

ORDINANCE NO. 09-2023

AN ORDINANCE OF THE CITY OF FORT WRIGHT IN KENTON COUNTY, 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 BOTH NATURAL GAS AND 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 K.R.S. 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 now uses the streets, alleys and public grounds of the City of Fort Wright ("City") for the transmission and distribution of either or both electricity and natural gas through and for consumption within the City; and

WHEREAS, Duke Energy is the successor to the Union Light, Heat and Power Company ("ULH&P"); and

WHEREAS, ULH&P had a franchise granted in 1996 for the use of the City streets, alleys and public grounds for the transmission and distribution of electricity through and for consumption within the City; but that franchise expired by law; and

WHEREAS, Duke Energy does not currently have a franchise for the use of streets, alleys and public grounds of the City for the transmission and distribution of either or both electricity and natural gas through and for consumption within the City.

NOW, THEREFORE, for the purpose of complying with the Constitution and Statutes of Kentucky and pursuant to the authority and requirements of Sections 163 and 164 of the Kentucky Constitution and K.R.S. 96.010 through 96.045:

BE IT ORDAINED by the City of Fort Wright as follows:

SECTION 1

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 Fort Wright 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 "facilities" means the tangible apparatus, equipment and instrumentalities and the appurtenances thereto used for the transmission and distribution of either or both electricity and natural gas 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.

1.4 The word "Franchisee" means the person to whom the City has awarded and granted a franchise hereby established.

1.5 The words "public property" mean real estate in the City that has been dedicated or is otherwise open to public use and is subject to regulation by the City.

1.6 The words "calendar quarter" mean three months (1/4) of a calendar year composed of the months of either: (a) January, February and March; or (b) April, May and June; or (c) July, August and September; or (d) October, November and December.

2.0 – Franchise

There is hereby established a non-exclusive franchise for the use of the public property within the City for the transmission and distribution of either or both electricity and natural gas through and for consumption within the City.

3.0 – Terms of Franchise

As required by K.R.S. 96.010, the terms and conditions of the franchise hereby established are as follows:

3.1 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 therefor publically and award it to the highest and best bidder; but the City shall have the right to reject any and all bids.

3.2 Bond Requirement

Pursuant to the requirements of K.R.S. 96.020(1), each bid for the franchise hereby established shall include cash or a certified check equal to five percent (5%) of the fair estimated cost of the plant required to render the service. The deposit shall be forfeited to the City in case the bid is accepted and the bidder fails, for thirty (30) days after the confirmation of the sale, to pay the price bid and to give a sufficient bond in a sum equal to one-fourth (1/4) of the fair estimated cost of the plan to be erected. This bond shall be conditioned to be enforceable in case the person giving it fails, within a reasonable time, to establish a suitable plant for rendering the service and being rendering the service in the manner set forth in the terms of the sale; provided, however, that pursuant to the provisions of K.R.S. 96.020(2), this Section 3.2 shall not apply to a

person already owning a plant and equipment sufficient to render the service required under the franchise hereby established.

3.3 Reservation of Rights

Pursuant to the requirements of K.R.S. 96.070, the City hereby reserves all of the rights identified therein and within the meaning thereof; and the City shall have all of the rights, privileges and authority established thereby; and 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.

3.4 Franchise Non-Exclusive

The franchise hereby established is not an exclusive franchise. It is a non-exclusive franchise; and the City reserves the right to also grant the franchise hereby established to others in accordance with the Kentucky Certified Service Territories Act at K.R.S. 278.016, *et seq* and other applicable law.

3.5 Franchise Not Assignable

The franchise established hereby shall not be assignable without the written consent of the City; however, the Franchisee may assign the franchise to any affiliate which may, during the term of the franchise, assume the obligation to provide electricity and/or natural gas throughout and for consumption within the City without being required to seek the City's consent to such assignment.

3.6 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 has been certified by the Public Service Commission of Kentucky pursuant to K.R.S. Chapter 278.

