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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION _____
CASE NO. 24-CI-_____

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CITY OF COVINGTON, KENTUCKY

PLAINTIFF

v.

DUKE ENERGY KENTUCKY, INC.
CT Corporation System
306 W. Main Street
Suite 512
Frankfort, Kentucky 40601

DEFENDANTS

and

THE KENTUCKY PUBLIC SERVICE COMMISSION
P.O. Box 615,
211 Sower Boulevard,
Frankfort, Kentucky 40602

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE AND/OR
OTHER APPLICABLE RELIEF

Plaintiff, the City of Covington, Kentucky (the “City” or “Covington”), by and through counsel, hereby files its Complaint for Declaratory Judgment, and in support thereof alleges as follows:

1. This is an action for declaratory judgment and other relief brought pursuant to Kentucky Revised Statute § 418.040, wherein Covington seeks a declaration of its rights, obligations and legal relations arising from a disputed utilities franchise between Duke Energy Kentucky, Inc. (“Duke”) and Covington.

PARTIES

2. Covington is a municipal corporation of the Home-Rule class located within the Commonwealth of Kentucky.

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3. Duke is a utilities company doing business in the Commonwealth of Kentucky by providing, among other things, electricity.

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4. Defendant, the Kentucky Public Service Commission (“PSC”), is an administrative body with jurisdiction over utilities in the Commonwealth of Kentucky. The PSC is included as a defendant for the purpose of putting it on notice to this action. In addition to, based on the relief sought, the PSC is made a party to assert any objection to the relief sought by the City regarding application of Kentucky’s Certified Territories Act.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to KRS § 23A.

6. Venue is proper pursuant to KRS § 452.450 because Duke is a corporation with its registered agent residing in Franklin County, Kentucky.

7. The actions and/or inactions which gave rise to this Complaint all occurred in the Commonwealth of Kentucky.

FACTS UNDERLYING THE CONTROVERSY

8. Covington incorporates by reference all previous allegations contained herein.

9. Covington, in accordance with Sections 163 and 164 of the Constitution of the Commonwealth of Kentucky and KRS 96 enacted Commissioner’s Ordinance No. O-10-24 on May 14th, 2024, requiring public utilities, including providers of electricity within their boundaries, to bid for a non-exclusive franchise not to exceed 20 years. A copy is attached hereto as **Exhibit A.**

10. The ordinance also grants utilities providers with franchises the right to use the City’s Right-of-Ways on such terms and conditions as are deemed reasonable and necessary.

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11. Ky. Const. §163 states that an electric company cannot, “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”.

12. Ky. Const. §164 states that a city cannot grant a franchise or privilege that extends longer than a twenty-year term. Additionally, the city “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.”

13. The Kentucky Eastern District Court held in reference to Ky. Const. §§ 163 and 164 that, “these two sections of the Constitution are mandatory and must be read together, and that no franchise to occupy the streets and public ways of a municipality of the commonwealth can be acquired in any other way than by a strict compliance with these two sections.” *Union Light, Heat & Power Co. v. Railroad Com.*, 17 F.2d 143, 148 (D. Ky. 1926).

14. KRS Ch. 96 governs the sale of franchises in Kentucky. Specifically, KRS § 96.010(1) requires that, “[a]t least eighteen (18) months before the expiration of any franchise acquired under or prior to the present Constitution, the legislative body of each city shall provide for the sale of a new franchise to the highest and best bidder on terms that are fair and reasonable to the city, to the purchaser of the franchise and to the patrons of the utility. The terms shall specify the quality of service to be rendered.”

15. KRS § 82.082 authorizes the City to exercise any and all powers within its boundaries that are not in conflict with the Kentucky Constitution or state statutes.

16. In order to protect the health, safety and welfare of the citizens of Covington, Kentucky, to protect and preserve the City’s public Right-of-Way and infrastructure and to provide

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for the orderly administration of the franchise, it is necessary and appropriate to require the successful franchisee to conduct its business and operations in a lawful manner in compliance with the terms and conditions set forth in the ordinance which was drafted in accordance with the Kentucky Constitution.

17. The City gave Duke the opportunity to comment on the draft of the ordinance in the interest of settling this dispute. Duke sent a list of objections which included the assertion that the ordinance would be null if passed due to Duke’s alleged perpetual franchise.

18. Duke must comply with the City’s new non-exclusive electric franchise ordinance if it wishes to continue providing electricity in Covington.

19. The City also intends to file with the Public Service Commission an application for a declaratory order and a formal complaint against Duke regarding this dispute.

DECLARATION ONE
VALIDITY OF CITY’S ORDINANCE

20. The City incorporates by reference all previous allegations contained herein.

21. Duke objects to the City’s ordinance because it claims that it has an irrevocable, perpetual electric franchise that the City cannot grant to another electric provider.

22. Duke claims that it is the successor to Covington Electric Light Company which was granted an exclusive electric franchise in its charter incorporated by the Kentucky General Assembly in 1882.

23. Duke argues that Ky. Const. §§ 163 and 164 and KRS Ch. 96 do not apply to its franchise because it allegedly inherited the franchise from Covington Electric Light Company which was granted the franchise in 1882 before those laws were enacted in 1891.

24. Duke cites 1881-82 Ky. Acts. Ch. 1138 § 6 as granting Covington Electric Light Company and its successors an irrevocable, perpetual franchise, “[s]aid company shall have the

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privilege, subject to the regulations of the city authorities, to lay its pipes and mains; to erect its poles, posts, and wires through and along any street or highway in the city aforesaid or adjacent thereto as it may seem fit: *Provided*, It in no way permanently obstructs the use of the same to the public or any individual; and it is hereby required to place and put in repair any street or highway through which its line of pipes, wire, &c., may pass; but it is allowed to temporarily obstruct for a reasonable time in laying its line, and repairing the same.”

