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College of Law
Office of Clinical Legal Education

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TO: Public Power Coalition

The purpose of this memo is to determine how the City of Syracuse can take control of the electric utility that is currently franchised to National Grid.

The City of Syracuse (“City”) has the right to purchase National Grid’s property. NY state and local laws grant the City the power to purchase a public utility. More specifically, the City’s right is derived from an 1897 electric light franchise (“1897 Franchise Agreement” or “Agreement”) which governs the contractual rights and obligations between National Grid and the City. Under the Agreement, National Grid may use the City’s land to furnish electricity. At any time, however, the City retains the power to purchase National Grid’s property.

It appears the City has met its obligations to purchase National Grid’s property. The City is not required to apply for a certificate of authority from the public service commission. In addition, the City has already passed Local Law No. 13 giving it the legal authority to purchase National Grid’s property. As long as the City’s plan does not require changes to the local law, a public referendum is not required. The City should move forward to propose an offer to purchase National Grid’s property.

This memo addresses the following issues: First, what relevant law authorizes the City to establish, own and operate an electric utility? Second, how does the City acquire the electric utility from National Grid?

I. What relevant law authorizes the City of Syracuse to establish, own and operate an electric utility?

A. General Municipal Law § 360

NY General Municipal Law § 360 authorizes the City to purchase National Grid’s property. Section 360 gives the City power to “establish, own and operate” a “public utility service”. A public utility service is defined, among other things, as “real and personal property” necessary to furnish electricity. NY GEN MUN § 360(1). In this case, “public utility services”

refers to National Grid’s systems, structures, and any of their real and personal property used or necessary for providing electric services (“National Grid’s property”).

The City may “construct, lease, purchase, own, acquire, use and/or operate” facilities and it has the power to acquire a public utility company by purchase or condemnation¹. NY GEN MUN § 360(2),(6). More specifically, the NY General Municipal Law § 360(3) provides that local law must establish: (1) the methods of constructing, leasing, purchasing, and acquiring the plant and facilities for electric services and the maximum and the estimated costs and (2) the method of furnishing the electric services.

B. City of Syracuse Local Law No. 13

As required by NY General Municipal Law § 360, the City of Syracuse enacted a local law authorizing the purchase of National Grid’s property. Local Law No. 13 (“local law”) Section 2 allows the City to “use, lease or acquire transmission, substation and distribution facilities”. In a mandatory referendum in the November 1982 election, the voters approved Local Law No. 13.

Notable provisions in the local law include a statement that the “use, lease, or acquisition of the transmission, substation and distribution facilities for the public utility service will result in no net cost to the city.” See Section 5 of Local Law No. 13. The City plans to recover in full an estimated annual outlay of \$15,683,526. See Section 5 of Local Law No. 13. Also, the law states that “it is anticipated that the purchase and distribution of energy . . . at no net cost to the city, will result in savings to energy consumers.” See Section 5 of Local Law No. 13.

While NY General Municipal Law § 360(5) requires a general election to be held for the approval of the local law and that the City’s legislative body must publish the local law in a local newspaper, we will assume these procedures were properly executed for Local Law No. 13.

As required by NY General Municipal Law § 360, the City has already established a local law authorizing the purchase of National Grid’s property.

C. Can the City Rely on the Local Law No. 13?

As it stands, unless a provision of the local law has been invalidated², Local Law No. 13 authorizes the City to purchase National Grid’s property.

¹ More specifically, the NY Attorney General’s Office in 1969 issued an opinion that General Municipal Law, § 360(2) and (6) collectively show that it was the legislature’s intent to authorize municipal corporations to purchase transmission lines.

² Other than the version of Local Law No. 13 provided to us by the City of Syracuse’s Corporation Counsel, we were unable to locate Local Law No. 13 or any changes or amendments using our University Law Library resources.

One of our concerns is whether the City may need to amend or revise the local law before purchasing National Grid's property. A change of a provision of law "relating to" a public utility franchise triggers a mandatory referendum. NY MUN HOME RULE § 23(2)(i). In other words, if the City needs to amend Local Law No. 13, another referendum is likely required. Here, the City seeks to purchase National Grid's property to establish its own electric utility service. This purchase essentially terminates the existing electric utility franchise. Thus, any amendments or revisions to Local Law No. 13 related to the purchase of National Grid's electric utility will likely require a mandatory referendum.

