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Via Hand Delivery

September 9, 2011

Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602-0615

RECEIVED

SEP 09 2011

PUBLIC SERVICE
COMMISSION

Re: Application Of Kentucky Power Company For A Certificate Of Public
Convenience And Necessity Authorizing The Applicant To Obtain A Franchise In
The City Of Ashland, Boyd County, Kentucky, Case No. 2011-00018

Dear Mr. Derouen:

Enclosed herewith please find for filing with the Commission in the above-styled matter an original and 10 copies of the Response Of Ashland To The Notice Of Filing Of Franchise Ordinance By Kentucky Power Company.

If you, or your staff, have any questions regarding this filing, please do not hesitate to contact me.

Sincerely,

Holland N. McTyeire, V

HNM/jh

Enclosures

cc: Richard W. Martin

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Kentucky Power not place a pro-rata franchise charge on individual customer's monthly bills as a separate line item. The City subsequently granted Kentucky Power the Franchise with the condition that Kentucky Power comply with Section 8 of Ordinance No. 84, 2011 by not placing the franchise fee as a separate item on the customer's billing. The City in its Ordinance stated that it would seek Court review of Kentucky Power's refusal to comply with the City's bid provisions. Kentucky Power has ignored the requirement enumerated in Section 8 of Ordinance No. 84, 2011. Section 8 of Ordinance No. 84, of 2011 is neither ambiguous or unreasonable nor is it arbitrary or capricious. Ordinance No. 84, 2011, Exhibit A.

With disregard for Section 8 of Ordinance No. 84, 2011, Kentucky Power has placed a pro-rata franchise "tax" on each customer's monthly bill thereby fully recouping the franchise fee directly from residents of the City within Kentucky Power's service territory. KRS 278.040(2) expressly states that while the Commission possesses exclusive jurisdiction over the regulation of utility rates, "nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions." Accordingly, the power of the Commission to act is not without limitation.

The Kentucky Supreme Court held in *Peoples Gas Co. of Kentucky v. City of Barbourville*, 165 S.W.2d 567 (Ky. 1942) that the Commission only has jurisdiction over rates and does not have jurisdiction over the collection of franchise fees. The Kentucky Court of Appeals also held in *Berea College Utilities v. City of Berea*, 691 S.W.2d 235, 237 (Ky. App. 1985) that a franchisor logically and justly may impose a minimum bid requirement "on terms that are fair and reasonable to the city, the purchaser of the franchise and the patrons of the utility." *See also, Groover v. City of Irvine*, 300 S.W. 904 (Ky. 1927). The conclusion from these authorities is that the Commission does not have jurisdiction over the matter until after the

City awards the Franchise. Therefore, Kentucky Power's argument that a pre-existing tariff changes this result is incorrect because a tariff cannot apply before the Franchise has been awarded and cannot serve to limit the City's ability to impose reasonable conditions on the award of the Franchise.

The purpose of Section 164 of the Kentucky Constitution is to prevent city councils from selling, at an inadequate price, the rights and privileges of Kentucky citizens. Given the lack of competition among public utilities the possibility of unrealistically low bids is certainly not remote. Under Section 164, cities "have the right to reject any and all bids." Obviously included in that right is the right to reject a bid which the franchisor deems inadequate.

The City's requirement that the franchise fee not be a line item charged to the individual customer's bill is a fair and reasonable means to sell its Franchise. To permit Kentucky Power to reject such a condition allows it the right to use the City rights-of-way without any cost.

It is clear that Kentucky Power's actions are repugnant to both the statutory scheme and case law. The City has filed a Petition for Declaration of Rights in the Boyd Circuit Court, Civil Action No. 11-CI-00902, for the Court to determine the legality of the City's Franchise and the responsiveness of Kentucky Power's bid. The City respectfully requests that the Commission determine it lacks jurisdiction to rule on the effect of City Ordinance No. 84, 2011, Section 8 on the Commission Tariff which Kentucky Power believes exempts it from compliance with the Franchise requirements. It is clear that jurisdiction to address this issue lies with the courts and not with the Commission.

WHEREFORE, the City of Ashland prays that the Ordinance filed by Kentucky Power with the Commission be accepted and the Franchise be in effect pending action by the courts to determine the validity of the City's action.

