IN THE SUPREME COURT OF OHIO

THE CLEVELAND ELECTRIC ILLUMINATING CO.,	:	**Case No. 2020-0277**
	:	
	:	**On Appeal from the**
Plaintiff-Appellant/ Cross-Appellee	:	**Cuyahoga County Court of Appeals, Eighth Appellate District**
	:	
v.	:	
	:	**Court of Appeals**
CITY OF CLEVELAND, et al.,	:	**Case No. CA 19-108560**
Defendants-Appellees/ Cross-Appellants.	:	
	:	

MERIT BRIEF OF *AMICI CURIAE* AMERICAN MUNICIPAL POWER, INC. AND OHIO MUNICIPAL ELECTRIC ASSOCIATION IN OPPOSITION TO PLAINTIFF-APPELLANT AND IN SUPPORT OF CROSS-APPELLANTS

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INTRODUCTION

Cleveland Public Power ("CPP") is fully complying with the Ohio Constitution and this Court's precedent. CPP sells only surplus product outside the City of Cleveland, as permitted by Section 6, Article XVIII of the Ohio Constitution. Section 4, Article XVIII of the Ohio Constitution expressly reserves to municipalities specific home rule powers that include the ability to own and operate municipal utility electric distribution systems. *See Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 288 (2000). Section 6, Article XVIII of the Ohio Constitution expressly grants municipalities the authority to sell surplus utility product, including electricity, outside the municipal boundary with the limitation that such sales not exceed 50% of the total product sold within the municipality. *Id.* In *Toledo Edison*, this Court interpreted these constitutional provisions as "preclud[ing] a municipality from purchasing electricity solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits." *Id.* at 293. The record in this case demonstrates that CPP has fully complied with these requirements.

The unconstitutional relief sought here by Cleveland Electric Illuminating ("CEI") is an absolute prohibition on sales of surplus power by municipalities outside of the municipal boundary. CEI erroneously argues that the express language of the Ohio Constitution and this Court's precedent have been overtaken by allegedly new factual circumstances existing in the wholesale electricity markets that render illegitimate the prudent practices CPP uses to acquire its electricity supply. CEI conveniently omits in its description of new factual circumstances several important facts that go to the heart of the unfairness of CEI's position. Cleveland is one of the few municipalities in Ohio or elsewhere that has "direct, door to door competition for customers with a large [investor-owned utility] IOU *inside their corporate limits.*" *See, e.g.,* CPP Reply Br., Exh. A ("Bentine Affid."), Exh. 1 ("Bentine Expert Report") at 10 (Apr. 15, 2019). This means that if CEI is successful, CEI will freely compete for customers within Cleveland's corporate limits but

CPP may not compete with CEI, even subject to the constitutional limitations, outside of Cleveland's corporate limits.

Additionally, while CEI, IOUs and cooperative *amici* portray the situation as dire (the IOUs "need protection from unbridled incursions into their territories by unregulated municipal utilities such as CPP," they are "under siege from unfair competition," and, if left unchecked, "unregulated municipal utilities will grow more brazen in encroaching upon regulated utilities' territories, competing unfairly, and poaching their customers"), the reality is that the magnitude of the issue is limited and relatively minor in context. *See* IOU *Amici* Br. at 3, 9. Even if *all* municipal electric utilities in Ohio were to serve customers outside of their corporate limits to the full 50% constitutional maximum (which is not realistic), the total customers served by municipal electric utilities would be less than 10% statewide, leaving over 90% of Ohio customers to be served by the IOUs and cooperatives. *See* Bentine Expert Report at 17. It is also important to note that customers being served by municipal electric utilities outside of the municipal corporation limits voluntarily elect to take such service from the municipal electric utility – customers are not obligated to take service from municipal electric utilities outside of the corporation limits.

CEI misconstrues this Court's discussion of the "artificial surplus" present in *Toledo Edison* and asks the Court to take an activist role and read into the Ohio Constitution language that is not there, simply because such a reading would advance CEI's objective of retaining monopolistic control over customers in its own service territory. For this reason, the Court should deny the appeal brought by CEI.

The Court of Common Pleas recognized that CEI's request depends on an unsupportable interpretation of the Ohio Constitution when it granted summary judgment to CPP and denied CEI's summary judgment motion. The Eighth District upheld denial of CEI's motion, but also

overturned the trial court's grant of summary judgment to CPP and remanded the case for further development of the facts. The Eighth District imposed a list of conditions that must apply in order to justify sales of surplus electricity outside the municipality, up to the 50% limit expressly stated in the Ohio Constitution. In doing so, the Eighth District impermissibly added its own restrictions to the unambiguous express constitutional language. For this reason, the Court should reverse the Eighth District's order overturning the trial court's grant of summary judgment to CPP.

