.111(1).
[102] *See* n. 98, *supra*.
[103] *See* LG&E Rates, Terms and Conditions for Furnishing Natural Gas Services, P.S.C. Gas No. 90 (a copy is included in Appendix A to LG&E's Opening Brief).
[104] *Id.* (emphasis added).
[105] *Id.*

Louisville Metro's franchise fee does not extend to all customers within Jefferson County, but only those within Louisville Metro's "jurisdiction" to grant a franchise and the territorial limits of that "authority." As explained in LG&E's opening brief, Louisville Metro's "jurisdiction" and "authority" to require a gas franchise is that of a city, is coequal with the Home Rule Cities in Jefferson County, and extends only to the Franchise Area.[106] LG&E is not required to collect Louisville Metro's franchise fee from gas customers in the Home Rule Cities, nor can Louisville Metro require such collection. **And Louisville Metro knows it**.

Louisville Metro plainly admitted in the 2016 Franchise Agreement that its franchise jurisdiction does not extend to the areas within the Home Rule Cities. The 2016 Franchise Agreement is expressly limited to the Franchise Area which, by definition, does not extend "within the *jurisdiction* of any other city located in Jefferson County."[107] That limitation was not simply a point of negotiation between the parties. It was mandated by a formal opinion of the Jefferson County Attorney dated May 2, 2011, an opinion requested by and issued to Louisville Metro (the "Opinion").[108]

Louisville Metro as part of the franchise negotiations in 2011 requested an opinion as to whether Louisville Metro could require LG&E to pay franchise fees on gas services provided in

[106] LG&E Opening Brief at 20-23, discussing Louisville Metro's delegated powers under KRS 67.101(2)(d), the denial by KRS 416.140(1) of county power and authority to grant gas franchises and the exclusive jurisdiction of each city to grant franchises for their rights-of-way under Section 163. Even where counties have been delegated the power to grant franchises, they have no authority to grant franchises within cities. *See, e.g.*, Ky. Atty. Gen'l Op. No. 77-111 *2, 1977 Ky. AG LEXIS 674 (determining that the Pike Fiscal Court could not issue "a cable television franchise that involved territory within the corporate boundaries of a city located in the county in question."), reaffirmed by Ky. Atty. Gen'l Op. No. 77-601 *2, 1977 Ky. AG LEXIS 181(stating that "the fiscal court still cannot project its franchises into municipalities within the county, since the county's jurisdiction in granting a franchise under § 164 of the constitution extends only to the county's unincorporated territory.") (copies included in Appendices F and G to this brief).

[107] *See* n. 98, *supra*.

[108] Opinion of the Jefferson County Attorney "Re: LG&E – Gas Franchise Fees" dated May 2, 2011 (a copy is included in Appendix H to this brief). The Opinion is attached to the agendas of at least ten different Louisville Metro Council meetings which are publicly available on Louisville Metro's website. A copy of the Opinion attached to one such meeting agenda can be viewed at the following Internet link: http://agendas.louisvilleky.gov/SIREPub/view.aspx?cabinet=published_meetings&fileid=531789&usg=AFQjCNH2tbKpQ9krU0ynJIdYe_yznmWJIA (last visited Sept. 14, 2017).

the Home Rule Cities. The Jefferson County Attorney serves as "the legal advisor and representative to" Louisville Metro.[109] Although Louisville Metro and the Jefferson County Attorney on its behalf contend here that gas customers within the Home Rule Cities are "within the Louisville Metro jurisdictional borders,"[110] the Jefferson County Attorney's Opinion plainly concluded that when granting a gas franchise Louisville Metro's "jurisdiction," "authority," and "territorial" limits did not extend to the Home Rule Cities:

> Thus, the defined cities within Jefferson County, post merger, remain as fully empowered municipalities under Section 157a of the Constitution and the enactments of the General Assembly applicable to each city. Thus, the general **jurisdiction** and **authority** of Louisville Metro as a municipality is limited by law to (1) the **territory** encompassed by the city of the first class [Louisville] which the consolidated government replaced, and (2) those areas of Jefferson County ***outside*** of the **territorial boundaries** of all ***other*** cities within Jefferson County which existed as of the onset of Louisville Metro Government pursuant to KRS Chapter 67C. [111]

The Jefferson County Attorney concluded that Louisville Metro lacks the power to require collection of its gas franchise fee within the Homes Rule Cities. As aptly stated in the Opinion: "It is but a short step to the principle that one municipality, Louisville Metro, may not directly or indirectly tax or otherwise assess the citizens of other equally sovereign municipalities, that are incorporated cities within Jefferson County."[112]

Gas customers in the Home Rule Cities are not within Louisville Metro's authority to grant a gas franchise and are not within the territorial boundaries of Louisville Metro's franchising authority. Accordingly, Louisville Metro's proposed countywide collection of its gas

[109] KRS 67C.115(5).
[110] *Id.*
[111] Opinion at 3 (emphasis added).
[112] *Id.* at 3.

franchise fee is contrary to the plain language of LG&E's tariff, KRS 278.160(2) and the filed-rate doctrine.

2. Louisville Metro has failed to establish a disparate impact nor is there any disparate impact within Louisville Metro's franchise jurisdiction

Without citation to law or evidence, Louisville Metro vaguely claims that "the LG&E practice …. appear[s] to create discriminatory and disparate impacts" on "minority and less economically advantaged populations" which raises "serious concerns regarding compliance with the Kentucky Civil Rights act [sic] and the Federal Fair Housing Act."[113] But Louisville Metro fails to clearly explain the practice of concern, to allege a violation of those acts, or offer any legal analysis as to how its franchise fee is cognizable under those acts. And Louisville Metro also fails to explain how either the Kentucky Civil Rights Act or the Federal Fair Housing Act has any application to the rate issue in this case. Louisville Metro simply has failed to offer a legal argument to which LG&E can provide a meaningful response.

In *Smith v. Smith*,[114] the Kentucky Court of Appeals held that it is not the responsibility of the court "to search the record to find where it may provide support for [a party's] contentions" and in the absence of such support, the court is "to give little credence to the arguments by either party that are not supported by a conforming citation to the record." Citing *Smith*, the Kentucky Court of Appeals in *Calvert v. Rector*,[115] dismissed an appeal for lack of any legal explanation of the appellant's objection to the judgment from which the appeal was taken. The Court explained that "[i]t is not the responsibility or prerogative of the court to search

[113] Louisville Metro Brief at 14.
[114] 235 S.W.3d 1, 5 (Ky. App. 2006).
[115] Ky. Ct. App. Case No. 2012-CA-000476, 2013 Ky. App. Unpub. LEXIS 622 (July 26, 2013) at *2 (Unpublished). A copy of this opinion is included in Appendix I to this brief pursuant to Ky. R. Civ. Proc. 76.28(4)(c).

the record for support of a party's contentions. We are neither required nor empowered to practice law in lieu of or on behalf of the parties before us." So too here.

At the risk of boxing shadows, the "LG&E practice" that concerns Louisville Metro appears to be the method of collecting Louisville Metro's franchise required by LG&E's Commission-approved Franchise Fee Rider. No "serious concerns" about a disparate impact on LG&E customers in the Franchise Area are or could be presented by the application of that method in this case. Section 11(b) of the 2016 Franchise Agreement provides that if this Commission re-affirms that Kentucky law requires LG&E to collect Louisville Metro's fee only from customers within the Franchise Area, **the franchise rate is zero** -- i.e., no franchise fee is owed, none is to be collected from LG&E's customers, and there is **no impact**, disparate or otherwise, on customers within the Franchise Area. Accordingly, if LG&E is required to collect Louisville Metro's fee exclusively within the Franchise Area, the 2016 Franchise would not impose **any** franchise fee on LG&E and no fee would be collected from customers in the Franchise Area. Louisville Metro's spurious concerns about a disparate impact are founded upon an impact that cannot even occur under the terms of the 2016 Franchise.

Moreover, Louisville Metro's casual disparate impact analysis suffers the same jurisdictional flaws as its claims that it can reach into the Home Rule Cities and surrounding counties. Jurisdiction and authority to grant a gas franchise clearly informs any impact analysis because in addition to Louisville Metro, there are eighty-three other jurisdictions in Jefferson County – the Home Rule Cities – that have the exclusive constitutional authority to require gas franchises and impose franchise fees with respect to the use of their rights-of-way. So informed, the Commission-approved Franchise Rider ensures equal treatment amongst and within all

franchise authorities because the franchise fees of each jurisdiction must be collected from all of the gas customers within that jurisdiction.

LG&E's Franchise Rider provides fair, just and reasonable rates because it ensures there can be no disparate impact. By requiring that each jurisdiction's franchise fee be collected only from customers within that jurisdiction, no customer pays more than one franchise fee and all customers within each jurisdiction pay an equivalent franchise fee.

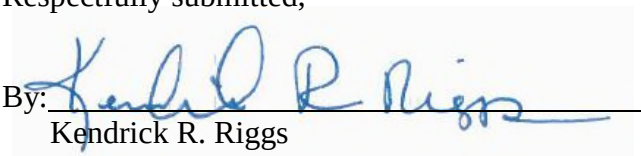
CONCLUSION

In sum, LG&E requests the Commission deny Louisville Metro's requests because they directly conflict with well-settled 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 collect 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. In doing so, consistent with the express terms in the 2016 Franchise, no franchise fee will be due.[116]

[116] See Section 11(b) of the Franchise Agreement.

