

ORDINANCE NO. 2020-8

draft Ord 2019-N
as amended

AN ORDINANCE ESTABLISHING A NON-EXCLUSIVE FRANCHISE FOR THE USE OF PUBLIC RIGHTS OF WAY FOR THE PURPOSES OF INSTALLATION, MAINTENANCE, UPGRADE, REPAIR, AND REMOVAL OF POLES, CABLE, OPTICAL FIBERS, WIRES, AND ELECTRICAL CONDUCTORS, CONDUITS, SUBWAYS, MANHOLES, AND OTHER FACILITIES AND FIXTURES OF A TELECOMMUNICATIONS (NON-CABLE TELEVISION) SYSTEM.

WHEREAS, the City owns and controls the public rights of ways within its corporate limits, and Section 253 of the Federal Communications Act of 1934, as amended, including 47 USC Section 253, acknowledges that the City has the authority to control access to and use of the Right-of-ways within the City's jurisdictional limits; and

WHEREAS, the Public Rights-of-Way are valuable public resource that have required and will continue to require substantial investment by the City; and

WHEREAS, consistent with applicable law, the City desires to minimize inconvenience and disruption to the public, provide for the orderly and efficient use of the Public Right-of-Way now and in the future, preserve adequate capacity for existing and future uses of the Public Rights-of-Way, and obtain fair and reasonable compensation for the use of the Public Rights-of Way; and

WHEREAS, the City intends to exercise, to the maximum extent permitted by applicable law, its authority with respect to the regulation of the occupation and use of the Public Rights-of-Way in connection with the construction, maintenance, and repair of a Telecommunications System;

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Villa hills:

SECTION 1

- a. There is hereby created a non-exclusive franchise, granting to the purchaser thereof, whose bid or proposal may be accepted by the City Council through a separate Ordinance or Resolution, and whose bid or proposal meets the criteria of this Ordinance, the discretionary right to construct, erect, operate, and maintain upon, through, along, under and over the streets alleys, avenues, public roads, highways, bridges, viaducts, sidewalks and/or other public right of ways of the City of Villa Hills, Kentucky a telecommunications system (or a related system which is not otherwise a cable system) embracing underground conduits, manholes, telephone poles, cables, boxes, wires, fixtures, fiber, electrical conductors and other apparatus, equipment and facilities necessary, essential, used or useful to and in the installation and/or operation of any type of non-cable television, telecommunications system, subject to all provisions of this ordinance and the City's right of way ordinance. This franchise requires that the franchisee shall comply with any and all applicable, existing, and future local laws and

ordinances, as may be adopted or amended in the future, and their respective regulations.

- b. Prior to any installation of facilities in the City owned right of ways, the grantee of the non-exclusive franchise ("Grantee") shall enter into a franchise agreement with the City, incorporating the terms of this Ordinance. No franchise agreement shall be effective until and unless accepted by the City Council through adoption of either a separate Ordinance or Resolution.

SECTION 2

2. Definitions. The following terms, as used in this Ordinance, have the following meanings, with all terms defined in the singular to have the correlative meaning when used in the plural and vice versa:

- a. "Abandonment" means the permanent cessation of all uses of a Telecommunication System.
- b. "Better" means Facilities which the Grantee, in its discretion, favors over Like-for-Like Facilities. For example, as a general matter the City prefers underground Facilities to overhead Facilities. If the Grantee decides that it would also prefer to place certain overhead Facilities underground, its work will be performed on a "Better" basis. As another example, if the Grantee decides to replace existing poles with poles that are more aesthetically pleasing, its work will be performed on a "Better" basis.
- c. "City" means the City of Villa Hills, Kentucky.
- d. "Customer" means any unaffiliated (with Grantee) Person located within the corporate limits of the City who uses the Telecommunications Services of the Grantee as the end user thereof.
- e. "Effective Date" means the date in which this Ordinance will take effect, as determined by the City Council.
- f. "Emergency Situation" means an event that is beyond the ability of the Grantee to control and which creates an imminent threat of danger to the public safety or interruption of Telecommunications Services, and includes, but is not necessarily limited to, severe weather conditions, strikes, labor disturbances, war or acts of war, insurrection, riots, acts of public enemy, fire, flood, or other acts of God.
- g. "Encroachment Ordinance" means the Ordinance adopted by the Villa Hills City Council establishing standards related to the installation, operation, construction, repair and maintenance, of facilities located within the rights-of-ways controlled by the City. This Ordinance is generally found under Chapter 51 of the City's Code of Ordinances.