STATEMENT OF *AMICI CURIAE* INTEREST

A. American Municipal Power, Inc.

American Municipal Power, Inc. ("AMP") is a non-profit wholesale power supplier and service provider for 135 members, including 134 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with nine members that is headquartered in Smyrna, Delaware. AMP's members own and operate municipal electric distribution utilities. AMP's members collectively serve more than 650,000 residential, commercial, and industrial customers and have a system peak of more than 3,400 megawatts. AMP's Ohio members include the City of Cleveland and eighty-four other Ohio municipalities.

The ability of AMP's members to effectively and efficiently operate their electric systems will be impaired in the event the Court adopts either of the two different unconstitutional and overly-restrictive limitations on municipal utility authority that were, respectively: (1) propounded by the Plaintiff-Appellant CEI, and (2) reflected in the Eighth Appellate District's decision. These unlawful restrictions on sales outside municipal boundaries directly burden the selling utility by impairing its ability to manage its wholesale electricity supply. To the extent surplus electricity is sold in a neighboring municipality pursuant to a franchise granted to the seller, then prohibiting

these sales also attacks the neighboring municipality's constitutional authority to grant such franchises.

B. Ohio Municipal Electric Association

The Ohio Municipal Electric Association ("OMEA") provides legislative liaison services for AMP and eighty Ohio public power communities, with the goal of protecting the independence and constitutional rights of Ohio municipal electric systems. The OMEA serves as the legislative liaison to AMP and represents the state and federal legislative interests of the organization. Although closely aligned with AMP, the OMEA is a separate, nonprofit entity guided by a sixteen-member Board of Directors composed of elected officials from member communities and four municipal electric systems representatives who may be, but are not required to be, elected officials of the communities they serve.

Similar to AMP, the OMEA's ability to protect the independence and constitutional rights of Ohio municipalities will be impaired in the event the Court adopts either of the two different unconstitutional and overly-restrictive limitations on municipal utility authority propounded by the Plaintiff-Appellant CEI, and reflected in the Eighth Appellate District's decision. These unlawful restrictions on sales outside municipal boundaries directly burden the selling utility by impairing its ability to manage its wholesale electricity supply.

STATEMENT OF THE CASE AND FACTS

A. The City of Cleveland lawfully sought to sell surplus power to customers outside its municipal boundaries.

The City of Cleveland has lawfully exercised its home rule rights under Sections 4 and 6, Article XVIII of the Ohio Constitution in owning and operating CPP and in seeking to sell its surplus electricity to customers outside its municipal boundaries. CPP obtains supplies of electricity to serve its customers in Cleveland from a variety of sources, including electricity that

is generated using coal and natural gas, along with renewable resources such as hydroelectric, solar and wind generation. According to the City, these resources are intended to "(i) secure long-term stable sources of power, (ii) explore local generation opportunities where transmission congestion costs are mostly avoided, (iii) mitigate the costs of meeting its resource adequacy obligations, and (iv) diversify its generation supply portfolio and increase its supply of renewable energy." Appellee Br. at 4. One such resource is CPP's Brooklyn Solar project.

B. The Court of Common Pleas appropriately denied CEI's motion for summary judgment and granted summary judgment to CPP.

The Court of Common Pleas found that there were no issues of material fact in dispute, such that the case was suitable for resolution by summary judgment. Judgment at 2-6. The court found that the case turned on two points of law: (1) whether CPP had exceeded the 50% limitation imposed by Section 6, Article XVIII of the Ohio Constitution, and (2) whether CPP purchased electricity solely for the purpose of resale outside the municipal boundary. *Id.* at 14-15. The trial court found that CPP's electricity sales outside the City of Cleveland were approximately 3% of its annual sales within the City, which does not exceed the 50% constitutional limitation. *Id.* at 6, 15. Additionally, the trial court found that "there is no evidence that [CPP has violated] either the Ohio Constitution or the *Toledo v. Bryan* case . . . ." *Id.* at 11.

C. The Eighth District affirmed denial of summary judgment to CEI, reversed the grant of summary judgment to CPP, and crafted its own extra-constitutional test to govern the fact-finding directed in its remand order.

The Eighth District correctly rejected CEI's argument that the trial court erred in denying summary judgment to CEI because "any surplus electricity CPP possesses can only be an 'artificial surplus,' *i.e.*, 'an amount acquired only so it could be resold outside Cleveland's boundaries.'" Opinion ¶ 39. The court disagreed with CEI's claims that "the Ohio Constitution and *Toledo Edison* [require] a municipality to produce or purchase the precise amount – and only the precise

amount – of electricity needed to satisfy the requirements of its municipal customers." *Id.* The court also rejected CEI's assertion that only two circumstances would permit CPP to sell electricity outside of the City of Cleveland: if CPP itself produced the power to be sold and CPP served no customers in Cleveland with power purchased from other parties, or if the electricity to be sold was an unavoidable surplus from a transaction necessary to supply customers in Cleveland. *Id.* ¶ 40. CEI renews these arguments before this Court in its merits brief.