Respectfully submitted,

Richard W. Martin by HNMF

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COUNSEL FOR THE CITY OF ASHLAND

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Response Of Ashland To The Notice Of Filing Of Franchise Ordinance By Kentucky Power Company was mailed via United States Mail, postage prepaid, to Mark R. Overstreet, Stites & Harbison, PLLC, P. O. Box 634, Frankfort, Kentucky 40602-0634, counsel for Kentucky Power Company, on this 9th day of September, 2011.

H.N. McTyeire

COUNSEL FOR THE CITY OF ASHLAND

ORDINANCE NO. 84, 2011

AN ORDINANCE OF THE CITY OF ASHLAND, KENTUCKY, GRANTING FOR A TERM OF TEN (10) YEARS TO KENTUCKY POWER COMPANY, A DIVISION OF AMERICAN ELECTRIC POWER, ITS SUCCESSORS AND ASSIGNS, A FRANCHISE, PRIVILEGE, RIGHT AND AUTHORITY TO ACQUIRE, MAINTAIN, CONSTRUCT AND OPERATE IN, ABOVE, UNDER, ACROSS AND ALONG THE STREETS, THOROUGHFARES, ALLEYS, BRIDGES AND PUBLIC PLACES OF THE CITY OF ASHLAND, KENTUCKY AND ITS SUCCESSORS AND ASSIGNS, LINES, POLES AND EQUIPMENT FOR THE TRANSPORTATION, TRANSMISSION AND DISTRIBUTION OF ELECTRIC ENERGY TO THE CITY OF ASHLAND AND THE INHABITANTS THEREOF, AND THE PERSONS AND CORPORATIONS BEYOND THE LIMITS THEREOF FOR LIGHT, HEAT, POWER AND ANY OTHER PURPOSES, AND FOR THE TRANSMISSION, TRANSPORTATION AND DISTRIBUTION OF SAME WITHIN, THROUGH OR ACROSS SAID CITY AND REPEALING ORDINANCE NO., 69, SERIES OF 2002.

* * * * *

WHEREAS, there is now existing a franchise for an electric power company to own, maintain and operate its electric power lines upon, along, over and under the streets, alley, sidewalks and public ways of the City of Ashland, Kentucky, which present franchise expires on July 10, 2011, and

WHEREAS, there is a continuing public necessity for adequate service of electric power and energy to the citizens of the City of Ashland, Kentucky, and

WHEREAS, it appears that it is to the interest of the public that a franchise be advertised and sold granting and entitling the grantee to use the public ways, streets, alleys and other public places for the erection, operation and maintenance of lines for the transmission and distribution of electric power to the citizens and to persons, firms and corporations beyond the limits of the City of Ashland, Kentucky, and

WHEREAS, Kentucky Power Company, a division of American Electric Power, a corporation organized and existing under the laws of the State of Kentucky, offers to purchase the right, privilege, franchise and authority to erect and operate an electric light and power system in the City of Ashland, Kentucky, and

WHEREAS, a copy of the Certificate of Convenience and Necessity has been issued by the order of the Public Service Commission of Kentucky, Case No. 2011-00018, dated January

18, 2011, authorizing Kentucky Power Company, a division of American Electric Power to bid, and

WHEREAS, Kentucky Power Company, a division of American Electric Power, owns and operates in the City of Ashland, plant and equipment sufficient to render the services required, and is now furnishing adequate service to the City and its inhabitants.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF ASHLAND, KENTUCKY:

SECTION 1. The Kentucky Power Company, a division of American Electric Power, its successors and assigns, hereinafter called the "GRANTEE", are granted the right, privilege and authority to acquire, maintain, construct and operate in, above, under, across and along the streets, thoroughfares, alleys, bridges and public places (as the same now exist or may hereafter be laid out) of the City of Ashland, Boyd County, Kentucky, lines, poles and equipment for the transportation, transmission and distribution of electric energy, either by means of overhead or underground conductors, with all the necessary or desirable appurtenances for the purpose of supplying electric energy to said City and the inhabitants thereof and persons and corporations beyond the limits thereof for light, heat, power and any other purpose or purposes for which electric energy is now or may hereafter be used, and for the transmission of the same within, through or across said City.