- h. "Facilities" means the cables, optical fiber, poles, wires, electrical conductors, conduits, subways, handholes, manholes, fixtures, appliances, and appurtenances that are owned, physically controlled or physically maintained by the Grantee in, on, over, or under the Public Rights-of-Way that provide or are capable of providing Telecommunications Services. However, "Facilities" does not include such facilities, including small cell towers and poles used to provide wireless telecommunication services, as those are governed by a separate franchise agreement.
- i. "FCC" means the Federal Communications Commission.
- j. "Franchise" has the meaning set forth in this Ordinance.
- k. "Grantee" means the party proposing to install or re-locate, maintain, upgrade, any and all non-cable television facilities in or about the City's right of ways, and Grantee's successors and assigns.
- l. [Reserved].
- m. "Like-for-Like" means the installation or relocation of Facilities in a like or similar manner of construction when compared to previously installed facilities. For example, placement of Facilities above-ground using aerial construction in locations where existing Facilities are constructed above-ground (aerial-to-aerial) or the placement of Facilities underground in locations where existing Facilities are constructed underground are "Like-for-Like"; in the case of underground Facilities, conduit installations are to be replaced by conduit, and direct burial installations (where permitted) are to be replaced by direct burial.
- n. "Minimum Annual PROW Use Fee" means \$15,000 in the first year of the Grantee's franchise and shall increase by \$1,000 annually.
- o. "Ordinance" means this Ordinance, as amended, modified, or supplemented from time to time.
- p. "Person" means an individual, a corporation, a partnership, an association, a trust, or any other entity or organization, including a governmental or political subdivision or an agency of instrumentality thereof.
- q. "Public Rights-of-Way" means the streets, alleys, roads, bridges, sidewalks, lanes, courts, ways, and boulevards, including utility easements, waterways, or other public places used as public rights-of-way, as the same now or may hereafter exist, which are under the jurisdiction or control of the City. For the purposes of this Ordinance, the airwaves above the Public Rights-of-Way used for broadcast, cellular mobile radio service, satellite, or other wireless services shall be excluded from the requirements of this

Ordinance. In addition, the term “Public Rights-of-Way” does not include Structures.

- r. “PROW” Use Fee” means the Public Rights-of-Way Use Fee that the City of Villa hills is authorized to impose pursuant to *Kentucky CATV Assn., Inc. v. City of Florence, et. al.*, 520 SW3d 355 (Ky., 2017).
- s. “Encroachment Ordinance” means the Ordinance adopted by the Villa Hills City Council establishing standards related to the installation, operation, construction, maintenance, and discontinuance of facilities located within the rights-of-way controlled by the City. This Ordinance is generally found under Chapter 51 of the City’s Code of Ordinances.
- t. “Single Point of Contact” means the person designated by Grantee to fulfill the obligations set forth under Section 3 of this Ordinance.
- u. “Structures” includes buildings, parks, parkways, signs, fences, tanks, poles, lines, fixtures, facilities, equipment, and appurtenances of the City of Villa Hills.
- v. “Surety Bond” has the meaning set forth in this Ordinance.
- w. “Telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received by or through any electronic, cable, optical, microwave, or other medium or method in existence of hereafter devised, regardless of the protocol used for such transmission or conveyance.
- x. “Telecommunications Services” means the offering of Telecommunications for a fee, regardless of the facilities used. The term “Telecommunications Services” shall not include cable services, cellular or wireless communications services.
- y. “Telecommunications Systems” means the plant, equipment, real property (including interests in real property), tangible and intangible personal property, cable, wires, optical fibers, amplifiers, antennas, and all other electronic devices and Facilities of a telecommunications provider located in, on, over, or under the Public Rights-of-Way.
- z. “Term” has the meaning set forth in this Ordinance.

SECTION 3

- 3. Grant of Franchise.** Upon receipt of a bid or proposal which meets the criteria of this Ordinance, the City shall grant to the Grantee a non-exclusive franchise (the “Franchise”) to occupy and use the Public Rights-of-Way to install, construct,

maintain, upgrade, repair, and remove Facilities for the purpose of providing Telecommunications Services, including telephone and broadband Internet access service and leasing of facilities within the City subject to the conditions of this Ordinance. Grantee is not authorized to sublicense or sublease to any person the right to occupy or use the Public Rights-of-Way to install, construct, maintain, upgrade, repair, or remove Facilities or any other facilities for any purpose.

SECTION 4

4. Single Point of Contact.

- a. At all times during the Terms of this Ordinance, the Grantee shall have designated a Single Point of Contact to respond to and address any and all comments, questions, requests, and other communications from the City within forty-eight (48) hours of receipt of same. If the Grantee at any time designates a different person as the Single Point of Contact, it shall notify the City in writing in advance by providing the name, title, address, direct-dial telephone number, cellular telephone number, and e-mail address of the new Single Point of Contact.
- b. Pursuant to Section 4(a), Grantee shall ensure that this person will fulfill the obligations of the Single Point of Contact as set forth under Section 4(a).

SECTION 5

5. Incorporation of City's Encroachment and Small Cell Tower Design Guidelines Ordinances. Unless expressly provided otherwise in this Ordinance, all terms, conditions, and obligations existing under Title V, Chapters 51 and 52 of the City Code of Ordinances, are hereby incorporated and made a part of this Franchise Ordinance. in the event of a conflict between the Franchise Ordinance and Chapters 51 and 52 of the City Code of Ordinances, then the latter (Chapters 51 and/or 52) shall prevail.

SECTION 6

- 6. Term of Franchise.** The Franchise commences on the Effective Date and expires 10 (ten) years after the effective date.

SECTION 7

- 7. Nonexclusive Franchise.** Nothing in this Ordinance affects the right of the City to grant any Person, other than Grantee, a franchise to occupy and use the Public Rights-of-Way to install, construct, maintain, upgrade, repair, and remove such Person's facilities, poles, wires, electrical conductors, optical fibers, conduits, subways, manholes, fixtures, appliances, and appurtenances for the purpose of providing Telecommunication Services or to engage in any other activity in the Public Rights-of-Way, provided that the exercise of such right will not require any

existing grantee's facilities to be unreasonably interfered with or unreasonably relocated. Nothing in this Ordinance affects the right of the City to occupy and use the Public Rights-of-Way to install, construct, maintain, operate, upgrade, repair, and remove its facilities poles, wires, electrical conductors, optical fibers, conduits, subways, manholes, fixtures, appliances, and appurtenances or to engage in any other activity in the Public Rights-of-Way, provided that the exercise of such right will not require any existing grantee's facilities to be unreasonably interfered with or unreasonably relocated.