In addition, the Eighth District reversed the trial court's grant of summary judgment to CPP and remanded the case for a determination of "whether the city purchased excess electricity *solely* for the purpose of selling it to others outside municipal limits . . . ." *Id.* ¶ 41. The court determined that Sections 4 and 6, Article XVIII of the Ohio Constitution "aim to avoid . . . 'unfettered authority' by municipalities 'to purchase and resell electricity to entities outside their boundaries' . . . ." *Id.* ¶ 39 (citing *Toledo Edison* at 293). The court correctly allowed that "[a] city is not required to forgo considerations such as cost, risk mitigation, economies of scale, environmental impact and reliability in favor of purchasing only the precise amount of electricity required for use by customers within the municipality at any given time." *Id.* But the court rejected CPP's interpretation of the *Toledo Edison* holding, stating "the Ohio Supreme Court did not interpret Sections 4 and 6 as precluding a municipality from purchasing electricity solely for the purpose of extraterritorial resale only where it resells 'the entire amount' of that purchased electricity to customers outside its geographic boundaries." *Id*. ¶ 34. The interpretation of these constitutional provisions and of this Court's decision in *Toledo Edison* is the subject of CPP's jurisdictional cross-appeal of the Eighth District's reversal of the trial court's grant of summary judgment in favor of CPP.

OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

Plaintiff-Appellant CEI urges the Court to interpret the unambiguous terms of the Ohio Constitution in a manner that is unsupported by its plain meaning, contrary to this Court's interpretive precedent. *See, e.g., Toledo City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.,* 146 Ohio St. 3d 356, 359 (2015) ("Where the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean." (quoting *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520 (1994))). Sections 4 and 6, Article XVIII of the Ohio Constitution are unambiguous, as determined in *Toledo Edison*. The only interest that would be advanced by CEI's activist interpretation of the Ohio Constitution and revisionist application of this Court's opinion in *Toledo Edison* would be CEI's interest in gaining unconstitutional monopolistic control over the customers in its service territory. CEI seeks reversal of a denial of summary judgment in the proceedings below, where CEI's unconstitutional propositions were twice found to be meritless. CEI's unsupported and sweeping reinterpretations of the Ohio Constitution should be denied by this Court as well.

ARGUMENTS CONTRA APPELLANT CEI'S PROPOSITIONS OF LAW

Plaintiff-Appellant's Proposition of Law No. 1:

> A municipal utility violates Article XVIII, sections 4 and 6 if it sells electricity outside municipal boundaries from an artificial surplus, including any avoidable excess electricity a municipality purchases that was not to supply the city or its inhabitants.

Plaintiff-Appellant's Proposition of Law No. 2:

> A municipal utility violates Article XVIII, sections 4 and 6 if it can buy only the amount of electricity needed within the city, but instead it buys excess electricity and sells electricity outside municipal boundaries.

Plaintiff-Appellant's Proposition of Law No. 3:

> A municipal utility violates Article XVIII, Sections 4 and 6 if it buys any amount of electricity for a purpose other than supplying that electricity to itself or its inhabitants, then sells the resulting excess to customers outside city limits.

CEI's three propositions of law are related formulations of the same request for an impermissible judicial revision of the Ohio Constitution. In combination, CEI's propositions can be reduced to an argument that:

> A municipal utility violates Article XVIII, sections 4 and 6 if it sells electricity outside municipal boundaries from an artificial surplus, which exists if (1) it can buy only the amount needed within the municipality, but buys excess instead, or (2) it buys any amount of electricity for a purpose other than supplying that electricity to itself or its inhabitants.

In contrast, the actual language of Sections 4 and 6, Article XVIII of the Ohio Constitution states (emphasis added):

> § 4 Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, *any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants*, and *may contract with others* for any such product or service. . . .
>
> § 6 Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the *surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipalit*y. . . .

In support of its propositions of law, CEI erroneously argues that the Ohio Constitution forbids municipal utilities from purchasing electricity for resale outside the municipal boundaries; invokes the theoretical possibility that CPP might avoid excess purchases of electricity as justification for denying CPP its constitutional right to do so; and makes baseless claims of unfair competition by municipal utilities. CEI leans heavily on an eminent domain case, *Britt v. City of*

Columbus, 38 Ohio St.2d 1 (1974), for the uncontroverted principle that Section 6, Article XVIII should not be read to expand municipal power by implication; propounds an overbroad reading of this Court's holding in *Toledo Edison*; and predicts that "a wave of unfair competition" for municipal utilities will distort Ohio's electricity markets. As discussed below, these erroneous arguments do not provide a basis to impose the unconstitutional judicial restrictions on municipal home rule powers that CEI seeks from this Court.