In particular, one provision of Local Law No. 13 that may need to be updated is the annual outlay of the estimated cost to purchase National Grid's property. As required by NY General Municipal Law § 360(3), the local law requires the maximum and estimated costs of purchasing National Grid's property. If the estimate of \$15,683,526 is not current, the City will likely need to update the local law along with any other outdated language. If the local law is no longer relevant or is in conflict with the City's decision to purchase, the City must pass a new local law and hold a referendum. The City's Corporation Counsel should address these concerns.

II. How does the City of Syracuse Acquire the Electric Utility from National Grid?

A. The 1897 Franchise Agreement Authorizes the City of Syracuse to Purchase National Grid's Property

1. National Grid's Power is Limited by the 1897 Franchise Agreement

National Grid, as the successor of the electric utility franchise, is subject to all of terms of the 1897 Franchise Agreement including the provision that the City may at any time purchase National Grid's property. Under Article 2 of NY Transportation Corporations Law § 11, National Grid has the power to generate, acquire and supply electricity for heat or power in the City with the consent of the City's legislative body and under regulations that the City's legislative body may prescribe. However, National Grid's power under NY Transportation Corporations Law § 11 is limited by a Franchise Agreement dated on December 21, 1896 and accepted on January 5, 1897 and January 28, 1897 ("1897 Franchise Agreement"). In this Agreement, the City of Syracuse grants a franchise right to Eugene Hughes and Company and all future successors in perpetuity. Essentially, this means that the entity that acquires Eugene Hughes and Company is given rights under this franchise and any entity that subsequently acquires that entity takes over the rights under the 1897 Franchise Agreement. This transfer of rights from one entity to another can occur indefinitely until the agreement is voided or revoked.

A more recent contract between Niagara Mohawk Power Corporation and the City of Syracuse proves that the 1897 Franchise Agreement is still an operational agreement. In the contract between Niagara Mohawk Power Corporation and the City, the City sought to license Niagara Mohawk's conduit and overhead distribution system for its traffic signal equipment. Both Niagara Mohawk and the City signed the 1996 agreement acknowledging the legal authority of the 1897 electric franchise. Effective January 31, 2002, National Grid acquired Niagara Mohawk, and subsequently, National Grid became a successor under the 1897 Franchise Agreement. See National Grid 2001/2002 Annual Report, page 19. Therefore, it is likely indisputable that the 1897 Franchise Agreement grants the City the right to purchase National Grid's property.

2. The City has the Right to Purchase National Grid's Property Pursuant to the 1897 Franchise Agreement

New York courts have well established rules regarding franchise agreements. A franchise is a special privilege or right conferred by or under the authority of the government. *Matter of Penn-York National Gas Corp. v. Maltbie*, 299 N.Y.S. 1004, 1009 (1937) (citing, *Curtis v. Leavitt*, 15 N.Y. 9 (1857)). More specifically a public utility franchise allows the utility to use public property in exchange for supplying a public service. *Rochester Gas and Elec. Corp. v. Public Service Com'n of State of N.Y.*, 71 N.Y.2d 313, 315 (1988). A franchise is usually accompanied by conditions regulating, limiting and/or controlling the exercise of the rights and privileges conferred. *Public Service Corporation of Long Island*, 107 Misc. 19, 22. 176 N.Y.S. 621, 623 (Sup 1919).

In this situation, there is such a contract that gives the City the right to buy National Grid's property at any time. The relevant section of the 1897 Franchise Agreement is below.

Section 17

City's right to purchase National Grid: the City reserves the right "at any time" after fifteen years after the passage of this Agreement, to purchase the plant and property of National Grid. See Amended Section 17 of the 1897 Franchise Agreement.

While National Grid may assert its right to "erect, construct, maintain and use . . . public places of the City" in perpetuity, this is limited by the City's power to purchase National Grid's plant and property. Just as Niagara Mohawk and the City relied on the 1897 Franchise Agreement, the City today may similarly rely on the same agreement to exercise its right to purchase National Grid's property.

