

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Petition of the City)
of Hamilton, Ohio and Duke Energy Ohio,) Case No. 13-270-EL-ATR
Inc., to Transfer Facilities to the City of)
Hamilton, Ohio.)

JOINT PETITION
FOR APPROVAL OF A TRANSACTION BETWEEN PUBLIC UTILITIES

The City of Hamilton (Hamilton) and Duke Energy Ohio, Inc., (Duke Energy Ohio) respectfully submit this Joint Application and move the Public Utilities Commission of Ohio (Commission) to approve the Joint Application and issue the findings and approvals requested herein.

I. Introduction

1. Hamilton is an Ohio municipal corporation. Under the authority and power granted by, *inter alia*, Article 18 of the Ohio Constitution, Hamilton is a “municipal electric utility,” as defined by Ohio Revised Code (R.C.) 4928.01(A)(20).

2. Pursuant to R.C. 4905.02, R.C. 4905.04, 4928.01(A)(11), and 4933.81, the Commission does not have jurisdiction over Hamilton.

3. Duke Energy Ohio is an Ohio corporation and is a “public utility” as defined in R.C. 4905.02, and “electric light company” as defined in R.C. 4905.04(A)(4), and “electric

distribution utility” as defined by R.C. 5928.01(A)(6), an “electric utility” as defined by R.C. 4928.01(A)(11), and an “electric supplier” as defined by R.C. 4933.81(A).

4. Duke Energy Ohio is subject to the Commission’s jurisdiction pursuant to R.C. 4905.02, R.C. 4905.04, and in accordance with R.C. 4928.01(A)(11) and R.C. 4933.81(A).

5. Pursuant to R.C. 4905.48(B), “Any public utility may purchase or lease the property, plant, or business of any other such public utility.” In addition, “Any such public utility may sell or lease its property or business to any other such public utility.” R.C. 4905.48(C).

II. Background

6. On October 2, 2012, Hamilton and Duke Energy Ohio entered into a Facilities Transfer Agreement (FTA), attached hereto as Exhibit A. Pursuant to the FTA, Duke Energy Ohio agrees to transfer certain distribution facilities, e.g., poles, neutral conductor, down guys and anchors, hereinafter referred to as “Facilities,” that were used in service of the former Smart Papers Mill, located at B Street South Warwick, Hamilton, Ohio. These assets were previously used in the distribution of electricity to Smart Papers Mill.

7. The Smart Papers Mill is no longer in business at this location and the City of Hamilton has assumed legal ownership of the facilities. Thus, the City seeks to acquire the necessary facilities to provide electric service to its own property that is entirely within its municipal boundaries. In previous, analogous situations, the Commission has determined that such transfers are not tantamount to an abandonment of service or facilities and are not subject to Commission review under R.C. 4905.20 and 4905.21.¹

¹ See, e.g., *In the Matter of the Joint Application of the East Ohio Gas Company d/b/a Dominion East Ohio, Constitution Gas Transport Co., Inc., and Knox Energy Cooperative Association for*

8. Ohio law requires that Commission approval whenever a public utility seeks to purchase or lease the property plant or business of any other public utility.²

9. Duke Energy Ohio makes the following representations regarding the continuation of adequate service to its customers:

- a. Since Smart Paper Mill is no longer doing business at this location, electric service has been discontinued. The City of Hamilton will provide service at this location once the transfer is approved. The facilities in question are entirely within the municipal boundaries of the City of Hamilton.
- b. All customers of Duke Energy Ohio will continue to be provided with uninterrupted and adequate electric service, with no consequent impact on just and reasonable rates.

10. The required officer verifications are submitted herewith.

11. Joint Applicants respectfully request that the Commission find that no hearing on this Joint Application is warranted or required and that this Joint Application be approved forthwith.

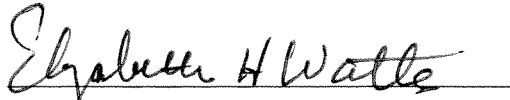
III. Conclusion

WHEREFORE, Duke Energy Ohio and the City of Hamilton respectfully requests that the Commission approve this Application without a hearing, as provided in R.C. 4905.48.

Approval of the Transfer of Assets and Substitution of Service, Case No. 11-4324-GA-ATR, Finding and Order (August 17, 2011).

² R.C. 4905.48.

Respectfully submitted,

A handwritten signature in cursive script that reads "Elizabeth H. Watts". The signature is written in black ink and is positioned above a horizontal line.