A. The Ohio Constitution Expressly Permits Municipal Utilities to Sell Electricity Outside of the Municipal Boundaries.

CEI erroneously argues that the Ohio Constitution forbids municipal utilities from purchasing electricity for resale outside the municipal boundaries. CEI Br. at 20. CEI's rationale is that Section 4, Article XVIII grants authority to *contract with others* for utility products and services (electricity in this case) that is constrained to circumstances where the electricity *is or is to be supplied to the municipality or its inhabitants*. *Id.* CEI argues that Section 6, Article XVIII must be read in *pari materia* with Section 4, such that "[t]o comply with Section 6, a municipality's sales of 'product' outside the city must derive from a 'surplus'—i.e., an amount left over from its authorized Section 4 operations for in-city use." *Id.* As a factual matter, CEI's argument hinges on a finding that CPP's surplus "is not necessary to supply any Cleveland customer," and is therefore an "artificial surplus" as a matter of law. *Id.* But the facts show otherwise, CEI's constitutional analysis depends on flawed interpretations of this Court's precedent, and CEI disregards the intent of Article XVIII's framers, as discussed next.

1. CEI seeks an unconstitutional expansion of this Court's holding in *Toledo Edison*.

Notably absent from Section 6, Article XVIII is any reference to an "artificial" surplus, yet CEI's arguments all flow from this concept. This Court used the term "artificial surplus" once in *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d at 293, stating:

> Thus, we hold that Sections 4 and 6 of Article XVIII of the Ohio Constitution, read in *pari materia*, preclude a municipality from purchasing electricity solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits. In other words, a municipality is prohibited from in effect engaging in the business of brokering electricity to entities outside the municipality in direct competition with public utilities. This prohibition includes a de facto brokering of electricity, *i.e.*, where a municipality purchases electricity solely to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries.

In *Toledo Edison*, the Court had before it a unique set of facts and the narrow question of "whether a municipality has constitutional authority *to purchase electricity solely* for direct resale to an entity that is not an inhabitant of the municipality and not within the municipality's limits." *Id.* at 291 (emphasis added). The Court found that a municipality lacks such authority. It is this narrow holding that CEI proposes that the Court expand into a generally applicable judicial policy eviscerating Section 6, Article XVIII of the Ohio Constitution.

In *Toledo Edison,* the Court interpreted Sections 4 and 6, Article XVIII, in *pari materia* but CEI's interpretation only considers Section 4 and disregards the plain meaning of the language addressing "surplus" in Section 6. Under CEI's interpretation, Section 6 is given no meaning because, as argued by CEI, a municipal utility in Ohio can never actually have a surplus. Ascribing no meaning to one of two related provisions is inconsistent with the Court's interpretive approach in *Toledo Edison* and should be rejected. *See, e.g., Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 144 Ohio St.3d 387, 389 (2015) ("it is well known that our duty is to 'give effect to the words used, not to delete words used or to insert words not used.'" (quoting *Columbus–Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969))).

2. CEI's reliance on *Hance* and *Britt* is erroneous.

CEI cites *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461 (1959) for CEI's proposition that "[m]unicipalities may sell electricity outside city limits only to the extent that their operations,

undertaken for the sole authorized 'purpose of supplying' in-city demand, unavoidably create such 'surplus product.'" CEI Br. at 22. *Hance*, however, addressed a circumstance where the municipality had agreed to supply the full requirements of a neighboring electric cooperative going forward and had for five previous years violated the 50% limitation in Section 6, Article XVIII. *Hance*, 169 Ohio St. at 461, 462. In this case it is undisputed that CPP's sales outside of its municipal boundaries are well below the constitutional 50% maximum. CEI has, therefore, taken the Court's decision in *Hance* out of context and *Hance* offers no support for CEI's unconstitutional proposals.

Similarly, CEI's reliance on *Britt v. City of Columbus*, 38 Ohio St.2d 1, is misplaced. CEI argues that *Britt* stands for the proposition that "[i]mplied powers under Article XVIII may not be created by judicial extrapolation . . . ." CEI Br. at 23 (quoting *Britt*, 38 Ohio St.2d at 9). But *Britt* is an eminent domain case that did not address municipal rights to sell surplus power outside the city limits. In any event, it is CEI that is attempting to infer conditions that are contrary to the express terms addressing surplus sales in Article XVIII, and the general principle in *Britt* cited by CEI, therefore, mitigates against CEI's proposal.

3. CEI disregards the Article XVIII framers' intent to facilitate municipal power supply contracting and the express language of Section 6.

CEI claims that "[i]n 1912, a primary goal of the Home Rule Amendment framers was to encourage municipalities to construct and own complete utility systems." CEI Br. at 5. While construction and ownership of municipal utilities was a significant consideration, a more accurate assessment is that the framers were intent on empowering municipalities to provide utility services for the benefit of their residents. Construction and ownership of complete utility systems was one approach endorsed by the framers. Another approach, clearly recognized in 1912 and expressly

included within the municipal authority granted by Section 4, is the power to contract for utility services and products.