SECTION 8

8. Permits: Location of Facilities.

- a. Prior to commencing any activity involving the placing, constructing, installing, moving, or changing the location or otherwise altering any Facilities or digging in, cutting, or disturbing any Public Right-of-Way or other public property of the City, the Grantee shall obtain all permits and approvals required under the City's Code of Ordinances and shall comply with all directives in Chapters 51 and 52 of the Code of Ordinances.
- b. The Facilities authorized by this Ordinance, whether in existence on the Effective Date hereof or coming into existence at some point thereafter, shall be at locations approved by the City that are reasonably suitable and convenient for the purposes of the Grantee and the City. Except where approval of any state or federal regulatory entity is required by law, the location of proposed Facilities shall be subject to review by the City Administrator or his designee with the right on the part of the Grantee to appeal from his decision to the City Council. The decision of the City Council on said appeal shall be final and binding as to the location of such Facilities. In addition, any permission provided pursuant to Section 6 shall be conditioned upon the Grantee's compliance with the provisions, terms, conditions, and limitations of this Ordinance and with such reasonable and lawful provisions, terms, conditions, and limitations which the City determines are necessary in order to preserve, protect, or promote the safety of the public using the Public Rights-of-Way and other public property of the City, to prevent interference with or obstruction of the use of the Public Rights-of-Way and other public property of the City by the City, the public, or another public utility or public service corporation for their respective purposes and functions, or to preserve, protect, or promote the health, safety, and general welfare of the City and its citizens.
- c. During an Emergency Situation, the Grantee may take all reasonable measures to restore service and alter its Facilities to ensure the safety of the citizens of the City; provided, however, that the Grantee shall notify the City Administrator of any such action.

- d. Upon the completion of any new Facilities, the Grantee shall provide the City, upon request and at no cost to the City, copies of any as built diagrams of such new Facilities prepared by the Grantee in the normal course of its businesses.

SECTION 9

9. Public Works and Relocation of Equipment.

- a. Whenever the City, in its sole, non-arbitrary discretion, determines that the Facilities disturb, interfere, or conflict with the operation, relocation, improvement, repair, construction, or maintenance of present or future Public Right-of-Way, or public works (including but not limited to storm sewers, sanitary sewers and street lights), or other public property of the City, the City may require by written notification that any Facilities of Grantee be removed or relocated. Within thirty (30) days after receipt of notification unless the City Administrator for good cause extends such time, Grantee shall submit to the City Administrator a design plan and work schedule for removing or relocating the Facilities. Grantee shall complete the removal or relocation within ninety (90) days after submitting its design plan and work schedule to the City Administrator.
- b. Grantee shall bear all costs of removal and relocation and shall install any new or additional Facilities on a Like-for-Like or Better basis; provided, however, that in the event that the City specifically requests that the Grantee install Facilities that are more expensive than Like-for-Like Facilities, the City shall bear the costs of removal or relocation, but only by the amount by which the cost of the more expensive Facilities exceeds the cost of Like-for-Like Facilities. The City shall provide, at no cost to Grantee, permits and alternative space in the Public Rights-of-Way for such relocation of Facilities, provided that (i) such alternative space need not be in the exact same Public Rights-of-Way shall be in reasonable proximity to the previous location; and (ii) such space shall be reasonably economically and technologically feasible for the relocation of such Facilities.
- c. The City shall coordinate the new location with Grantee, with preference being that the facilities be relocated to underground.
- d. If Grantee does not complete removal or relocation within one hundred twenty (120) days after receiving notification from the City, then the City may, after giving at least fifteen (15) days' written notice to Grantee, take such actions at Grantee's expense as are necessary to effect such removal or relocation. In the event the City effects the removal or relocation of any Facilities pursuant to this Section 9, the City shall not be liable to the Grantee for any damages incurred by Grantee that result from such removal or relocation. In addition, in the event the City effects the removal or relocation of any Facilities pursuant to this Section 9, Grantee shall

indemnify the City for, and hold the City harmless from, any and all losses, damages, judgments, liabilities, costs, and expenses arising from or based upon the claims of third parties who allege personal injury, property damage, or other loss caused, in whole or in part, by the removal or relocation; provided, the Grantee shall not be required to indemnify and hold the City harmless to the extent that the loss incurred by a third party is caused by the City's negligence or willful misconduct.

- e. The Grantee shall be entitled to any state or federal funds made available to the City in conjunction with the relocation or protection of work (i.e., protection of Grantee Facilities from harm or damage when the City is working in the Public Right-of-Way).
- f. Upon request, the Grantee shall be given access to the street plans and specifications, and any proposed modifications to such, in the possession of the City.

SECTION 10

- 10. Aesthetic, Third Party, or Competitive Relocation.** If the City or any Person requests that the Grantee relocate its Facilities for aesthetic purposes, for the benefit of a third party (including but not limited to a private developer), or for the benefit of the City to compete as a telecommunications provider, then the City or Person requesting the relocation shall reimburse the Grantee for all such relocation costs.

SECTION 11

- 11. Temporary Raising and Lowering of Wires.** The Grantee shall upon sixty (60) days' prior written notice by the City or any Person holding a permit to move any Structure, or within the time that is reasonable under the circumstances, temporarily raise or lowers it cables and wires or otherwise move Facilities to permit the moving of such Structure. Grantee may impose a reasonable charge on any Person other than the City for any such movement of its Facilities and may require payment of such charge prior to such movement.

