

**CITY OF VILLA HILLS, KENTUCKY
ORDINANCE NO. 2020-4**

draft Ordinance 2019-P
(as amended)

AN ORDINANCE OF THE CITY OF VILLA HILLS, KENTUCKY ESTABLISHING A NON-EXCLUSIVE FRANCHISE FOR THE USE OF THE PUBLIC STREETS, ALLEYS AND OTHER PUBLIC GROUNDS OF THE CITY FOR THE TRANSMISSION AND DISTRIBUTION OF ELECTRICITY THROUGH AND FOR CONSUMPTION WITHIN THE CITY; AND PROVIDING THE TERMS THEREOF.

WHEREAS, Duke Energy Kentucky, Inc. (“Duke Energy”) is a public utility subject to the provisions of Sections 163 and 164 of the Kentucky Constitution and KRS 96.010 through 96.045; and

WHEREAS, Section 163 of the Kentucky Constitution prohibits public utilities from using the streets, alleys and other public grounds within a city without a franchise for that use; and

WHEREAS, Duke Energy currently has access to the streets, alleys and public grounds of the City of Villa Hills, Kentucky (“City”) for the transmission and distribution of electricity through and for consumption within the City; and

WHEREAS, the City Council for the City of Villa Hills, Kentucky has found and determined that the construction, operation, maintenance, and utilization of a franchise over, across, and under public right of way in the City of Villa Hills is a valuable property right and benefits said utility to the extent it would be required to invest capital and incur right of way acquisition costs without the use thereof; and the City Council has further found and determined that the construction, installation, operation, removal, maintenance and/or repair of utility owned facilities and other infrastructure necessarily and unavoidably results in the damage and degradation of the City’s streets and sidewalks, for which the City is entitled to reasonable compensation in order to offset and recover the cost of restricting, removing, repairing or resurfacing damaged public rights of ways; and

WHEREAS, in order to protect the health, safety, and welfare of the citizens, businesses, and visitors in the City of Villa Hills, 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 below.

NOW, THEREFORE, for the purpose of complying with the Constitution and Revised Statutes of Kentucky and pursuant to the authority and requirements of Sections 163 and 164 of the Kentucky Constitution and KRS 96.010 through 96.045;

BE IT ORDAINED BY THE CITY OF VILLA HILLS, KENTUCKY AS FOLLOWS:

Section 1.0 – Definitions

As used herein, the following words and phrases have the meanings indicated for them:

- 1.1 The word “City” means the City of Villa Hills, Kentucky in Kenton County, Kentucky.
- 1.2 The words “Continuing Default” mean a default lasting for a period of more than thirty (30) consecutive calendar days.
- 1.3 The word “Emergency” means any situation, condition or circumstance presenting a real or perceived threat of destruction or damage to life or property or the loss of electrical service due to any cause whatsoever.
- 1.4 The word “Facilities” means the tangible apparatus, equipment and instrumentalities and the appurtenances thereto used for the transmission and distribution of electricity through and within Public Property in the City, including, without limitation, poles, wires, cables, cross-arms, conduits, anchors, junction boxes, manholes, mains, pipes and valves.
- 1.5 The words “Franchisee” or “Grantee” mean Duke Energy Kentucky, the entity to whom the City has awarded and granted a non-exclusive franchise for the transmission and distribution of electricity through and for consumption within the City.
- 1.6 The words “Franchise Agreement” mean the electricity franchise agreement entered into by and between the City of Villa Hills, Kentucky and Duke Energy Kentucky, Inc.
- 1.7 The words “Public Property” mean real estate in the City of Villa Hills, Kentucky that has been dedicated or is otherwise open to public use and is subject to regulation by the City of Villa Hills, Kentucky.

Section 2.0 – Existing Legislation

- 2.1 The City has already adopted legislation and regulations pertaining to encroachments in the City’s Rights of Way codified under Chapter 51 of the City Code of Ordinances. These provisions contained in Chapter 51 of the Villa Hills Code of Ordinances are incorporated by reference and are part of any Franchise as if fully set out herein.

Section 3.0 – Franchise

- 3.1 There is hereby established a non-exclusive franchise for the use of the Public Property within the City for the transmission and distribution of electricity for consumption both within and outside of the City.

Section 4.0 – Terms of Franchise

As required by KRS 96.010, the terms and conditions of the franchise hereby established are as follows:

- 4.1 Bidding Requirement

Pursuant to Section 164 of the Kentucky Constitution, before granting the franchise hereby established, the City shall first, after due advertisement, receive bids publicly, and award it

to the highest and best bidder, based upon the discretion and judgment of the City; and the City shall have the right to reject any and all bids if in its judgment said bid responses are unresponsive.