There is no support in the Ohio Constitution itself or in its history for CEI's interpretation that would apply the 50% surplus sales authority in Section 6 only to electricity produced by resources that a municipal utility constructs and owns, but not to resources that the municipal utility acquires by contract. But that is the essence of CEI's interpretation. CEI quotes documentation from the Constitutional Convention demonstrating that, "[i]n 1912, municipal sales of surplus electricity outside the city were 'an absolute necessity in order to make municipal ownership feasible,' because of the practical economics and inefficiencies involved in constructing sizable projects." CEI Br. at 19 (quoting 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1458 (1912) *available at https://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/day64.pdf*). The sentence quoted continues: "because if you were going to stop a traction line at the city limits frequently you might as well have no traction line, but, to prevent that, the limit of fifty per cent excess product or service was determined on, which seemed very reasonable." *Id.* This expresses no limitation on the nature of acquisition of the municipal utility service or product to only those produced by facilities owned by the municipality, and to the exclusion of contracted services or products.

The framers' intent that Section 6 be read literally is clear from the same paragraph CEI quotes, which begins: "Now, we took a great deal of time in getting the correct phraseology for this section. The members will recall how every word was weighed, [and] what its effect was in relation to what we had in mind . . . ." *Id.* Consistent with the framers' intent, the Court should reject CEI's revisionist approach that would limit Section 6 surplus sales authority to only "owned"

resources, or preclude application of Section 6 in the event the "market shifted" as CEI alleges. CEI Br. at 6.

CEI similarly over-extrapolates an acknowledgement of economies of scale into an unconstitutional implied limitation on Section 6 surplus sales authority with respect to contracted resources when CEI quotes the Ohio Constitutional Revision Commission as stating: "'economically, a municipality had to build in a surplus electric capacity when it erected its generating facility in order to be able to meet future electrical needs of its residents without expansion.'" CEI Br. at 6 (quoting Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 7, at 3624 (Mar. 15, 1975) *available at* https://www.lsc.ohio.gov/documents/reference/current/ohioconstrevisioncommrpt/v7%20pgs%203309-3650%20local%20gov%203651-3849%20judiciary.pdf). However, CEI fails to note the language concluding the paragraph from which CEI quotes, which states:

> the framers agreed upon the 50% limitation on municipal utility products or services sold outside a municipality in order to balance the economic needs of both private and municipal utility owners. The Local Government Committee concluded that the 50% restriction should be retained for municipally-owned electric and gas utilities.

Id. There is no discussion of any intent to limit application of Section 6 to owned generating resources and the 50% surplus sales authority provided by Section 6 that was determined to be reasonable in 1912 was confirmed to be reasonable in 1975. The Constitutional Revision Commission considered opening the door to further municipal competition outside the municipality but ultimately elected not to pursue any changes. Nevertheless, the Commission's consideration of this issue demonstrates the Commission's recognition that any changes to Section 6 surplus sales authority will require a constitutional amendment. Markets may "shift" but the Ohio Constitution should not be shifted by judicial interpretation.

B. CEI's reliance on flexibility in CPP's supply contracts in support of CEI's artificial surplus claim is based on oversimplified misconceptions of how the wholesale electricity market functions.

The Eighth District provided examples of legitimate reasons why a municipal utility might obtain surplus electricity, stating that:

> A city is not required to forgo considerations such as cost, risk mitigation, economies of scale, environmental impact and reliability in favor of purchasing only the precise amount of electricity required for use by customers within the municipality at any given time.

Opinion at ¶ 39. These factual assertions are supported by record evidence presented to the trial court by CPP. *See, e.g.,* CPP Reply Br., Exh. A ("Bentine Affid."), Exh. 1 ("Bentine Expert Report") at 29 (Apr. 15, 2019) ("CPP operates with the goals of being mindful of the environment, securing economies of scale, mitigating risks, and lowering the cost of service to its inhabitants."). These considerations are not "loopholes," as argued by the investor-owned utility *amici.* IOU *Amici* Br. at 8. Rather, these are factors that CPP prudently considers.

CEI argues that these considerations are invalid. CEI Br. at 36, 39. CEI claims that if "a municipality can buy the exact amount of electricity consumed, Section 4 does not empower [the] municipality to purchase more electricity than its constituents use in order to enhance revenue or advance other objectives through extraterritorial sales." *Id.* at 36. CEI's argument is best summarized as a conclusion that municipal purchases of electricity supply are not within the authorities granted by Section 4, Article XVIII if the purchases could somehow be avoided at any cost. But there is no support for this premise in the Ohio Constitution or this Court's precedent.

In fact, the opposite is true. CEI fails to acknowledge that "revenue enhancement" is the very essence of the framers' rationale for Section 6 to begin with. The premise that economies of scale in constructing utility infrastructure will be realized through sales outside the municipality

depends on the utility revenue received by the municipality being "enhanced" by the additional proceeds resulting from those outside sales.