SECTION 2. Said lines and appurtenances shall be constructed so as to interfere as little as possible with the traveling public in its use of the streets, thoroughfares, alleys, bridges and public places. The location of all poles and conduits shall be made under the supervision of the City government.

SECTION 3. The right, privilege and franchise shall be in full force and effect for a period of ten (10) years from the effective date of this ordinance.

SECTION 4. The GRANTEE of this franchise shall save the City harmless from any and all liability rising in any way from negligence in the erection, maintenance or operation of said lines and appurtenances.

SECTION 5. The GRANTEE of this franchise shall have the right and privilege to take up such portion or part of any pavement and make such excavation in the streets, thoroughfares, alleys, sidewalks, bridges, public ways and public places of the City of Ashland as may be deemed necessary for the construction and maintenance of its lines, wires or cables,

but whenever the GRANTEE of this franchise shall begin the erection of any lines or other equipment, it shall promptly and diligently prosecute the work to completion and leave the streets, thoroughfares, alleys, bridges and public places where such work is done in as good condition of repair as before such work was commenced and consistent with the then current standards of the City of Ashland.

SECTION 6. Wherever in this franchise either the City of Ashland or the GRANTEE thereof is referred to, it shall be deemed to include the respective successors and assigns of either and all rights, privileges and obligations contained in this franchise shall be binding upon and inure to the benefit of the respective successors and assigns of said City and said GRANTEE, whether so expressed or not.

SECTION 7. The GRANTEE of this franchise may make such rules and regulations covering the furnishing of said electric energy as may be fair and reasonable and consistent with the standard practice of the GRANTEE. Said GRANTEE may charge such rates for electrical service as shall be fair and reasonable. The said GRANTEE shall render service under said franchise of like quality, that is adequate, efficient and reasonable, to that now being rendered to said City.

SECTION 8. 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 3% of revenues collected within Ashland city limits. The successful bidder shall not collect, as a separate item on the periodic bills of its customers, an amount equal to the total of each customer's proportionate part of the franchise fee set forth above. Any effort to collect the 3% from the GRANTEE's Ashland customers will result in the filing of a declaration of rights in Boyd Circuit Court by the City.

The Company shall remit to the City, quarterly, all amounts due under this franchise within forty-five (45) days after each three (3) month period.

SECTION 9. The consideration paid by the successful bidder for the franchise, privilege, right and authority provided for herein, shall be complete compensation and consideration for said franchise, privilege, right and authority, and for the use and occupancy of the streets, thoroughfares, alleys, sidewalks, bridges, public ways and other public places of the City, in lieu of any street or alley rental or of any charge for the use or occupancy of said

streets, thoroughfares, alleys, sidewalks, bridges, public ways and other public places of said City, and in lieu of any pole tax or meter tax.

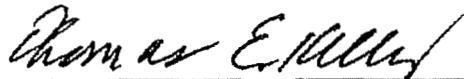
SECTION 10. The City shall have the right, during the life of this franchise, to use, at its own risk and cost for the purpose of fire alarm and traffic control systems, sufficient room upon the poles and sufficient room on the conduits hereafter constructed in underground work to carry the necessary wires for the above purposes and it shall use the same so as not to interfere with the use thereof by the purchaser and the City agrees to indemnify the purchaser against any liability or damage to any person or property for which it may become liable or which it may sustain by reason of any such use of said poles or conduits.

SECTION 11. That Ordinance No. 69, series of 2002, is hereby repealed.

SECTION 12. All ordinances and parts of ordinances in conflict herewith, to the extent of such conflict only, are hereby repealed.

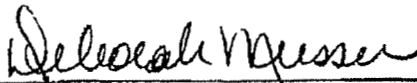
SECTION 13. This ordinance shall be in full force and effect from and after its adoption, readoption and publication, as required by law.

SECTION 14. It is hereby authorized that publication of this ordinance shall be in summary form.



MAYOR

ATTEST:



CITY CLERK

ADOPTED BY THE BOARD OF COMMISSIONERS:

READOPTED BY THE BOARD OF COMMISSIONERS:

PUBLISHED:

JUN 16 2011

JUL 21 2011

REQUESTED/SPONSORED BY: STEPHEN W. CORBITT, CITY MANAGER