

IN THE SUPREME COURT OF OHIO

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

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REPLY BRIEF OF *AMICI CURIAE*  
AMERICAN MUNICIPAL POWER, INC. AND  
OHIO MUNICIPAL ELECTRIC ASSOCIATION  
IN FURTHER SUPPORT OF CROSS-APPELLANTS

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## TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. FURTHER ARGUMENT IN SUPPORT OF CPP’S PROPOSITION OF LAW	3
A. CPP’s Proposition of Law is Consistent With the Authorities Granted by Article XVIII, Sections 4 and 6 of the Ohio Constitution	3
B. CPP’s Proposition of Law is Consistent With <i>Toledo Edison</i>	5
C. CPP’s Proposition of Law is Consistent With the Trial Court’s Proper Application of the Ohio Constitution and <i>Toledo Edison</i> in Granting Summary Judgment to CPP	6
D. Legislative Determinations Reflected in Ordinances and Resolutions Authorizing the Acquisition and Disposition of Electricity Are Entitled to a Strong Presumption of Constitutionality	7
E. Municipalities Have Relied on Their Constitutional Home Rule Powers and Statutory Authority to Invest in Utility Assets and Acquire Electricity Supplies that Could Produce Stranded Costs if CPP’s Proposition of Law is Rejected	8
III. CONCLUSION	9
APPENDIX	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

**CASES**

*Allion v. Toledo*,  
99 Ohio St. 416 (1919).....8

*Arnold v. Cleveland*,  
67 Ohio St. 3d 35 (1993) .....7

*Hilton v. Toledo*,  
62 Ohio St. 2d 394 (1980).....7

*Porter v. Oberlin*,  
1 Ohio St. 2d 143 (1965).....7

*State ex rel. Maurer v. Sheward*,  
71 Ohio St. 3d 513, 520 (1994))).....5

*Toledo City Sch. Dist. Bd. of Edn. v. State Bd. of Edn.*,  
146 Ohio St. 3d 356, 359 (2015).....5

*Toledo Edison Co. v. Bryan*,  
90 Ohio St. 3d 288 (2000) ..... 1-2, 4, 6, 9

*Univ. Hts. v. O'Leary*,  
68 Ohio St. 2d 130 (1981).....7

**CONSTITUTIONAL PROVISIONS**

Ohio Constitution, Article XVIII, Section 4..... *passim*

Ohio Constitution, Article XVIII, Section 6..... *passim*

**STATUTES**

R.C. 743.12 .....9

**OTHER AUTHORITY**

*In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46,*  
Case No. 2020-1488, 12/28/2020 Case Announcements #2, 2020-Ohio-6913 .....8

Laura A. Bischoff, *Nonprofit Poured \$13.9M into Political Groups in 2019,*  
Dayton Daily News (Dec. 23, 2020).....2

John Caniglia, *Statehouse Bribery Scandal Now in Cleveland, FirstEnergy’s Dark Money Used  
to Attack CPP,* Cleveland.com (Dec. 24, 2020) .....2

## I. INTRODUCTION

The proposition of law of Appellees/Cross-Appellants, the City of Cleveland and Cleveland Public Power (collectively, “CPP”) is consistent with the authority granted by Article XVIII, Sections 4 and 6 of the Ohio Constitution and the holding in *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288 (2000). Under CPP’s proposition of law:

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 purposes of reselling the entire amount of that electricity extraterritorially.

CPP Jurisdictional Memorandum at 24; CPP Merit Brief at 36.

CPP’s proposition of law is fully consistent with the trial court’s application of the Ohio Constitution and the *Toledo Edison* decision to the facts of this case. The trial court appropriately determined that resolution of this case depends on: (1) whether CPP “exceeded the fifty-percent (50%) limitation set by Article XVIII, Section 6, of the Ohio Constitution . . . ,” Judgment at 14-15, and (2) whether CPP purchased “electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality’s geographic limits,” *id.* at 15 (quoting *Toledo Edison*, 90 Ohio St. 3d at 292 (emphasis added by the trial court)). The trial court found that neither of these restrictions were violated and therefore granted summary judgment to CPP. There is no argument that CPP’s extraterritorial sales totaled more than 3% of its sales within the municipal boundaries. *See* CEI First Merit Brief at 12; Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 37. Clearly, CPP’s primary purpose is to supply electricity to the municipality or its inhabitants. CPP contracts with others for such products or services as authorized by Article XVIII, Section 4 of the Ohio Constitution. Therefore, *amici curiae* American

Municipal Power, Inc. (“AMP”) and Ohio Municipal Electric Association (“OMEA”) urge the Court to grant Cross-Appellants’ cross-appeal.

