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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 24-CI-01149

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CITY OF COVINGTON, KENTUCKY

PLAINTIFF

VS.

DEFENDANT DUKE ENERGY KENTUCKY, INC.'S
NOTICE OF FILING OF REMOVAL

DUKE ENERGY KENTUCKY, INC., et al.

DEFENDANTS

PLEASE TAKE NOTICE that on December 31, 2024, Defendant Duke Energy Kentucky, Inc., by counsel, filed its Notice of Removal in the Office of the Clerk of the United States District Court for the Eastern District of Kentucky, Central Division at Frankfort. A copy of the Notice of Removal is attached hereto as **Exhibit 1**.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true and correct copy of the foregoing was electronically filed, and was served electronically or via U.S. mail upon the following on December 31, 2024.

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Exhibit 1

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT

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CITY OF COVINGTON, KENTUCKY

PLAINTIFF

v.

CIVIL ACTION NO. _____

DUKE ENERGY KENTUCKY, INC., ET AL.

DEFENDANTS

NOTICE OF REMOVAL

Defendant Duke Energy Kentucky, Inc. (“Duke Energy”), by counsel, and pursuant to 28 U.S.C. §§ 1441 and 1446, hereby files this Notice of Removal removing this action from the Franklin Circuit Court in Franklin County, Kentucky to the United States District Court for the Eastern District of Kentucky, Central Division at Frankfort. In support of this Notice of Removal, Duke Energy states as follows:

1. On or about November 20, 2024, Plaintiff, City of Covington, Kentucky (“Covington”), commenced this action by filing a Complaint for Declaratory Judgment and Injunctive and/or Other Applicable Relief (“Complaint”) against Duke Energy and the Kentucky Public Service Commission (the “PSC”) in Franklin Circuit Court, Civil Action No. 24-CI-01149.

2. Service of the Complaint was affected on Duke Energy and the PSC on December 2, 2024. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all copy of process, pleadings, and orders in this action are attached as **Exhibit 1**.

3. Covington named the PSC as a nominal defendant in this action “for the purpose of putting it on notice” of the claims asserted against Duke Energy and to enable the PSC to “assert

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any objection to the relief sought by [Covington]” in the Complaint. [Complaint, Exh. 1, ¶ 4.] The Complaint does not assert a claim for relief against the PSC.

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4. As the following discusses in more detail, this is a civil action that may be removed to this Court pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446.

ORIGINAL JURISDICTION

5. This Court possesses original federal question jurisdiction over Declaration One contained in the Complaint.

6. U.S. District Courts maintain original jurisdiction over any claim “arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C § 1331. This includes claims that involve a “substantial, disputed question of federal law” so long as the federal issue is “(1) necessarily raised, 2) actually disputed, 3) substantial, and 4) capable of resolution in federal court without upsetting the traditional balance of state and federal judicial power.” *Dillon v. Medtronic, Inc.*, 992 F. Supp. 2d 751, 756 (E.D. Ky. 2014) (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)); *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555, 565 (6th Cir. 2007).

7. The Complaint asserts six claims for declaratory and related injunctive relief that arise from Covington’s attempt to extinguish the perpetual electric right-of-way franchise that the Kentucky General Assembly granted to a predecessor of Duke Energy in 1882. Covington enacted Commissioner’s Ordinance No. O-10-24 (the “Franchise Ordinance”), which authorizes for bid a twenty-year non-exclusive electric right-of-way franchise in Covington, Kentucky. After Duke Energy did not bid on Covington’s right-of-way franchise because of its preexisting perpetual right-of-way franchise granted by the Commonwealth, Covington sued Duke Energy seeking a legal determination that its perpetual right-of-way franchise has been extinguished. Briefly summarized, the claims asserted in the Complaint include the following:

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a. **Declaration One, Validity of Covington’s Ordinance:** Covington seeks a declaration that Duke Energy does not have a perpetual electric right-of-way franchise in the City of Covington and, therefore, the Franchise Ordinance is valid. [See Complaint, Exh. 1, ¶¶ 21-38.]