Dated: September 15, 2017

Respectfully submitted,

By: 

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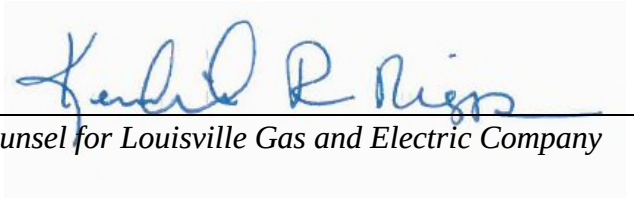
Counsel for Louisville Gas and Electric Company

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, this is to certify that the foregoing electronically filed September 15, 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 September 15, 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 Reply Brief of Louisville Gas and Electric Company will be hand delivered to the Commission September 18, 2017.



Counsel for Louisville Gas and Electric Company

Appendix to LG&E Reply Brief

No.	Document
A	Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (excerpt)
B	Official Report of the Proceedings and Debates in the Convention (1890), Vol. II (excerpt)
C	*City of Ashland v. Columbia Gas of Kentucky, Inc.*, Boyd Circuit Court, Div. II, No. 93-CI-458 (July 7, 1995) (unpublished)
D	*Columbia Gas of Kentucky, Inc. v. City of Ashland*, Case No. 95-CA-2127-MR (Ky. App. July 19, 1996) (unpublished)
E	*City of Ashland v. Kentucky Power Company*, Boyd Circuit Court, Div. II, Case No. 11-CI-00902 (Sept. 25, 2013) (unpublished)
F	Ky. Atty. Gen'l Op. No. 77-111
G	Ky. Atty. Gen'l Op. No. 77-601
H	Opinion of the Jefferson County Attorney "Re: LG&E – Gas Franchise Fees" dated May 2, 2011
I	*Calvert v. Rector*, Ky. Ct. App. Case No. 2012-CA-000476, 2013 Ky. App. Unpub. LEXIS 622 (July 26, 2013)

A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS.

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

THOMAS M. COOLEY, LL.D.,

FORMERLY ONE OF THE JUSTICES OF THE SUPREME COURT OF MICHIGAN, AND JAY PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN; NOW CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION.

SIXTH EDITION,

WITH LARGE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES,

BY ALEXIS C. ANGELL,

OF THE DETROIT BAR.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1890.

CHAPTER XIV.

THE POWER OF TAXATION.

THE power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it.

Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes.[1] The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it or not. No constitutional government can exist without it, and no arbitrary government without regular and steady taxation could be anything but an oppressive and vexatious despotism, since the only alternative to taxation would be a forced extortion for the needs of government from such persons or objects as the men in power might select as victims. Chief Justice *Marshall* has said of this power: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to

[1] Blackwell on Tax Titles, 1. A tax is a contribution imposed by government on individuals for the service of the State. It is distinguished from a subsidy as being certain and orderly, which is shown in its derivation from Greek, τάξις, *ordo*, order or arrangement. Jacob, Law Dic.; Bouvier, Law Dic. "The revenues of a State are a portion that each subject gives of his property in order to secure, or to have, the agreeable enjoyment of the remainder." Montesquieu, Spirit of the Laws, b. 12, c. 30. In its most enlarged sense the word "taxes" embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. See Perry *v.* Washburn, 20 Cal. 318, 350; Loan Association *v.* Topeka, 20 Wall. 655, 664; Van Horn *v.* People, 46 Mich. 183.

the taking of property under legitimate taxation. When the Constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain. Taxation and eminent domain indeed rest substantially on the same foundation, as each implies the taking of private property for the public use on compensation made; but the compensation is different in the two cases. When taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax;[1] and these benefits amply support the individual burden.

But if these special local levies are *taxation*, do they come under the general provisions on the subject of taxation to be found in our State constitutions? The Constitution of Michigan directs that "the legislature shall provide an uniform rule of taxation, except on property paying specific taxes; and taxes shall be levied upon such property as shall be prescribed by law;"[2] and again: "All assessments hereafter authorized shall be on property at its cash value."[3] In the construction of these provisions the first has been regarded as confiding to the discretion of the legislature the establishment of the rule of uniformity by which taxation was to be imposed; and the second as having reference to the annual valuation of property for the purposes of taxation, which it is customary to make in that State, and not to the actual levy of a tax. A local tax, therefore, levied in the city of Detroit, to meet the expense of paving a public street, and which was levied, not in proportion to the value of property, but according to an arbitrary scale of supposed benefit, has been held not invalid under the constitutional provision.[4]

So the Constitution of Illinois declares that "the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some

[1] People *v.* Mayor, &c. of Brooklyn, 4 N. Y. 419; Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560; Scovill *v.* Cleveland, 1 Ohio St. 126; Northern Indiana R. R. Co. *v.* Connelly, 10 Ohio St. 159; Washington Avenue, 69 Pa. St. 352; s. c. 8 Am. Rep. 255; White *v.* People, 94 Ill. 604.

[2] Art. 14, § 11.

[3] Art. 14, § 12.

[4] Williams *v.* Mayor, &c. of Detroit, 2 Mich. 560. And see Woodbridge *v.* Detroit, 8 Mich. 274; State *v.* Stout, 61 Ind. 143; Taylor *v.* Boyd, 63 Tex. 533.

OFFICIAL REPORT

—OF THE—

PROCEEDINGS AND DEBATES

—IN THE—

CONVENTION

ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE

CONSTITUTION

—OF THE—

STATE OF KENTUCKY.

VOLUME II.

FRANKFORT, KY.:
E. POLK JOHNSON, PRINTER TO THE CONVENTION.
1890.

dollars. But, Mr. Chairman, let us inquire for a moment about the theory of taxation. Mr. Cooley says, in his Constitutional Limitations: "Taxation is the equivalent for the protection which the Government affords to the persons and property of its citizens; and as all are alike protected, so all alike should bear the burden in proportion to the interest secured." Now, sir, when taxation takes money for the public use, the tax-payer receives, or is supposed to receive, his just compensation in the protection which government affords to his life, liberty and property, and in the increase in value of his possessions, by the use to which the Government applies the money raised by the tax; and either of these benefits will support the burden. You will find in the case of The People v. The Mayor of Brooklyn, 4th New York Reports, that the Court says: "A rich man derives more benefit from taxation in the protection and improvement of his property than a poor man, and ought, therefore, to pay more." It is, in fact, and should ever be recognized as the true mode of distributing the public burden, for it measures every man's contribution to the Government by the amount of protection which the Government gives to him and his property. "The principle of taxation is and must be, in all well regulated Governments, where there are no privileged classes of property, that all the property should pay its distributive share to the support of the Government, and to the discharge of public burdens, just in proportion to the amount of the value of the property protected by the Government and its laws. I merely make these suggestions because some gentlemen are very sensitive about the natural theory of bartering rights between the Government and the citizen." You see, therefore, that this is the common ground on which we stand; it is the base from which we start; it is the platform of great underlying fundamental principles. So agreeing upon this general proposition, let us examine the matter really in dispute. What then shall we agree upon? In the first place, that taxation must be equal and uniform, and I will not debate the question now before this body with any gentleman who will not agree to that proposition. What is the next proposition? That there shall be no double taxation. That is another elementary principle that we all agree upon. Having reached thus far in our simple logic, your churches cannot possibly escape taxation, except (understand I am agreeing that we should perhaps exempt places of actual worship, not to exceed a certain value, and endowed schools), you violate this general principle. As a citizen must pay tax to the State for the same amount of property that he owns above a certain amount, so the church or any charitable institution must pay tax to the State. In discussing the question of taxation, in the history of all the world, no man has ever been able to discover a system of absolute mathematical equality. They may have improved upon the system; they may have classed it to suit certain means of taxation, but absolute mathematical equality is not to be obtained There is some point where you must doubly tax property; but an equitable and uniform system will only tax a small particle of property in that manner. When we have reached the point of uniform taxation upon all subjects, we have reached, in my mind, the most equitable, as well as the fairest system of taxation known to the political economists and publicists of this century. A different system of taxation must be applied to mortgages, to notes, to incomes upon personal property, as well as real property, existing in corporations that do business in several States, than that system applied to visible or corporal property known as lands, public buildings, and all property that is tangible. I do not know but that the system applied in New Jersey, and, I believe, some other States of this Union, taxing corporations entirely would be a good one,

BOYD CIRCUIT COURT
DIVISION II
FILE NO. 93-CI-00458

CITY OF ASHLAND, KENTUCKY
a City of the Second Class, PLAINTIFF,

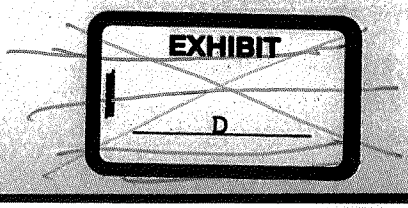
VS: ORDER AND JUDGMENT

COLUMBIA GAS OF KENTUCKY, INC., DEFENDANT.

****

The City of Ashland seeks declaratory relief against Columbia Gas of Kentucky, Inc., stating that the Defendant is operating without a valid franchise agreement and has failed to submit responsive bids to the City's advertised specifications pursuant to KRS 96.010 and sections 163 and 164 of the Kentucky Constitution. The main hang up appears to be that the Defendant wants to include a line item on the bills of customers in the City of Ashland for collection of the franchise fee back from those who receive the service. The City takes the position that if Columbia can pass the cost of the franchise onto the customers of Ashland, then Columbia has essentially received the valuable privilege of using the City's rights-of-way for free which would be unfair to city taxpayers. The City feels that the utility must absorb the cost of the franchise as a part of doing business since it is receiving something valuable for it.