CPP demonstrated throughout this proceeding that the complexity involved in matching the municipal utility customers' demand for electricity and the utility's wholesale supply makes it necessary to acquire supplies that may at times exceed the municipal utility's customers' demand. *See, e.g.*, CPP Ans. Br. at 34-40 (citing *inter alia* City's MSJ; City's Reply; Bentine Expert Report). Additionally, CPP purchases energy supplied from renewable sources to meet the City's renewable goals and manage carbon risk. (Trial Dkt. 59 (10/26/18), Exh. A at 22-23). CEI's erroneous and simplistic view of what constitutes a "necessary" acquisition would force CPP to make up any supply shortfalls with spot market purchases, thereby unnecessarily exposing CPP and its customers to excessive risk and costs. This would unreasonably preclude CPP from exercising its right to cost-effectively acquire electricity in a manner that may result in a surplus that is fully consistent with Sections 4 and 6, Article XVIII of the Ohio Constitution.

CEI argues that the existence of a wholesale energy spot market operated by PJM Interconnection, L.L.C. ("PJM") obviates the possibility that CPP would ever have a legitimate surplus to offer for sale outside the City's municipal boundaries. CEI Br. at 26. This argument completely ignores the reality of the multiple complex markets operated and multitude of services offered by PJM. Fundamentally, PJM operates day-ahead and real-time spot markets for energy. PJM also operates a capacity market, which includes auctions conducted three years in advance of the delivery year, in which suppliers offer to commit their generating units to be available to provide energy in the future.

As demonstrated by the Bentine Expert Report (*see, e.g.,* Attachment B thereto), prices in PJM's capacity and energy markets are highly variable and relying solely on capacity and energy

procured in those markets would entail a high level of risk and cost that CPP has prudently sought to avoid. For example, CPP's generating resources are considered by PJM to be "behind the meter" and therefore: (1) relieve CPP of an obligation to procure the corresponding amount of capacity in PJM's capacity market, and (2) are barred from making sales in PJM's energy markets. One implication of this rational arrangement and the fact that CPP's customers' use of electricity varies over time is that CPP will necessarily have surplus capacity and energy to make available to retail customers outside its municipal boundaries. *See* Bentine Expert Report at 24.

CEI's suggestion that CPP could rely solely on PJM markets to prudently meet its wholesale electricity requirements is grossly inaccurate. The Bentine Expert Report discusses two filings with the Federal Energy Regulatory Commission ("FERC") made by the American Public Power Association ("APPA"), AMP, and others in 2018 demonstrating that flaws in PJM's capacity market require significant changes. *Id.* at 31. Circumstances have deteriorated dramatically since then, to the point that the Public Utilities Commission of Ohio ("PUCO") has indicated that states may withdraw from PJM's capacity market as a result of recent FERC mandates affecting PJM. *See* PUCO, Request for Rehearing, FERC Docket No. EL16-49-002, at 10 (filed January 21, 2020) ("it is reasonable to expect that the Order will cause one or more states to exit participation in the organized wholesale capacity market . . . ."), *available at* https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15447687. These mandates include sweeping application of PJM's Minimum Offer Price Rule, such that vertically integrated utilities (both municipally-owned and investor-owned) will likely end up paying twice for many capacity resources. *See* APPA/AMP Request for Rehearing, FERC Docket No. EL16-49-002, at 3 (filed January 21, 2020), *available at*

https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15447389; *see also* Bentine Expert Report at 30.

It is telling that *amicus* AEP has already availed itself of the opportunity to avoid procuring capacity in PJM's markets. As explained by AEP:

> Historically, the outcome of the annual PJM Interconnection LLC (PJM) Reliability Pricing Model (RPM) capacity auctions have represented significant risk for AEP. The auctions are conducted three years prior to the delivery year and determine the prices AEP will be paid for its unregulated generating capacity.
>
> In 2017, AEP sold the majority of its deregulated generating fleet because of the volatility associated with the capacity auctions. After the asset sale, the bulk of the remaining AEP generation in PJM operates under a regulated construct, and meets PJM's capacity reserve requirements through a self-supply arrangement called the Fixed Resource Requirement (FRR) plan. Therefore, the PJM capacity auctions no longer have a significant impact.

2017 AEP Corporate Accountability Report, *available at* http://2017.aepsustainability.com/about/regulatory/capacity.aspx.

The investor-owned utility *amici* fail to recognize the relationship between steps taken to avoid PJM capacity market participation and the concomitant acquisition or retention of resources that produce energy. *See* IOU *Amici* Br. at 11. Under CEI's unconstitutional reading of Section 6, Article XVIII, municipal utilities would be constrained to meeting their marginal energy needs in PJM's energy spot markets. This would effectively preclude them from acquiring capacity resources to utilize as behind-the-meter generation and offset their PJM capacity market obligations (comparable to what AEP does with its FRR resources) because the result would be redundant acquisition of energy. In other words, the investor-owned utility *amici* seek to deprive municipal utilities of the type of risk management and cost reduction tools that these *amici* themselves have available. In addition to smacking of fundamental unfairness, this is not consistent with the home rule principles reflected in Article XVIII.