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25. This section is preceded by § 5 which specifically limits the company’s privilege to furnish electric in Covington to a 25-year term: “That the business of said company is limited to furnishing and supplying the city of Covington and its inhabitants, and persons and corporations located near said city, with light and motive power, generated by electricity, steam, or other artificial means, or to the furnishing and supplying either said light, power, or heat, and may charge therefor such price and compensation as may be agreed upon between said company and the individuals or corporations contracting with it...and the body hereby incorporated shall have the exclusive privilege of conducting the business above described, within and adjacent to said city, for the term of twenty-five years[.]”

26. Covington Electric Light Company was consolidated into The Suburban Electric Company in 1894 which was later declared bankrupt in 1899. The Suburban Electric Company transferred all its rights and franchises to The North American Company that transferred them to The Union Light, Heat & Power Company on the same day in 1901. The Union Light, Heat & Power Company was acquired by The Cincinnati Gas & Electric Company in 1944.

27. The Cincinnati Gas & Electric Company merged with its subsidiary The Union Light, Heat & Power Company and Indiana’s PSI Energy to create Cinergy Corp. in 1994. The Duke Energy Corporation acquired Cinergy Corp. in 2006 which included The Union Light, Heat

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& Power Company. Duke has been the electric service provider for the City since acquiring The Union Light, Heat & Power Company.

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28. The question of whether Covington Electric Light Company’s exclusive electric franchise was passed on to the above list of successors was previously adjudicated from 1900-1904 when Covington wished to construct its own electric plant to provide the City with electricity. *Shaw v. Covington*, 194 U.S. 593 (1904). The Suburban Electric Company, as the consolidated version of the Covington Electric Company, objected to Covington’s plan and claimed that Covington’s construction of a new plant would impair the obligations of a contract in violation of Article I § 10, of the United States Constitution. The contract that Suburban was referring to was the clause in the Covington Electric Company’s charter which gave the company an exclusive electric franchise in Covington. *Id.* at 596.

29. The Supreme Court in *Shaw* ultimately held that Covington Electric Light Company lost its exclusive franchise when it was consolidated into The Suburban Electric Company in 1884 and so the franchise could not be passed on to its successors. *Id.* These successors include The Union Light, Heat, & Power Company which was a party to the case and Duke which alleges it inherited its franchise from The Union Light, Heat, & Power Company. The Court noted that the prevailing local opinion was that the granting of exclusive rights/privileges was forbidden, citing *Louisville Gas Co. v. Citizens’ Gas Co.*, 115 U.S. 683. The Court also stated that, “[e]verything in the constitution looked to the abolition and refusal of special privileges and to putting all corporations on an equal footing. It was natural, therefore, when old corporations consolidated, that the law should treat the new corporation which it then called into being as it would have treated another corporation coming into being at the same time.” *Shaw*, 194 U.S. at 599.

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30. The Suburban Electric Company was created through consolidation under KRS §§ 555 and 556. Under § 556, a new corporation created by consolidation, “shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer.” The Court stated that the language of this statute does not allow for the transfer of an exclusive franchise granted to a named corporation that no longer exists.

31. Additionally, the Court in *Shaw* held that the consolidated Suburban Electric Company was a new corporation subject to Ky. Const. §§ 163 and 164 when it was created in 1894. *Id.* at 598. So any exclusive franchise The Suburban Electric Company may have inherited was lost because it would have been in violation of those sections of the Kentucky Constitution. The Court specifically stated that, “[w]hen the Covington Company died its monopoly came to an end.” *Id.* at 600.

32. Under the Court’s ruling in *Shaw*, Duke could not have inherited an exclusive franchise from Covington Electric Light Company because that franchise ceased to exist when the company was consolidated into The Suburban Electric Company.

33. Additionally, Covington Electric Light Company’s charter specifically stated that it was only granted the exclusive privilege of furnishing electricity for a 25-year term which would have ended in 1907. If this Court found, in conflict with *Shaw*, that Covington Electric Light Company’s franchise was passed on to The Union Light, Heat & Power Company, that franchise would have ended in 1907.

34. Both the District Court and Supreme Court cases for *Shaw* included exhibits which were contracts between The Suburban Electric Company and the City of Covington for the provision of streetlamps and the furnishing of electric services on specific streets in 1897, 1899, and 1901. If The Suburban Electric Company had inherited Covington Electric Light Company’s

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exclusive franchise for all of Covington in the consolidation, then Suburban would have no need to enter into these contracts.

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35. It is also false to assume that the company got to keep the right-of-way after the end of this term simply because § 6 of the charter does not specifically state a time limit when § 5 directly before it does. Even if Duke does have a perpetual right of way for the City’s streets, it does not have the exclusive right to furnish electric services in the City. The right of way has no use if Duke does not have the electric franchise.

36. In the alternative, if Duke is found to have a perpetual franchise, it must be limited to the geographic area of the city of Covington in 1882 when the General Assembly granted the franchise. The franchise did not automatically extend to new areas as the city boundaries changed. The court in *Florence v. Owen Electric Coop., Inc.*, 832 S.W. 2d 876 held that the rights of the City of Florence’s electric franchisee, The Union Light, Heat & Power Company, did not extend to newly annexed territories that were already being served by Owen Electric. The City asserts that the reach of Duke’s alleged pre-constitutional franchise is limited to the geographic area of the City from 1882 since any later annexed territories should have continued to be served by their pre-existing electric providers.

37. Duke may try to claim it qualifies for the exception to Ky. Const. § 163 which states that “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.” This exception cannot apply to Duke though because the rights conferred by Covington Electric Light Company’s charter ceased to exist when the company was consolidated in 1884.