The Defendant on the other hand argues that the bids submitted were responsive in that they would generate more revenue for the City than the ordinances would have and that the City's interpretation of the ordinance is arbitrary, capricious



and oppressive. The Defendant makes a strong argument that if utilities have to go to the Public Service Commission and seek rate increases to offset the cost of franchise fees, the net effect will be that customers in our area of the state will be paying higher rates because of a franchise fee in a different area of the state. The Defendant points out that in this scenario, a customer's rates will be affected by franchise fees set by governing bodies who do not represent them. The Defendant also argues that the City of Ashland is the only city in Kentucky that does not allow a line item charge to its customers for the utility to recoup the franchise fee.

The Defendant is probably correct as to where the current course is leading, that being the request to the PSC for a rate increase to offset the franchise fee. However, the fact remains 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. 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 item charge in order to protect its taxpayers from the additional charge does not make it unreasonable, arbitrary or capricious. Although the Defendant has successfully pointed to a problem that could someday affect rates for natural gas for all Kentuckians, this Court cannot grant the Defendant the relief it seeks without running afoul of the case law cited in the City's brief.

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that Ordinance 155, 1992 of the City of Ashland is a proper exercise of the Plaintiff's constitutional authority and the Defendant's bids are not responsive. The Defendant is Ordered to submit a responsive bid which does not provide for a line item charge to customers within thirty (30) days. The Defendant's Counterclaim is dismissed. This is a Final Order and no cause for delay.

Entered this the 7th day of July 1995.

C. E. [illegible], JUDGE
BOYD CIRCUIT COURT, DIVISION II

I, the undersigned Clerk of the Boyd Circuit Court, do hereby certify that the aforegoing ORDER AND JUDGMENT was this day entered of record in my office and I have given written notice of said entry by mailing a true and correct copy of same to the following:

Kevin P. Sinnette
Asst. Corporation Counsel
P.O. Box 1839
Ashland, Ky. 41105-1839

Kimberly S. McCann
P.O. Box 1111
Ashland, Ky. 41105-1111

This the 7 day of July 1995.

CLERK, BOYD CIRCUIT COURT

BY: Rita Blevins, D.C.

RENDERED: July 19, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-2127-MR

COLUMBIA GAS OF KENTUCKY, INC. — APPELLANT

V.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 93-CI-458

CITY OF ASHLAND, KENTUCKY,
A CITY OF THE SECOND CLASS — APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: WILHOIT, Chief Judge, DYCHE, and GUDGEL, Judges.

GUDGEL, JUDGE: This is an appeal from a declaratory judgment entered by the Boyd Circuit Court. The issue is whether the court erred by finding that appellee City of Ashland (City) was entitled to reject as unresponsive the bid of appellant Columbia Gas of Kentucky, Inc. (Columbia Gas) because Columbia Gas proposed to charge back to its customers on their bills the amount which was bid for the franchise. We are of the opinion that it did not. Hence, we affirm.

The relevant facts are uncomplicated and undisputed. Columbia Gas has provided natural gas service to the City and its residents since 1913 although its franchise to do so expired in

1922. Despite the provisions of KRS 96.010(1), the City never undertook to sell a new franchise until after it enacted Ordinance No. 155, providing for the advertisement and sale of a gas company franchise, in December 1992. That ordinance states in pertinent part as follows:

> SECTION 12. As consideration for the rights conferred by the granting of this franchise, and to compensate the City for its superintendence of the franchise, the successful bidder shall pay to the City a fee, the minimum of which shall be equal to 36% of the charges paid for gas services by the City of Ashland upon the following conditions:
>
> (a) Such fees shall be initially fixed by separate ordinance which shall state the City's acceptance of the Company's bid.
>
> (b) The Company shall remit to the City, quarterly, all amounts due under this franchise. The first such remittance shall be based upon revenues received by the Company during the first three (3) months following the effective date of the franchise as set forth in Section 19 hereof, and shall be paid within forty-five (45) days following such period. Thereafter, payments shall be made within forty-five (45) days after each subsequent three (3) month period. The final payment shall be paid within forty-five (45) days following the expiration of this franchise.
>
> (c) In the event the City of Ashland makes no payments to a company as defined by this ordinance, the bid for a ten (10) year franchise shall be a minimum of $3,000.00 payable

within forty-five (45) days of the granting of a franchise.

. . . .

SECTION 15. (1) Bids and proposals for the purchase and acquisition of the franchise and privileges hereby created shall be in writing and shall be delivered to the City Clerk or designated subordinate upon the date and at the time fixed in said advertisement for the receipt of such.

(2) Bids offered for purchase of this franchise shall state the bidder's acceptance of the conditions set forth in this ordinance.

(3) Any cash or check remitted by an unsuccessful bidder shall be returned.

SECTION 16. At the first regular meeting of the City Commission following the receipt of such bids, the City Manager shall report and submit to the City Commission all bids and proposals for acceptance of bids. Acceptance of a bid shall be expressed by an ordinance. The City Commission reserves the right, for and in behalf of the City, to reject any and all bids for said franchise and privilege. In case the bids reported by the City Manager shall be rejected by the City Commission, it may direct, by resolution or ordinance, that said franchise and privilege be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and accepted.

Columbia Gas thereafter submitted two bids for the franchise, each of which stated in relevant part as follows:

Section 12 In consideration of the granting of this franchise to distribute gas within the City of Ashland, Columbia Gas of Kentucky, Inc. will pay an annual franchise fee equal to two percent (2%) of the annual gross service revenues received by Columbia

> Gas of Kentucky, Inc. from the sale of gas within the corporate limits of the City of Ashland, Kentucky. Columbia Gas of Kentucky, Inc. will collect, as a separate item on the periodic bills of its customers served within the corporate limits of the City of Ashland, Kentucky, and pay over to the Ashland municipal government, an amount equal to the total of each customers' proportionate part of the franchise fee set forth above. In the event Columbia Gas of Kentucky, Inc. is prohibited by any regulatory body or court from collecting such proportionate amounts from customers receiving service within the corporate limits of Ashland, Kentucky, then to that extent, Columbia Gas of Kentucky, Inc. shall be relieved from any obligation under this Section. For the purposes of the foregoing paragraph, the franchise shall be effective March 1, 1993, and calculation of amounts payable hereunder shall commence with all bills tendered to customers by the Company on and after said date. Payment of said amount to the City of Ashland, after approval by the Kentucky Public Service Commission, shall be made quarterly on the 15th day after the end of each quarter without certification of the amount of gross service revenues by a public accountant.[1]

The City both rejected Columbia Gas's bids as unresponsive and filed a civil action seeking a declaration of rights to that effect. Columbia Gas responded with a counterclaim, seeking an adjudication that the City's rejection of its bids was arbitrary and void.

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[1]Columbia Gas's bids also requested other provisions or conditions relating to subjects besides those set forth in the City's bid documents. However, as the parties did not address these differences in either their pleadings or their arguments to the court below, we assume they can be resolved amicably.

Eventually, the case was submitted to the court for decision on the parties' briefs. On July 7, 1995, the court entered a judgment which stated in relevant part as follows:

> The main hang up appears to be that the Defendant wants to include a line item on the bills of customers in the City of Ashland for collection of the franchise fee back from those who receive the service. The City takes the position that if Columbia can pass the cost of the franchise onto the customers of Ashland, then Columbia has essentially received the valuable privilege of using the City's rights-of-way for free which would be unfair to city taxpayers. The City feels that the utility must absorb the cost of the franchise as a part of doing business since it is receiving something valuable for it.
>
> The Defendant on the other hand argues that the bids submitted were responsive in that they would generate more revenue for the City than the ordinances would have and that the City's interpretation of the ordinance is arbitrary, capricious and oppressive. The Defendant makes a strong argument that if utilities have to go to the Public Service Commission and seek rate increases to offset the cost of franchise fees, the net effect will be that customers in our area of the state will be paying higher rates because of a franchise fee in a different area of the state. . . .
>
> The Defendant is probably correct as to where the current course is leading, that being the request to the PSC for a rate increase to offset the franchise fee. However, the fact remains 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. 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 item charge in order to protect its taxpayers from the additional charge does not make it unreasonable, arbitrary or capricious.

This appeal followed.

Given the relevant factual background and the court's ruling, we 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 possesses 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.

Sections 163 and 164 of the Kentucky Constitution and KRS 96.010(1) authorize cities such as Ashland to sell utility franchises. Specifically, Section 163 of the constitution in effect provides that no utility shall be permitted or authorized to construct facilities along, over, under, or across a city right-of-way without the consent of the proper legislative body, while Section 164 forbids any city from granting a franchise for a term exceeding twenty years and directs that the award of such a franchise must occur only after there has been public advertisement and the receipt of bids therefor. Moreover, although Section 164 states that a franchise shall be awarded "to the highest and best bidder," the section also authorizes a city "to reject any or all bids." In addition, KRS 96.010(1) provides

that the sale of a new franchise to the highest and best bidder shall be on "terms that are fair and reasonable to the city," to the purchaser, and to the utility's customers, and that such "terms" shall specify the quality of the service which is to be rendered.

Having reviewed the applicable constitutional and statutory provisions, it is immediately apparent that nothing in the language of those provisions expressly authorizes a city to dictate the source of the funds which must be utilized by a utility to pay a franchise fee. Indeed, KRS 278.040(2) expressly states that the Public Service Commission (PSC) possesses exclusive jurisdiction over the regulation of utility rates. Nevertheless, it does not follow that the City's actions herein are illegal and void, as the law to the contrary is well settled.