By contrast, Appellant/Cross-Appellee, the Cleveland Electric Illuminating Co.’s (“CEI”), and CEI’s *amici*, Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc. (“Buckeye”) torture *Toledo Edison*’s holding to have the Court substitute their judgement of how CPP should operate at the expense of CPP’s constitutionally protected right to sell electricity to customers outside the municipal boundaries subject to the requirements of Sections 4 and 6 of Article XVIII of the Ohio Constitution. CEI shamelessly claims that CPP’s extraterritorial electricity sales are “exactly the competition that this Court and the framers identified as presumptively ‘unfair.’” CEI Third Merit Brief at 1. CEI made this claim of unfair competition only weeks before public records revealed that CEI’s parent company, FirstEnergy Corp., contributed \$200,000 to Partners for Progress that ultimately flowed to a now defunct “consumer group,” Consumers Against Deceptive Fees, “a group that billed itself as an advocate for Cleveland utility customers by questioning rates” but who critics say was, in fact, “a vehicle of FirstEnergy that sought to topple a competitor, city-owned CPP.” John Caniglia, *Statehouse Bribery Scandal Now in Cleveland, FirstEnergy’s Dark Money Used to Attack CPP*, Cleveland.com (Dec. 24, 2020), [https://www.cleveland.com/cityhall/2020/12/dark-money-linked-to-house-bill-6-scandal-funds-group-critical-of-cleveland-public-power-records-show.html?outputType=amp&\\_\\_twitter\\_impression=true](https://www.cleveland.com/cityhall/2020/12/dark-money-linked-to-house-bill-6-scandal-funds-group-critical-of-cleveland-public-power-records-show.html?outputType=amp&__twitter_impression=true) (reproduced in Appendix A-1 hereto); *see also* Laura A. Bischoff, *Nonprofit Poured \$13.9M into Political Groups in 2019*, Dayton Daily News (Dec. 23, 2020), <https://www.daytondailynews.com/local/nonprofit-poured-139m-into-political-groups-in-2019/YJ7CIGA4G5GTLHS56WAEHUNA2Q/> (reproduced in Appendix A-2 hereto).



This Court should reject yet another of CEI's attempts to garner a competitive advantage and grant Cross-Appellants' cross-appeal. Such a finding requires only that the Court interpret the plain language of Article XVIII, Sections 4 and 6 of the Ohio Constitution, which unequivocally grant authority to municipalities to own and operate a public utility for the purpose of supplying electricity to the municipality or its inhabitants, as well as to "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 municipality . . . ." Ohio Const., Art. XVIII, § 6.

## **II. FURTHER ARGUMENT IN SUPPORT OF CPP'S PROPOSITION OF LAW**

### **A. CPP's Proposition of Law is Consistent With the Authorities Granted by Article XVIII, Sections 4 and 6 of the Ohio Constitution.**

CPP's Proposition of Law is consistent with the authority granted by Article XVIII, Sections 4 and 6 of the Ohio Constitution. Under CPP's proposition of law:

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 purposes of reselling the entire amount of that electricity extraterritorially.

CPP Jurisdictional Memorandum at 24; CPP Merit Brief at 36.

CPP complied with the constitutional requirements of Article XVIII, Sections 4 and 6 of the Ohio Constitution. Specifically, pursuant to its Home Rule authority, CPP's primary purpose is to supply electricity to the municipality or its inhabitants. CPP contracts with others for such products or services as authorized by Article XVIII, Section 4 of the Ohio Constitution. As CEI has acknowledged, CPP has not exceeded the 50% limitation set by Article XVIII, Section 6 of the Ohio Constitution. *See* CEI First Merit Brief at 12; Trial Dkt. 96 (4/15/19), Exh. A (Affidavit

of John Bentine) at ¶ 37. Further, consistent with the trial court’s determination, CPP did not purchase electricity “solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality’s geographic limits . . . .” Judgment at 15 (quoting *Toledo Edison*, 90 Ohio St. 3d at 292 (emphasis added by the trial court)).

