IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF *AMICI CURIAE* BUCKEYE POWER, INC. AND OHIO RURAL ELECTRIC COOPERATIVES, INC. IN FURTHER SUPPORT OF APPELLANT/CROSS-APPELLEE, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND BRIEF IN RESPONSE TO APPELLEES' BRIEF ON THEIR CROSS-APPEAL

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Table of Contents

APPENDIX

Table of Authorities

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Appellees, City of Cleveland, Cleveland Public Power ("CPP"), Cuyahoga County, and City of Brooklyn ("Brooklyn"), along with their Amici Curiae, Ohio Municipal League, American Municipal Power, Inc. ("AMP"), and Ohio Municipal Electric Association ("OMEA") (collectively "Appellees"), seek a ruling from this Court that would have the practical effect of allowing municipalities to provide firm retail electric service to customers located outside of their municipal boundaries in an amount up to 50% of the total municipal electric load, without any other limitations whatsoever. In doing so, they ask this Court to expand the authority of municipal electric utilities beyond what is permitted by the Ohio Constitution, and to act contrary to this Court's prior precedent.

The authority of municipal electric utilities to sell surplus product is granted by Article XVIII, Section 6, of the Ohio Constitution. The clear purpose of Article XVIII, Sections 4 and 6, of the Ohio Constitution, is to allow a municipal electric utility to provide retail electric service within municipal boundaries to the inhabitants of the municipality. If, and only if, a municipal electric utility has an unavoidable surplus left over after first undertaking the primary obligation to serve municipal inhabitants, it may sell that surplus to customers outside of municipal boundaries, not to exceed 50% of the total electric service provided to municipal inhabitants.

Appellees seek to improperly expand the role of the municipal electric utility to allow it to enter into the general electric utility business outside municipal boundaries. However, the limited role of municipal electric utilities outside of municipal boundaries has been reinforced repeatedly. *See Toledo Edison Co. v. City of Bryan*, 90 Ohio St. 3d 288, 737 N.E.2d 529 (2000); *Britt v. City of Columbus*, 38 Ohio St. 2d 1, 309 N.E.2d 412 (1974) *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461, 159 N.E.2d 741 (1959). This Court should reaffirm these cases and reject Appellees' proposition of law.

Appellees have failed to effectively respond to the central arguments and facts in this case made and presented by Appellants[1] that: (i) under the facts of this case and based on its use of requirements contracts and market purchases to meet its incremental needs for power, Cleveland Public Power ("CPP") has an artificial and avoidable surplus; (ii) based on the development of the PJM Interconnection, LLC ("PJM") wholesale electricity market, and the ability of any municipal utility to use market purchases and requirements contracts to meet their incremental needs for power as CPP has done, it is not necessary for any municipal utility to have true surplus; and (iii) most importantly, even if a municipal electric utility could hypothetically develop a true surplus for whatever reasons, this surplus can and should be disposed of in the PJM wholesale market, rather than sold at retail, for all of the reasons described by Buckeye and OREC in their initial brief.

Appellants have demonstrated that under the facts of this case CPP does not have a true electric surplus. CPP has structured its portfolio such that it can fulfill CPP's exact electric requirements in real time. As a result, CPP would never need surplus electricity to serve its municipal load, and any excess electricity it obtains for Brooklyn is necessarily purchased solely for that purpose. CPP has not, and cannot, refute this fact. Accordingly, any surplus acquired to serve Brooklyn is artificial surplus and its sale to Brooklyn violates the Constitution as recognized in *Bryan*.