In Peoples Gas Co. of Kentucky v. City of Barbourville, 291 Ky. 805, 165 S.W.2d 567 (1942), our highest court was asked to interpret and harmonize the constitutional and statutory provisions regarding a municipality's authority to sell utility franchises in light of certain newly-enacted statutes (now embodied, substantially unchanged, in KRS Chapter 278) which created the PSC. The court resolved the issues relating to the attachment and extent of the PSC's jurisdiction as follows:

> That language is an express limitation upon the powers of the Commission, with a like preservation of the power and authority of municipalities theretofore possessed by them, from the time our state was admitted into the Union. Such power and authority was and is the right of municipalities upon installing a

> utility within its borders to prescribe for the character of service to be rendered by it and the rates to be charged therefor at the beginning. The statute nowhere indicates a purpose to entirely take from municipalities such authority or to diminish their power in such respects, but only to modify it by prescribing that from time to time thereafter the "regulation" of rates and service was conferred upon the Public Service Commission. The language itself assumes that there were already existing provided rates, facilities and terms of service to be regulated by the Commission in the exercise of the jurisdiction conferred upon it by the act; but nowhere in the statute, either in the section referred to or any other part of it, is there any intimation that it was the purpose of the legislature to strip and take away from the municipality, in the granting of such franchise, the power and authority to enact and prescribe beginning terms and conditions, but which nevertheless might thereafter be regulated as applicable to both rates and services performed.

165 S.W.2d at 570-71. Hence contrary to Columbia Gas's contention, it is clear that the PSC's jurisdiction does not attach until after a city awards a utility franchise. Until then, the city has sole jurisdiction to determine the franchise's terms regarding both rates and services. Moreover, it is of no significance herein that Columbia Gas was previously awarded a franchise and that it has been conducting its business without a franchise for many years, as any rights Columbia Gas acquired under the old franchise have long since expired. Hence, the City is entitled to offer the new franchise on different terms and conditions if it wishes. Cf. Kentucky Utilities Co. v. Board of

Commissioners of City of Paris, 254 Ky. 527, 71 S.W.2d 1024 (1933).

Further, in a case such as this where a city has exercised its constitutional authority in rejecting a bid, the courts may not interfere in the city's exercise of its discretion absent very limited circumstances. Indeed, the applicable rule is well stated in Groover v. City of Irvine, 222 Ky. 366, 300 S.W. 904, 905 (1927), as follows:

> Here there is presented for the first time the question whether the discretion vested in the board of council of the municipality is subject to the control of the courts in the circumstances presented. In granting franchises for the public benefit, a city council acts in a legislative capacity. In the exercise of this power a discretion is vested, which cannot be taken away by the courts. Inasmuch, however, as the members of the city council act as trustees for the public to the end that the latter may obtain such conveniences as telephones, electric lights, and the like, they may not, after the sale of a franchise, arbitrarily or corruptly reject all bids and thereby escape the obligation to award the franchise to the highest and best bidder. However, when the exercise of the power and discretion to reject bids is attacked in the courts, the presumption will be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public. To proceed upon any other theory would be to substitute the judgment and discretion of the courts for the judgment of the members of the council with whom the lawmakers have seen fit to lodge the power. Little Rock Railway & Electric Company v. Dowell, 101 Ark. 233, 142 S.W. 165, Ann. Cas. 1913D, 1086. Hence it is incumbent on one who calls in question the

> discretion of the council to allege and prove facts showing that the council acted arbitrarily or corruptly, and was therefore guilty of a clear and palpable abuse of discretion.

Here, Columbia Gas urges that the City's rejection of its bids was arbitrary because, although a municipality may set a reasonable fee for granting a franchise, nothing in the applicable constitutional or statutory provisions authorizes a municipality to dictate how a utility company raises the necessary funds for purchasing a franchise. We disagree.

As noted above, KRS 96.010(1) dictates that the sale of any new franchise, even to a utility such as Columbia Gas which held a previous but now expired franchise, must be on terms which are fair and reasonable "to the city, to the purchaser of the franchise and to the patrons of the utility." Here, the record shows that the City requested a minimum bid for the franchise of $18,810. Columbia Gas in response offered to pay approximately $123,000 for the franchise, disclosing that it would recoup this sum from its customers through line item charges added to their monthly bills. The City objected to the plan as being unfair and unreasonable to the customers of Columbia Gas, especially since the amount bid for the franchise was significantly higher than the minimum amount which the City had indicated it would accept. Nothing in the record establishes that the City's efforts to protect its residents from additional monthly charges by exercising its constitutionally-authorized discretion to reject Columbia Gas's bid was not done "with reason and in good faith

for the benefit of the public." Groover v. City of Irvine, 300 S.W. at 905. Absent any showing that the City's conduct constituted a clear and palpable abuse of discretion, it follows that the City did not act arbitrarily by rejecting Columbia Gas's bid. Hence, the court did not err by denying Columbia Gas's request for relief.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Kimberly S. McCann
Ashland, KY

BRIEF FOR APPELLEE:

Richard W. Martin
Kevin P. Sinnette
Ashland, KY

ORAL ARGUMENT FOR APPELLEE:

Kevin P. Sinnette
Ashland, KY

IN THE
BOYD CIRCUIT COURT
CATLETTSBURG, BOYD COUNTY, KENTUCKY
DIVISION II
FILE NO. 11-CI-00902

CITY OF ASHLAND, KENTUCKY PLAINTIFF

VS JUDGMENT

KENTUCKY POWER COMPANY DEFENDANT

This action is before the Court on motions for summary judgment by both parties. The Court has heard oral argument on the motions and has carefully considered the briefs submitted and any attachments thereto. The facts are largely undisputed and are set forth below along with conclusions of law and judgment.

FACTS

In April of 2011 the City of Ashland, through it's board of elected commissioners, approved an ordinance that would provide for the advertisement for bids for the purpose of the sale of a franchise to the successful bidder for the transmission and distribution of electricity within the City of Ashland, Kentucky. The specifications in the advertisement included the requirement of payment of a franchise fee annually in an amount equal to three percent of the revenues collected by the successful bidder within Ashland. A portion of Section Eight of the ordinance provided that "the successful bidder shall not collect, as a separate item on the periodic bills of it's customers, an amount equal to the total of each customer's proportionate part of the franchise fee."

Subsequent thereto, Respondent Kentucky Power Company, (hereinafter referred to as "KPC") submitted a bid to the City which was consistent with all specifications of the advertisement

with the exception of that portion of Section Eight which prohibited KPC from charging the City's customers for reimbursement of the three percent franchise fee paid to the City. KPC further advised the City that KPC would be in violation of a state statute, KRS 278.160, if it did not charge the customers on their monthly bills in order to recoup the franchise fee paid to the City.

On July 16, 2011 the City, by virtue of Ordinance 84, 2011, granted KPC the franchise but expressly set forth in the ordinance that if KPC were to recoup the franchise fee from it's customers within the City of Ashland that the City would file a petition for declaration of rights in the Boyd Circuit Court. KPC proceeded to bill it's Ashland customers for the recoupment of the franchise fee as a line item on the monthly bills of the Ashland customers and this action followed.

CONCLUSIONS OF LAW

1. The franchise agreement is a binding contract between the parties to this action.
2. KRS 278.160 prohibits utilities from deviating from the terms of tariffs approved by the Kentucky Public Service Commission.
3. KRS 278.160 by operation of law became part of the contract between the City and KPC.
4. The public service commission has exclusive jurisdiction over regulating the rates and fees and manner of collection pertaining to public utilities.
5. The franchise fee rate and method of recoupment are not only permitted by the public service commission but are

required. The various rules and regulations promulgated by the Public Service Commission are created under authority of KRS 278.160 and therefore occupy the status of state law.

6. When in conflict, state law prevails over municipal ordinances.

7. If KPC were to comply with the provision in Section Eight of the ordinance which forbids it from recouping the franchise fee from it's customers within the City of Ashland, KCP would be violating state law.

8. The City may not prevent by ordinance the fact that KRS 278.160 becomes part of the contract as a matter of law.

9. Sections 163 and 164 of the Kentucky Constitution grant municipalities the authority to advertise for bids on franchises and either accept or reject bids. The City's attempt to prohibit recoupment of the franchise fee from customers is clearly a matter relating to the regulation of rates and is therefore beyond the City's authority and exclusively within the authority of the Public Service Commission.

10. The provision in question contained in Section Eight of the ordinance cannot be justified under KRS 82.082 because it is directly in conflict with a state statute.

11. The City is not entitled to modify the franchise agreement or rescind same because KRS 278.160 and the regulatory scheme created thereunder became a part of the contract by operation of law at it's inception.

12. KRS 278.040(2) grants exclusive jurisdiction to the Public Service Commission over the rates and services of all public utilities. Therefore the City has no authority to dictate that KPC cannot recoup the three percent fee from it's customers.

13. KRS 278.010(12) makes it clear that the tariffs approved by the Public Service Commission fall within the definition of "rates" and are therefore exclusively a matter for the Public Service Commission.

14. The City of Ashland is an incorporated entity separate and apart from it's residents. KPC remits quarterly payments to the City to pay the franchise fee. The fact that KPC generates the revenue to pay the fee by charging it's customers is not an issue between KPC and the City but rather an issue between KPC and it's customers pertaining to rates and is therefore strictly within the exclusive jurisdiction of the Public Service Commission.