Article XVIII, Section 4 of the Ohio Constitution states in relevant part that:

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. . . . (emphasis added).

CEI seizes on the highlighted language and argues that it places specific measurable quantitative limits on the amount of electricity that CPP may sell outside the municipal boundary. CEI Third Merit Brief at 3-4. CEI completely ignores the preceding language, which states that the municipal utility may be *within or without its corporate limits*. A much more reasonable interpretation reflecting the express language of Section 4 is that this section places qualitative limits on the character of utility services that the municipality may provide, not the quantity of such services. In other words, Section 4 restricts municipalities from engaging in any utility enterprise that is not or will not be providing service within the municipality.

This literal reading of Section 4 is exceedingly more plausible than CEI’s contorted extrapolation, which strays well beyond the express constitutional terms because the drafters included specific measurable quantitative limits on the amount of authorized extra-territorial utility services in Article XVIII, Section 6, as follows:

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 municipality*. . . . (emphasis added).

This demonstrates that the drafters understood how to craft specific quantitative limits. The drafters did so. The quantitative limits sought by CEI, however, are absent. This Court should follow its precedent and reject CEI’s baseless activist interpretation. *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))).

**B. CPP’s Proposition of Law is Consistent With *Toledo Edison*.**

*Toledo Edison* stands for only one relevant proposition of law—a municipality is precluded “from purchasing electricity *solely for the purpose of reselling the entire amount* of the purchased electricity to an entity outside the municipality’s geographic limits.” *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288, 293 (2000).

In *Toledo Edison*, the Court noted that: “Appellee, Ohio Municipal Electric Generation Agency Joint Venture 4, is a joint venture of . . . four municipalities to facilitate the purchase, transmission, and resale of electricity.” *Id.* at 288. The electricity to be purchased, transmitted, and sold by the municipalities acting through the joint venture was to be sold to a single customer, Chase Brass, that was “outside of all the municipalities’ geographic limits.” *Id.* at 288-289. “The municipalities had to purchase electricity in order to fulfill their obligation to provide Chase Brass with electricity.” *Id.* at 289.

In remanding for further fact-finding as to whether the electricity purchased by the municipalities was “solely for the purpose of resale to an entity outside the geographic boundaries of the municipalities,” the Court reading Article XVIII, Sections 4 and 6 of the Ohio Constitution *in pari materia*, explained that the Constitution requires municipal utilities to “purchase electricity *primarily* for the purpose of supplying its residents and reselling only surplus electricity from that

purchase to entities outside the municipality.” *Id.* at 292 (emphasis added). Accordingly, a purchase that is solely for the purpose of supplying electricity to extraterritorial customers is not consistent with the primary purpose of supplying its residents with electricity.

There is no support for CEI’s expansion of the *Toledo Edison* holding to preclude municipal utility purchases of “any amount of extra electricity, no matter how the transaction is structured.” CEI Third Merit Brief at 5. The express holding of the Court is limited to circumstances where the *sole purpose* of acquiring the *entire amount* is extraterritorial resale. CEI’s assertion that this Court interprets Section 6 to prohibit a municipal utility from “acquir[ing] utility product other than that which ‘is or is to be supplied to the municipality or its inhabitants,’” *id.* at 9 (quoting Article 4), is patently false. Under the Court’s *Toledo Edison* holding, Article XVIII, Section 4 precludes a municipality from engaging in a utility business involving solely a product that is not supplied or to be supplied within the municipality and the municipality cannot successfully claim that the product to be sold by such an enterprise is “surplus” under Section 6.