The proposal advanced by the cooperative *amici*, who ask this Court to limit surplus sales by municipalities under Section 6 to sales made at wholesale, is similarly inconsistent with Article XVIII. The cooperative *amici* urge this Court to impose restrictions on municipal home rule rights that would preclude municipal utilities from making sales to retail customers located outside of the municipality. The cooperative utilities base this proposal on multiple layers of alleged facts that are not record evidence in this proceeding. The cooperative *amici* assert that retail customers necessarily require long-term firm service commitments that cannot ever be met by a "true surplus," as that term would be defined under an erroneous interpretation of this Court's holding in *Toledo Edison,* similar to CEI's. The cooperative's proposed judicial ban on municipal sales should be rejected because it: (1) depends on that erroneous interpretation, as discussed above, and is therefore unconstitutional; (2) assumes alleged facts supporting a sweeping conclusion regarding all retail customers in Ohio and those facts are not in the record and do not exist; and (3) amounts to an alternative proposition of law propounded for the first time by *amici* in the merits phase of this proceeding, contrary to this Court's acceptance of the appeal and cross-appeal upon consideration of the jurisdictional memoranda and only with respect to the propositions of law specified in the June 23, 2020 entry.

C. CEI's invocation of the Certified Territories Act is misplaced.

The Certified Territories Act, R.C. 4933.81 to 4933.90, provides that, "*[e]xcept as* otherwise provided in this section and *Article XVIII of the Ohio Constitution*, each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory . . . ." R.C. 4933.83(A) (emphasis added). The Act contains multiple other references qualifying the rights of electric suppliers, such as CEI, to be the exclusive provider within their respective certified territories based on the municipal home rule provisions in the Ohio Constitution. *See* R.C. 4933.82(B) ("Certification of territory pursuant to

[the Act] shall not in any manner prohibit or restrict the rights of municipalities under Article XVIII or any other article of the Ohio Constitution . . . ."); R.C. 4933.83(C); R.C. 4933.84; and 4933.87. The express intent of the Ohio legislature is, therefore, that the Certified Territories Act respect in every way the rights of municipalities under Article XVIII and CEI's attempt to use the Act as support for its propositions of law that seek to render Section 6, Article XVIII meaningless is unfounded. *See* CEI Br. at 38-39.

CEI's reliance on the Certified Territories Act also ignores the pro-competitive provisions of the Electric Restructuring Act that include, *inter alia*, allowing competitive retail electric suppliers to provide certain competitive services within the certified territory of electric utilities, such as CEI. *See, e.g.,* R.C. 4928.03 ("retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers."). Similarly, CEI's argument that "[t]he State's policy thus favors regulation, not laissez-faire competition by the unregulated utilities who pick and choose their customers and their territories," CEI Br. at 38, ignores the fact that municipal utilities are heavily regulated in a number of ways and that any examination of the so-called "level playing field" in the electric utility industry must take a look at all of the factors that contribute to "equity" between suppliers. For instance, as units of local government, Ohio municipal electric utilities are subject to state statutes and public accountability standards that other suppliers are not. These include:

- Public purpose requirements;
- Public Records Law (Ohio Revised Code Section 149.43);
- Sunshine Law (O.R.C. Section 121.22);
- Competitive bidding (O.R.C. Section 735.05);
- Conflict of interest standards (O.R.C. Section 102.03);
- Prevailing Wage Law (O.R.C. 4115.05);
- Investment restrictions (O.R.C. 135.14);
- Local regulation by consumers via referendum and initiative;

- Civil service (O.R.C. 124.01 et seq.);
- Public hearings on budgets;
- Public election (or recall) of chief executive officer; and
- Public hearing and approval of financing.

D. Wild speculation by CEI and aligned *amici* is not grounds to rewrite the Ohio Constitution.

CEI engages in pure speculation regarding the future effects of the Eighth District's decision not to adopt CEI's unconstitutional proposals in a bombastic effort to prompt the Court to grant its appeal. CEI proclaims that allowing municipal utilities to "compete unfettered across an unlimited territory . . . will distort the marketplace, undermining public utilities' crucial economies of scale and leading to tariff increases." CEI Br. at 39. CEI forecasts "cascading rate increases" and a "spiral of unfair competition." *Id.* at 11. Similarly unfounded rhetoric flows from the investor-owned utility *amici* who describe proliferation of post-hoc contrivances, brazen encroachment, unfair competition, and customer poaching. IOU *Amici* Br. at 9. These same *amici* claim that they are "under siege" by municipal utilities that enjoy more favorable tax treatment. IOU *Amici* Br. at 3. This claim is troubling, given that many investor-owned utilities pay little to no federal or state income taxes. *See, e.g.,* Institute for Policy Studies, *Utilities Pay Up*, at 8 (July 2016) ("The utilities industry pays the lowest effective federal tax rate of any business sector. Of the 40 U.S. publicly held utilities companies that were profitable in 2015, 23 paid no federal income taxes and 16 paid no state taxes." For example, in 2015 Duke Energy paid $0 in federal income tax and received $12 million in state income tax refunds on pre-tax income of $4.2 billion) *available at* https://ips-dc.org/wp-content/uploads/2016/07/IPS-Utilities-Tax-Report-FINAL.pdf. The cooperative *amici* allege that municipal utilities "'cherry pick' only the best type of customers and electric loads to serve, leaving the certified electric suppliers with stranded investments . . . ." Coop. *Amici* Br. at 2. But none of the speculative predictions presented by CEI and its aligned