SECTION 12

- 12. Trees, Plants, and Other Vegetation.** In placing, constructing, installing, improving, maintaining, repairing, and using the Facilities authorized by this Ordinance, the Grantee shall avoid all unnecessary damage to trees in the Public Rights-of-Way and shall not cut or otherwise injure said trees to any greater extent than is reasonably necessary.

SECTION 13

- 13. Restoration and Protection of City Property.** In the event that the Grantee, in the course of placing, constructing, installing, improving, maintaining, repairing, or

using any of its Facilities, disturbs or causes damage to any Public Right-of-Way, Structure, or other public property of the City, the Grantee shall promptly notify the City Administrator and the Director of Public Works of the damage and shall, at its own cost and expense, replace, repair, or restore the damaged property to at least as good condition as it was in immediately prior to the damage. In Emergency Situations, the Grantee may make partial or temporary repairs consistent with the directives of the City. The Director of Public Works shall give final approval of the condition of such Public Rights-of-Way, Structures, and other public property of the City after restoration. If the Grantee does not complete such replacement or repair within thirty (30) days after notice by the City to the Grantee, the City may undertake such replacement or repair and the Grantee shall reimburse the City for any and all reasonable costs of the same. In the event the City undertakes repair or replacement work pursuant to this Section 12, the City shall not be liable to the Grantee for any damages incurred by the Grantee that may result from such work, except for damage, resulting from the negligent or willful acts or omissions of the City, its officers, agents, employees, or contractors. In addition, in the event the City undertakes repair or replacement work pursuant to this Section 13, the Grantee shall indemnify the City for, and hold the City harmless from, any and all losses, damages, judgments, liabilities, costs, and expenses arising from or based upon the claims of third parties who allege personal injury, property damage, or other loss caused, in whole or in part, by the work; provided that Grantee shall not be required to indemnify and hold the City harmless to the extent that the loss incurred by a third party is caused by the City's negligence or willful misconduct.

SECTION 14

14. Use of Grantee's Facilities.

- a. Grantee shall, when so requested by the City Administrator, permit its poles and other overhead structures to be used by the City, provided the City pays for the cost of any make-ready work (i.e., work that Grantee must perform, such as moving a cable, terminal, or hub, in order to enable the City to make an attachment to Grantee's poles) associated with or required by the City's placing thereon of any traffic lighting, cable for traffic lighting, signs, fire and police alarms, telephone wires, and other appliances which may be necessary for the exclusive use of the police or fire department of the City. Such use by the City shall not interfere with the proper use of said poles and other overhead structures by Grantee. The location and character of the City's traffic lighting, cable for traffic lighting, signs, fires and police alarms, telephone wires, and other appliances shall be subject to the prior approval of Grantee. The City shall indemnify and save harmless Grantee from any and all loss, damage, cost, or expense to or which may be incurred by the Grantee, or to which it may be subjected by reason of, or as a result of, the use of said poles and other overhead structures by the City as provided herein.

- b. Prior to allowing any Person other than the City, including but not limited to any provider of cellular telecommunications services, to place any facilities or equipment on or otherwise use Grantee's Facilities located in the Public Rights-of-Way, Grantee shall direct the Person to obtain permission from the City to occupy and use the Public Rights-of-Way.

SECTION 15

15. Protection of Property of Other Utility Services. The Grantee shall take all prudent action to avoid damage or injury to pipes, cables, fixtures, and installation of other utility services, particularly those installations whose disruption can cause hazards or danger to person or property. In the event such damage or injury occurs, the Grantee shall promptly notify such other affected utility and the City Administrator or his designee and shall cooperate and contribute its capabilities to the extent necessary to remove any hazards and repair any damage.

SECTION 16

16. Undergrounding.

- a. Where consistent with the City's Code of Ordinances, Grantee shall install any new Facilities underground in locations servicing new subdivisions or other areas within the City where Facilities currently do not exist, to the extent that the City makes the same undergrounding requirement applicable to all other franchisees authorized to occupy and use the Public Rights-of-Way. Existing overhead Facilities of the Grantee may remain overhead when repaired, upgraded, or increased in capacity. If, however, Grantee relocates existing overhead Facilities, it shall where possible, relocate them to underground.
- b. In the event that the Grantee undertakes undergrounding of its Facilities, the Grantee shall cooperate with the City and other utilities whose facilities are collocated on existing poles or other structures to ensure that those facilities are properly removed and relocated.

SECTION 17

17. Development. Prior to obtaining any encroachment permits from the City, Grantee shall provide the City with a site plan or development plan or similar such document depicting the nature of the work to be performed in the right-of-way, the scope of the activity, and the anticipated timeframe for the work from completion to end. Grantee shall comply in all respects with the City's permitting ordinances and its Right-of-Way Ordinance. There shall be no changes, revisions or additions to the communication service Facilities identified in the site plan, once the franchise is accepted by the City Council, without the express written consent of

the City, provided that the City's issuance of an encroachment permit for new routes and facilities shall be deemed written consent for such new routes and facilities.