38. In consideration of the foregoing arguments, we respectfully request a declaration concerning the validity of the City’s electric franchise ordinance and Duke’s right to the electric

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franchise. Specifically, that if Duke desires to continue to operate in the City of Covington’s rights of way, that it must comply with Ky. Const. §§ 163 and 164 and KRS Ch. 96.

DECLARATION TWO
FAIRNESS AND REASONABLENESS OF ORDINANCE

39. The City incorporates by reference all previous allegations contained herein.

40. Duke further objects to the ordinance claiming that it contains requirements that violate the mandate of KRS § 96.010(1) which states that any franchise renewal be “on terms fair and reasonable” to the City, the utility, and the utility’s patrons.

41. Duke has never specifically stated which “objectionable provisions” within the ordinance are unreasonable or unfair; Duke has merely asserted that the ordinance contains provisions that violate KRS § 96.010(1).

42. The ordinance does not contain any requirements that violate KRS § 96.010(1). In fact, the ordinance was drafted and passed so that the City was in compliance with KRS Ch. 96 and Sections 163 and 164 of the Constitution of the Commonwealth of Kentucky.

43. If the City allowed Duke’s alleged exclusive perpetual franchise to continue then that would violate KRS Ch. 96 which does not allow exclusive franchises to be granted.

44. Furthermore, another designated provider, Owen Electric Company, which the Defendant PSC has granted exclusive territory within the Covington’s boundaries, has responded and entered into a franchise consistent therewith.

45. In consideration of the foregoing arguments, we respectfully request a declaration concerning the reasonableness and fairness of the City’s electric franchise ordinance.

DECLARATION THREE
APPLICATION OF CERTIFIED TERRITORIES ACT

46. The City incorporates by reference all previous allegations contained herein.

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47. Duke also asserts that Kentucky’s Certified Territories Act, specifically KRS §§ 278.016 -278.020, gives Duke the exclusive right to provide electric service in Covington and makes the ordinance null.

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48. Kentucky’s Certified Territories Act does not give Duke the exclusive right to provide electric service in Covington and does not conflict with the City’s ordinance on electric franchises.

49. The laws within the Act merely give the Public Service Commission (the “PSC”) its jurisdiction and dictate how the PSC can regulate utilities within Kentucky.

50. KRS § 278.020(5) specifically states that utilities obtain franchises from cities or governmental agencies, the PSC only requires that the utility obtain a certificate of convenience and necessity before applying for a franchise. The PSC does not directly determine which companies are granted utility franchises.

51. The Act does establish certified territories for the purposes of setting exclusive boundaries for retail electric suppliers, but it does not give any specific suppliers the right to serve an area; that is determined by the city or governmental agency located in that territory.

52. The Act also does not state that suppliers in certified territories can have the exclusive right to furnish retail electric services perpetually, that would violate Ky. Const. § 164 which sets a 20-year term limit.

53. In consideration of the foregoing arguments, we respectfully request a declaration concerning the application of Kentucky’s Certified Territories Act to this dispute and whether the Act provides protection to Duke’s alleged franchise.

DECLARATION FOUR
ABILITY TO SOLICIT BIDDERS AND PSC AUTHORIZATION

54. The City incorporates by reference all previous allegations contained herein.

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55. The City also seeks a declaration regarding its ability to solicit other bidders for the electric franchise and the PSC’s obligation to authorize a new electric provider in Covington if Duke refuses to bid to renew its franchise.

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56. KRS § 96.010(1) requires the legislative body of every Kentucky city to “provide for the sale of a new franchise to the highest and best bidder on terms that are fair and reasonable to the city, to the purchaser of the franchise and to the patrons of the utility.” This statute requires the franchise be sold to the highest and best bidder, there is no preference for renewing a franchise with the last franchisee.

57. Ky. Const. § 164 also requires that, “[b]efore 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.”

58. The court in *Kentucky Utilities Company v. Board of Commissioners, City of Paris*, 254 Ky. 527 did require the city to give a previous franchisee the opportunity to bid on a new franchise in open competition. The City must solicit other bidders for Duke to have the opportunity to bid in open competition.

59. The City seeks to solicit other bidders for the electric franchise in accordance with KRS § 96.010(1) and Ky. Const. § 164.

60. The PSC is given the power to certify and regulate utility providers in the Commonwealth of Kentucky by KRS Ch. 278. Under § 278.017(2) the PSC is given the power to establish the boundaries of retail electric suppliers’ certified territories. § 278.020 sets out the requirement that utility providers obtain a certificate of public convenience and necessity before

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they can construct facilities, provide utility services, obtain a franchise or license, acquire ownership of a utility, or cease providing services.

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61. The City also seeks to have this Court order the PSC to give the portion of Duke’s certified territory that covers Covington to a new electric service provider and to grant a certificate of public convenience and necessity to that new provider so that they can provide electric services in Covington.

62. In consideration of the foregoing arguments, we respectfully request a declaration concerning the City’s ability to solicit other bidders for the electric franchise and the PSC’s obligation to authorize a new electric provider in Covington.

DECLARATION FIVE
RIGHT TO PURCHASE DUKE’S FACILITIES

63. The City incorporates by reference all previous allegations contained herein.

64. In the alternative, if this Court holds that the ordinance is not enforceable against Duke, the City requests a declaration about its ability to purchase Duke’s pre-existing facilities in Covington in accordance with KRS §96.045.

65. KRS §96.045(1) does not allow existing electric public utility facilities to be duplicated by a city. If Duke is found to have an existing right-of-way but not the privilege of providing electric services, this statute allows the City to purchase Duke’s facilities or acquire them by eminent domain to use them to provide Covington with electricity without constructing new facilities. The City would have to acquire Duke’s facilities to be able to furnish electricity without Duke as the provider.

66. The City would like to purchase Duke’s electric service facilities located within Covington in accordance with KRS §96.045(1) if the Court determines Duke has a franchise for the right-of-way and if this Court does not require Duke to comply with the ordinance.

