ORDINANCE NO. 1880

AN ORDINANCE CREATING AND ESTABLISHING FOR BID A NON-EXCLUSIVE ELECTRIC FRANCHISE FOR THE PLACEMENT OF FACILITIES FOR THE TRANSMISSION, DISTRIBUTION AND SALE OF ELECTRICAL ENERGY WITHIN THE PUBLIC RIGHT-OF-WAY OF THE CITY OF DANVILLE FOR A TWENTY (20) YEAR DURATION; IN RETURN FOR PAYMENT TO THE CITY OF DANVILLE OF THE SUM OF THREE PERCENT (3%) OF FRANCHISEE'S GROSS RECEIPTS PER YEAR FROM THE FRANCHISEE'S SALE OF ELECTRICITY TO ELECTRIC-CONSUMING ENTITIES INSIDE THE CITY OF DANVILLE'S CORPORATE LIMITS; RESERVING THE RIGHT TO IMPOSE A FRANCHISE FEE 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 DANVILLE'S CORPORATE LIMITS AND FURTHER PROVIDING FOR COMPLIANCE WITH RELEVANT LAWS, REGULATIONS AND STANDARDS; INDEMNIFICATION; INSURANCE; CANCELLATION OR TERMINATION; AND BID REQUIREMENTS; ALL EFFECTIVE ON DATE OF PASSAGE.

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DANVILLE:

SECTION 1. -

(a) There is hereby created a non-exclusive franchise to acquire, lay, maintain, operate, enter upon, construct, install, use and repair, in the public Right-Of-Way of the City a system of works for the generation, transmission and distribution of electrical energy from points either within or without the corporate limits of this City, to this City and the inhabitants thereof, and from and through this City to persons, corporations and municipalities beyond the limits thereof, and for the sale of same for light, heat, power and other purposes. Such systems may include poles or other structures, wires and other apparatus necessary for the operation of said system in, upon, over, under; across and along each and all of the Right-Of-Way within the present and future corporate limits of this City, subject to all the provisions of this Ordinance. Any new line extensions for City use in any City parks (the "Parks") shall be placed underground provided the City opens and closes the ditch and lays the conduit. Any new line extensions in the Parks for other customers' use shall be placed underground at those other customers' expense. Where commercially practicable, the Company when planning future construction will give special consideration for other parks, greenways, and other public Right-Of-Way similar or related in public use. Such special consideration includes constructing overhead facilities on the opposite side of public roads bordering such areas or placing the facilities underground provided the City opens and closes the ditch and lays the conduit. Additionally, the Company shall have the right to use the streets with its service and maintenance vehicles in furtherance of the Franchise. This Ordinance does not excuse the franchisee from complying with any and all existing and future federal, state or local laws and ordinances, as may be amended, including but not limited to the terms and provisions of the Code, or the provisions of its zoning ordinance, if applicable, which

are incorporated herein by reference, and shall apply as if fully set further herein unless such provisions (i) conflict with the terms or provisions of this Ordinance, (ii) conflict with or impair 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 otherwise (iii) are preempted by the action of any authority with jurisdiction over the Company.

(b) The Company will replace segments of existing overhead facilities within the public Right-Of-Way with underground facilities at the request of and cost to the City in accordance with its general underground practices and procedures and rules established by the Kentucky Public Service Commission. Subject to such practices and procedures and rules, repairs or replacements of existing facilities or construction of new facilities within areas where existing facilities have been placed underground at the request of the City also shall be placed underground; *provided, however,* the City shall pay any incremental cost associated with placing new facilities in such areas underground.

SECTION 2. - The following definitions apply to this Ordinance:

(a) *Code* means the Code of Ordinances, City of Danville.

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

(c) *Commission* means the legislative body of the City of Danville.

(d) *Facility* or *Facilities* means any tangible asset in the Right-Of-Way, including but not limited to equipment and apparatus such as pipes, conduits, wires, cables, amplifiers, transformers, fiber optic lines, antennae, pole or ducts, required, necessary, used or useful in the provision of utility or other services.

(e) *Government* or *City* means the City of Danville.

(f) *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.

(g) *Public Utility* or *Utility* means a Party or Person that is defined in KRS Chapter 278 as a utility and (i) is subject to the jurisdiction of the Kentucky Public Service Commission, the Federal Communications 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.

(h) *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 for a term of twenty (20) years from the effective date of this Ordinance. In addition to complying with the requirements contained in federal or state law or regulation, and the Code, the Company agrees that all construction shall be performed in a workmanlike manner and in such a way as not to unnecessarily interfere with the public's use of the Right-Of-Way.

SECTION 4. - As consideration for the granting of this franchise, 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. The Government shall notify the Company in writing within a reasonable time of receiving notice of any issue it determines may require indemnification.