JUDGMENT

Based on the conclusions stated above, the Court finds that on factual issues which are not disputed Respondent KPC is entitled to judgment as a matter of law and it's motion is sustained. The motion of the City of Ashland for summary judgment is overruled. The Court finds that the portion of Section Eight contained in Ordinance 84, 2011, which seeks to prohibit KPC from recouping it's franchise fee on the monthly bills of it's customers is in direct conflict with state law and is therefore null and otherwise unenforceable. The Court further finds that with that exception,

the remainder of the franchise agreement is a binding and valid contract between the parties. The petition and amended petition for declaration of rights is dismissed at the cost of Petitioner.

This is a final order and there is no cause for delay.

ENTERED this the 25th day of September, 2013.

C. DAVID HAGERMAN, JUDGE
BOYD CIRCUIT COURT
DIVISION II

I hereby certify that a true and correct copy of the foregoing Order was mailed to:

1. Hon. Wendell Roberts, Hon. Donald Yates, P. O. Box 70, Ashland, KY 41105-0070

2. Hon. Richard Martin, P. O. Box 2528, Ashland, KY 41105-2528

3. Hon. Kevin Sinnette, P. O. Box 1358, Ashland, KY 41105-1358

This 25 day September 2013.

BOYD CIRCUIT COURT
BY: A Medley D.C.

1977 Ky. AG LEXIS 674

Office of the Attorney General of the State of Kentucky

Reporter
1977 Ky. AG LEXIS 674 *

OAG 77-111

February 21, 1977

Core Terms

franchise, fiscal, cable television, municipal, pike, exclusive franchise, grant a franchise, territory, street, supervisory, television, antenna, bridge, cable

Request By: [*1]

Mr. James P. Pruitt, Jr.

Attorney at Law

The Call Building

Pikeville, Kentucky 41501

Opinion By: Robert F. Stephens, Attorney General; By: Charles W. Runyan, Assistant Deputy Attorney General

Opinion

On behalf of the Pike Fiscal Court you have drafted an ordinance governing Cable Television Franchises within Pike County.

The question has arisen as to whether or not Pike Fiscal Court is the proper franchise authority for areas which may fall within incorporated municipalities and cities. You thus request an opinion as to the effect of an attempt by the Pike Fiscal Court to grant Cable Television Franchises which extend into a city's incorporated area.

Section 164 of the Kentucky Constitution has been held to be self-operative and confers upon municipalities and counties authority to grant franchises pertaining to subjects over which they were given supervisory jurisdiction by the laws of the state. *Christian-Todd Telephone Co. v. Commonwealth, 156 Ky. 557, 161 S.W. 543 (1913); Irvine Toll Bridge Co. v. Estill Co., 210 Ky. 170, 275 S.W. 634 (1925); Tri-State Ferry Co. v. Birney, 235 Ky. 540, 31 S.W.2d 932 (1930);* and *Warfield Natural Gas Co. v. Lawrence County, 300 Ky. 410, 189 S.W.2d 357 (1945).* **[*2]** Since fiscal courts have control over the use of county roads and bridges (not state highway projects) within their respective counties [*KRS 67.080* and KRS Chs. 178 and 179], it is our opinion that counties, through their fiscal courts, are authorized to grant franchises for the use of the public ways of the counties by television antenna cable systems pursuant to § 164, Kentucky Constitution.

Likewise, in *City of Owensboro v. Top Vision Cable Co. of Ky., Ky., 487 S.W.2d 283 (1972),* the court held that a city may grant a franchise covering the operation of a community antenna television service within a city. The court described such a franchise as an agreement between the granting authority and the holder, such agreement partaking of the usual incidents of a contract. Here again a city's right to apply the provisions of §§ 163 and 164 of the Constitution rests upon the city's statutory supervisory control over a city's streets or ways. See § 163,

Kentucky Constitution, KRS Ch. 96, KRS 85.140, *93.050*, *94.110*, *94.360*, and *Ray v. City of Owensboro, Ky., 415 S.W.2d 77 (1967).*

We now come to the question as to whether a fiscal court can grant a cable television franchise involving **[*3]** territory within the corporate boundaries of a city located in the county in question. We do not think so. There are at least two reasons for this conclusion. For one thing, since a city has exclusive jurisdiction over city streets or ways, the fiscal court cannot impinge upon such exclusive authority to be exercised by the city over such ways within its boundaries. Thus a fiscal court can only exercise its franchise authority in connection with roads or ways located within the county boundaries, but excluding streets or ways located within municipal boundaries. Secondly, the language in Ray v. City of Owensboro, above, suggests strongly that the number of franchises to be granted by a particular granting authority would be left to the governing body of the city or county, depending upon public necessity. The court wrote that "only where the public interest demands should competition be restrained or limited." Thus if it is possible for a local government to grant an exclusive franchise, it follows that it would be impossible for a city to grant an exclusive franchise and then suffer the fiscal court's granting another exclusive franchise in the same city territory.

Even considering **[*4]** the wide powers vested in fiscal courts by the Home Rule statute, *KRS 67.083*, it is our opinion that even the latter statute does not permit a fiscal court to cross over into municipal territory with its cable television franchises, since the city's exclusive-authority-over-streets-statutes would be in conflict with such attempted county action.

Load Date: 2014-07-03

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1977 Ky. AG LEXIS 181

Office of the Attorney General of the State of Kentucky

Reporter
1977 Ky. AG LEXIS 181 *

OAG 77-601

September 28, 1977

Core Terms

fiscal, franchise, grant a franchise, cable television, assembly, pike, unincorporated territory, enact a law, municipal, delegate, bridge, cable

Request By: [*1]

Mr. James P. Pruitt, Jr.

Attorney at Law

The Call Building

Pikeville, Kentucky 41501

Opinion By: Robert F. Stephens, Attorney General; By: Charles W. Runyan, Assistant Deputy Attorney General

Opinion

As attorney for Pike Fiscal Court's effort to grant franchises for cable television operators in Pike County, you request our opinion as to the legal authority for the fiscal court's granting franchises under a Pike County cable television ordinance in light of the recent opinion of the Supreme Court of Kentucky dealing with *KRS 67.083*, the Home Rule statute.

The Supreme Court of Kentucky, in Fiscal Court of Jefferson County v. City of Louisville (76-604) [decided September 16, 1977], in holding that the Home Rule statute was unconstitutional, ruled that the General Assembly has no constitutional authority, under § 29, Constitution, to delegate to fiscal courts the power to enact laws. The court said that fiscal courts are not legislative bodies under the Constitution. However, the court pointed out that the legislature can enact a law and delegate in the law the power to fiscal court to determine some fact or state of things upon which the law makes or intends to make its own action depend. In **[*2]** other words, where the General Assembly enacts a law, it may provide that a fiscal court can implement the law by way of exercising an administrative or executive discretion. The court relied on *Bloemer v. Turner, Ky., 137 S.W.2d 387 (1939)* and *Holsclaw v. Stephens, Ky., 507 S.W.2d 462 (1974)* for its decision on this point.

The answer to your question is that a fiscal court may, pursuant to § 164 of the Kentucky Constitution, grant cable television franchises. The declaring of *KRS 67.083* as being unconstitutional by the court in no way affects the right of fiscal courts to grant cable television franchises, since the granting is done strictly under § 164 of the constitution. The constitution is our supreme law. As we said in OAG 77-111, § 164 is self-operative or self-executing and requires no implementing legislation on the part of the General Assembly. That section confers upon both cities and counties authority to grant franchises pertaining to subjects over which they were given supervisory

jurisdiction by the laws of the state. *Irvine Toll Bridge Co. v. Estill Co., 210 Ky. 170, 275 S.W. 634 (1925);* and *Warfield Natural Gas Co. v. Lawrence County, 300 Ky. 410, 189 S.W.2d 357 (1945).* Thus since fiscal courts have control over county roads and bridges within the county [*KRS 67.080* and KRS Chapters 178 and 179], fiscal courts are authorized to grant franchises for the use of public ways of the counties by television antenna cable systems pursuant to § 164, Constitution. See *Ray v. City of Owensboro, Ky., 415 S.W.2d 77 (1967);* and *City of Owensboro v. Top Vision Cable Co. of Ky., Ky., 487 S.W.2d 283 (1972).*

We pointed out in OAG 77-111 that even under *KRS 67.083* the fiscal court had no authority to extend such franchises into municipal territory within the county, since the city's exclusive authority over city streets (by statute) would prohibit such intrusion. Since *KRS 67.083* has been struck down, the fiscal court still cannot project its franchises into municipalities within the county, since the county's jurisdiction in granting a franchise under § 164 of the constitution extends only to the county's unincorporated territory.

Thus the Home Rule decision does not prohibit nor affect a fiscal court's granting a cable television franchise under § 164, Constitution. Of course the fiscal court's **[*4]** franchise can cover only unincorporated territory.

Load Date: 2014-07-03

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Louisville, KY 40202

(502) 574-6336
Fax (502) 574-5366

Julie Lott Hardesty
First Assistant

May 2, 2011

Ms. Ellen Hesen, Chief of Staff
Office of the Louisville Metro Mayor
Metro Hall
527 W. Jefferson Street
Louisville KY 40202

Confidential Client / Attorney Communication

Mr. Steve Rowland, Chief Financial Officer
Louisville Metro Government
Department of Finance & Budget
601 W. Jefferson Street
Louisville KY 40202

Re: **LG&E - Gas Franchise Fees**

Dear Ms. Hesen and Mr. Rowland:

Pursuant to Pat Mulvihill's e-mail request of April 26, 2011 for a formal opinion to be directed to you, the following is provided:

QUESTION

May Louisville Metro Government ("Metro") assess franchise fees on a private utility franchisee which fees are derived in any part from services provided by the utility within the corporate limits of incorporated cities in Jefferson County?