SECTION 18

18. Public Rights-of-Way Closings. Nothing in this Ordinance waives or releases the right of the City in and to the Public Rights-of-Way. If all or part of any Public Rights-of-Way is eliminated, discounted, closed, de-mapped, or abandoned, the Franchise shall cease with respect to such Public Rights-of-Way upon the later to occur of (a) the effective date that such Public Rights-of-Way become eliminated, discontinued, closed, de-mapped, or abandoned and any conditions specified by the City are met; (b) in the case of any transfer of title to such Public Rights-of-Way to a Person, the closing date of such transfer. The City shall condition its consent to the elimination, discontinuance, closing, de-mapping, or abandoning on the agreement of any Person to (i) grant an easement with rights of ingress and egress, at no additional charge, to the Grantee providing the right to continue to occupy and use the Public Rights-of-Way and/or (ii) reimburse the Grantee for the reasonable costs of supporting, protecting, or relocating the affected Facilities.

SECTION 19

19. Compensation/PROW Use Fee and License Fee. In lieu of any tax imposed upon Grantee under Kentucky Revised Statute §136.600 et seq., the City hereby establishes an annual PROW use fee in an amount up to \$4,225 per wireless antenna located in the public-rights-of-way with the amount to be determined by Council by Resolution and/or Franchise Agreement with the Grantee. The PROW fee shall also include a fee up to \$0.90 per linear foot of cable, fiber, conduit or wire occupying the Right-of-Way by Grantee, and/or Grantee's agents, contractors, and assigns. In the event that the Grantee, its agent or contractor, constructs any pole or other facility, or structure, including towers on the Right-of-Way, then the PROW fee shall include \$500.00 for each such pole, facility or tower. Additionally the PROW fee shall include, if applicable, \$5.00 per square foot of space in the Right-of-Way that the Grantee's facilities and related equipment occupies other than those already referenced in this paragraph.

a. Grantee's first minimum Annual PROW Use Fee payable under this ordinance shall be paid to the City within forty-five (45) days of the execution of the franchise agreement. Such payment shall be prorated for the remainder of the calendar year (rounded to the nearest month) through December 31. Thereafter Grantee shall pay each Minimum Annual PROW Use Fee on or Before April 15, and Grantee's Minimum Annual PROW Use Fee paid to the City will be credited towards Grantee's PROW Use Fee for that Calendar year.

[a]b. If the PROW Use Fee is eliminated, discontinued, preempted, or otherwise is declared or becomes invalid, the City shall in good faith determine fair, reasonable, non-discriminatory, and competitively neutral compensation

to the City for use of the Public Rights-of-Way by the Grantee for Facilities to provide Telecommunication Services.

[b]c. No Credits or Deductions. The compensation and other payments to be made: (i) shall not be deemed to be in the nature of a tax; and (ii) shall be in addition to any and all taxes or other fees or charges that the Grantee shall be lawfully required to pay to the City or to any state or federal agency or authority, all of which shall be separate and distinct obligations of the Grantee.

[e]d. This charge is in addition to any and all other separate charges provided for in other City Ordinances, including occupational taxes, licensing, permitting fees and costs, including but not limited to property taxes imposed by Kentucky Revised Code Chapter 132.

SECTION 20

20. Reservation of Rights. No acceptance by the City of any payment shall be construed as an accord and satisfaction that the amount paid is in fact the correct amount, nor shall such acceptance of any payment be construed as a release of any claim that the City may have for further or additional sums payable under the provisions of this Ordinance. All amounts paid shall be subject to audit and re-computation by the City. There is hereby reserved to both the City and Grantee every right and privilege available to them under applicable law, and nothing herein shall be deemed in any way to waive, relinquish, release or abrogate any of the lawful rights and privileges available to either party.

SECTION 21

21. Continuing Obligation and Holdover. If the Grantee continues to use Facilities in the Public Rights-of-Way to provide Telecommunication Services after the Term, then the Grantee shall continue to comply with all applicable provisions of this Ordinance, including without limitation, all compensation and other payment provisions of this Ordinance, throughout the period of such continued use, provided that any such continued operation shall in no way be construed as a renewal or other extension of this Ordinance or the Franchise, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after the Term, including, but not limited to, damages and restitution. If this Ordinance terminates for any reason whatsoever (other than a judicial or legislative determination that the compensation set forth in Section 19 of this Ordinance is invalid) and the Grantee fails to cease using the Facilities in the Public Rights-of-Way to provide Telecommunications Services, the City, in addition to all other remedies available to it under this Ordinance or by law, shall be entitled to receive all payments it is entitled to receive under this Ordinance, including, but not

limited to, the compensation set forth in Section 19 of this Ordinance for so long as the Grantee has Facilities in the Public Rights-of-Way.

SECTION 22

22. Quality. All work involved in the installation, maintenance, upgrade, repair, and removal of the Facilities shall be performed in a safe, thorough, and reliable manner in accordance with industry, professional, state, and federal mandated standards and using materials of good and durable quality. If at any time it is determined by the City or any other agency or authority of competent jurisdiction that any Facilities are harmful to the health or safety of any Person or property, then the Grantee shall, at its own costs and expense, promptly correct all such conditions.

SECTION 23

23. Liability Limitation. Except as set forth herein, neither the City nor its officials employees, agents, attorneys, consultants, or independent contractors shall be responsible to the Grantee for any liability as a result of or in connection with the protection, breaking through, movement, removal, alteration, or relocation of any Facilities by or on behalf of the Grantee or the City in accordance with this Ordinance and in connection with any emergency related to the safety, health, and welfare of the public. However, nothing in this Section 23 shall waive any rights that the Grantee has against the City for any willful misconduct or negligent acts or omissions of the City.