Amy B. Spiller

Deputy General Counsel

Elizabeth H. Watts

Associate General Counsel

Duke Energy Ohio, Inc.

139 Fourth Street, Room 1303 Main

Cincinnati, Ohio 45202

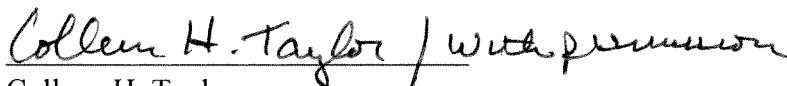
Phone (513) 287-4359 (Cincinnati)

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Fax (513) 287-4385

Amy.Spiller@duke-energy.com

Elizabeth.Watts@duke-energy.com

A handwritten signature in cursive script that reads "Colleen H. Taylor". To the right of the signature, the words "with permission" are written in a smaller, less formal cursive script.

Colleen H. Taylor

EHW

Law Director, City of Hamilton

345 High Street, Suite 710

Hamilton, Ohio 45011

Phone (513) 785-7183

Fax (513) 785-7187

taylorc@ci.hamilton.oh.us

FACILITIES TRANSFER AGREEMENT

This **FACILITIES TRANSFER AGREEMENT** (this "**Agreement**") is made as of the 2nd day of October, 2012 ("**Effective Date**") by and between **DUKE ENERGY OHIO, INC.**, an Ohio corporation with office located at 139 East Fourth Street, Cincinnati, Ohio (the "**Duke Energy**"), and **THE CITY OF HAMILTON**, a municipality within the State of Ohio, County of Butler, with offices located at 375 High St., Hamilton OH 45011 (the "**City**") (individually, Duke Energy and the City may be referred to as the "**Party**," hereinafter, and collectively, the "**Parties**").

WHEREAS, Duke Energy desires and intends to transfer certain facilities to the City; and

WHEREAS, the City desires and intends to accept said facilities pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of **ONE DOLLAR** and the promises and the mutual covenants contained herein, and other good and valuable consideration, including such consideration as set forth in Paragraph 11, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. **Transfer of Facilities.** Duke Energy owns certain facilities that were used in the service of the former Smart Papers Mill, which is located at B Street South Warwick, Hamilton, OH. Duke Energy agrees to transfer and convey all right, title, and interest in certain electric distribution facilities and equipment, e.g., poles, neutral conductor, down guys and anchors (hereinafter collectively referred to as the "**Facilities**") to the City, and the City agrees to accept and receive all right, title, and interest from Duke Energy, in and to said Facilities, which are more particularly described on the attached Exhibit A, which is incorporated herein by reference. The Facilities will be transferred, conveyed, and granted to the City pursuant to this Agreement. The poles to be transferred are numbered with Duke Energy's identifiable numbering and are identified in Exhibit A. Duke Energy intends that the only poles related to the former Smart Papers Mill that will not transfer to the City are those poles with Duke Energy's 69 kV atop the poles.

2. **Closing Date; Duke Energy Approvals.** The Closing will occur when all work to be performed is completed, e.g., removal of switches and there is no additional work to be performed regarding the transfer of the Facilities from Duke Energy to the City (the "**Closing Date**"). The Closing Date is estimated to occur within ninety (90) days of the Effective Date hereof. This Agreement is subject to the approval of Public Utilities Commission of Ohio ("**PUCO**"), and Duke Energy shall make application to the PUCO subsequent to the Effective Date, Closing Date hereof, and the physical transfer of any applicable Facilities. Duke Energy's obligations hereunder are contingent upon it receiving the appropriate internal approvals and any requisite PUCO after the Parties execute this Agreement. Should Duke Energy fail to receive any approvals, including PUCO approval to transfer the Facilities and complete the contemplated transaction hereunder, Duke Energy has the right to terminate this Agreement upon notification to the City that it is terminating this Agreement and any accompanying agreements, and neither Party shall have any further liability to the other Party hereunder, and this Agreement shall be

considered null and void even if the Closing has occurred since the Closing was contingent upon obtaining PUCO approval, which of necessity is required to occur subsequent to the Closing Date. Such termination shall be effective as the effective termination date set forth in the written notification. If the PUCO fails to approve the application for the transfer of the Facilities, the transfer of the Facilities shall be reversed or rescinded and the Parties shall agree on how to restore the Parties to their condition prior to the Effective Date herein as if no transfer had occurred and as if the Parties had not executed this Agreement.