4.2 Bond Requirement.

The Franchisee shall not be required to post a bond pursuant to the requirements of KRS 96.020(1), as it already owns a plant and equipment sufficient to render the service required under the franchise hereby established.

4.3 Reservation of Rights.

The City hereby reserves all of the rights reserved to home rule cities as set forth in the applicable Kentucky Statutes and within the meaning thereof; and the City shall have all of the rights, privileges and authority established thereby. The Franchisee shall comply with all of the lawful exercise thereof by the City and with all other laws, rules and regulations of all governmental agencies having jurisdiction thereof.

4.4 Franchise Nonexclusive.

The franchise which is the subject of this Ordinance is not an exclusive franchise. It is a nonexclusive franchise, meaning that the City reserves the right to also grant an electricity franchise to other providers in accordance with the Kentucky law.

4.5 Franchise Not Divisible Nor Assignable.

The franchise established herein is not divisible; nor assignable in whole or in part to a third-party without the written consent of the City. In the event that the Franchisee ceases to provide electric utility services under this Ordinance, the franchise shall terminate, and Franchisee shall not be permitted use of the City's rights of way until and unless the parties negotiate a new franchise. Notwithstanding the foregoing, the Franchisee may transfer the franchise to any existing corporate parent, subsidiary or affiliate which may, during the term of its Franchise Agreement, assume the obligation to provide electricity throughout and for consumption within the City without being required to seek the City's consent to such assignment.

4.6 Franchise Area.

The franchise established hereby shall be for the use of those portions of the Public Property within the City that are included in the territory for which the Franchisee currently serves or may hereinafter serve pursuant to KRS Chapter 278.

4.7 Effective Period of Franchise.

4.7.1. The franchise established hereby shall be effective for a period of ten (10) years, commencing on July 1, 2020.

4.7.2. The franchise may be renewed for an additional term, not to exceed ten (10) years, upon request of the Franchisee, and approval of the City Council. The request for renewal shall be made by Franchisee in writing to the Mayor at least one hundred

eighty (180) days, but no earlier than one (1) year in advance of the termination date of the Franchise Agreement. The ultimate decision as to whether to grant an additional franchise term shall be that of the City Council.

- 4.7.3. The franchise awarded to the Franchisee creates no vested rights in the Franchisee, other than those expressly provided under the Franchise Agreement, this Ordinance, or at law, and any installation or placement of Facilities by Franchisee in the rights-of-way are at Franchisee's risk.

4.8 Franchisee Rights and Privileges During Effective Period.

During the term of the franchise, the Franchisee may engage in the following activities; but always subject to the rights reserved by the City pursuant to the provisions of the previous Section 4.3 hereof:

4.8.1. Continuation of Existing Facilities.

The continued operation, use, maintenance, repair, construction and/or reconstruction to the existing or improved condition thereof of the electrical Facilities of the Franchisee within or upon any Public Property within the City.

4.8.2. New Facilities.

The Franchisee shall provide commercially reasonable notice of any non-Emergency extension or expansion of any existing electrical Facilities of the Franchisee, or the construction or installation of new Facilities within the City limits and the plans and specifications for such new Facilities to the City. The Franchisee shall abide by the City's permitting process and receive necessary approval thereof by the Mayor or the designee thereof, which approval shall not be withheld unless the extension, expansion, construction or installation described in those plans and specifications is contrary to the public health, safety, welfare and convenience or future City right of way plans. In the event that any request for the extension or expansion of any existing Facilities of the Franchisee or the construction or installation of new Facilities of the Franchisee is denied by the Mayor or his designee, such denial shall be set forth in writing with the basis of the denial set forth therein within forty-five (45) days of the Franchisee's notice. If written denial or approval is not received within forty-five (45) days of the Franchisee's notice, the extension, expansion, construction or installation request shall be deemed approved. The City acknowledges that the Franchisee has a statutory duty to provide adequate, efficient and reasonable service and that the Franchisee shall not be prevented from fulfilling that statutory or regulatory obligation due to any delay by the Mayor or the designee thereof in giving, or failing to give, any approval described herein.

Nothing in this Ordinance shall excuse Franchisee from obtaining any and all required permits, including City permits, licenses, and approvals, and to pay the fees and costs associated with said permits, licenses, and approvals, including any performance and maintenance bonds if applicable, in the same manner as any other entity doing business in the City of Villa Hills.