SUMMARY OF OPINION

The answer is "no." Under present statutes and constitutional provisions regarding the award of municipal franchises to private utilities, Metro is authorized only to regulate the utility's use of Metro facilities and/or its

right of way to provide the services. Accordingly, Metro has no authority to require a private utility franchisee, by contract or otherwise, (1) to provide services in any area not within Metro's jurisdiction; or (2) to pay to Metro franchise fees based on the utility's provision of services within other municipal jurisdictions.

OPINION AND ANALYSIS

Section 163 of the Kentucky Constitution requires utilities to obtain a franchise from a municipality to use the municipality's right-of-way to lay its pipes or mains or erect its poles (Tab 1). Section 164 lays out the conditions and limitations on a municipality's issuance of a franchise[1] (Tab 2). The franchise awarding a gas transmission and sale franchise to the Louisville Gas & Electric Company ["LG&E"], together with a franchise agreement, is now before the Louisville Metro Council ("Metro Council") for approval. Section 11 of the proposed agreement ["Franchise Fees"] (Tab 3) currently reads as follows:

> "As compensation for the franchise granted to the Company, Louisville Metro shall receive payment of a total annual fee of 3% of gross receipts per quarter from the Company's transmission, distribution, or sale of natural gas to all entities inside Louisville Metro's corporate limits, payable within 30 days of the quarter's end; ..."[2] (Emphasis added).

Section 1 of the franchise agreement also limits the franchise as granted to "the public right of way of Louisville Metro."

KRS 67C.101(1), (Tab 4), provides that a consolidated local government, " ... replaces and supersedes the governments of the pre-existing city of the first class and its county. But, KRS 67C.111(1), (Tab 5), says:

> "(1) All cities other than those of the first class located within the territory of the consolidated local government, upon the successful

[1] For instance, Section 164 provides that the term of a franchise may not exceed 20 years, and that the franchise must be advertised for bids.

[2] For the sake of clarity, as well as conformity with the jurisdictional provisions of KRS Chapter 67C relating to a consolidated government, this office has recommended that the language in this sentence which now reads "inside Metro Louisville's corporate limits" be changed to read "within the jurisdiction of Louisville Metro."

> 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*" [Emphasis added]

Thus, the defined cities within Jefferson County, post merger, remain as fully empowered municipalities under Section 157a of the Constitution and the enactments of the General Assembly applicable to each class of city. Thus, the general **jurisdiction** and authority of Louisville Metro as a municipality is limited by law to (1) the territory encompassed by the city of the first class [Louisville] which the consolidated government replaced, and (2) those areas of Jefferson County *outside* of the territorial boundaries of all *other* cities within Jefferson County which existed as of the onset of Louisville Metro Government pursuant to KRS Chapter 67C.[3]

Sections 163 and 164 of the Constitution make it clear that when a municipality awards a franchise for the purpose of providing utility services to its constituents, it is clearly undertaking what is known as a governmental function as that term is understood and applied under Kentucky law. It is equally clear that unless otherwise authorized by statute or by the Constitution, a municipality may only provide governmental services within its territorial boundaries (jurisdiction) for the benefit of those citizens who live or work within those boundaries. It is but a short step to the principle of Kentucky law that one municipality, Louisville Metro, may not directly or indirectly tax or otherwise assess the citizens of other equally sovereign municipalities, that are incorporated cities within Jefferson County, for services purportedly provided by one to the other; see, e.g. *City of Pioneer Village v. Bullitt County, Ky. 2003, 104 S.W.3d 757, 767; City of Corbin v. Kentucky Utilities Company, Ky. App. 1969, 447 S.W. 2d 356;* and *Miller v. City of Pineville, Ky. 1905, 89 S.W. 261*[4]

In *Dyer v. City of Newport, Ky. 1906, 94 S.W. 25,* the Court held:

> "It is not within the power of the city of Newport to embark in ..... governmental enterprises beyond its territorial jurisdiction. It is not authorized to undertake by contract or otherwise to discharge a governmental duty to localities other than its own territory, for the reasons (1) that a municipality has only such power as is **expressly**

[3] KRS 67C.101(5) states , "A consolidated local government shall have power and jurisdiction throughout the total area embraced by the official jurisdictional boundaries of the county." This section is not a broad as it seems when taken together with, and qualified by KRS 67C.111(1) . This latter statute clearly reserves all municipal powers to 2nd through 6th class cities within the territorial boundaries of Metro Government.

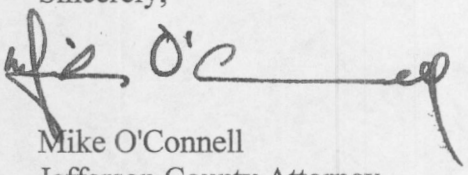
[4] This presumes the absence of explicit statutory authorization or some kind of Interlocal Cooperation Agreement between the municipalities involved.

> delegated to it by the Legislature, and such as is incidentally included therein; and (2) that to execute any power of government presupposes the power to levy and collect taxes from its inhabitants and property within its jurisdiction to defray the expenses incurred in its execution. **There is no express and no implied grant of power to Newport to engage in such enterprise beyond its corporate limits; nor has it the right, therefore, to levy and collect taxes for such purpose." (Emphasis added).**

This is still the law unless and until changed by the General Assembly pursuant to its power to do so under Section 157a of the Constitution.

This issue may, on its face, appear inequitable. However, resolution of such inequities is within the province of the General Assembly or by other agreements entered into from time to time with surrounding communities

Sincerely,



Mike O'Connell
Jefferson County Attorney

Cc: Louisville Metro Council Members

Kentucky Constitution

Section 163

Public utilities must obtain franchise to use streets.

No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus 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; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

Text as Ratified on: August 3, 1891, and revised September 28, 1891.
History: Not yet amended.

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Exhibit #1

Kentucky Constitution

Section 164

Term of franchises limited -- Advertisement and bids.

No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway.

Text as Ratified on: August 3, 1891, and revised September 28, 1891.
History: Not yet amended.

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Exhibit #2

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT by and between Louisville/Jefferson County Metro Government, a consolidated local Government of the Commonwealth of Kentucky ("Louisville Metro"), and LOUISVILLE GAS AND ELECTRIC COMPANY, a Kentucky Corporation, 220 West Main Street, Louisville, Kentucky 40232 (the "COMPANY"):

NOW, THEREFORE, for good and valuable consideration, the parties hereto, agree as follows:

SECTION 1. GRANT OF FRANCHISE. There is hereby created a non-exclusive franchise to acquire, lay, maintain and operate in the public right of way of Louisville Metro a system of mains, pipes, fixtures and appliances for the transmission, distribution, and sale of gas for heating and other purposes, subject to all the provisions of this Franchise Agreement.

SECTION 2. RIGHTS RESERVED BY LOUISVILLE METRO.

A. Subject to the laws of the United States and the Commonwealth of Kentucky, and to the ordinances of Louisville Metro. The Company shall have the right and privilege of laying and maintaining gas mains, pipes, wire, manholes, ducts, and other apparatus, equipment, and facilities (collectively "Equipment") necessary, essential, and/or used or useful for the transmission, distribution, and sale of natural gas for heating and other purposes within Louisville Metro or to any other town or any portion of the county or to any other county, subject to the provisions of this Franchise Agreement. The Equipment may be placed in, along, under, and across (but not above) the streets, and to transmit, distribute and sell gas through Equipment, within the statutory boundaries of Louisville Metro as they now exist or may hereafter be extended; subject to the provisions of this Franchise Agreement, to Louisville Metro regulations and ordinances applicable to utilities (including but not limited to compliance with work standards, obtaining permits, work hours, and payment of permit fees),, and to all powers (including police powers) inherent to, conferred upon, or reserved to Louisville Metro.

Exhibit #3

B. Louisville Metro reserves the right to make such tests of gas meters, pressure, specific gravity and heat value of the gas furnished by Company hereunder as it shall deem necessary or advisable.

C. The Company agrees further to furnish the Mayor of Louisville Metro and the Jefferson County Attorney of written notice, by certified mail, concurrent with its filing an application with the Public Service Commission for an increase in rates, and such notice shall specify amount and type of increase to be sought and alerting to Louisville Metro that such a filing is being made. The Company agrees to maintain "as-built" drawings of all Equipment within the right-of-way, and to provide said drawings to the Director of Public Works, as requested.

SECTION 3. FRANCHISEE WORK IN THE RIGHT OF WAY. No right of way shall be disturbed and no excavation in any of the right of way will be made, except in accordance with Louisville Metro's regulations and ordinances relating to the use of the right of way and with the written permission of the Director of Public Works and Assets, or the Director's Designee (hereinafter "the Director") and under his/her supervision. Equipment of the Company shall be located within the Louisville Metro right of way as may be designated by the Director, and in accordance with Regulations issued by the Director pursuant to law and ordinances. Should the Company fail or refuse to replace or restore right of way to Louisville Metro standards or condition as required by the Director within a reasonable time, then the right of way may be replaced and restored by Louisville Metro under the direction of the Director at the cost and expense of the Company. Work by the Company as required in this Franchise Agreement shall be done in a workmanlike manner and so as not to unnecessarily interfere with public use of any of Louisville Metro right of way.

SECTION 4. LOUISVILLE METRO ORDERED WORK IN THE RIGHT OF WAY. Whenever Louisville Metro or any of its departments or agencies shall grade, regrade, widen, or alter

the right of way, or shall construct, reconstruct, or alter any other municipal public works therein, it shall be the duty of the Company, when so ordered by Louisville Metro, to change its equipment in the right of way at its own expense so as to conform to the established grade or line of such street and so as not to interfere with such municipal public works so constructed, reconstructed or altered.