3. **Acceptance/Delivery.** Subject to Paragraph 2 above, upon the Closing Date: (i) Duke Energy shall be deemed to have delivered the Facilities to the City, (ii) the City shall be deemed to have taken delivery of and accepted the Facilities from Duke Energy and (iii) all right, title, and ownership of the Facilities shall be transferred to the City.

4. **Condition of Facilities.** EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES OF DUKE ENERGY AS TO TITLE EXPRESSLY SET FORTH IN THIS PARAGRAPH, THE FACILITIES ARE BEING TRANSFERRED TO THE CITY "AS-IS, WHERE IS," (EXCEPT THOSE FACILITIES THAT WILL BE PHYSICALLY TRANSFERRED) WITHOUT ANY REPRESENTATIONS AND WARRANTIES WHATSOEVER, WHETHER STATUTORY, EXPRESS, OR IMPLIED INCLUDING WITHOUT LIMITATION, ANY WARRANTIES OR REPRESENTATIONS AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR AS TO THE CONDITION OR QUALITY OF THE FACILITIES. DUKE ENERGY SHALL NOT BE LIABLE, WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY), UNDER ANY WARRANTY OR OTHERWISE RELATING TO THE FACILITIES FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, OR INCIDENTAL LOSS OR DAMAGE, ANY DAMAGE TO OR LOSS OF ANY PROPERTY OR FACILITIES, OR ANY LOSS OF USE OF PROPERTY OR THE FACILITIES.

5. **Remarking of the Facilities.** The City shall, as soon as practical after the transfer of the Facilities to the City and at the City's sole cost, remove any Duke Energy identifying marks from the Facilities and re-stencil the Facilities with the City's identifying marks and applicable tags, if applicable. Should the City fail to remove Duke Energy's identifying marks expeditiously or at any time subsequent to the Closing Date, Duke Energy shall bear no further responsibility for the Facilities, which shall include but not be limited to any bodily injuries, death, or damages subsequent to the transfer of said Facilities to the City.

6. **Use of Corporate Name.** The City shall not use the name Duke Energy Ohio, Inc., or Duke Energy in any manner subsequent to the Closing Date.

7. **Representations and Warranties of Duke Energy.** Duke Energy hereby represents, warrants, and declares to and in favor of the City as follows:

(a) Duke Energy is a corporation duly organized, existing and in good standing under the laws of the State of Ohio, and all requisite PUCO approvals will be requested by Duke Energy subsequent to the Parties' execution hereof.

(b) Duke Energy is the lawful and rightful owner of the Facilities and has the right and good title to convey and transfer the same to the City.

(c) This Agreement constitutes the legal, valid, and binding obligation of Duke Energy, enforceable in accordance with its terms.

(d) There are no liens, encumbrances, or third party interests in the Facilities.

8. **Representations and Warranties of the City.** The City hereby represents, warrants, and declares to and in favor of Seller that as follows:

(a) The City is a municipal subdivision duly organized, existing, and in good standing under the laws of the State of Ohio. The execution, delivery, and performance of this Agreement by the City has been duly and validly authorized and approved by all requisite action(s).

(b) This Agreement constitutes the legal, valid, and binding obligation of the City, enforceable in accordance with its terms.

(c) There is no contract or agreement to which the City is a party that would prohibit the City from fulfilling its obligations hereto.

(d) The City has obtained or will obtain prior to the Closing Date, or subsequent thereto, if applicable, any requisite approvals, consents, permits, ordinances, etc., needed to consummate the transfer of the Facilities from Duke Energy to the City as contemplated by the Parties herein.

9. **No Finder.** Each Party represents and warrants to the other that neither it nor any third party acting on its behalf has paid, or has become obligated to pay, or committed the other Party hereto to pay any fee or commission to any broker, finder, or intermediary for or on account of the transactions contemplated by this Agreement.

10. **City's Obligation.** The City agrees to accept the Facilities "AS-IS" and "WHERE-IS" as of the Effective Date and at all time thereafter, and subsequent to the Effective Date herein Duke Energy shall have no further responsibility or liability related to the Facilities.

11. **Additional Considerations.** Since Duke Energy's service to the former Smart Papers mill has been discontinued, Duke Energy may also elect to discontinue its St. Clair Substation and remove associated facilities from the Duke Energy system. Duke Energy has developed the main concepts for the most probable scenario. Duke Energy will be responsible for the cost and perform the work associated with the removal of said facilities. Completion of certain portions may require permits, easements, or other rights-of-way from the City of Hamilton, and/or other cooperation from the City. The conceptual plans have been discussed by the Parties, and both are agreeable to the same as of the Effective Date hereof, and as such the City agrees that any necessary permits, easements, or other rights-of-way, and/or other cooperation from the City shall not be unreasonably withheld, delayed, or withdrawn. The

timing of any changes to Duke Energy facilities within the City shall be at the sole discretion of Duke Energy.