**C. CPP’s Proposition of Law is Consistent With the Trial Court’s Proper Application of the Ohio Constitution and *Toledo Edison* in Granting Summary Judgment to CPP.**

CPP’s proposition of law is fully consistent with the trial court’s application of the Ohio Constitution and the *Toledo Edison* decision to the facts of this case. The trial court appropriately determined that resolution of this case depends on: (1) whether CPP “exceeded the fifty-percent (50%) limitation set by Article XVIII, Section 6, of the Ohio Constitution . . . ,” Judgment at 14-15, and (2) whether CPP purchased “electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality’s geographic limits,” *id.* at 15 (quoting *Toledo Edison*, 90 Ohio St. 3d at 292 (emphasis added by the trial court)). The trial court found that neither of these restrictions were violated and therefore granted summary judgment to

CPP. CPP's formulation is essentially the same as the trial court's appropriate framing of the issues.

**D. Legislative Determinations Reflected in Municipal Ordinances and Resolutions Authorizing the Acquisition and Disposition of Electricity Are Entitled to a Strong Presumption of Constitutionality.**

The utility services provided by CPP that are the subject of attack by CEI are activities that have been authorized by municipal ordinances and resolutions. *See, e.g.*, CPP Jurisdictional Memorandum at 22 (“the City’s pricing and provision of products, with which CEI takes issue, is set by legislation . . .”). CEI’s arguments are challenges to the constitutionality of this municipal legislation and should be treated as such.

When “determining the constitutionality of an ordinance . . .,” the Court has consistently honored “the fundamental principle requiring courts to presume the constitutionality of lawfully enacted legislation.” *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 38 (1993) (citing *Univ. Hts. v. O’Leary*, 68 Ohio St. 2d 130, 135 (1981); *Hilton v. Toledo*, 62 Ohio St. 2d 394, 396 (1980)). The Court has held that “the legislation being challenged will not be invalidated unless the challenger establishes that it is unconstitutional beyond a reasonable doubt.” *Id.* at 38-39. CEI has failed to meet this burden.

CEI asks the Court to substitute the judgment of CEI’s witness for the judgment of Cleveland’s City Council and conclude that CPP makes unnecessary purchases of electricity for resale. CPP has provided substantial evidence rebutting CEI’s assertions. The essence of this matter is a difference of opinion over how to prudently operate a municipal electric utility. There is no “palpable abuse of power,” and therefore the Court should “not substitute its judgment for legislative discretion. Local authorities are presumed to be familiar with local conditions and to know the needs of the community.” *Id.* at 48 (quoting *Porter v. Oberlin*, 1 Ohio St. 2d 143, 149,

(1965) (quoting *Allion v. Toledo*, 99 Ohio St. 416 (1919))). Accordingly, CEI has failed to provide the Court with a valid basis upon which to overturn the relevant local legislative determinations.

It is telling that the proponents of forcing municipal utilities to dump excess power into the wholesale markets irrespective of whether it would be at a loss are unwilling to operate under the same conditions. For example, CEI's *amicus* Buckeye asserts that "with the development of the PJM wholesale market, it is simply not necessary for municipalities to have excess electricity beyond what is needed to meet their municipal load" because they can either meet all needs through "flexible requirements contracts" or the "wholesale market [is] readily available to sell any excess that might exist." Buckeye Third Brief at 16. However, Buckeye also argues that if municipal utilities serve extraterritorial customers, it could result in increased costs to cooperative customers who have acquired generation to serve load that may elect to take service from municipalities, putting cooperatives at risk of bearing stranded costs. Buckeye Third Brief at 18-19. Thus, at least for the energy that could be sold into the PJM market, it is clear that Buckeye's preference is not to have to do what it repeatedly suggests CPP should do. *See, e.g.*, Buckeye Third Brief at 16-17. As the Court is aware, CEI's parent, FirstEnergy Corp., has apparently taken more extreme measures to avoid the PJM market in the form of subsidies from Ohio customers to support its market activity. *See, e.g., In the Matter of Establishing the Clean Air Fund Rider Pursuant to R.C. 3706.46*, Case No. 2020-1488, 12/28/2020 *Case Announcements #2*, 2020-Ohio-6913 (granting temporary stay).