SECTION 24

24. No Obstruction. Except in the case of an Emergency Situation, in connection with the installation, maintenance, upgrade, repair, or removal of Facilities, the Grantee shall not obstruct the Public Rights-of-Way or any other public property, or other traffic to, from, or within the corporate limits of the City without having first obtained a permit from the City. Facilities of the Grantee in the Public Rights-of-Way shall be located so as to cause minimum interference with any use of the Public Rights-of-Way and adjoining property.

SECTION 25

25. Safety Precautions. Grantee shall maintain in good and safe condition all Facilities it places within the Public Rights-of-Way. The Grantee shall, at its own cost and expense, undertake to prevent accidents at its work sites in, at, or on the Public Rights-of-Way, including the placing and maintenance of proper guards, fences, barricades, watchmen, and suitable and sufficient lighting, in accordance with federal and state law.

SECTION 26

26. Emergency of City. The City, at any time, in case of fire, disaster, or other Emergency Situation, may as determined by the City in its sole reasonable discretion, cut or move Facilities of the Grantee, in which event the City shall not incur any liability to the Grantee unless such liability is due to the negligence or willful misconduct of the City. The City will make every reasonable effort to consult with the Grantee prior to any such cutting or movement of Facilities and the Grantee shall be given the opportunity to perform such work itself. The City shall have the obligation to protect the Grantee's Facilities to the maximum extent reasonable under the circumstances. Absent the City's negligence or willful misconduct, all costs to repair or replace such Facilities shall be borne by the Grantee.

SECTION 27

27. Use of City Structures. This Ordinance does not grant to the Grantee's right to use City-owned Structures. The terms and conditions of any use of City-owned Structures by the Grantee shall be set forth in a separate ordinance, agreement, lease, or other document, as appropriate.

SECTION 28

28. Compliance with Laws. The Grantee shall comply with all lawful local laws, rules, regulations, orders, and other directives of the City issued pursuant to this Ordinance or with respect to the City's management of the Public Rights-of-Way, provided they are applied in equitable and nondiscriminatory fashion to all uses of the Public Rights-of-Way. The Grantee shall have the sole responsibility for obtaining all permits, as well as any licenses and other forms of approval or authorization that the City may now or hereafter require, prior to commencing any work involving the installation, maintenance, upgrade, repair or removal of Facilities in, on, over and under the Public Rights-of-Way. The City has the right to oversee, regulate, and inspect any such work in accordance with the provisions of this Ordinance and applicable law. The City reserves the right to adopt or issue such rules, regulations, orders, or other directives governing the Grantee or the Grantee's Facilities as it shall find necessary or appropriate in the lawful exercise of its police power, and such other lawful orders as the City shall find necessary or appropriate relating to management of the Public Rights-of-Way. No rule, regulation, order, or other directive issued pursuant to this Section 28 shall constitute an amendment to this Ordinance.

SECTION 29

29. Books and Records. To the extent necessary to determine the Grantee's compliance with this Ordinance or to carry out the City's authority to manage the Public Rights-of-Way, the Grantee shall make available to the City for inspection, examination, and/or audit within thirty (30) days' written notice to the Grantee,

complete and accurate books of account, records, documents, and other information as the City may reasonably need with respect to the Telecommunication System and the Facilities, including without limitation, books of account, records, documents, and other information adequate to enable the Grantee to demonstrate that, at all times throughout the Term, it is and has been compliance with each term and condition of this Ordinance. The City may request books and records in order to conduct a compliance audit at any time during the term of this Franchise provided that the City gives the Grantee written notice sixty (60) days in advance of the audit.

SECTION 30

30. Insurance Specifications.

- a. Throughout the Term, the Grantee shall, at its own expense, maintain a commercial general liability insurance policy reasonably acceptable to the City. At the request of the City, Grantee shall provide a certificate of liability insurance demonstrating that the Grantee is maintaining the insurance requirements of this Section 30. Such policy or policies shall be issued by companies duly authorized or permitted to do business in the Commonwealth of Kentucky. Such policy or policies shall insure (a) the Grantee and (b) include the City and its officials, boards, commissions, Council, elected officials, and employees as an additional insured as their interest may appear under this Agreement against claims for bodily injury or damage to property that may arise out of the Grantee's occupation and use of the Public Rights-of-Way under this Ordinance in the amount of one million dollars (\$1,000,000.00) per occurrence for bodily injury and property damage, and Worker's Compensation insurance, as required by Kentucky law. The City and its officials, boards, commissions, Council, elected officials, and employees shall be included as an additional insured as their interest may appear under this Agreement, excluding Worker's Compensation and employer's liability.
- b. The provision of this Section 30 shall not be construed to limit the provisions of Section 31 in any manner.

SECTION 31

31. Surety Bond.

- a. Upon acceptance of this Ordinance, the Grantee shall furnish a Surety Bond, made payable to the City, in an amount not less than twenty-five thousand dollars (\$25,000.00) nor more than two hundred fifty thousand dollars (\$250,000.00) depending upon the scope and magnitude of the Grantee's facilities occupying the Right-of-Way. The Surety Bond shall be written by a corporate surety or bank reasonably acceptable to the City and authorized to do business in the Commonwealth of Kentucky. Within sixty

(60) days after the date of any notice of cancellation of the Surety Bond, the Grantee shall obtain and deposit with the City a replacement surety bond that complies with the requirements of this Section 31 and that is reasonably acceptable to the City Attorney. Such replacement surety bond shall show continuous coverage as required by this Section 31 from the effective date of cancellation of the prior surety bond forward. The Surety Bond will be in the form of Exhibit C attached hereto.