12. **Damages.** Each Party shall be responsible and not hold the other Party responsible from loss, damage, liability, or expense resulting from damage to personal property of a third party, or injuries, including death, to third parties to the extent caused by a negligent act or omission of either Party or either Party's subcontractors, agents, or employees during the physical transfer of applicable Facilities hereunder. Such responsibility shall be reduced to the extent damage or injuries are attributable to others.

13. **Taxes.** All taxes and transfer, excise, filing, documentation fees, or similar charges associated with the conveyance or transfer of the Facilities hereunder shall be the responsibility of the City.

14. **Further Assurances.** At the reasonable request of the City, Duke Energy shall make, do and execute or cause to be made, done and executed all such further acts, deeds, and assurances as the City may, at any time or from time to time, reasonably request to more effectively convey the Facilities to the City and effectuate this Agreement.

15. **Survival of Representations and Warranties.** The Facilities are being transferred "as is" and subsequent to the physical transfer of the Facilities, Duke Energy shall have no further liability for such transferred Facilities.

16. **Successors and Assigns.** This Agreement shall inure to the benefit of the Parties and be binding upon the parties hereto, and their respective successors and assigns.

17. **Severability.** Any term, condition, or provision of this Agreement which is, or is deemed to be, void, prohibited, or unenforceable in any jurisdiction is, as to such jurisdiction, severable herefrom, and is ineffective to the extent of such avoidance, prohibition, and unenforceability without in any way invalidating the remaining terms, conditions, and provisions hereof. Any such avoidance, prohibition, and unenforceability in any jurisdiction shall not invalidate or render unenforceable such term, condition or provision in any other jurisdiction.

18. **Waiver.** No waiver by either Party hereto of any breach hereunder shall be deemed a waiver of any other or subsequent breach.

19. **Modifications.** This Agreement shall not be altered, amended, changed, waived, terminated, or modified in any respect or particular unless the same shall be in writing and signed by or on behalf of both Parties.

20. **Entire Agreement.** This Agreement expresses the entire understanding and agreement between the Parties hereto pertaining to the subject matter hereof and supersedes all prior or contemporaneous understandings, statements, or agreements between the parties on such subject matter. Each Party acknowledges and agrees that no employee, officer, agent, or representative of the other Party has the authority to make any representations, statements, or promises in addition to or in any way different than those contained in this Agreement, other

than in writing signed by both Parties, and that it is not entering into this Agreement or transaction in reliance upon any representation, statement, or promise of the other Party except as expressly stated herein. This Agreement contains the entire agreement and understanding between the Parties hereto with respect to the subject matter contained herein and supersedes all prior agreements, understanding, and representations, oral or written. No modification, limitation, or agreement to that effect in writing and signed by Parties hereto.

21. **Governing Law.** This Agreement, the construction of this Agreement, all rights and obligations between the Parties to this Agreement, and any and all claims arising out of or relating to the subject matter of this Agreement (including all tort claims), shall be governed by the laws of the State of Ohio. If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected, but shall continue to be valid and enforceable to the fullest extent permitted by law.

22. **Termination.** This Agreement may be terminated at any time prior to the Closing Date by mutual written consent both Parties.

23. **Counterparts: Facsimile Execution.** This Agreement may be executed in one or more counterparts, all of which will be considered one and the same agreement and will become effective when one or more counterparts have been signed by each of the Parties and delivered to the other Party, it being understood that the Parties need not sign the same counterpart. Further, this Agreement may be executed by facsimile signature(s).

24. **Consequential Damages & Limitation of Liability.** IN NO EVENT SHALL EITHER PARTY HAVE ANY LIABILITY FOR (A) DAMAGES TO EITHER PARTY CAUSED BY DELAY IN PERFORMANCE, (B) DAMAGES IN EXCESS OF THE COST OF THE FACILITIES OR (C) INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR ECONOMIC CONSEQUENTIAL DAMAGES OF ANY KIND WHATSOEVER INCLUDING WITHOUT LIMITATION, LOSS OF USE, DATA, PROFIT, OR REVENUE, BUSINESS INTERRUPTION, OR LOSS OR DAMAGE TO PROPERTY OR EQUIPMENT, OR OTHER ECONOMIC LOSS INCURRED BY EITHER PARTY AS A RESULT OF EITHER PARTY'S PERFORMANCE OR CANCELLATION OF THIS AGREEMENT, WHETHER ANY CLAIM IS BASED UPON THEORIES OF INFRINGEMENT, WARRANTY, CONTRACT, NEGLIGENCE, STRICT LIABILITY, TORT OR OTHERWISE, EVEN IF THE PARTIES HAVE BEEN APPRISED OF THE POSSIBILITY OF SUCH DAMAGES.