SECTION 5. INDEMNIFICATION AND HOLD HARMLESS. The Company shall indemnify, hold harmless, and defend Louisville Metro, its elected and appointed officials, employees, agents, and successors in interest from all claims, damages, losses, and expenses including attorneys' fees, arising out of or resulting, directly or indirectly, from the Company's (or Company's Subcontractors, if any) performance or breach of the contract, provided that such claim, damage, loss, or expense is: (1) attributable to personal injury, bodily injury, sickness, death, or to injury to or destruction of property, including the loss of use resulting therefrom, or breach of contract; and (2) not caused by the negligent act or omission or willful misconduct of Louisville Metro or its elected and appointed officials and employees acting within the scope of their employment. This Hold Harmless and Indemnification Clause shall in no way be limited by any financial responsibility or insurance requirements and shall survive the termination of this Contract.

SECTION 6. FINANCIAL REPORTS. When requested to do so by Louisville Metro, the Company shall make available to Louisville Metro copies of its regular monthly or annual statements, reports, and records as to heat value and pressure of gas distributed pursuant to this franchise, and such other reports as Louisville Metro may reasonably request.

SECTION 7. ENERGY ASSISTANCE PROGRAMS. The Company agrees to continue to cooperate with state and local government low-income energy assistance efforts, including state and local government energy assistance programs, and further agrees to the continued operation of a voluntary customer check off system for customer contributions to energy assistance efforts, such as Winterhelp.

SECTION 8. TERM OF FRANCHISE. The franchise hereby granted is not exclusive and shall be in effect for a term of ten years, beginning on the date the franchise is awarded by Louisville Metro, unless terminated sooner under the terms of this Franchise Agreement. The effective date of this agreement shall also be subject to the provisions of Section 16, below. Louisville Metro has a one-time right to re-open this Franchise Agreement for the purpose of reviewing or revising terms after the fifth year of this Franchise Agreement is complete.

SECTION 9. TRANSFER OF FRANCHISE.

(A) The Company is hereby given the right to transfer or assign the franchise created by this Ordinance to any person, firm or corporation that is able, ready, and willing to carry out the terms of this franchise, except that the Company shall, prior to such transfer or assignment, obtain from the Director written consent to such transfer or assignment upon the terms and conditions set forth in this Section 9, which consent shall not be unreasonably withheld.

(B) During the term of the franchise, the Company shall not sell, transfer, assign, lease, dispose of, exchange or release (hereinafter collectively referred to as a "transfer") of more than five per centum of the ownership of its gas transmission system to a person, (hereinafter "proposed transferee") without the prior written authorization of the Director.

(1) In seeking said prior written authorization, the Company shall have the responsibility:

(a) To establish to the satisfaction of the Director the financial solvency of the proposed transferee by submitting all current financial other data for the proposed transferee such as will demonstrate the financial and technical capability of the proposed transferee to carry out the terms and conditions of this Franchise Agreement.

(b) To otherwise establish to the satisfaction of the Director that the

financial standing of the proposed transferee is such that the proposed transferee will in all respects be able to maintain and operate the Company's gas transmission system for the remaining term of the Franchise Agreement.

(C) Any proposed transferee shall execute an agreement, in the form and containing the conditions approved by the Jefferson County Attorney, that it will assume and be bound by all of the provisions, terms and conditions of this Franchise Agreement as well as all applicable federal and state laws and Louisville Metro ordinances, and further that the proposed transferee shall be primarily liable and obligated under said documents without, however, relieving the company from its obligations to the Louisville Metro area under the terms and conditions of the Franchise Agreement.

(D) No transfer pursuant to this Section 9 shall be made within 13 months of the termination date of the term of Franchise Agreement.

(E) Nothing in any approval by the Director or by Louisville Metro of any transfer shall be construed to waive or release any rights of Louisville Metro in and to the streets, public ways, public places, and right of way of Louisville Metro or as a release of any of the Louisville Metro's police powers.

(F) The occurrence of any event which constitutes either grounds for entry into or application for, or an Order for Relief under the United States Bankruptcy Code, or placement of the Company into receivership, or the issuance of any order to the Company or any of its stockholders by a government agency or court of competent jurisdiction to divest any interest related to the gas transmission system which is the subject of this Franchise Agreement, or the entry of any judgment against the Company which, in the opinion of Louisville Metro impairs the Company's credit, shall be deemed an unauthorized transfer and assignment under the provisions of this subchapter and shall:

(1) Be deemed a material breach and default of this Franchise Agreement; and

(E) Shall subject the Company to any and all remedies, legal and equitable, which are available to Louisville Metro in order to protect the safety and welfare of its citizens whether such remedies are set forth in this Franchise Agreement or otherwise.

(G) The occurrence of an unauthorized transfer may, at the sole option of Louisville Metro, terminate the Franchise Agreement and accelerate all of Louisville Metro's rights and remedies including, inter alia, the right of Louisville Metro to award a franchise to another person. The Company shall notify the Metro Chief Financial Officer of any occurrence which constitutes an unauthorized transfer under the provisions of this Section 9 and of the entry of any judgment against it within 24 hours of such occurrence.

(H) From and after any of the occurrences enumerated in Section (G), the Company shall not make, execute or enter into any deed, deed of trust, mortgage, contract, conditional sale contract or any loan, lease, pledge, sale, or any other agreement or hypothecation concerning any of the facilities or property, real or personal, of the gas transmission system without the written approval of the Director.

SECTION 10. POSSIBLE RATE REGULATION.

(A) In the event that the Public Service Commission of Kentucky shall cease to have jurisdiction over Company's gas rates and service and no other regulatory authority shall have by law such jurisdiction over gas rates and service in Louisville Metro, then the Metro Council of the Louisville Metro shall have regulatory jurisdiction over Company's gas rates and service in Louisville Metro within the limits permitted by law and to the extent that the Public Service Commission of Kentucky presently has such jurisdiction; provided, however, Company shall have the right to seek redress in court by appeal or otherwise from any regulatory order or action of the Metro Council of Louisville Metro on the ground that such order or action is unjust, unreasonable, unlawful or confiscatory.

(B) If the Metro Council acquires regulatory jurisdiction as aforesaid, the then existing

SECTION 14. DEFINITIONS. Terms not defined but referred to in this Franchise Agreement shall be construed to reflect a common usage.

SECTION 15. TERMINATION. Either party to this Franchise Agreement may terminate the Franchise Agreement upon one (1) year's written notice to the non-terminating party. In the event that the Company abandons or terminates this Franchise Agreement, the Company shall at the Metro Government's direction, restore any property, public or private, to Louisville Metro standards, including any improvements made to such right of way. Restoration of Louisville Metro right of way shall be in accordance with the directions and specifications of Louisville Metro and all applicable laws. The Company, at the option and direction of the Metro Government, shall restore the right of way at its expense.

SECTION 16. EFFECTIVE DATE OF AGREEMENT. This agreement shall be effective only upon (1) the issuance by the Kentucky Public Service Commission of all approvals and certificates required by law; and (2) the solicitation of bids by Louisville Metro for a franchise as is defined and provided in this agreement in accordance with Kentucky law.

IN WITNESS WHEREOF, the Parties have executed this Franchise Agreement this ____ day of _____, 201_.

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, KENTUCKY	LOUISVILLE GAS AND ELECTRIC COMPANY
By:	By:

Greg Fischer Mayor	Title:
APPROVED AS TO FORM AND LEGALITY: Michael J. O'Connell Jefferson County Attorney By:	

67C.101 Election to approve consolidation of county and city of the first class — Powers, privileges, and jurisdiction of consolidated local government.

(1) The governmental and corporate functions vested in any city of the first class shall, upon approval by the voters of the county at a regular or special election, be consolidated with the governmental and corporate functions of the county containing the city. This single government replaces and supersedes the governments of the pre-existing city of the first class and its county.

(2) (a) A consolidated local government shall have all powers and privileges that cities of the first class and their counties are, or may hereafter be, authorized to exercise under the Constitution and the general laws of the Commonwealth of Kentucky, including but not limited to those powers granted to cities of the first class and their counties under their respective home rule powers.

(b) A consolidated local government shall continue to exercise these powers and privileges notwithstanding repeal or amendment of any of the laws upon which the powers and privileges are based unless expressly repealed or amended for consolidated local governments.

(c) In addition, a consolidated local government shall have other powers and privileges as the government may be authorized to exercise under the Constitution and general laws of the Commonwealth of Kentucky.

(d) A consolidated local government is neither a city government nor a county government as those forms of government exist on July 15, 2002, but it is a separate classification of government which possess the greater powers conferred upon, and is subject to the lesser restrictions applicable to, county government and cities of the first class under the Constitution and general laws of the Commonwealth of Kentucky.

(e) A consolidated local government shall be accorded the same sovereign immunity granted counties, their agencies, officers, and employees.

