

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

This matter is before the Commission upon a motion filed by Louisville/Jefferson County Metro Government (“Louisville Metro”) seeking dismissal of Louisville Gas and Electric Company’s (“LG&E”) application for a declaratory ruling regarding the proper method of recovering the municipal franchise fee pursuant to a natural gas franchise agreement (“Franchise Agreement”) entered into between Louisville Metro and LG&E. Alternatively, Louisville Metro requests that the record of this matter be incorporated into Louisville Metro’s complaint case, Case No. 2016-00347,¹ and that this matter then be dismissed. In support of its motion, Louisville Metro asserts that the language of the Franchise Agreement at issue contemplated that Louisville Metro would file a complaint against LG&E challenging the method of recovery of the franchise fee. Louisville Metro argues that there are no provisions in the Franchise Agreement that contemplate the resolution of the issue regarding the collection of the franchise fee via an application for a declaratory order by LG&E. Louisville Metro further asserts that disputes over a utility’s rates should be governed by the processes under KRS 278.260 and 807 KAR

¹ Case No. 2016-00347, *Louisville/Jefferson County Metro Government v. Louisville Gas and Electric Company* (Complaint filed Sept. 19, 2016.)

5:001, Section 20, relating to formal complaints, and that Louisville Metro has filed such a complaint with the Commission, docketed as Case No. 2016-00347. Last, Louisville Metro contends that the single issue raised by LG&E in the instant matter is best addressed through the exploration of the three issues that Louisville Metro has raised in Case No. 2016-00347 given that the issue raised by LG&E is the same as that raised in the first claim in Louisville Metro's complaint. Accordingly, Louisville Metro concludes that dismissal of this matter would not prejudice any party herein and would promote judicial economy because the issue raised by LG&E in this case would be addressed in Case No. 2016-00347.

On September 29, 2016, LG&E filed a response requesting that the Commission deny Louisville Metro's motion in its entirety. LG&E contends that it filed the instant application because legal questions regarding the method of recovery of the franchise fee arose during the negotiation of the natural gas Franchise Agreement with Louisville Metro. LG&E maintains that the express terms of the Franchise Agreement reflect the difference of opinion between Louisville Metro and LG&E on the method of recovery issue and that the Franchise Agreement merely memorializes each party's existing rights to seek the legal remedies available to it, including any action before the Commission to resolve the issue. LG&E further maintains that nothing in KRS 278.260, or the formal complaint process set forth in 807 KAR 5:001, Section 20, requires that this dispute be resolved pursuant to a formal complaint. LG&E contends that the declaratory order process as set forth in 807 KAR 5:001, Section 19, is an appropriate mechanism for resolving this dispute because that process could, if the Commission so desires, contain a hearing for the purpose of allowing the parties to present oral

arguments and a discovery schedule. LG&E argues that the issues contained in Louisville Metro's complaint in Case No. 2016-00347 are duplicative of the issues raised in this matter.² Lastly, LG&E asserts that judicial economy is not a basis to dismiss the instant matter and, if the Commission were to consolidate the two cases, LG&E asserts that this action should survive because there is no legal or factual reason for the first-filed action to be consolidated into the second-filed action.

On October 4, 2016, Louisville Metro filed its reply in support of its motion to dismiss. Louisville Metro claims that the plain language of the Franchise Agreement clearly indicates both parties' anticipation and contemplation that issues related to the Franchise Agreement would be explored in an action filed by Louisville Metro with the Commission. Louisville Metro contends that the Franchise Agreement allows LG&E to file a case with the Commission only if, for some reason, Louisville Metro were not to file a case. Louisville Metro further claims that KRS 278.260 is the only procedure available to it to challenge LG&E's franchise fee recovery methods, relying upon a Kentucky Court of Appeals opinion in *Southern Bell Telephone & Telegraph Co. v. City of Louisville*,³ and on this basis argues that the Commission should dismiss the instant matter. Louisville Metro reiterates that it is more efficient to address the legal issue raised by LG&E as part of Louisville Metro's complaint in Case No. 2016-00347, which contains additional issues beyond what is raised in this matter.

² Contrary to Louisville Metro's characterizations, LG&E states that it has asked the Commission to make two legal determinations: 1) that LG&E must abide by its tariff and 2) that, pursuant to Commission policy, LG&E's tariff requires recovery of municipal franchise fees as a line-item charge on the bills of the ratepayers residing within the jurisdiction imposing the franchise fee.

³ 96 S.W.2d 695, 697 (Ky. App. 1936).