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67. In consideration of the foregoing arguments, we respectfully request a declaration concerning the City’s right to purchase Duke’s facilities in Covington under KRS 96.045 if this Court holds that the City’s ordinance is not enforceable against Duke.

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DECLARATION SIX

APPLICATION OF RIGHT OF WAY ORDINANCES AND INJUNCTIVE RELIEF

68. The City incorporates by reference all previous allegations contained herein.

69. The City seeks a declaration regarding the application of the City’s right of way ordinances to Duke.

70. Duke has failed to comply with the City’s duly enacted ordinances on right of way encroachments found in sections 96.055 through 96.071 of the Covington, Kentucky Code of Ordinances.

71. Duke has continually subleased its electric poles to other companies and received revenue from these leases by allowing the indirect use of the public right of way that it holds with the electric franchise.

72. § 96.067 of the Covington, Kentucky Code of Ordinances covers the installation, relocation, or discontinuation of facilities by those who have registered facilities within the City’s rights-of-way. Subsection (H) outlines the ability of franchisees who have registered utility poles to lease them to other entities. It requires that franchisees ensure lessees remove their equipment when directed to do so by the City, give identifying information to the City, be authorized to do business in the City, and stay current on license fees and occupational taxes due to the City.

73. Duke has violated and refuses to comply with § 96.067(H). In as much, the City has this Court to issue a declaration of rights and issue injunctive and/or other applicable relief to compel Duke’s compliance with said Ordinance.

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EXISTENCE OF AN ACTUAL CONTROVERSY

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74. The City submits that an actual controversy exists by virtue of the fact that Duke claims it has an irrevocable perpetual franchise in the City’s rights-of-way and the City has enacted an ordinance that requires Duke to bid on an electric franchise. Duke has refused to submit a bid in compliance with that ordinance, leading to this action.

75. Considering this controversy, the City asks that this Court issue a declaration of rights and duties of the parties hereto and to declare the extent of Duke’s right to the electric franchise and if it must comply with the City’s ordinance to keep said franchise.

76. The City also asks this Court to declare the reasonableness and fairness of its electric franchise ordinance, if Kentucky’s Certified Territories Act protects Duke’s alleged franchise, if the City can solicit other bidders, or in the alternative if the City has a right to purchase Duke’s facilities in Covington under KRS § 96.045.

WHEREFORE, the City of Covington, Kentucky respectfully seeks a declaration of its rights as follows:

A. As to declaration one, Covington respectfully requests a declaration concerning the validity of its non-exclusive electric franchise ordinance and Duke’s rights to an alleged perpetual electric franchise within Covington;

B. As to declaration two, Covington respectfully requests a declaration concerning the reasonableness and fairness of its non-exclusive electric franchise ordinance;

C. As to declaration three, Covington respectfully requests a declaration concerning if Kentucky’s Certified Territories Act provides protection to Duke’s alleged perpetual franchise;

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D. As to declaration four, Covington respectfully requests a declaration concerning its ability to solicit other bidders for the non-exclusive electric franchise and the PSC's obligation to authorize a new electric provider in Covington;

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E. As to declaration five, Covington respectfully requests a declaration concerning the City's right to purchase Duke's facilities in Covington under KRS 96.045;

F. As to declaration six, Covington respectfully requests a declaration concerning the application of the City's right of way ordinances to Duke and issuing an Order of injunctive relief for compliance therewith;

G. An award of attorney fees, costs, and expenses incurred by the City in this action; and

H. Any other relief to which the City may be entitled.

Respectfully submitted,

/s/ Brandon N. Voelker

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 Kentucky*

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EXHIBIT A

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COMMISSIONER'S ORDINANCE NO. O-10-24

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AN ORDINANCE CREATING AND ESTABLISHING FOR BID NON-EXCLUSIVE ELECTRIC FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF ELECTRICITY WITHIN THE PUBLIC RIGHT-OF-WAY OF THE CITY OF COVINGTON FOR A TWENTY (20) YEAR DURATION, IMPOSING A FRANCHISE FEE IN OF THE SUM OF UP TO FIVE PERCENT (5%) OF FRANCHISEE'S GROSS RECEIPTS PER YEAR FROM THE FRANCHISEE'S SALE OF ELECTRICITY TO ELECTRIC-CONSUMING ENTITIES INSIDE THE CITY OF COVINGTON'S CORPORATE LIMITS AND FURTHER PROVIDING FOR INDEMNIFICATION; INSURANCE; CANCELLATION OR TERMINATION; AND BID REQUIREMENTS; ALL EFFECTIVE ON DATE OF PASSAGE.

* * * *

WHEREAS, Sections 163 and 164 of the Constitution of the Commonwealth of Kentucky, and Chapter 96 of the Kentucky Revised Statutes, authorize municipal corporations to require public utilities, including providers of electricity within their boundaries, to operate under franchise agreements and to grant utilities the right to use Right-Of-Way on such terms and conditions as are deemed reasonable and necessary; and

WHEREAS, KRS 82.082 authorizes the City to exercise any and all powers within its boundaries that are not in conflict with the Kentucky Constitution or state statutes; and

WHEREAS, the City Commission of the City of Covington, Kentucky, has found and determined that the construction, operation, maintenance and utilization of an electric franchise over, across or under Right-Of-Way in the City of Covington, benefits said utility and the customers it serves; and

WHEREAS, the City Commission has further found and determined that the construction, installation, removal, maintenance and/or repair of utility-owned facilities and other infrastructures does periodic and unavoidable disturbance that gradually results in the degradation of the City's streets and sidewalks, for which the City is entitled to reasonable compensation in order to offset and recover the costs of reconstructing, removing, repairing or resurfacing damaged Right-Of-Way; and,

WHEREAS, in order to protect the health, safety and welfare of the citizens of Covington, Kentucky, to protect and preserve the City's public right-of-way and infrastructure and to provide for the orderly administration of the franchise contemplated herein, it is necessary and appropriate to require the successful franchisee to conduct its business and operations in a lawful manner in compliance with the terms and conditions set forth hereinbelow.