(3) A consolidated local government shall have power and authority to:

(a) Levy and collect taxes upon all property taxable for state purposes within the territorial limits of the consolidated local government not exempt by law from taxation;

(b) License, tax, and regulate privileges, occupations, trades, and professions authorized by law, to be uniform throughout the jurisdiction;

(c) Make appropriations for the support of the consolidated local government and provide for the payment of all debts and expenses of the consolidated local government and the debts and expenses of the county and city of which it is the successor;

(d) Issue or cause to be issued bonds and other debt instruments that counties containing a city of the first class are authorized to issue or enter into all other financial transactions as may be permitted by law;

(e) Purchase, lease, construct, maintain, or otherwise acquire, hold, use, and operate any property, real or personal, for any public purpose, and sell, lease,

Exhibit # 4

or otherwise dispose of any property, real or personal, belonging to a consolidated local government;

(f) Exercise the power of eminent domain for any public purpose subject to the limitations and exceptions prescribed by the Constitution and the general laws of the Commonwealth of Kentucky;

(g) Accept federal or state funds and other sources of revenue that are applicable to counties and cities of the first class;

(h) Establish, erect, maintain, and operate facilities for the confinement, detention, and rehabilitation of persons convicted of the violation of the ordinances and laws of a consolidated local government or the Commonwealth of Kentucky;

(i) Pass and enforce by fines and penalties, if necessary, all ordinances not inconsistent with law, as are expedient in maintaining the peace, good government, health, and welfare of the inhabitants of the county and prevent, abate, and remove nuisances;

(j) Collect and dispose of garbage, junk, and other refuse, and regulate the collection and disposal of garbage, junk, and other refuse by others;

(k) Provide for the redevelopment, renewal, or rehabilitation of blighted, deteriorated, or dilapidated areas;

(l) Enforce zoning regulations;

(m) Enter into contracts and agreements with other governmental entities and with private persons, firms, and corporations;

(n) Adopt procedures for collective bargaining with its employees and for the certification of exclusive bargaining agents for groups of employees in accordance with the Constitution and general laws of the Commonwealth of Kentucky and its ordinances; and

(o) Exercise all other powers and authorities granted to counties and cities of the first class by the general laws of the Commonwealth of Kentucky.

(4) The powers of the consolidated local government shall be construed liberally in favor of the consolidated local government. The specific mention or failure to mention of particular powers in this section shall not be construed as limiting in any way the general or specific powers of a consolidated local government.

(5) A consolidated local government shall have power and jurisdiction throughout the local area embraced by the official juridical and boundaries of the county.

(6) A consolidated local government shall be known as ....../..... County Metro Government, which shall be the combination of the names of the largest city in existence on the date of the adoption of the consolidated local government and the county.

Effective: July 14, 2000

History: Amended 2000 Ky. Acts ch. 346, sec. 2, effective July 14, 2000. -- Created 2000 Ky. Acts ch. 346, sec. 1, effective July 14, 2000.

or otherwise dispose of any property, real or personal, belonging to a consolidated local government;

(g) Exercise the power of eminent domain for any public purpose subject to the limitations and exceptions prescribed by the Constitution and the general laws of the Commonwealth of Kentucky;

(h) Accept federal or state funds and other sources of revenue that are available to counties and cities of the first class;

(i) Establish, erect, maintain, and operate facilities for the confinement, detention, and rehabilitation of persons convicted of the violation of the ordinances and laws of a consolidated local government or the Commonwealth of Kentucky;

(j) Pass and enforce by fines and penalties, if necessary, all ordinances not inconsistent with law, as are expedient in maintaining the peace, good government, health, and welfare of the inhabitants of the county and prevent, abate, and remove nuisances;

(k) Collect and dispose of garbage, junk, and other refuse, and regulate the collection and disposal of garbage, junk, and other refuse by others;

(l) Provide for the redevelopment, renewal, or rehabilitation of blighted, deteriorated, or dilapidated areas;

(m) Enforce zoning regulations;

(n) Enter into contracts and agreements with other governmental entities and with private persons, firms, and corporations;

(o) Adopt procedures for collective bargaining with its employees and for the certification of exclusive bargaining agents for groups of employees in accordance with the Constitution and general laws of the Commonwealth of Kentucky and its ordinances; and

(p) Exercise all other powers and authority granted to counties and cities of the first class by the general laws of the Commonwealth of Kentucky.

(4) The powers of the consolidated local government shall be construed broadly in favor of the consolidated local government. The specific mention, or failure to mention, of particular powers in this section shall not be construed as limiting in any way the general or specific powers of a consolidated local government.

(5) A consolidated local government shall have power and jurisdiction throughout the total area embraced by the official jurisdictional boundaries of the county.

(6) A consolidated local government shall be known as ..../..... County Metro Government, which shall be the combination of the names of the largest city in existence on the date of the adoption of the consolidated local government and the county.

Effective: July 14, 2002

History: Amended 2002 Ky. Acts ch. 346, sec. 53, effective July 14, 2002. -- Created 2000 Ky. Acts ch. 184, sec. 1, effective July 14, 2000.

67C.111 Status of cities other than those of the first class located within the territory of the consolidated local government.

(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.

(2) Upon the adoption of a consolidated local government in a county containing a city of the first class, there shall be no further incorporations of cities within the county.

(3) Upon the adoption of a consolidated local government in a county containing a city of the first class, there shall be no annexations for a period of twelve (12) years by any city remaining in the county. After that time, any proposed annexation by a city in that county shall first receive the approval of the legislative council of the consolidated local government prior to the city proceeding under the provisions of KRS Chapter 81A. The city shall request the approval of the consolidated legislative council by ordinance. The consolidated legislative council's decision shall be made by ordinance and within sixty (60) days of the receipt of the request by the affected city. If an ordinance has not been enacted by the consolidated legislative council within sixty (60) days, the request for a city to proceed with an annexation proposal shall be deemed to be approved by the consolidated legislative council.

(4) The adoption of a consolidated local government in a county containing a city of the first class shall not prevent the merger or dissolution of any existing cities as provided by law or the merger of any remaining cities with the newly consolidated local government.

Effective: July 14, 2000

History: Created 2000 Ky. Acts ch. 189, sec. 6, effective July 14, 2000.

Exhibit #5

Calvert v. Rector

Court of Appeals of Kentucky

July 26, 2013, Rendered

NO. 2012-CA-000476-MR

Reporter
2013 Ky. App. Unpub. LEXIS 622 *; 2013 WL 3895828

DAN CALVERT, APPELLANT v. DIANE RECTOR; DIANE RECTOR, in her capacity as Executor of the ESTATE of JAMES CALVERT; AND DONNA LEWIS, APPELLEES

Prior History: **[*1]** APPEAL FROM DAVIESS CIRCUIT COURT. HONORABLE JOSEPH W. CASTLEN III, JUDGE. ACTION NO. 10-CI-01244.

Core Terms

references, fail to comply, circuit court, parties, ample, appellate brief, deficiencies, sentences, requires, blatant, directs, lawyers

Counsel: BRIEF FOR APPELLANT: Nicholas Goetz, Owensboro, Kentucky.

BRIEF FOR APPELLEE: Clifton A. Boswell, Owensboro, Kentucky.

Judges: BEFORE: CAPERTON, COMBS, AND LAMBERT, JUDGES. ALL CONCUR.

Opinion by: COMBS

Opinion

AFFIRMING

COMBS, JUDGE: Dan Calvert appeals the judgments against him entered on December 29, 2011, and February 21, 2012, in Daviess Circuit Court. Due to the severe deficiencies of his brief, we decline to address the merits and, therefore, affirm.

Kentucky Rule[s] of Civil Procedure (*CR) 76.12* provides guidelines for appellate briefs. "A brief may be stricken for failure to comply with any substantial requirement of this Rule[.]" *CR 76.12(8)(a)*. We routinely exercise leniency with parties proceeding *pro se*. However, in this case, Calvert is represented by counsel, and the errors are both serious and numerous.

CR 76.12(4)(c)(i) directs that a brief include an INTRODUCTION "not exceeding two simple sentences[.]" The introduction of Calvert's brief contains three sentences. Although this error alone surely is not a serious one, it marks the beginning of a series of deficiencies that cumulatively mandate our striking **[*2]** the brief.

The next error is more troubling. *CR 76.12(4)(c)(iv)* requires a STATEMENT OF THE CASE "consisting of a chronological summary of the facts and procedural events ***necessary to an understanding of the issues*** presented by the appeal, ***with ample references***" to the record. (Emphases added). Calvert's brief explains neither the factual nor procedural history of the case. It fails to identify either the appellees or the action that had been filed in circuit court presumably underlying this appeal. The brief fails to explain its objection to the judgment from which the appeal is taken. Thus, this

Court is put in the untenable position of speculating as to the possible legal premise supposedly supporting the appeal. Furthermore, there are ***no*** references to the record — much less the ample references required by the rule. It is not the responsibility or prerogative of the court to search the record for support of a party's contentions. We are neither required nor empowered to practice law in lieu of or on behalf of the parties before us. *Smith v. Smith, 235 S.W.3d 1, 5 (Ky. App. 2006)*.

Finally, Calvert's brief also fails to comply with *CR 76.12(4)(c)(v)*, which requires a reference to the **[*3]** record supporting preservation of the errors asserted in the ARGUMENT section of the brief. This rule also directs that the argument include references to the record. And again, Calvert has failed to cite to the record in support of his contentions.

While striking a brief is indeed an ultimate recourse, we note the admonition recently articulated by this Court in the separate concurrence of Senior Judge Harris:

> [T]he Court should strike the Appellant's brief because of ***blatant failure*** to comply with the requirement that an appellate brief set forth "ample references to the specific pages of the record . . . ." I fear that letting lawyers get by with the disregard of the rules serves only to foster and encourage further erosion of the standards to which Kentucky lawyers should be held.

J.M. v. Commonwealth, Cabinet for Health and Family Services, 325 S.W.3d 901, 904 (Ky. App. 2010) (Sr. J. Harris concurring). (Emphasis added.)

Regrettably, the failures in this case are so blatant as to compel our striking the brief. We affirm the Daviess Circuit Court.

ALL CONCUR.

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