- b. In addition to the Surety Bond, the Director of Public Works of the City may also require the Grantee to submit additional surety in connection with specific construction, maintenance, or other projects undertaken by the Grantee, in accordance with applicable law and the City's standard permitting procedures. The Grantee shall only be required to maintain such additional surety for this duration of the specific construction, maintenance, or other project.
- c. At any time during the Term, the city may require the Grantee to increase the amount of the Surety Bond if the City finds that new risks or other factors applicable to the Grantee's activities in the Public Right-of-Way exist that reasonably justify a change in the amount of the Surety Bond. Such new facts may include, but are not limited to, such matters as material changes in the Grantee's activities in the Public Rights-of-Way; material changes in the amount and location of Facilities; activities that require restoration resulting from activities by the Grantee located within the Public Rights-of-Way; the Grantee's record of repeated non-compliance with the terms and conditions of this Ordinance; and material changes in the amount and nature of construction, maintenance, and other activities to be performed by the Grantee in the Public Rights-of-Way pursuant to this Agreement.
- d. The purpose of the Surety Bond is to serve as security for:
 - i. The faithful performance by the Grantee of all terms, conditions, and obligations of this Ordinance;
 - ii. Any expenditure, damage, cost, or loss incurred by the City arising out of the Grantee's failure to comply with its obligations pursuant to this Ordinance and/or all rules, regulations, orders, permits, and other directives of the City relating to the Public Rights-of-Way;
 - iii. The removal of Facilities from the Public Rights-of-Way at the termination of this Ordinance, at the election of the City, pursuant to Section 34 of this Ordinance; and
 - iv. Any loss or damage to the Public Rights-of-Way or any property of the City during the installation, upgrade, construction, repair, maintenance, or removal of Facilities.

- e. The City shall provide the Grantee at least ten (10) days' notice prior to making any withdrawal from the Surety Bond, provided, however, that the City shall not make any withdrawals by reasons of any breach for which the Grantee has not been given notice and opportunity to cure prior to the notice required by this Section 31 or any other provision of this Ordinance. The withdrawal of any amount from the Surety Bond shall constitute a credit against the amount of the applicable liability of the Grantee to the City, but only to the extent of such withdrawal. The City shall provide notice to the Grantee that the City has withdrawn any amount from the Surety bond within thirty (30) days after the date of such withdrawal.
- f. Within thirty (30) days after receipt of notice from the City that any amount has been withdrawn from the Surety Bond, the Grantee shall restore the Surety Bond to the amount specified in this Ordinance, provided that if a court finally determines that such withdrawal by the City was improper the City shall refund the improperly withdrawn amount to the Surety Bond such that the balance in the Surety Bond shall not exceed the amount specified in this Ordinance.
- g. The obligation to perform and the liability of the Grantee pursuant to this Ordinance shall not be limited by the acceptance of the Surety Bond required by this Section 31.

SECTION 32

32. Indemnification of City.

- a. Grantee shall, at its sole cost and expense, fully indemnify, defend and hold harmless the City and its officers, employees, and agents from and against any and all losses and any and all claims, suits, actions, liability, and judgments for damages or other relief arising out of the installation, construction, operation, co-location, or maintenance of the Grantee's Facilities, including but not limited to any claim for bodily injury or property damage. The indemnity obligation of the Grantee under this Section 32 shall include, but is not limited to, providing legal representation and otherwise defending the City and its officers, employees, and agents against any claim, suit, or action covered by this indemnification. The City shall provide the Grantee with prompt notice of any loss, claim, suit, or action covered by this indemnification. The City may also participate in this defense directly, at its own expense. For clarity's sake, the Grantee shall not be responsible for any claim, suit, action, or other liability arising from the negligence or willful misconduct of the City or its officers, employees or agents.
- b. If a final judgment is obtained against the City or one or more of its officers, employees, or agents in a suit or action, either independently or jointly with Grantee, for which the City and its officers, employees, and agents are

entitled to be indemnified and held harmless under this Section 32, Grantee shall pay the full amount of every judgment, including all costs and attorneys' fees, entered against the City and any of its officers, employees, and agents.

- c. The Grantee shall be entitled to settle a claim brought in a suit or action for which the City and officers, employees, and agents are entitled to be indemnified and held harmless under Section 32(a), provided that the Grantee must obtain the prior written approval of the City for any settlement of such claims against the City, which approval shall not be unreasonably withheld or unreasonably delayed.
- d. The indemnities in this Section 32 shall survive the expiration or earlier termination of this Ordinance.

SECTION 33

33. Transfer of Franchise. Neither the Franchise nor any rights or obligations of the Grantee pursuant to this Ordinance, nor any guaranty of the performance of the Grantee's obligations pursuant to this Ordinance, shall be assigned, sold, or transferred in any manner, in whole or in part without prior written notice to and approval from the City, which approval shall not be unreasonably delayed or withheld.

SECTION 34

34. Enforcement and Termination.

- a. In the event that Grantee fails to perform any of its obligations under this Ordinance, and such failure is not the result of circumstances beyond the Grantee's control, the City may impose a monetary penalty of up to \$500.00 per day for as many days as the violation continues; provided, however, that the City shall not impose any such monetary penalty unless it has provided the Grantee notice of its failure to perform and the Grantee has not, within forty-five (45) days after receiving such notice (or such longer time as may be reasonable under the circumstances), corrected such failure to perform.
- b. In addition, in the event that the City believes that the Grantee has failed to perform any of its obligations under this Ordinance and the Grantee fails to remedy within ninety (90) days after receiving notice from the City, the City may hold a public hearing before the City Council, after providing written notice of the hearing to the Grantee. If, at the conclusion of such hearing, the Council determines that the Grantee is in breach of this Ordinance and that the breach is not the result of circumstances beyond the Grantee's control, the Council may terminate this Ordinance and the Grantee shall have no further rights, privileges, or authority hereunder.