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NOW, THEREFORE,
BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF COVINGTON, KENTON COUNTY, KENTUCKY:

Section 1

There is hereby created a non-exclusive franchise to enter upon, lay, acquire, construct, operate, maintain, install, use, and repair, in the Right-Of-Way of the City, a system or works for the transmission and distribution of electricity within and without the corporate boundaries of the City as it now exists or may hereafter be constructed or extended, subject to the provisions of this Ordinance. Such system may include poles, pipes, manholes, ducts, structures, and any other apparatus, equipment and facilities above and below the ground (collectively, "Equipment") necessary, essential, and/or used or useful to the transmission, distribution and sale of electricity through the City or to any other town or any portion of the county or to any other jurisdiction ("Services"). Additionally, the Company shall have the right to use the streets with its service and maintenance vehicles in furtherance of this Franchise. Prior to beginning the construction or installation of any new facilities under this Franchise, the Company shall obtain any necessary governmental permits for such construction or installation, copies of which it shall provide to the City. For avoidance of doubt, the Company shall not be required to obtain a permit prior to undertaking any maintenance or Emergency restoration work on existing facilities. To the extent a permit is necessary for such Emergency restoration work, the Company shall make any necessary permit application filings within any prescribed time by applicable ordinance or, if not provided by ordinance within a reasonable period, not to exceed fifteen (15) days, following completion of the work. Work performed by the Company under this Franchise shall be performed in a workmanlike manner and in such a way as not to unnecessarily interfere with the public's use of City streets. Whenever the surface of any City street is opened, it must be restored at the expense of the Company within any prescribed time by applicable ordinance of if not provided by ordinance, within thirty (30) days for hard surfaces and within fifteen (15) days for soft surfaces along city streets. Such restoration shall be to a condition comparable to what it was prior to the opening thereof. By way of example, brick pavers must be restored with brick pavers and stamped concrete must be restored with stamped concrete. During seasonal periods where weather prevents the restoration within the times set forth in this Ordinance or in the event of any shortage of materials or labor, the Company shall make temporary restorations satisfactory to the City and shall work with the City to develop a mutually agreeable and reasonable period for permanent restoration. In the event a street is opened at the request of the City for a reason other than providing adequate, efficient and reasonable service, then the City shall bear the expense of opening and restoring the street.

Section 2

The following definitions apply to this Ordinance:

City Commission means the legislative body of the City of Covington.

Company means the Party or Person that shall become the purchaser of said franchise, or any successor or assignee of such Party or Person.

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Facility includes all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of the utility in the Right-Of-Way.

Government or City means the City of Covington.

Gross Receipts means those amounts of money which the Company receives from its customers within the City's geographical limits or boundaries for the retail sale of electricity under rates, temporary or permanent, authorized by the Kentucky Public Service Commission and represents amounts billed under such rates as adjusted for refunds, the net write-off of uncollectible accounts, corrections or other regulatory adjustments. Revenues do not include miscellaneous service charges, including but not limited to turn-ons, meter sets, insufficient funds, taxes, local fees, late fees and interest, which are related to but are not a part of the actual retail sale of electricity.

Party or Person means any natural or corporate person, business association or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a Utility, a successor or assign of any of the foregoing, or any other legal entity. As used in this ordinance, the term *Parties* shall collectively refer to the Company and the Government.

Public Utility or Utility means a Party or Person that is defined in KRS Chapter 278.010 as a utility and: (i) is subject to the jurisdiction of the Kentucky Public Service Commission or the Federal Energy Regulatory Commission; or (ii) is required to obtain a franchise from the Government to use and occupy the Right-Of-Way pursuant to Sections 163 and 164 of the Kentucky Constitution.

Right-Of-Way means the surface of and the space above and below a public roadway, highway, street, freeway, lane, path, sidewalk, alley, court, boulevard, avenue, parkway, cartway, bicycle lane or path, public sidewalk, or easement held by the Government for the purpose of public travel and shall include Rights-Of-Way as shall be now held or hereafter held by the Government.

Section 3

The Franchise created herein shall be non-exclusive and shall continue for a period of TWENTY (20) years from and after the effective date of this Ordinance, as set forth in Section 5. The Company may, at its option, terminate this Franchise upon one hundred eighty (180) days' written notice if: (a) the City breaches any of its obligations hereunder and such breach is not cured within ninety (90) days of the Company's notice to the City of such breach; (b) the Company is not permitted to pass through to affected customers all fees payable by it under Section 9 herein; or (c) the City creates or amends any ordinance or regulation which, in the Company's sole discretion, would have the effect of: (i) substantially altering, amending or adding to the terms of this Ordinance; (ii) substantially impairing the Company's ability to perform its obligations under the Franchise in an efficient, unencumbered and profitable way; or (iii) preventing the Company from complying with applicable statutes or regulations, rules or orders issued by the Kentucky Public Service Commission. Without diminishing the Company's rights under this Section 3, the City agrees that to the extent it desires to pass or amend an

ordinance or regulation which could have the effect of substantially: (i) altering, amending, or adding to the terms of this Ordinance; (ii) impairing the Company's ability to perform its obligations under this Franchise in an efficient, unencumbered and profitable way; or (iii) preventing the Company from complying with applicable statutes or regulations, rules or orders issued by the Kentucky Public Service Commission, that it will first discuss such proposed ordinance or regulation with the Company and the parties shall negotiate in good faith regarding the same.

Section 4

The Company is authorized to operate throughout all the territory within the corporate limits of the City for which it is authorized under state or federal law.