3.7 Effective Period of Franchise

The franchise established hereby shall be effective for a period of twenty (20) years, beginning on the first day of the calendar month immediately following the grant and award of a franchise hereby established to a Franchisee and ending twenty (20) years thereafter, unless previously terminated by the City pursuant to the provisions hereof or as otherwise provided by operation of law. (Ref.: Ky Const. Sec. 164)

3.8 Franchise Termination

In the event of any continuing default by a Franchisee of any of the obligations of the franchise hereby established after a written notice and description thereof to the Franchisee from the City by certified mail, return receipt requested, and upon the failure of the Franchisee to reasonably cure the default within a reasonable

period of time, the City may terminate the franchise awarded and granted to the defaulting Franchisee, through a written notice thereof to the Franchisee, by certified mail, return receipt requested, to be effective no less than ninety (90) days from the delivery of said written notice to the Franchisee.

3.9 Franchisee Rights and Privileges During Effective Period

While the franchise established hereby is effective, 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 3.3 hereof:

3.9.1 Continuation of Existing Facilities

The continued operation, use, maintenance, repair, construction and/or reconstruction to the existing condition thereof all of the facilities of the Franchisee within or upon any public property within the City.

3.9.2 New Facilities

The franchise shall provide commercially reasonable notice of any non-emergency extension or expansion of any existing facilities of the Franchisee, or the construction or installation of new facilities within the franchise area; and the plans and specifications for such new facilities to the City. The franchise shall abide by the City's permitting process and receive the 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. 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 thirty (30) days of the Franchisee's notice. If written denial or approval is not received within thirty (30) 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 obligation due to any delay by the Mayor or the designee thereof in giving or failing to give any approval described herein.

3.9.3 Pavement Removal, Excavation and Grading

The Franchise shall provide commercially reasonable notice of any non-emergency removal or revision of any pavement and any excavation and grading reasonable 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 the City's permitting process and receive approval thereof by the Mayor or the designee thereof, which approval shall not be withheld unless the proposed pavement removal, excavation or grading are contrary to the public health, safety, welfare and convenience.

In the event that any request for pavement removal or revision, excavation or grading 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 thirty (30) days of the Franchisee's notice. If a written denial or approval is not received within thirty (30) days, the removal or revision of any pavement and any excavation and grading 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 obligation due to any delay by the Mayor or the designee thereof in giving or failing to give any approval described herein.

3.9.4 Right of Way Maintenance

The Franchisee shall have the right, without payment of fees, to cut, trim or remove any trees, overhanging branches 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 facilities. If, during the franchise period, the City closes to public use 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.

3.9.5 Other Activities

All other activities that are reasonably necessary for the use by the Franchisee of the public property within the franchise area pursuant to the provisions of the franchise hereby established.

3.10 Franchisee Obligations During Effective Period

While this franchise is effective, the Franchisee shall:

3.10.1 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 \$500,000.00 conditioned upon the faithful performance by the Franchisee of the terms and conditions of the franchise hereby established; provided, however, that this requirement may be waived by the Mayor or the designee thereof upon the reasonable satisfaction thereof with the net worth of the Franchisee.

3.10.2 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 \$1,000,000.00 per person and \$2,000,000.00 per occurrence, by which the Franchisee and the City are insured against any legal liability to others that is in any related to any acts or omissions of the Franchisee pursuant to the

franchise hereby established; provided, however, that this requirement may be waived by the Mayor or the designee thereof upon the reasonable satisfaction thereof with the net worth of the Franchisee.

3.10.3 Provision of Electricity and Natural Gas

Provide either or both electricity and natural gas 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 ("Commission").

3.10.4 Maintenance of Facilities

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

3.10.5 Prosecution of Work

During the construction, maintenance, repair, replacement, reconstruction, 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 at the least possible hazard to the public health, safety, inconvenience 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.

3.10.6 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 a reasonable time after a written request therefor from the City.

3.10.7 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 3.3 hereof.

3.10.8 Franchise Fee

Pay to the City within thirty (30) days after the end of each calendar quarter a franchise fee equal to five percent (5%) of the gross receipts of the Franchisee from the sale of electricity and natural gas for consumption within the City during the previous calendar quarter, along with a certification signed by an officer of the Franchisee or a Certified Public Accountant employed by or on behalf of the Franchisee indicating the quarter's gross receipts, payment calculation, and any necessary gross-ups for collections by the Franchisee. The franchise fee required hereby is not in substitution or in lieu of any other tax, fee, imposition or charge for which the Franchisee would otherwise be responsible and liable. The franchise fee required hereby is in consideration of the use of the public streets, alleys and other public grounds within the City by the Franchisee pursuant to the provisions of the franchise hereby established, since such use is a valuable right in property, the acquisition and maintenance of which is very expensive to the City; and, without such use, the Franchisee would be required to acquire easement in private property for the transmission and distribution of either or both electricity and natural gas, at considerable expense to the Franchisee.