amici are supported by evidence in the record and, even if true, would not be grounds for this Court to rewrite the Ohio Constitution. The Court should, therefore, disregard them.

SUPPORT FOR CROSS-APPEAL

The Eighth District correctly recognized that the Ohio Constitution does not require municipal utilities to precisely match their electricity procurement with their native customers' demand for electricity on an instantaneous basis. Opinion at ¶ 39. The Eighth District, however, reversed the trial court's appropriate grant of summary judgment to CPP on CEI's claims and remanded for resolution by the trier of fact the issue of "whether the city purchased excess electricity *solely* for the purpose of selling it to others outside municipal limits . . . ." Opinion at ¶ 41. While this formulation of the issue may appear facially consistent with *Toledo Edison*, the remand instructions include the Eighth District's incorrect expansion of this Court's holding in *Toledo Edison* and disregard for the plain meaning of Section 6, Article XVIII, as discussed below. The Eighth District's erroneous interpretation of the Ohio Constitution and misapplication of this Court's decision in *Toledo Edison* erodes the constitutional authority of municipal utilities in Ohio.

ARGUMENTS SUPPORTING CROSS-APPELLANT'S PROPOSITIONS OF LAW

Cross-Appellant's Proposition of Law No. 1:

> A municipal corporation has the right to sell electricity to extraterritorial customers so long as the amount sold to extraterritorial customers does not exceed fifty percent of the total electricity consumed within the municipal corporation's limits, and so long as the municipal corporation does not purchase electricity solely for the purpose of reselling the entire amount of that electricity extraterritorially.

There are two legitimate constraints that exist governing the authority of a municipal utility to sell electricity to customers outside of the municipality. The first of these is the 50% limitation imposed by Section 6, Article XVIII of the Ohio Constitution. The second is this Court's holding that "a municipality [does not have] constitutional authority to purchase electricity solely for direct resale to an entity that is not an inhabitant of the municipality and not within the municipality's

limits." *Toledo Edison*, 90 Ohio St.3d at 291. Cross-appellant's first proposition of law correctly reflects both of these principles.

In response to CEI's unsupported arguments and the Eighth District's erroneous remand instructions, CPP's first proposition of law seeks only to clarify that the Court in *Toledo Edison* had no intention of infringing on municipal utilities' authority under Section 6, Article XVIII. The final clause in CPP's first proposition is nearly verbatim from the Court's *Toledo Edison* decision and includes an addition to reflect the facts underlying that case – an addition that is implicit in the *Toledo Edison* holding. It is undisputed that the municipalities in *Toledo Edison* had engaged in a joint venture that involved reselling *the entire amount* of electricity purchased solely for the purpose of resale and CPP's first proposition of law makes clear that this is the extent of the *Toledo Edison* holding.

The *Toledo Edison* decision contains no statements expressing an intent to require a case-by-case analysis of subjective intent any time a municipal utility seeks to sell surplus electricity outside the municipality, notwithstanding that its external sales are well below the constitutional 50% threshold and there is no evidence of a purchase intended entirely for resale. Under such an approach, the resulting cloud of potential litigation hanging over every transaction would materially impair the municipal utility's ability to operate efficiently and effectively, for the same reasons discussed *supra* in response to CEI's similarly egregious proposals. But the Eighth District rejected an appropriately narrow reading of *Toledo Edison* and found that the trial court erred in considering only whether the purchase was made with the intention of reselling "the entire amount." Opinion at ¶ 35. This Court should endorse CPP's first proposition of law to ensure that its *Toledo Edison* decision is not misinterpreted in a manner that infringes on municipal authority

under Section 6, Article XVIII by inappropriately inferring restrictions that do not appear in the text of the Ohio Constitution. *E.g., Toledo City Sch. Dist. Bd. of Edn.*, 146 Ohio St. 3d at 359.

CONCLUSION

For the foregoing reasons, the Court should: (1) deny Plaintiff-Appellant's appeal; (2) grant Cross-Appellants' cross-appeal; and (3) reverse the Eighth Appellate District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing merit brief of *amici curiae* American Municipal Power, Inc. and the Ohio Municipal Electric Association was served on October 20, 2020, by e-mail pursuant to Supreme Court Practice Rule 3.11 on the following:

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