**E. Municipalities Have Relied on Their Constitutional Home Rule Powers and Statutory Authority to Invest in Utility Assets and Acquire Electricity Supplies that Could Produce Stranded Costs if CPP's Proposition of Law is Rejected.**

Municipal utilities have invested in utility assets and acquired electricity supplies that may entail surplus. These arrangements were made based on a reasonable belief that obtaining such

surplus was consistent with their constitutional Home Rule powers under Article XVIII, Sections 4 and 6. These investments are also consistent with statutory authority. *See* R.C. 743.12.

Municipal utilities serve extraterritorial customers because the customers want to be served by municipal utilities and, in many cases, these customers did not have another option because it was not economic for investor-owned utilities or cooperatives to extend facilities to serve them. In the event the Court rejects CPP's proposition of law and instead expands its *Toledo Edison* holding in the manner propounded by CEI, the effect may be to render these investments and supplies unusable and jeopardize service to these customers. Simultaneously, the revenue associated with these surpluses could be terminated. In many cases this would very likely shift the stranded costs associated with these arrangements to the municipal utilities' remaining customers, increasing the rates they pay.

### III. CONCLUSION

For the foregoing reasons, the Court should grant Cross-Appellants' cross-appeal.

Respectfully submitted,

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December 29, 2020

## **APPENDIX A-1**

John Caniglia, *Statehouse Bribery Scandal Now in Cleveland, FirstEnergy's Dark Money Used to Attack CPP*, Cleveland.com (Dec. 24, 2020)



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## Statehouse bribery scandal now in Cleveland, FirstEnergy's dark money used to attack CPP

Updated Dec 24, 2020; Posted Dec 24, 2020



Cleveland City Hall.

By [John Caniglia](#), [cleveland.com](https://www.cleveland.com)



CLEVELAND, Ohio — A dark money group's efforts to undermine Cleveland Public Power were bankrolled by \$200,000 from FirstEnergy Corp. — money that reached the group through a nonprofit at the center of the House Bill 6 bribery scandal, records and interviews show.

Tax filings and federal court documents link FirstEnergy's funds in 2019 to Consumers Against Deceptive Fees, a group that billed itself as an advocate for Cleveland utility customers by questioning rates. Critics, however, say the group was, in fact, a vehicle of FirstEnergy that sought to topple a competitor, city-owned CPP.

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The documents provide the first connection between issues at Cleveland City Hall and the investigation that shook the Ohio Statehouse. They come months after Cleveland City Council had begun an investigation into the group's funding sources.

"The pattern is pretty clear," said Cleveland Council President Kevin Kelley. "Dark money is operating against residents. All these groups have righteous sounding names that make one think that they are supporting good causes. But you need to look at where the money is coming from."

FirstEnergy and its affiliates are accused of funneling \$60 million in bribes to Larry Householder, the former speaker of the Ohio House of Representatives, and four others in order to pass a \$1.3 billion legislative bailout of two nuclear plants and some coal plants.

The aging nuclear plants in Oak Harbor and Perry were once owned by a subsidiary of FirstEnergy. Neither FirstEnergy nor any of its employees has been charged, and it has said it is cooperating in the investigation.

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The company and its affiliates funneled much of the money through dark money groups, according to federal records prosecutors filed. The groups were set up as nonprofits that, ostensibly, were to aid social welfare causes. In fact, authorities said, the groups used the nonprofit status to hide the source of contributions.

An FBI affidavit and tax records show that FirstEnergy and its affiliates funneled \$20 million in 2019 to a nonprofit called Partners for Progress, which was

established in 2017 with help from Dan McCarthy, a Columbus lobbyist who later became a top aide to Ohio Gov. Mike DeWine.

The FBI referred to the group as a “pass-through,” or a nonprofit that was used to hold FirstEnergy funds before Householder and his allies funneled the money elsewhere. While the FBI document did not identify Partners for Progress by name, the tax filing makes it clear that it was the nonprofit linked to the investigation.

Partners for Progress filed tax records with the IRS for 2019 last month. The records, first obtained by the Energy and Policy Institute and reported on by the Cincinnati Enquirer, show FirstEnergy was the sole source of its funds.