4.8.3. Pavement Removal, Excavation and Grading.

The Franchisee shall provide commercially reasonable notice of any non-Emergency removal or revision of any pavement and any excavation and grading reasonably necessary within any Public Property in the franchise area and the plans and specifications for such new Facilities to the City. The Franchisee shall abide by all City Ordinances and requirements, including but not limited to: permitting ordinances, encroachment ordinances, licensing and repair ordinances, and ordinances addressing remediation, time limitations based on right of way street construction, and replacement of graded roads and surfaces. Franchisee shall have the right to disturb, break, and excavate in the public-right-of-way as may be reasonable and necessary to provide the service authorized by the Franchise Agreement; however, the City may deny Franchisee the right to so disturb, break and excavate in the public-right-of-way if by doing so the activity is injurious to the health and welfare of the public. Franchisee will repair any damage caused solely by Franchisee to any part of the public-right-of-way and will restore, as nearly as practicable, such property to substantially its condition immediately prior to such damage. Franchisee shall use reasonable care in conducting its work and activities in order to prevent injury to any person and unnecessary damage to any real or personal property. Franchisee shall, when reasonably practicable, install all wires, materials and/or pipelines underground at such depth and in such manner so as not to interfere with the existing pavement, curbs, gutters, water or sewer pipes owned, or controlled by the City or any other local governmental agency.

4.8.4. Tree Trimming and Graffiti Removal.

The Franchisee shall have the right, to cut, trim or remove any trees, overhanging branches, roots or other obstructions on Public Property which in the reasonable opinion of the Franchisee may endanger or interfere with the efficient installation or maintenance of electrical Facilities. Any trimming, removal or other disturbance of trees shall conform to all applicable laws or regulations. If, during the franchise period, the City closes to public use or disposes of or conveys any Public Property in or on which Facilities of the Franchisee are located, the City shall make such provisions as may be legal and necessary to grant the Franchisee the right to retain the Facilities thereof within that Public Property, along with the rights to maintain and operate such facilities.

The Franchisee shall at its own cost and expense, maintain all facilities in a clean, graffiti free manner, and shall remove any and all graffiti or profane or inappropriate language from its equipment or facilities located within the public rights-of-ways in an expedited fashion.

4.8.5. Franchisee Obligations During Effective Period.

While this Franchise is effective, the Franchisee shall provide the following:

4.8.6. Surety Bond.

Provide the City with, and continually maintain, a surety bond with:

(a) the City as the Obligee; and (b) the Franchisee as the Principle; and (c) a surety

approved by the Mayor of the City, in an amount equal to One Hundred Thousand Dollars (\$100,000.00) conditioned upon the faithful performance by the Franchisee of the terms and conditions of the franchise hereby established. However, this requirement shall be initially waived by the City on the basis that the Franchisee is deemed to have sufficient financial resources to fulfill its obligations under the Franchise Agreement. The City reserves the right to revisit the waiver of a surety bond if there is a material downgrade to the creditworthiness of the Franchisee such that the corporate credit rating of the Franchisee falls below the investment-grade threshold of BBB- (S&P) or Baa3 (Moody's).

4.8.7. Liability Insurance.

Provide the City with and continually maintain a comprehensive policy of liability insurance, with the Franchisee and the City as named insureds, and with limits not less than \$500,000.00 per person and \$1,000,000.00 per occurrence, by which the Franchisee and the City are insured against any legal liability to others that is in any way related to any acts or omissions of the Franchisee pursuant to the franchise hereby established. However, this requirement shall be initially waived by the City on the basis that the Franchisee is deemed to have sufficient financial resources to fulfill its obligations under the Franchise Agreement and is self-insured.

4.8.8. Provision of Electricity.

Provide electricity to the consumers thereof within the City that is no less in character, quantity and geographical area than that provided at the time a franchise established hereby is granted and awarded to the Franchisee; and also equal to and no less in character and quantity than that provided to consumers thereof outside of the City and according to the same terms, conditions, rates, charges and costs as approved by the Kentucky Public Service Commission.

4.8.9. Maintenance of Facilities.

Cause the Facilities of the Franchisee within the franchise area to be maintained and repaired to a condition that is functional and safe and not a hazard to the public health, safety, welfare and convenience.

4.8.10. Prosecution of Work.

During the construction, maintenance, repair, replacement, re- construction, expansion, extension, new construction or installation of any of the Facilities of the Franchisee, the Franchisee shall promptly and diligently prosecute such activities to completion within a reasonable time, and as specified in any applicable right of way ordinances, and at the least possible hazard to the public health, safety, convenience and general welfare; and, upon completion thereof, the Public Property of the City in which those activities occurred shall be restored by the Franchisee to a condition that is as good or better than the condition thereof at the time of the commencement of those activities.