Once a contract is properly in force, it becomes a contractual obligation that cannot be impaired by laws of the municipality or state. *Quinby v. Public Service Commission of State of*

New York for Second Dist., 223 N.Y. 244, 262 (1918). Therefore, the court should remain consistent with its past practices and uphold the provisions of this contract permitting the City to purchase the property of National Grid pursuant to the 1897 Franchise Agreement.

B. Procedures to Purchase

Certain procedures must be met before the City purchases National Grid's property. First, unlike privately owned utility plants, when a city plans to own and operate its own electric utility, a city not required to obtain the consent of the Public Service Commission. NY GEN MUN § 364(2)(a). Therefore, the City does not need to obtain a certificate from the Public Service Commission authorizing the purchase of an electric utility.

Second, as required by NY General Municipal Law § 360(3), the City has to set the "proposed method" and procedures for the purchase of National Grid's plant and facilities. Section 2 of Local Law No. 13 provides that the City may acquire for compensation the "transmission, substation and distribution facilities necessary to furnish" power to the City. According to the local law, the City may purchase National Grid's property. If the City chooses to exercise eminent domain, it must be authorized by another local law and public referendum. See Section 6 of Local Law No. 13. Third, the local law must provide the maximum and estimated costs of the proposed method. NY GEN MUN § 364(3). Local Law No. 13 states that \$15,683,526 is the estimated annual outlay for the purchase, distribution and delivery of energy. See Section 5 of Local Law No. 13. Fourth, the local law must give the "method of furnishing electric services". NY GEN MUN § 364(3). Local Law No. 13 meets this requirement in the following relevant provisions: Section 2 of Local Law No. 13 allows the City to contract for the purchase or acquisition of electric, hydroelectric or other forms of energy; Section 3 permits the City to arrange with any utility companies for the distribution of energy and for the collection of charges within certain service areas; Section 4 addresses the factors required to fix electricity rates; and Section 5 estimates that the acquisition of transmission, substation and distribution facilities for the City's electric utility will result in no net cost to the city.

Lastly, if there is a disagreement regarding the purchase price, the City and National Grid must follow the requirements in Local Law No. 13. While Local Law No. 13 does not specify how to calculate the purchase price, we can reasonably assume that the City has the discretion to set and negotiate a purchase price with National Grid. If the City and National Grid cannot agree on a purchase price, Section 17 of the 1897 Franchise Agreement provides the following procedure to resolve such a dispute.

Section 17

Procedure for disagreement: any disagreement over the purchase price must be resolved by a three person commission to be appointed by the Appellate Division of the Supreme Court, Fourth

Department. This three person commission will appraise the value of the property and generate a report of the appraisal to the City's Mayor and Common Council within six months after the commission's appointment. Within six months after the receipt of the commission's report, the City's Mayor and Common Council can decide to purchase National Grid's plant and property at the appraised value.

Therefore, it appears that the City has met its obligations under state and local laws and now only needs to make an offer to purchase National Grid's property.

C. Alternatives to Purchase

Under NY General Municipal Law § 360(6), the City can acquire National Grid's property through eminent domain. The procedure of eminent domain is governed by NY Eminent Domain Procedure Law. As the Public Power Coalition is already aware of, this can be time-consuming and unreasonably expensive for the City. For such reasons, we did not analyze this option in detail.

III. Conclusion

The City's right to purchase National Grid's property is derived from both state and local laws and an electric utility contract. NY General Municipal Law § 360 and Local Law No. 13 grant the City the power to establish, own and operate an electric utility and the laws provide the proposed method of doing so. The City may at any time purchase National Grid's property according to the contractual rights specified in the 1897 Franchise Agreement. Additionally, the City has met its obligation to create a City run public utility and now must propose an offer to purchase National Grid's property. While there are some concerns that the City needs to amend or revise Local Law No. 13, this is an issue that the City's Corporation Counsel can more appropriately resolve.

Therefore, consistent with the electric utility franchise and state and local laws, the City has the authority to purchase National Grid's property at any time.