SECTION 5. - The Company agrees to procure and maintain throughout the term of this franchise and any extension thereof, both commercial general liability insurance and motor vehicle insurance, in accordance with all applicable laws and regulations.

SECTION 6. - This franchise is not exclusive and the Government reserves the right to grant similar franchises to more than one Company.

SECTION 7. - No assignment of this franchise or the electric transmission and distribution system subject to this franchise shall take place without at least sixty (60) days advance written to the Government and consent by the Government which consent shall not be unreasonably withheld.

SECTION 8. - 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. Payment of penalties shall not excuse non-performance under this Ordinance. The right of the Government to seek and collect penalties as set forth in this section is in addition to its right to terminate and cancel as set forth in Section 9 of this Ordinance.

SECTION 9. - (a) In addition to all other rights and powers pertaining to the Government by virtue of the franchise or otherwise, the Government, by and through its

Commission, reserves the right to terminate and cancel the franchise and all rights and privileges of the Company hereunder in the event that the Company:

(1) Willfully violates any material provision of the franchise or any material rule, order, or determination of the Government made pursuant to the franchise, except where such violation is without fault or through excusable neglect;

(2) Willfully attempts to evade any material provision of the franchise or practices any fraud or deceit upon the Government;

(3) Knowingly makes a material misrepresentation of any fact in the application, proposal for renewal, or negotiation of the franchise;

(4) If experiencing a foreclosure or other judicial sale of all or a substantial part of the Company's Facilities located within the City of Danville, the Company shall provide the Government at least thirty (30) days advance written notice of such foreclosure or sale;

(5) Is no longer able to provide regular and customary uninterrupted service to its customers in the franchise area.

(b) Prior to attempting to terminate or cancel this franchise pursuant to this section, the City Manager or his or her designee, or the Commission shall make a written demand that the Company do or comply with any such provision, rule, order or determination. If the violation, found in Section 9(a), by the Company 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 the franchise as early as the next regular Commission meeting agenda. The Government shall cause to be served upon

Company, at least ten (10) days prior to the date of such 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.

(1) It shall be a defense to any attempt to terminate and cancel the franchise that the Company was relying on federal law, state law, or a valid tariff in acting or not acting on the issue in dispute.

(2) The Commission shall consider the request of the Government and shall hear any person interested therein, and shall determine in its discretion, whether or not any violation by the Company was with just cause.

(3) If such violation by the Company is found to have been with just cause, the Commission shall direct the Company to comply therewith within such time and manner and upon such terms and conditions as are just and reasonable.

(4) If the Commission determines such violation by the Company was without just cause, then the Commission may, by resolution, declare that the franchise of the Company shall be terminated and forfeited unless there is compliance by the Company within such period as the Commission may fix.

SECTION 10. - The Commission shall have the right to cancel this franchise 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:

(a) 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,

(b) 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 11. - It shall be the duty of the City Manager, or his/her designee, to advertise the offer for sale at public auction of said franchise and privilege, after the Commission has duly authorized the offer of the sale. Said franchise and privilege shall be sold to the highest and best bidder or bidders at a time and place fixed by the City Manager after he or she has given due notice thereof by publication or advertisement as required by law. In awarding the franchise, the City shall consider the technical, managerial, and financial qualifications of the bidder to perform its obligations under the franchise.

SECTION 12. – The Company may, at its option, terminate the franchise and this Agreement upon five (5) days' written notice if (a) the City breaches any of its obligations hereunder and such breach is not cured within thirty (30) 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 13 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 Agreement; (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 12, 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 Agreement; (ii) 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, 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 13. – 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 Manager, or his/her designee, upon the date(s) and at the times(s) fixed by him or her in said publication(s) or advertisement(s) for receiving same. Thereafter, the City Manager shall report and submit to the Commission, at the time of its next regular meeting or as soon as practicable thereafter, said bids and proposals for its approval. The 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 Commission, it may direct, by resolution or ordinance, said franchise and privilege to be again offered for sale, from time to time, until a satisfactory bid therefore shall be received and approved.