4.8.11. Relocation of Facilities.

During any construction, maintenance, repair, replacement, improvement or expansion by the City of any of the Public Property within the franchise area or any improvements therein other than the Facilities of the Franchisee, or at any other time, the Franchisee shall remove, relocate or adjust any of the Facilities of the Franchisee in such Public Property within sixty days (60) after a written request from the City. The City acknowledges that many relocations projects will take longer than sixty (60) days to accomplish and agrees to grant reasonable extensions of time in accordance with Section 4.10 herein.

4.8.12. Reserved Rights of the City.

Comply with the exercise by the City of all of the rights thereof reserved by the City pursuant to the provisions of the previous Section 4.3 hereof.

4.8.13. Franchise Fee.

As consideration for the rights conferred by the granting of this ten (10) year franchise, and to compensate the City for its superintendence of the franchise, the Franchisee shall pay to the City a fee of up to five percent (5%) to be determined by the Villa Hills City Council of revenues upon the following conditions:

- a. The Franchisee will remit to the City quarterly payments on or before the 30th day after the end of each calendar quarter and shall also submit to the City quarterly a statement of the Franchisee's revenues.
- b. The Franchisee will reimburse the City for costs incurred by the City in advertising the bid and for publication of the necessary ordinances and for the doing of all other acts, including reasonable attorney fees, necessary to the letting of the bid for the franchise awarded by this Ordinance. These costs shall be invoiced by the City to the Franchisee and the Franchisee shall pay said costs within thirty (30) days of receipt of said invoice. The Franchisee shall not be required to pay more than \$5,000 in total under the terms of this provision.
- c. No acceptance of any franchise fee payment by the City 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 City may have for future or additional sums pursuant to this Ordinance. Any additional undisputed amount due to the City shall be paid within ten (10) days following written notice to the Franchisee by the City.
- d. To the extent that the Franchisee seeks to pass through fees and costs associated with permits and licenses of whatever nature, Franchisee must first obtain approval for such pass-through by the Kentucky Public Service Commission, except to the extent such approval has already been granted.
- e. No Credits or Deductions. The compensation and other payments to be made: (1) shall not be deemed to be in the nature of a tax; and (2) shall be in addition to any and all taxes or other fees or charges that Grantee shall be lawfully

required to pay to the City or to any State or Federal agency or authority, including but not limited to property taxes imposed by Kentucky Revised Statutes Chapter 132, all of which are and shall be separate and distinct obligations of the Grantee.

- f. The franchise fee provided herein is in addition to any and all other separate charges provided for in other City Ordinances including occupational taxes, licensing, permitting fees and costs.

4.9 Franchisee Obligations During and After Effective Period.

While this franchise is effective and also thereafter, the Franchisee shall and hereby does:

4.9.1. Release.

Release, acquit and forever discharge the City, and all of its officers, agents, successors and assigns thereof, from each, every, and any and all obligations and liabilities thereof, jointly and severally, to the Franchisee and the successors and assigns thereof for each, every, and any and all personal injuries, property damage, costs, expenses, losses, compensation and all other damages of every kind and nature, and all claims and causes of action therefore, at law, or in equity, including, without limitation, claims of third-parties for indemnification and/or contribution, which may accrue to the Franchisee and the successors and assigns thereof, through any act, omission, event or occurrence proximately caused by the negligence of the Franchisee, during the term of the franchise, which is in any way related to the franchise established hereby or the award or grant thereof to the Franchisee or the use of the public streets, alleys and other public grounds within the City by the Franchisee, pursuant to this Ordinance.

4.9.2. Indemnification.

Agree to pay, indemnify and hold the City and its officers, agents, successors and assigns thereof harmless and to defend them at the request of the City and at the sole cost and expense of the Franchisee, from each, every, any and all uninsured obligations and liabilities thereof to others and the executors, administrators, heirs, successors and assigns of such others for each, every, any and all personal injuries, property damage, costs, expenses, losses, compensation and all other damages of every kind and nature, and all claims and causes of action therefore, at law, or in equity, including, without limitation, claims of third parties for indemnification and/or contribution, which may accrue to such others and their executors, administrators, heirs, successors and assigns, through any act, omission, event or occurrence proximately caused by the negligence of the Franchisee during the term of this franchise which is related to the franchise established hereby or the award or grant thereof to the Franchisee or the use of the public streets, alleys and other public grounds within the City by the Franchisee, pursuant to this Ordinance.