- c. The availability of the remedies specified in subsections (a) and (b) of this Section 34 shall not preclude either party from seeking a writ of mandamus in the Kenton Circuit Court, or from bringing any other suit or action which sued party would be entitled to bring, at law or in equity, as provided by law.
- d. The failure of either party to at any time require performance by the other party of any provision hereof shall in no way affect the rights of such party thereafter to enforce the same. Nor shall the waiver by either party of any breach of any provision hereof be taken as a waiver of any succeeding breach of such provision or of the provision itself.

SECTION 35

35. Entire Ordinance. This Ordinance embodies the entire understanding and agreement of the City and the Grantee with respect to the subject matter hereof and supersedes all prior representations, agreements, and understandings, whether oral or written, between the City and the Grantee with respect to the subject matter hereof, including, without limitation, all prior drafts of this Ordinance and any and all written or oral statements or representations by any official, employee, agent, attorney, consultant, or independent contractor of the City or the Grantee.

SECTION 36

36. Delays and Failures Beyond Control of Grantee. Notwithstanding any other provision of this Ordinance, the Grantee shall not be liable for delay in performance of, or failure to perform, in whole or in part, its obligations pursuant to this Ordinance due to an Emergency Situation, whether the Grantee has exercised all due care in the prevention thereof, to the extent that such causes or other events are beyond the control of the Grantee. To the extent such delay in performance or failure to perform affects only part of the Grantee's ability to perform, the Grantee shall perform to the maximum extent it is able to do so. In all cases the Grantee shall take all steps within its power, in as expeditious a manner as possible, to correct such cause(s).

SECTION 37

37. Notices. All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments, designations, or other direction or communication hereunder, when made by the City, shall be sent to the Single Point of Contact pursuant to Section 3. All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments, designations, or other direction or communication hereunder, when made by the Grantee, shall be sent in writing to designee at the address provided by Grantee.

SECTION 38

38. Organization, Standing, Power, Authorization, and Enforceability. The Grantee shall certify that it is duly authorized, validly existing corporate entity, and in good standing under the laws of the Commonwealth of Kentucky, and is duly authorized to do business in the City. The Grantee has all requisite power and authority to execute, deliver, and perform this Ordinance, and any other agreements which may be entered into in connection with or as contemplated hereby.

SECTION 39

39. Binding Effect. This Ordinance and any subsequent franchise agreement shall be binding upon and inure to the benefit of the City and the Grantee and their respective permitted successors, transferees, and assigns.

SECTION 40

40. Headings: Other Terms. The headings contained in this Ordinance are to facilitate reference only, do not form a part of this Ordinance, and shall not in any way affect the construction or interpretation hereof. Terms such as “hereby” “herein,” “hereof”, “hereinafter,” and “hereto” refer to this Ordinance as a whole and not to the particular sentence or paragraph where they appear, unless the context otherwise requires. The term “may” is permissive, the term “shall” and “will” are mandatory. All references to any gender shall be deemed to include all others, as the context may require. Terms used in the plural include the singular, and vice versa, unless the context otherwise requires.

SECTION 41

41. No-Third-Party Beneficiary Rights. Nothing in this Ordinance is intended to interfere with any tariffs, contracts, or other arrangements between the Grantee and a third party or to create any third-party beneficiary rights.

SECTION 42

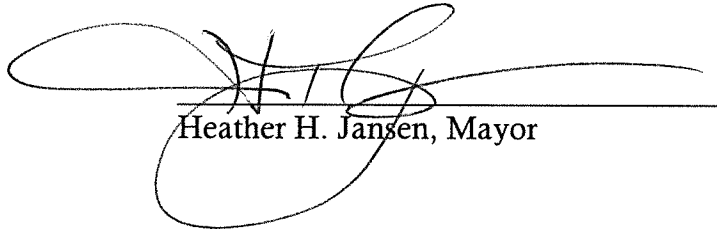
42. Delegation of City Rights. The City reserves the right to delegate and re-delegate, from time to time, any of its rights or obligations under this Ordinance to any governmental body, organization, agent, special purpose governmental entity, political subdivision, or official of the City. Upon any such delegation or re-delegation, references to “City” in this Ordinance shall refer to the body, organization, or official to whom such delegation or re-delegation has been made. Any such delegation or re-delegation by the City, no matter how often made, shall not be deemed an amendment to this Ordinance or require any consent of the Grantee.

SECTION 43

This Ordinance shall be in full force and effect upon the completion of two readings and publication in accordance with Kentucky law. Any and all ordinances or parts thereof not consistent with this Ordinance are hereby repealed with respect to those provisions conflicting with this Ordinance.

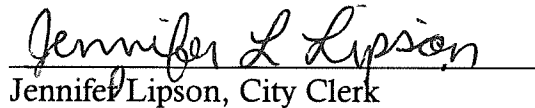
Passed by the City Council this 15th day of April 2020.

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



Heather H. Jansen, Mayor

ATTEST:



Jennifer L. Lipson, City Clerk

Sponsor: Baehner

First Reading: December 18, 2019

Second Reading: April 15, 2020

Ayes: Baehner, Cahill, Ringo, Stover, Thompson, Wadsworth

Nays: none

Abstentions: none Absent: none

Published: _____