Having reviewed the pleadings and being otherwise sufficiently advised, the Commission finds that the Franchise Agreement does not limit or restrict the rights of LG&E to bring the instant action to resolve the dispute concerning the methodology for recovery of the franchise fee. Neither does it specify whether either party has a superior right to file an action with the Commission to resolve the dispute. We note that the Franchise Agreement memorializes the dispute at issue and sets out the parties' respective rights to challenge or resolve the legality of the methodology by which LG&E intends to recover the franchise fee. Section 12 of the Franchise Agreement provides, in relevant part, as follows:

This Franchise Agreement contemplates that Louisville Metro reserves the right to challenge the Company's method of recovery of the Franchise Fee at the Kentucky Public Service Commission or any other court of competent jurisdiction. Both Louisville Metro and the Company reserve the right to challenge the jurisdiction of any forum where the Company's method of recovering the cost of the Franchise Fee from its customers is challenged. The Company and Louisville Metro, separately, reserve the right to seek all administrative relief from the Kentucky Public Service Commission or any other court of competent jurisdiction, including appeals of any final orders as permitted by law.

A plain reading of this section makes it clear that Louisville Metro could assert its rights to challenge the validity of how LG&E recovers the franchise fee by a filing "at the Public Service Commission or any other court of competent jurisdiction." Louisville Metro's right to so assert such a right is consistent with the pronouncement made in the *Southern Bell Telephone & Telegraph Co. v. City of Louisville* opinion. Section 12 of the Franchise Agreement also preserves the rights of both parties "to seek all administrative relief" from the Commission on the issue of the franchise fee methodology. There is no provision in Section 12 that imposes any limitation or condition upon the respective

rights of either Louisville Metro or LG&E to so seek redress with the Commission. Thus, LG&E has a right to file an action for a declaratory ruling pursuant to 807 KAR 5:001, Section 19, and Louisville Metro has a right to file a complaint pursuant to KRS 278.260. Finding that there is nothing in the Franchise Agreement or in the Commission's statutes or regulations that would prohibit LG&E's instant application, we will deny Louisville Metro's motion to dismiss.

The Commission also takes notice that an Order was issued today in Case No. 2016-00347 dismissing Louisville Metro's amended complaint in that matter for failure to state a *prima facie* case, but finding that Louisville Metro had provided sufficient evidence to justify a review of the allegations contained in its amended complaint and consolidating Case No. 2016-00347 into the instant matter. The Commission further finds that a procedural schedule is necessary for the processing of this matter. Accordingly, we will grant Louisville Metro's motion requesting that a procedural schedule be established.

IT IS THEREFORE ORDERED that:

1. Louisville Metro's motion to dismiss is denied.
2. Louisville Metro's motion for a procedural schedule is granted.
3. Pursuant to 807 KAR 5:001, Section 4(4), the case record of Case No. 2016-00347 shall be physically consolidated into the record of this matter.
4. The procedural schedule set forth in the appendix to this Order shall be followed.
5. a. Responses to requests for information in paper medium shall be appropriately bound, tabbed and indexed, and shall include the name of the witness

responsible for responding to the questions related to the information provided, with an original in paper medium and six copies in paper medium and an electronic version to the Commission.

b. Each response shall be answered under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.

c. Any party shall make timely amendment to any prior response if it obtains information which indicates that the response was incorrect when made or, though correct when made, is now incorrect in any material respect.

d. For any request to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.

e. Careful attention should be given to copied material to ensure that it is legible. When the requested information has been previously provided in this proceeding in the requested format, reference may be made to the specific location of that information in responding to this request.

f. A party filing a paper containing personal information shall, in accordance with 807 KAR 5:001, Section 4(10), encrypt or redact the paper so that personal information cannot be read.

6. Any party filing a paper with the Commission shall file an electronic copy in accordance with the electronic filing procedures set forth in 807 KAR 5:001, Section 8, and shall also file an original and six copies in paper medium. The original and copies in paper medium of testimony shall be appropriately bound, tabbed and indexed.

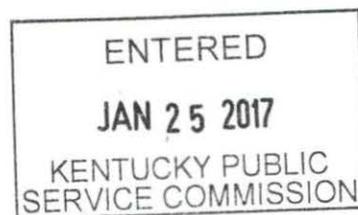
7. Any motion to intervene filed after February 3, 2017, shall show a basis for intervention and good cause for being untimely. If the untimely motion is granted, the movant shall accept and abide by the existing procedural schedule.

8. Pursuant to KRS 278.360 and 807 KAR 5:001, Section 9(9), a digital video transcript shall be made of the hearing.

9. Motions for extensions of time with respect to the schedule herein shall be made in writing and will be granted only upon a showing of good cause.

10. Nothing contained herein shall prevent the Commission from entering further Orders in this matter.

By the Commission



ATTEST:


Executive Director

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2016-00317 DATED **JAN 25 2017**

Requests for intervention shall be filed no later than 02/03/17

Each party shall simultaneously file, in verified form,
its testimony, if any, addressing all relevant
issues no later than 02/28/17

All requests for information to each party
shall be filed no later than 03/10/17

Each party shall file responses to requests
for information to it no later than..... 03/24/17

Each party shall file, in verified form,
its rebuttal testimony, if any, no later than..... 04/03/17

Formal Hearing to be held in Hearing Room 1
of the Commission's offices at 211 Sower Boulevard,
Frankfort, Kentucky, for the purposes of taking oral
arguments from the parties To Be Scheduled

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