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b. **Declaration Two, Fairness and Reasonableness of Ordinance:** Covington seeks a declaration that the Franchise Ordinance imposes requirements for franchise renewal that are fair and reasonable, in compliance with KRS 96.010(1). [Id. at ¶¶ 40-45.]

c. **Declaration Three, Application of Certified Territories Act:** Covington seeks a declaration that Kentucky’s Certified Territories Act, KRS 278.016 – 278.020, does not afford Duke Energy the “exclusive right to provide electric service in Covington and does not conflict with the [Franchise Ordinance].” [Id. at ¶¶ 47-45.]

d. **Declaration Four, Ability to Solicit Bidders and PSC Authorization:** Covington seeks a declaration that it has the right to solicit for bid a 20-year electric franchise, and that the Certified Territories Act “obligate[s] the PSC] to authorize a new electric provider in Covington.” [Id. at ¶¶ 55-62.]

e. **Declaration Five, Right to Purchase Duke Energy’s Facilities:** In the event it is determined that Duke Energy possesses an “existing right-of-way but not the privilege of providing electric services,” Covington seeks a declaration that it is entitled to purchase Duke Energy’s electric service facilities in Covington. [Id. at ¶¶ 64-67.]

f. **Declaration Six, Application of Right of Way Ordinances and Injunctive Relief:** Finally, Covington seeks injunctive and/or declaratory relief finding

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that Duke Energy is prohibited from subleasing its electric poles unless it complies with § 96.067 of the Covington, Kentucky Code of Ordinances. [*Id.* at ¶¶ 69-73.]

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8. A necessary component to the relief sought in Declaration One is a finding that the Franchise Ordinance does not run afoul of the Contract Clause of the U.S. Constitution, which prohibits states from “pass[ing] any . . . Law impairing the Obligation of Contracts[.]” *See* U.S. Const., Art. I, § 10, Cl. 1.

9. As the Complaint makes clear, Covington seeks to impair Duke Energy’s longstanding perpetual electric right-of-way franchise in Covington issued by the General Assembly of the Commonwealth of Kentucky in 1882. [Complaint, Exh. 1, ¶¶ 22-24.] The Complaint alleges that Duke Energy claims it has succeeded to the perpetual rights granted to its predecessor “to lay its pipes and mains; to erect its poles, posts, and wires through and along any street or highway in the city aforesaid [Covington] or adjacent thereto as it may seem fit.” [*Id.* at ¶ 24 (quoting 1881-82 Ky. Acts ch. 1138 §6, approved April 22, 1882).]

10. To grant the relief Covington requests in Declaration One, a court must necessarily find that the Franchise Ordinance does not unconstitutionally impair Duke Energy’s contractual entitlement to a perpetual electric right-of-way franchise in Covington under the 1882 legislative charter by the General Assembly of the Commonwealth of Kentucky at issue. The constitutionality of the Franchise Ordinance is a substantial, disputed issue of federal law that lies at the heart of the relief requested in Declaration One. *See Dillon*, 994 F. Supp. 2d at 756; *see also Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913) (reaffirming *Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649 (1912) and holding that a state-issued right-of-way franchise was perpetual and that a Kentucky city’s attempt to require a city-issued franchise violated the Contract Clause); *Louisville*, 224 U.S. 649 (holding that a city-issued right-of-way franchise was perpetual and that

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Kentucky city's subsequent attempt to require a city-issued franchise impaired the obligation of the contract); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (seminal case applying Contract Clause protections to state-issued perpetual charter rights); *Mediacom Southeast LLC v. BellSouth Telcoms., Inc.*, 672 F.2d 396 (6th Cir. 2012) (reversing and remanding for a determination as to the scope of a perpetual right-of-way franchise in Kentucky); *Lexington-Fayette Urban County Gov't v. BellSouth Telcoms., Inc.*, 14 Fed. Appx. 636 (6th Cir. 2001) (holding state-issued right-of-way franchise was perpetual, rejecting Kentucky city's attempt to require a city-issued franchise, and stating *Louisville*, 224 U.S. 649 and progeny "is still good law").