3.11 Franchisee Obligations During and After Effective Period

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

3.11.1 Release

Releases, acquits and forever discharges the City, and all of the officers, agents, employees, successors and assigns thereof, from each, every, any and all obligations and liabilities of any of them to the Franchisee and the successors and assigns thereof 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 therefor, at law or in equity, including, without limitation, claims of third parties for indemnification and/or contribution which may accrue during the effective period of the franchise established hereby to the Franchisee and the successors and assigns thereof, through any act, omission, event, occurrence proximately caused by any negligence of the City that is in any way related to the franchise established hereby or the award or grant thereof by the City to the Franchisee or the use of the public streets, alleys and other public grounds within the City by the Franchisee pursuant to the franchise established hereby.

3.11.2 Indemnification

Pay, indemnify and hold the City and the officers, agents, employees, successors and assigns thereof harmless from 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 obligations and liabilities of any of them 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 therefor, at law or in equity, including, without limitation, claims of third parties for indemnification and/or contribution, which may accrue during the effective period of the franchise established hereby 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 which is in any way related to the franchise established hereby or the award or grant thereof by the City to the Franchisee or the use of the public streets, alleys and public grounds within the City by the Franchisee pursuant to the franchise hereby established.

SECTION 2

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 Public Service Commission of Kentucky.

SECTION 3

Any and all Ordinances in conflict with this Ordinance shall be, and hereby are, repealed to the extent of said conflict.

SECTION 4

If any part of this ordinance or its application is deemed invalid by a court of competent jurisdiction, the city council intends that such invalidity will not affect the effectiveness of the remaining provisions or applications and, to this end, the provisions of this ordinance are severable.

SECTION 5

That this ordinance shall become effective upon its passage and shall be published under KRS 83A.060(9) and other applicable law. This ordinance may be published by summary.

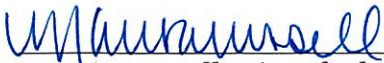
Passed by City Council on September 6, 2023, 2023.

CITY OF FORT WRIGHT, KENTUCKY

By: 

Dave Hatter, Mayor

ATTEST:


Maura Russell, City Clerk

FIRST READING: 8-2-2023

SECOND READING: 9-6-2023

PUBLICATION: 9-15-2023

NOTICE OF ADOPTION, TITLE AND SUMMARY OF
CITY OF FORT WRIGHT, KENTUCKY
ORDINANCE NO. 09-2023

I certify that the following is the Title and Summary of Ordinance No. 09-2023 of the City of Fort Wright, in Kenton County, Kentucky, which was adopted on the 6th day of September 2023:

Title of the Ordinance

AN ORDINANCE OF THE CITY OF FORT WRIGHT IN KENTON COUNTY, 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 BOTH NATURAL GAS AND ELECTRICITY THROUGH AND FOR CONSUMPTION WITHIN THE CITY; AND PROVIDING THE TERMS THEREOF.

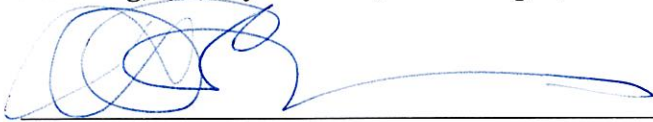
Summary of the Ordinance

Ordinance 09-2023 establishes a non-exclusive franchise with Duke Energy Kentucky, Inc. ("Duke Energy"), a public utility subject to the provisions of Sections 163 and 164 of the Kentucky Constitution and K.R.S. 96.010 through 96.045. 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 use. Duke Energy is the successor to Union Light, Heat and Power Company (ULH&P), which had a franchise granted in 1996 for use of the City streets, alleys and public grounds for transmission and distribution of electricity through and for consumption in the City, but that franchise expired by law. This franchise agreement shall be valid for a period of twenty (20) years, beginning on the first day of the calendar month immediately following the grant and award of the franchise, unless previously terminated by the City pursuant to the provisions included.