4.10 Extensions of Time.

Any deadline involving the operations of the Franchisee set forth herein may be extended by the City upon a showing that good cause exists for such extension. The request for an extension of time may be given in writing or verbally and be granted or denied in writing or verbally, however, any verbal request or verbal grant or denial of a request shall

subsequently be reduced to writing. For purposes of this section, "good cause" shall mean any circumstance, occasion or situation that would prevent the Franchisee from timely performance using reasonable methods in accordance with good utility practice; including, without limitation, weather, availability of materials or labor, action or inactions of government, acts of God, terrorism, sabotage or war, local, state or national emergencies or any other reasonable operational considerations of the Franchisee. The City shall not unreasonably withhold its consent for any such request from the Franchisee.

Section 5.0 – Breach of Franchise; Remedies

In the event that the Franchisee engages in a breach of any material provision of this Ordinance or the Franchise Agreement or willfully attempts to evade any material provision herein, or practices fraud or deceit upon the City, the City may terminate the Franchise and rights granted to Franchisee hereunder, provided, however, that such termination shall not be effective unless and until the procedures described below have been followed:

5.1 Notice.

City must deliver to Franchisee, by certified or registered mail, a written notice signed by the Mayor which: (i) fairly and fully sets forth in detail each of the alleged acts or omissions of Franchisee that the City contends constitutes a substantial breach of any material provision of the Franchise Agreement; and (ii) designates which of the terms and conditions of the Franchise Agreement that the City contends Franchisee breached.

5.2 Opportunity to Cure.

The City shall permit Franchisee the opportunity to rebut, cure or correct all of the alleged breaches set forth in the written notice within sixty (60) days of Franchisee's receipt of such notice. For avoidance of doubt, any effort to cure an alleged breach shall be deemed to be satisfactory so long as it is commenced by the Franchisee within sixty (60) days of receipt of notice from the City and is pursued by the Franchisee with reasonable diligence showing quantifiable progress and in accordance with good utility practice even if such cure cannot be completed within sixty (60) days.

5.3 Termination.

If Franchisee does not, to the satisfaction of the City, rebut, cure or correct the breaches set forth in the written notice, then the City may terminate the Franchise Agreement and may initiate legal action in the Kenton Circuit Court to recover any and all damages, costs, attorney fees, or other expenditures incurred by City as a result of Franchisee's breach and/or City's enforcement of the Franchise Agreement. The extent to which the City may have impaired the ability of the Franchisee to perform its obligations under the Franchise Agreement or cure any alleged deficiency shall be an affirmative defense in a court of competent jurisdiction to such any such action. To the extent permitted by Kentucky law, if the City is determined to have wrongfully terminated the Franchise Agreement, it shall be liable to reimburse the Franchisee for all costs, expenses and attorney fees incurred in any judicial proceedings. This provision shall not be construed to waive the City's right to assert governmental immunity or any other applicable claim or defense.

Section 6.0 – Construction

6.1 This Ordinance shall not be construed in a manner which would create an obligation,

requirement or duty on the part of the Franchisee which is in any way inconsistent with Kentucky law or its tariff on file with and approved by the Commission.

Section 7.0 – Change in Kentucky Law

- 7.1 In the event of a change of Kentucky law whereby retail rates of electricity service customers are no longer regulated by the Public Service Commission, the City shall have the option of terminating this Franchise with the Franchisee. If this Franchise is terminated by the City pursuant to this provision, the City and Franchisee shall have a duty to negotiate in good faith with respect to negotiating a new Franchise Agreement.

Section 8.0 – Conflicting Ordinances Repealed

- 8.1 All other ordinances or parts of ordinances in conflict with the provisions of this Ordinance shall be superseded by the terms of this Ordinance to the extent of any conflict between them.

Section 9.0 – Effective Date

This Ordinance shall be in fully force after its passage and publication according to law.

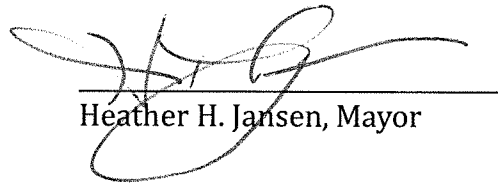
Section 10.0 – Publication

This ordinance shall be published in full on the City's website with a newspaper advertisement describing the ordinance, pursuant to House Bill 487, Section 143, passed during the 2018 regular session of the General Assembly.

Passed by the City Council this 19th day of February, 2020.

City of Villa Hills, Kentucky
A Municipal Corporation of the Home Rule Class

ATTEST:



Heather H. Jansen, Mayor



Craig T. Bohman, City Administrator/Clerk

Sponsor: Cahill
First Reading: December 18, 2019
Second Reading: February 20, 2020
Ayes: Baehner, Cahill, Ringo, Stover, Thompson, Wadsworth
Nays: None
Abstentions: None
Absent: n/a

Published: 02/27/2020