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11. Resolution of this dispute in federal court will not upset the traditional balance of state and federal judicial power because this is not the type of claim that is traditionally litigated in state court, given that the genesis of the legal issue arises under the U.S. Constitution. *Dillon*, 994 F. Supp. 2d at 756.

12. This Court therefore possesses original federal question jurisdiction over Declaration One pursuant to 28 U.S.C. § 1331.

SUPPLEMENTAL JURISDICTION

13. Because Declarations Two through Six asserted in the Complaint form part of the same case or controversy as Declaration One, removal of the entire action is appropriate under 28 U.S.C. § 1441(a) by operation of this Court's supplemental jurisdiction.

14. U.S. District Courts maintain supplemental jurisdiction over "all other claims that are so related to claims in the action within [the Court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). In other words, removal of an entire action is appropriate where the claims derive from

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a ““common nucleus of operative facts.”” *See Watson v. Cartee*, 817 F.3d 299, 303 (6th Cir. 2016) (quoting *Harper v. AutoAlliance Int’l, Inc.*, 392 F.3d 195, 209 (6th Cir. 2004)).

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15. Declarations Two through Six all derive from the same dispute and same set of facts as Declaration One. Indeed, as the Complaint patently acknowledges, the claims asserted in this action “aris[e] from a disputed utilities franchise between [Duke Energy] and Covington.” [Complaint, Exh. 1, ¶ 1.] Not only does Declaration One form a part of the same case and controversy as Declarations Two through Six, but the relief requested in Declarations Two through Six hinges on the success of Covington’s claim in Declaration One that Duke Energy is not entitled to a perpetual franchise.

16. Because Declarations Two through Six arise from the same nucleus of operative facts as Declaration One, this Court possesses supplemental jurisdiction over Declarations Two through Six pursuant to 28 U.S.C. § 1367.

REMOVAL

17. Removal to this Court is proper under 28 U.S.C. § 1446(a) because the United States District Court for the Eastern District of Kentucky encompasses the location of the Franklin Circuit Court where Covington originally filed this action. The Franklin Circuit Court is within the Central Division and assigned to the Frankfort Docket. *See* LR 3.1(a)(2)(A).

18. This Notice of Removal was timely filed within thirty days of service of the initial pleading upon Duke Energy and the PSC on December 2, 2024. 28 U.S.C. § 1446(b). Written notice of the filing of this Notice of Removal will be promptly given to all parties, and a copy of this Notice of Removal will be promptly filed with the Franklin Circuit Court. 28 U.S.C. § 1446(d). The notice that will be filed in Franklin Circuit Court is attached hereto as **Exhibit 2**.

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19. The PSC is a nominal party to this action, was improperly joined to this action, or both. The PSC has no authority under KRS Chapter 278 to adjudicate Covington's claim in Declaration One of the Complaint, *i.e.*, that Duke Energy does not have a perpetual electric right-of-way franchise in the City of Covington and, therefore, the Franchise Ordinance is valid. The PSC's consent to removal is therefore unnecessary under 28 U.S.C. § 1446(b)(2).

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20. By removing this action, Duke Energy does not waive any available defenses, nor does it admit any allegations contained in the Complaint. Duke Energy has not yet filed an answer or other responsive pleading. It will do so within seven days of the filing of this Notice of Removal, pursuant to Rule 81(c)(2)(C) of the Federal Rules of Civil Procedure.

WHEREFORE, Duke Energy gives notice that the entire above-styled action now pending in Franklin Circuit Court, Civil Action No. 24-CI-01149, is hereby removed to the United States District Court for the Eastern District of Kentucky, Central Division at Frankfort.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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I certify that on December 31, 2024, I served the foregoing via CM/ECF, which will send all parties of record a notice of electronic filing, and/or via U.S. mail or electronic mail upon the following:

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