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. Bids shall include such documentation as is necessary to support the bidder's determination of the fair estimated cost of the system required to render the service. Government reserves the right to review any of bidder's supporting documentation which justifies bidder's determination of said estimated cost. 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 14. –

(a) In consideration for the granting of the franchise the Company agrees to pay to the Government a franchise fee in a sum equal to three percent (3%) of gross receipts per year from the Company's sale of electricity to all electric-consuming entities (which includes businesses, industrial facilities and dwellings) inside the City's corporate limits unless the City establishes the franchise fee in a different amount pursuant to this section. The City reserves the right at any time, and upon sixty (60) days written notice, during the effective period of the franchise to be awarded hereby to impose upon the Company a franchise fee in an amount not to exceed five percent (5%) inclusive of any other City permitting fees, of the gross annual revenues as defined herein. No later than ten (10) working days after final acceptance of

its bid by the City, or any subsequent notification of any change in the amount of the fees in this Section 14, the Company shall make any necessary filings with the Kentucky Public Service Commission to provide for prompt and satisfactory cost recovery of the amounts payable under this Ordinance and any franchise awarded pursuant to its terms for any amounts for which it desires recovery. In the event that a new or modified tariff or special contract is necessary to comply with the franchise or to seek cost recovery, such filing shall be made within forty-five (45) days. The Company shall provide the City with copies of any filings it makes with the Kentucky Public Service Commission related to the franchise in order to satisfy the obligations created herein. The Company is otherwise required to continue submitting payments to the Government under the terms of its existing tariff and/or franchise until such time as any necessary approvals are obtained. The franchise fee, in any amount, shall be payable by the Company only if and to the extent the Company is authorized by the Kentucky Public Service Commission (or its successor) to pass through such fee to the entities served by it inside the Government's corporate limits; and provided further, that the Government shall notify the Company by certified mail return receipt requested to Company's registered agent of any annexations or other changes in the City's boundaries and provide the Company a list, in electronic format, of all addresses within the territory annexed or added to or de-annexed or otherwise removed from the Government's limits that are to be served by the Company, and within thirty (30) days of receipt of said certified letter Company shall begin imposing the franchise fee on any new areas annexed.

(c) As further consideration for the granting of this franchise, the Company shall permit the Government to utilize its poles, conduit, or raceway space at no charge when such space is vacant or available for public safety or governmental

purposes. This provision shall not supersede any existing or future agreement that the Government has with the Company pertaining to the use of the Company's space.

(d) In the event the sale of electricity is deregulated within the Commonwealth of Kentucky, and deregulation results in a material shortfall of revenue to the Government, the Government shall have the option of terminating the franchise agreement with the Company. If the franchise agreement 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 agreement to the Company.

(e) To the extent the Company actually incurs other reasonable incremental costs in connection with its compliance with the Government's ordinances, 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 15. –

(a) Payment of any amount due under this Ordinance shall be made on a quarterly basis within forty-five (45) days of the end of the preceding payment period.

(b) 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 Ordinance. Any additional amount due to the Government shall be paid within ten (10) days following written notice to the Company by the Government.

SECTION 16. - Bids offered for purchase of this franchise shall state the bidder's acceptance of the conditions set forth in this Ordinance. If any bid shall include an

offer of payment over and above the terms of the franchise, then a certified check for said amount, payable to the City, shall be deposited with the Government. This amount shall be in addition to the provision for payments contained in Section 14 and 15, which shall be considered as a condition of this franchise. Any check deposited by an unsuccessful bidder shall be returned when the Commission shall have accepted the bid or bids, which in its judgment is or are the highest and best.

SECTION 17. - 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 an opportunity to cure, such violations, failure or default continue as set forth in Section 8.

SECTION 18. – The Company shall have the authority to trim trees that are located within or overhang the Right-Of-Way so as to prevent the branches of such trees from coming in contact with the wires, cables, or other Facilities of the Company. Any trimming, removal or other disturbance of trees shall conform to all lawful ordinances, requirements and directives of the Government, and the Company shall make available upon reasonable request of the Government, information regarding its tree-trimming practices. In the event that the Company fails to timely and sufficiently respond to a legitimate and reasonable complaint regarding its failure to trim such trees, and such complaint is made known to the Government, the Government shall contact the Company with respect to such matter and attempt to reach a satisfactory result. Notwithstanding the foregoing, this provision in no way limits any existing or future lawful rights that the Government may have with respect to such trees.

SECTION 19. - 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 or a franchise shall be in a court of competent jurisdiction in Boyle County, Kentucky.

SECTION 20. - 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 21. - If any section, sentence, clause or phrase of the Ordinance is held unconstitutional or otherwise invalid, such infirmity shall not affect the validity of the remaining Ordinance.

SECTION 22. - The franchise created by this Ordinance shall take effect after the Commission accepts the bid(s).

SECTION 23. - This Ordinance shall become effective on the date of its passage and publication as required by law.

GIVEN FIRST READING AND PASSED 4/11/2016.

GIVEN SECOND READING AND PASSED 4/25/2016.

DATE OF PUBLICATION_____.

APPROVED:

_____
G. MICHAEL PERROS, MAYOR
CITY OF DANVILLE, KENTUCKY

ATTEST:

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DONNA PEEK, CITY CLERK
CITY OF DANVILLE, KENTUCKY