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Partners for Progress, according to the records, doled out \$13 million to Generation Now, which authorities say was a nonprofit that was used as a bank account for Householder and his allies. The records indicate that the money was used for “issue advocacy, lobbying and ballot referendums.”

The tax filing shows Partners for Progress sent \$200,000 to Consumers Against Deceptive Fees, a now-defunct organization that its former attorney said sought to advocate for Cleveland Public Power customers.

But the group’s advertisements were highly critical of the utility’s rates and services. Kelley and others have questioned whether the group sought to hurt Cleveland Public Power so FirstEnergy could gain the utility’s customers.

In Cleveland, FirstEnergy has about 60,000 customers and competes with Cleveland Public Power, which has about 70,000 residential, commercial and industrial customers.

“Look, Company A, Partners for Progress and Consumers Against Deceptive Fees, had one end game: to make it impossible for Cleveland Public Power to exist,” Kelley said.

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His reference to “Company A” stems from the FBI affidavit that referred to, but did not identify, FirstEnergy.

Weeks after the FBI arrested Householder and four others in July, Kelley began questioning whether dark money from the Statehouse had crept into Cleveland politics.

He sought to subpoena records from groups, such as Consumers Against Deceptive Fees and Clevelanders First, which had pushed to reduce City Council’s size and pay. City Council unanimously agreed to investigate the matter.

Kelley said the tax filing for Partners for Progress offers the first hint of how the Cleveland nonprofit gained some of its funding. But he said there was \$341,000 more, and it is unclear who donated it.

“When you think of a city council, we might think of maybe some rough arm wrestling, but we don’t envision special interests with dark money seeking to decide things,” said Catherine Turcer, the executive director of Common Cause Ohio, a government watchdog group. “Dark money is insidious, and it is everywhere.”

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Consumers Against Deceptive Fees was incorporated in February 2018. An attorney with the law firm of Roetzel & Andress filed the incorporation papers. The firm has done work involving the bankruptcy of FirstEnergy Solutions, the former subsidiary that had owned the power plants.

The nonprofit dissolved in November. Attorney Subodh Chandra represented it last year in a legal fight with the city involving a study, which offered a negative view of the utility's residential rates.

Chandra, who pushed the story about the study to reporters, filed suit against the city in August with the Ohio Supreme Court to make the study public. He said Thursday that he was "unaware of any indirect source of funding for the group." He declined further comment, saying he no longer represents the group. The suit was dismissed in September.

Michael VanBuren, the treasurer of Partners for Progress and an attorney for Calfee, Halter & Griswold in Cleveland, did not return messages left at his office.

McCarthy, who was listed as a principal when the group formed in 2017, declined to comment. In a statement after Householder's arrest, McCarthy said: "I was asked to be president of the board of Partners for Progress, a [nonprofit] organization, but resigned in late 2018 to resume a career in public service. I have not had any contact with it since."

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A spokeswoman for FirstEnergy declined to discuss the investigation because it is pending.

Two of Householder's closest allies – Jeffrey Longstreth and Juan Cespedes – have pleaded guilty to federal racketeering charges, while FirstEnergy has severed ties with several top officials, including Charles Jones, its former chief executive officer.

Defense attorneys in the case said they expect additional charges to be filed in early next year. Several lawsuits also have been filed against FirstEnergy,

claiming top executives failed to provide oversight. The U.S. Securities and Exchange Commission also is investigating FirstEnergy.

## **APPENDIX A-2**

Laura A. Bischoff, *Nonprofit Poured \$13.9M into Political Groups in 2019*, Dayton Daily News (Dec. 23, 2020)



## Nonprofit poured \$13.9M into political groups in 2019

OHIO NEWS | Dec 23, 2020

By Laura A. Bischoff, Columbus Bureau

A nonprofit linked to FirstEnergy Corp. poured more than \$13 million into Ohio political groups in 2019, including \$100,000 to one tied to former Dayton mayor Rhine McLin, \$300,000 to one that backs Gov. Mike DeWine and \$75,000 to one that pushed to elect Alice DeWine as Greene County prosecutor.

A spokeswoman for the governor said DeWine and Lt. Gov. Jon Husted asked FirstEnergy and other companies and individuals to contribute to their campaign or an independent expenditure committee — both legal routes.