25. **Headings.** Any titles, captions, and headings contained in this Agreement are for convenience only and shall not be deemed a part of this Agreement.

26. **Further Cooperation.** The Parties agree that at any time, or from time to time, on or before and after the Closing date, they will, on request of the other, execute and deliver such further documents and do such further acts and things as such other party may reasonably request in order fully to effectuate the purposes of this Agreement.

27. **Notice.** All notices, requests, and demands given or made upon the Parties shall be in writing and shall be deemed given (i) when delivered personally, upon delivery to an authorized representative of either Party or, if refused by the intended recipient, upon attempted

delivery; (ii) if sent by certified or registered United States mail, postage prepaid, five (5) days after deposit in the United States mail; (iii) if delivered by facsimile, on the date the sender obtains written telephonic confirmation that the fax was delivered; (iv) or electronically, on the date the sender obtains confirmation that the electronic transmission was received or delivered; or (v) if sent by nationally recognized express mail courier, fees prepaid, on the date officially recorded by such courier. Notice shall be effective if given in writing to the Parties at the address set forth in the first Paragraph on page 1 of this Agreement.

28. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, estates, successors and permitted assigns.

29. **Force Majeure.** In the event that either Party is unable to perform any of its obligations under this Agreement, because of natural disaster, actions, or decrees of governmental bodies or agencies, war, civil disturbances, terrorism, or communication line failure not the fault of the affected Party (a "**Force Majeure Event**"), the Party who has been so affected shall immediately give notice to the other Party and shall make commercially reasonable efforts to resume performance as expeditiously as possible. Upon receipt of such notice, all obligations under this Agreement shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, the Party whose ability has not been so affected may terminate this Agreement by providing written notice to terminate to the other Party. However, delays in delivery due to Force Majeure Events shall automatically extend the delivery date for a period equal to the duration of such Events.

[Signatures on following page]

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IN WITNESS WHEREOF, an authorized representative of Duke Energy Ohio, Inc. has executed this Agreement as of the Effective Date hereinabove set forth.

DUKE ENERGY OHIO, INC.

By: Donald A Eckstein

Name: Donald A Eckstein

Title: VP Dist Maint & Constr MDO

Date: 10/11/12

IN WITNESS WHEREOF, an authorized representative of The City of Hamilton has executed this Agreement as of the Effective Date hereinabove set forth.

THE CITY OF HAMILTON

By: Joshua A. Smith
Name: Joshua A. Smith
Title: City Manager
Date: 10/2/12

APPROVED AS TO FORM:
A/Colleen H. Jap
CITY DIRECTOR
CITY OF HAMILTON, OHIO 9/24/12

EXHIBIT A

**ST. CLAIR 41-43
SMART PAPER DISTRIBUTION CIRCUITS
FACILITIES TO BE TRANSFERRED TO
THE CITY OF HAMILTON**

<u>FACILITIES</u>	<u>QUANTITY</u>
Pole 65'cl2	26
Pole 60'cl2	1
Pole 55'cl2	2
Pole 50'cl2	2
Pole 45'cl2	2
poletop 7'sah	23
poletop 7' de asm	6
poletop 7'dde asm	4
poletop 10'sah	19
poletop 10' de asm	2
poletop 10'dde asm	6
buckarm 10'	2
terminal pole	2
pole grounds	33
pole keys	4
neutral rk1	17
14" screw anchor	18
single downguy	3
double downguy	16
single headguy	8
477acsr conductor	14922
247acar conductor	4059
4/0bc conductor	3498

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/22/2013 1:27:33 PM

in

Case No(s). 13-0270-EL-ATR

Summary: Petition In the Matter of the Joint Petition of the City of Hamilton, Ohio and Duke Energy Ohio, Inc., to Transfer Facilities to the City of Hamilton, Ohio. electronically filed by Ms. Elizabeth H Watts on behalf of Duke Energy Ohio, Inc.