Section 5

This Ordinance shall become effective on the date of its passage and publication as required by law. The Franchise created by this Ordinance shall take effect no earlier than thirty (30) days after the City Commission accepts the bid(s).

Section 6

The Company shall comply with all provisions of the City's Code of Ordinances ("Code"), including but not limited to, Urban Forestry, Right of Way Encroachment, Historic Preservation Guidelines, and Public Realm Streetscape Design Standards and City regulations (including any amendments thereto), unless such provisions: (i) conflict with the Company's ability to comply with any rule, regulation or order issued by the Kentucky Public Service Commission related to the Company's rates or services; or (ii) are otherwise preempted by the action of any state or federal authority with jurisdiction over the Company. The Company shall comply with the provisions of Covington Code of Ordinance §96.067 regarding Installation, Regulation, or Discontinuance of facilities and specifically including, but not limited to, §96.067(H) on leases of poles in the right of way to entities other than the Company. The Company shall not be excused from complying with any of the terms and conditions of this Ordinance by any failure of the Government, upon any one or more occasions, to insist upon the Company's performance or to seek the Company's compliance with any one or more of such terms or conditions.

Section 7

Rights Reserved by City. Subject to the above provisions, the Franchise created by this Ordinance is expressly subject to the right of the City: (i) to repeal the same for misuse, nonuse, or the Company's failure to comply with applicable local, state or federal laws; (ii) to impose such other regulations as may be determined by the City to be conducive to the safety, welfare and morals of the public; and/or (iii) to control and regulate the use of its Right-Of-Way as permitted by law. All rights and privileges granted in any electric franchise shall be subject to the provisions hereof, this Ordinance and to all powers (including police power) inherent in, conferred upon, or reserved to the City, including but not limited to those contained in the Code and in all regulations and or policies promulgated by the City.

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Section 8

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As consideration for the granting of the Franchise created by this Ordinance, the Company agrees it shall defend, indemnify, and hold harmless the Government from and against claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses asserted against the Government that the Company's use of the Right-Of-Way or the presence or operation of the Company's equipment on or along said Right-Of-Way has caused damage to tangible property or bodily injury, if and to the extent such damage or injury is not caused by the Government's negligence, gross negligence or willful conduct. The Government shall notify the Company in writing within a reasonable time of receiving notice of any issue it determines may require indemnification.

Section 9

A. Franchise Fees. For the privilege of utilizing said public streets and Rights-Of-Ways, the Company, its successors and assigns, shall be required to pay to the Government monthly three percent (3%) of Gross Receipts per month from the Company's sale of electricity to electric-consuming entities (which includes businesses, industrial facilities and dwellings) inside the City's corporate limits. Additionally, the City reserves the right to increase the franchise fee at any time after the one-year anniversary of the effective date of this Ordinance, and upon prior ninety (90) days written notice to the Company. Should the City exercise said right to increase the franchise fee, the City shall receive payment of franchise fees in an amount not to exceed five percent (5%) of the Gross Receipts received by the Company from the Company's sale of electricity to electricity-consuming entities (which includes businesses, industrial facilities and dwellings) inside the City's corporate limits.

Unless otherwise agreed in writing, no acceptance of any franchise fee payment by the Government shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount nor shall acceptance be deemed a release to any claim the Government may have for future or additional sums pursuant to this Franchise. Any additional and non-disputed amount due to the Government shall be paid within ten (10) days following written notice to the Company by the Government.

The Government shall have the right to inspect the Company's electric income records no more than once, annually, related to the Company's electric gross receipts within the City for a time period consisting of the lesser of the effective date of the franchise or the most recent two years (the Audit Period). The Government shall retain the right to audit and to re-compute any amounts determined to be payable under this agreement for the Audit Period; provided, however, that such audit shall take place within twelve (12) months following the close of the Company's fiscal year. If, as a result of such audit or review, the Government determines that Company has underpaid its franchise fees to the Government in any twelve (12) month period by ten percent (10%) or more, then, in addition to making full payment of the relevant obligation, the Company shall reimburse the Government for all expenses incurred as a result of an audit or review and such payments shall be paid within the thirty (30) days following written notice to the Company by the Government, which notice shall include a copy of the audit report and copies of all invoices for which the Government seeks reimbursement. If the audit shows

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that the Company has overpaid its franchise fee in any twelve (12) month period, then the Government will promptly make a payment to the Company of the overpayment amount and Company will make appropriate bill adjustments to affected customer's bill to credit back the overpayment.

Once the Government has exercised its right to audit any fiscal year, such year shall not be includable within the scope of any subsequent audit by the Government unless agreed to by the Company.

If any franchise fee is owed to the Government, in the event that any franchise fee payment or recomputed amount is not made to the Government on or before the applicable dates heretofore specified, interest shall be charged from such date at the annual rate of 2% over prime interest rate, unless the Company demonstrates that the non-payment is the result of an act or omission of the Commonwealth of Kentucky or the City and wholly beyond the fault of the Company.

Any other fees assessed to the Company in connection with the Company's operation within the City pursuant to this franchise, including use of the City's Right-Of-Way, including fees associated with permits and licenses of whatever nature, shall be payable by the Company only if and to the extent such fee is provided for under the laws of the Commonwealth of Kentucky and to the extent the Company is authorized by the Kentucky Public Service Commission (or its successor) to pass through such fees to the entities served by it inside the City's corporate limits.

To the extent the Company actually incurs other reasonable incremental costs in connection with its compliance with the Code, the Government agrees that the Company may recover such amounts from its customers pursuant to the terms of a tariff filed with and approved by the Kentucky Public Service Commission, if otherwise permitted by law.