“The governor asked for support for his daughter’s election sometime in, or after, September of 2019,” DeWine spokeswoman Lisa Peterson said in a written response to questions. Alice DeWine announced





Newly obtained IRS filings for Partners for Progress, a nonprofit funded by FirstEnergy, detail the money trail.

An 80-page criminal complaint in the Larry Householder public corruption case uses pseudonyms of “Company A” and “Energy Pass-Through” to describe FirstEnergy and Partners for Progress.

The complaint alleges that FirstEnergy was the sole funder of Partners for Progress, which in turn contributed \$900,000 in 2018 and \$13 million in 2019 to Generation Now, another nonprofit at the center of the corruption case.

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## **Explore** Should voters know more about undisclosed political money?

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Started in 2017, Partners for Progress is a 501(c)4 organization, which is required to publicly disclose its financials once a year in an IRS Form 990 and don't have to disclose their funding sources.

DeWine's chief lobbyist, Dan McCarthy, resigned as its president when McCarthy left The Success Group lobbying firm to join the governor's administration in early January 2019. McCarthy declined to comment.

McCarthy's former business partner at The Success Group, McKenzie Davis, replaced him on the Partners for Progress board. The Success Group has lobbied for FirstEnergy for more than a decade.

Partners for Progress released its 2019 IRS 990 form to the Dayton Daily News this week. It shows nearly \$14 million in contributions to seven other 501(c)4 nonprofits:

- \$13 million to Generation Now, which worked to pass House Bill 6, a controversial bailout for nuclear plants that DeWine signed into law in July 2019.
- \$300,000 to Securing Ohio's Future, which worked to drive voter turnout for the DeWine-Husted ticket in the 2018 election.
- \$200,000 to Consumers Against Deceptive Fees, a group critical of Cleveland Public Power.

- \$150,000 to Liberty Ohio Inc.

- \$100,000 to Rebuilding America, a progressive think tank whose board includes Democratic



McLIN, former U.S. Rep. Darin Hill and Ron Malone, a member of the Ohio Democratic Party's executive committee. The group recently changed its name to Modern America Project.

- \$85,000 to Jobs and Progress Fund Inc., which is based in West Chester.

- \$75,000 to Protecting Ohio Inc, which advocated for Alice DeWine to win the GOP primary for Greene County prosecutor this year. She lost the race.

"It is an outside group and I did not know how it was funded," Alice DeWine said.

Mike DeWine said Securing Ohio's Future is an independent organization, separate from his campaign.

When asked if he was aware of the Partners for Progress contributions, DeWine said: "No, I don't know what they are doing. I didn't know what they were doing." He also said that contributions had no influence on his decision to sign House Bill 6 into law in July 2019.

DeWine met with FirstEnergy officials at a Republican Governors Association fundraiser held Oct. 10, 2018 at the Columbus Club, Peterson confirmed. Earlier in 2018, DeWine and Husted toured one of the nuclear power plants previously owned by FirstEnergy, she said. The RGA supported DeWine's 2018 bid for governor.

McLin referred questions to Peter Mellinger, who is executive director of Modern America Project.

Mellinger said the group's board members are not compensated and it hasn't received any funds from Partners for Progress in 2020.

"It's all being shut down by the end of the year," he said. "Modern America Project is being closed as well."

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## Explore National super PAC money shows up in Greene County prosecutor primary

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McKenzie Davis, a FirstEnergy lobbyist and Partners for Progress director, referred questions about the group to its legal counsel, Fritz Berckmueller, who did not respond to messages seeking comment.

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## Explore Columbus utility gave \$200K to groups linked to HB6 scandal



In July U.S. Attorney David DeVillers alleged that Householder and four associates took more than \$60 million filtered through these nonprofit groups to put Householder in power and then pass and defend House Bill 6, a controversial energy bailout law.

These nonprofit groups have been part of Ohio's political landscape for years and are becoming more common in state and local contests, experts say.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief of *amici curiae* American Municipal Power, Inc. and the Ohio Municipal Electric Association was served on December 29, 2020, by e-mail pursuant to Supreme Court Practice Rule 3.11 on the following:

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