This Ordinance also establishes a Franchise Fee. As stated in Section 3.10.8, Franchise Fee: [Duke Energy must] Pay to the City within thirty (30) days after the end of each calendar quarter a franchise fee equal to five percent (5%) of the gross receipts of the Franchisee from the sale of electricity and natural gas for consumption within the City during the previous calendar quarter, along with a certification signed by an officer of the franchisee or a Certified Public Accountant employed by or on behalf of the Franchisee indicating the quarter's gross receipts, payment calculation, and any necessary gross-ups for collections by the Franchisee. The franchise fee required hereby is not in substitution or in lieu of any other tax, fee, imposition or charge for which the Franchisee would otherwise be responsible and liable. The franchise fee required hereby is in consideration of the use of the public streets, alleys and other public grounds within the City by the Franchisee pursuant to the provisions of the franchise hereby established, since such use is a valuable right in property, the acquisition and maintenance of which is very expensive to the City; and, without such use, the Franchisee would be required to acquire easement

in private property for the transmission and distribution of either or both electricity and natural gas, at considerable expense to the Franchisee.

I, Timothy B. Theissen, an attorney licensed to practice law in the Commonwealth of Kentucky, for Strauss Troy, L.P.A., City Attorney for the City of Fort Wright, in Kenton County, Kentucky, do hereby certify that this Notice of Adoption, Title and Summary of Ordinance No. 09-2023 was prepared by me, and that it represents an accurate description of the summary of the contents of the Ordinance. The full text of the Ordinance, its Exhibits, and other information relative to the Ordinance, are on file at the office of the City Clerk of the City of Fort Wright, Kentucky, in the Fort Wright Municipal Building, 409 Kyles Lane, Fort Wright, Kentucky 41011.



Timothy B. Theissen, City Attorney for Fort Wright, Kentucky
Strauss Troy, L.P.A.



AFFIDAVIT OF PUBLICATION

See Proof on Next Page

LINK Reader
31 Innovation Aly, Ground Floor
(859) 878-1669

I, Bailee Liston, of lawful age, being duly sworn upon oath depose and say that I am an agent of Column Software, PBC, duly appointed and authorized agent of the Publisher of LINK Reader, a publication that is a "legal newspaper" as that phrase is defined for the city of Covington, for the County of , in the state of Kentucky, that this affidavit is Page 1 of 2 with the full text of the sworn-to notice set forth on the pages that follow, and that the attachment hereto contains the correct copy of what was published in said legal newspaper or online notice website at <https://linkreader.column.us/search>, as provided by the requirements of KRS 424, in consecutive issues on the following dates:

PUBLICATION DATES:

Sep. 15, 2023

Notice ID: RktMZMYGMhRZkLEQnoZp

Notice Name: ord 09-2023 summary

PUBLICATION FEE: \$220.79

Bailee Liston

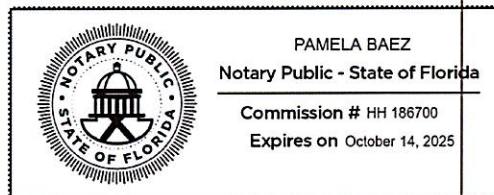
Agent

VERIFICATION

State of Florida
County of Orange

Subscribed and sworn to before me 09/26/2023

Notary Public
Notarized online using audio-video communication



NOTICE OF ADOPTION, TITLE AND SUMMARY OF
CITY OF FORT WRIGHT, KENTUCKY ORDINANCE NO.
09-2023

I certify that the following is the Title and Summary of Ordinance No. 09-2023 of the City of Fort Wright, in Kenton County, Kentucky, which was adopted on the 6th day of September 2023:

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I, Timothy B. Theissen, an attorney licensed to practice law in the Commonwealth of Kentucky, for Strauss Troy, L.P.A., City Attorney for the City of Fort Wright, in Kenton County, Kentucky, do hereby certify that this Notice of Adoption, Title and Summary of Ordinance No. 09-2023 was prepared by me, and that it represents an accurate description of the summary of the contents of the Ordinance. The full text of the Ordinance, its Exhibits, and other information relative to the Ordinance, are on file at the office of the City Clerk of the City of Fort Wright, Kentucky,

in the Fort Wright Municipal Building, 409 Kyles Lane, Fort Wright, Kentucky 41011.

Timothy B. Theissen, City Attorney for Fort Wright, Kentucky Strauss Troy, L.P.A.