Section 10

The Company shall maintain in force through the term of the Franchise insurance coverage for general liability insurance, auto liability and workers compensation, in accordance with all applicable laws and regulations. The Company shall maintain a general liability and auto liability coverage minimum limit of \$5,000,000 per occurrence. The Company may elect to self-insure all or part of this requirement.

Section 11

The Company agrees to charge such rate or rates as may from time to time be fixed by the Kentucky Public Service Commission or any successor regulatory body and will give notice of same as required by KRS 278.180 and the Orders of the Kentucky Public Service Commission construing same.

Section 12

In the event the Government believes the Company has materially breached this franchise or violated one of its terms, the Government shall provide written notice to the Company that states the precise alleged breach or violation and shall provide the

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Company a reasonable opportunity, not to exceed thirty (30) days from receipt of notice, to provide evidence that such breach or violation has not occurred or to take action to cure such breach or violation. MEDIA 5040

If after thirty days, the Company has either failed to provide evidence of such breach or violation not occurring or has failed to commence action to cure such breach or violation, the City reserves the right to assess a penalty in the amount of \$500 per violation or breach.

If payment of any penalty assessed under this provision not made to the Government on or before the applicable dates specified, interest shall be charged from such date at the annual rate of 2% over prime interest rate, unless the Company demonstrates that the non-payment is the result of an act or omission of the Commonwealth or the City and beyond the fault of the Company.

The Parties retain all rights available under the law of the Commonwealth of Kentucky with respect to enforce provisions of this Ordinance or any contract derived from the passage of this Ordinance, including the right to seek remedies at law, and direct damages.

The payment of penalties or damages shall not excuse non-performance under this Ordinance. The right of the Parties to seek and collect damages as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 13 of this Ordinance.

In no event shall either Party be liable under this Agreement to the other Party any special, incidental, punitive, exemplary, or consequential damages.

Section 13

(a) In addition to all other rights and powers pertaining to the Parties by virtue of the Franchise created by this Ordinance or otherwise, the Government, by and through its City Commission, and the Company, each reserve the right to terminate and cancel this Franchise and all rights and privileges of the hereunder in the event that the other Party:

- (1) Willfully violates any material provision of this Franchise, except where such violation is without fault or through excusable neglect;
- (2) Willfully attempts to evade any material provision of this Franchise or practices any fraud or deceit upon the other Party;
- (3) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of this Franchise; or
- (4) Is no longer able to provide regular and customary uninterrupted service to its customers in the franchise area.

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(b) Prior to attempting to terminate or cancel this Franchise pursuant to this section, the City's Mayor or his or her designee, or the City Commission, or the Company shall make a written demand that the Company or City do, or comply with, any such provision, rule, order or determination. If the violation, found in Section 13(a), by the Company or the City continues for a period of thirty (30) days following such written demand without written proof that corrective action has been taken or is being actively and expeditiously pursued, the Government may place its request for termination of this Franchise as early as the next regular City Commission meeting agenda. The Government shall cause to be served upon the Company, at least ten (10) days prior to the date of such City Commission meeting, a written notice of intent to request such termination and the time and place of the meeting, legal notice of which shall be published in accordance with any applicable laws. In the event of a breach by the City, the Company retains all rights available under the law of the Commonwealth of Kentucky with respect to enforce provisions of this Ordinance or any contract derived from the passage of this Ordinance,

(c) Any violation by the Company or its successor of the material provisions of this Franchise, or the failure promptly to perform any of the provisions thereof, shall be cause for the forfeiture of this Franchise and all rights hereunder if, after written notice to the Company and a reasonable opportunity to cure, such violations, failure or default continue as set forth in Section 13(a).

Section 14

Right to Cancel. The City shall have the right to terminate the Franchise created by this Ordinance thirty (30) days after the appointment of a receiver or trustee to take over and conduct the business of the Company, whether in receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said thirty (30) days, unless:

1. Within thirty (30) days after his election of appointment, such receiver or trustee shall have fully complied with all the provisions of this Ordinance and remedied all defaults thereunder; and,
2. Such receiver or trustee, within said thirty (30) days shall have executed an agreement, duly approved by the court having jurisdiction in the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provision of this Ordinance and the Franchise granted to the Company.

Section 15

In the event of a change of Kentucky law whereby retail rates of electric customers are no longer regulated by the Public Service Commission, the Government shall have the option of terminating this Franchise with the Company. If this Franchise is terminated by the Government pursuant to this provision, the Government and the Company shall have a duty to negotiate in good faith with respect to offering a mutually acceptable franchise to the Company.

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Section 16

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The Company shall conform to at least the minimum standards or requirements in federal and state law or regulation in the operation of its electric system pursuant to this Ordinance. In addition to complying with other applicable law, the Company agrees that:

- (a) Any defect in the work, materials or equipment, whether latent or patent, will be remedied by the Company;
- (b) Construction, reconstruction, maintenance, or removal of any facilities, shall be performed with due regard for the rights of the Government and others, and shall not unnecessarily interfere with, or in any way injure the property of the Government or others under, on, or above the ground, or otherwise unduly interfere with the public use of the Right-Of-Way;
- (c) Placement of lights, danger signals or warning signs shall be undertaken by the Company in compliance with applicable law; and
- (d) All new facilities shall be installed and shall be in conformance with the applicable requirements of this Ordinance and those set forth in the Code, the Zoning Ordinance, or any other applicable federal state and local laws or regulations. The Company assumes all responsibility for damage or injury resulting from its placement or maintenance of any facilities.
- (e) The Government shall have the ability to order the relocation of any facility located within the Right-Of-Way.
 1. Whenever the Government shall grade, regrade, construct, reconstruct, widen or alter any Right-Of-Way or shall construct, reconstruct, repair, maintain or alter a public improvement, including, but not limited to, storm sewers, sanitary sewers and street lights therein, it shall be the duty of the Company, when so ordered by the Government, to change, relay and relocate its facilities in the Right-Of-Way at no cost to the Government so as to conform to the established grade or line of such Right-Of-Way and so as not to interfere with such public improvements so constructed, reconstructed or altered. However, notwithstanding the above, if as part of said public improvement the Government, receives grant money, as part of a state for federally funded project, applicable for the relocation of any above-ground, to be relocated underground, the grant or other award shall be applied with the Company to bear any additional cost. The Company specifically acknowledges and agrees that the placement of facilities in the City's Right-Of-Way is a revocable permit, which may be revoked for specific facilities for the reasons set forth herein.
 2. The Government shall have the authority to order the relocation and/or for the Company to provide any required safety measures for any facility that due to proximity of a private property owner is interfering with the

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property owner's respective use of their property or is in violation of a safety standard set forth by law and/or regulation. Specifically, the Company agrees to either relocate and/or provide safety measures for an property owner whose ability to use, repair, rebuild, paint and/or make any required alterations to their property is impacted by the location of Company's facilities.

3. If the reason the Government is ordering the relocation is to assist in the installation of facilities by another party, the party seeking to install the facilities, or the project funding source, shall bear the costs of said relocation, unless an agreement is otherwise reached. This shall not apply to any relocation resulting from the relocation required by redevelopment and/or construction of a City owned property, which shall include ownership by Industrial Revenue Bond and/or similar economic incentive issued pursuant to applicable state law.
4. The Company shall, at no cost to the Government, place facilities underground if said above-ground facilities cause a public safety concern or are required to be placed underground pursuant to federal, state or local laws or regulations.

Section 17

This Ordinance and any Franchise awarded pursuant to it shall be governed by the laws of the Commonwealth of Kentucky, both as to interpretation and performance. The venue for any litigation related to this Ordinance and any Franchise awarded pursuant to it shall be in a court of competent jurisdiction in Kenton County, Kentucky.

Section 18

This Ordinance and any Franchise awarded pursuant to it does not create a contractual relationship with or right of action in favor of a third party against either the Government or the Company.

Section 19

If any section, sentence, clause or phrase of this Ordinance is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the remaining Ordinance unless the rights of the City or Company are materially altered or impaired.

Section 20

It shall be the duty of the City Commission, through the City Manager's Office, to offer for sale at public auction the Franchise and privileges created hereunder. Said Franchise and privileges shall be sold to the highest and best bidder or bidders at a time and place fixed by the City Commission after given due notice thereof by publication or advertisement as required by law. In awarding the franchise, the City shall consider the

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technical, managerial, and financial qualifications of the bidder to perform its obligations under the franchise.

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Section 21

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 Commission, through the office of the City Manager, upon the date(s) and at the times(s) fixed by publication(s) or advertisement(s) for receiving same. Thereafter, the City Manager shall report and submit to the City Commission, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval. The City Commission reserves the right, for and on behalf of the Government, to reject any and all bids for said franchise and privileges; and, in case the bids reported by the City Manager shall be rejected by the City Commission, it may direct, by resolution or ordinance, said franchise and privileges to be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and approved.

Bids offered for purchase of this Franchise shall state the bidder's acceptance of the conditions set forth in this Ordinance and shall be accompanied by a nonrefundable application fee in the amount of Four Thousand Dollars (\$4,000.00) payable to the City Commission to defray the City's costs of advertising and other administrative expenses incurred.

In addition, any bid submitted by a corporation or person not already owning within the territorial limits of the City a plant, equipment, and/or Facilities sufficient to render the service required by this Ordinance must be accompanied by cash or a certified check drawn on a bank of the Commonwealth of Kentucky, or a national bank, equal to five percent (5%) of the fair estimated cost of the system required to render the service, which check or cash shall be forfeited to the Government in case the bid should be accepted and the bidder should fail, for thirty (30) days after the confirmation of the sale, to pay the price and to give a good and sufficient bond in a sum equal to one-fourth (1/4) of the fair estimated cost of the system to be erected, conditioned that it shall be enforceable in case the purchaser should fail, within sixty (60) days, to establish and begin rendering the service in the manner set forth in this Ordinance. Such deposit need not be made by a corporation or person already owning within the territorial limits of the City a plant, equipment, and/or Facilities sufficient to render the service required by this Ordinance.

Section 22

The Franchise shall not be assignable without the written consent of the City; however, Franchisee may assign the Franchise to any affiliate, parent, or subsidiary entity which may, during the Term of the Franchise, assume the obligation to provide electricity throughout and for consumption within or outside the City without being required to seek the City's consent to such assignment. The Company shall provide the City with any notices required under the law of the Commonwealth of Kentucky.

If the Company experiences a foreclosure or other judicial sale of all or a substantial part of the Company's Facilities located with the City of Covington, the

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Company shall provide the Government with any notices required under the law of the Commonwealth of Kentucky.

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Section 23

The Company shall provide the City with the name, address, phone number and email address of each contractor and/or subcontractor constructing, installing, removing, maintaining and/or repairing Company-owned facilities in the City. Said information shall be provided to the City at least 7 days prior to any work being performed in the City by said contractors or subcontractors. Additionally, the Company, and all of its contractors and subcontractors, shall comply with all City ordinances and/or regulations, including, but not limited to, Section 96 of the Code.

Section 24

As set forth herein, the "Franchise Fee," is a fee paid by the Company's customers. In as much, Company agrees as further consideration of the use of the City's rights of way, the Company agrees to apply all Revenue Justification Policies, Economic Development Policies and/or other similar policy or procedure, provided for in the submittals to the Kentucky Public Services Commission by the Company.

Section 25

This Ordinance shall take effect and be in full force when passed, published, and recorded according to law.



MAYOR

ATTEST:


CITY CLERK

Passed: May 14, 2024 (Second Reading)

April 23, 2024 (First Reading)

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