Appellees attempt to sidestep this Court's holding in *Bryan* by arguing that Article XVIII, Section 6, authorizes municipal utilities to provide service to retail customers located outside municipal boundaries for up to 50% of municipal load, as long as (i) the municipal utility does not

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[1] "Appellants" as referenced herein shall refer to Appellant/Cross-Appellee the Cleveland Electric Illuminating Company ("CEI"), and its Amici Curiae, Duke Energy Ohio, Inc., Ohio Power Company, Dayton Power & Light Company, Buckeye Power, Inc. ("Buckeye") and Ohio Rural Electric Cooperatives, Inc. ("OREC").

explicitly designate a specific contract or resource to provide energy for a load outside its municipal boundaries, and (ii) *any* portion of a contract, resource, or purchase could be allocated to municipal use. (Merit Brief of CPP, City of Cleveland, Cuyahoga County, and Brooklyn ("CPP Brief") at 10, 16, 21, 43.) Appellees' position ignores the realities of electric supply and the PJM market and seeks to eviscerate Article XVIII, Section 6, of the Ohio Constitution and this Court's prior holdings by making the "surplus product" limitation in Section 6 meaningless. Electricity is fungible, and the various parts of a utility's portfolio of assets (whether generation resources or purchase contracts or market purchases) are not dedicated or "earmarked" to serve certain load or retail customers because they are not required to be so dedicated under any law or PJM market rules, nor are they so dedicated in actual practice based on electric industry standards. Furthermore, in the PJM market, all generation resources must be offered and sold into the market, and PJM decides which and when resources are dispatched, and all load is purchased from and served by PJM. As a result, under CPP's argument, CPP would have complete and unfettered discretion and control over whether specific contracts or resources are, or are not, deemed to be so dedicated, and CPP would, therefore, do so in a completely self-serving manner so as to purportedly meet a standard that does not, in fact, exist under Article XVIII, Section 6, and that CPP has also created out of whole cloth in a similarly self-serving manner.

Similarly, under Appellees' approach, Appellees have complete and unbounded discretion to deem and designate, or not, that every resource or contract in its portfolio is allocated to some portion, however small, of its municipal load and the rest to load outside its boundaries. Thus, CPP will also ensure in a self-serving manner that no contract or resource will ever be solely dedicated to supply load outside the municipality. Again, any such designation, or not, would be completely under CPP's control, as there is no law, requirement, PJM market rule, or industry

practice, that specific generation contracts or resources or market purchases be dedicated to specific retail customers.

A better way to view CPP's portfolio of resources is as a stack of resources. The important resources to focus on are the contracts or resources that result in the purchases of energy that serve CPP's incremental and variable needs for power. These incremental transactions are what determines whether CPP does, or does not, have surplus power. In this case, it is CPP's flexible market purchases and requirements contracts that meet CPP's incremental needs for power. Ignoring the actual resources that generate the surplus power at issue in this case, Appellee's approach is wholly artificial, irrelevant, and self-serving, engineered only to undermine this Court's holding in *Bryan.*

The industry facts also reveal that as a result of the development of a robust wholesale market in PJM, and the ability of any municipal utility to use requirements contracts and market purchases to meet their incremental requirements, just as CPP has done, then any surplus is avoidable. Under the circumstances of the market as Amici, Buckeye and OREC, and the other Appellants, have described them, any municipal utility surplus is an artificial surplus and cannot be a true surplus.

Most importantly, Appellees have failed to address Buckeye's and OREC's core argument in their initial brief that, even if a municipal utility does have true surplus for whatever reason, this surplus can and should be disposed of in the wholesale market—*not* the retail market. Retail sales are made to end-use customers. Such transactions require permanent electric distribution infrastructure (poles and wires) to be built to serve the load and, as in this case, require a firm commitment from the municipal utility to supply all electricity demands of the customer 24 hours a day, 7 days a week, with dedicated capacity and long-term planning. That is the very nature of

a firm retail service obligation. These features explain why there is no competition for retail distribution service in Ohio, and why the State of Ohio, as a matter of public policy, has assigned monopoly service territories for retail distribution service to all electric utilities in Ohio other than municipal utilities. By contrast, as discussed below and in Buckeye's and OREC's Brief in Support of Appellant/Cross-Appellee, true surplus of the type referred to in Article XVIII, Section 6, is unpredictable, intermittent, short-term, and is simply not compatible with a firm retail service obligation. On the other hand, the wholesale energy market is a perfect match for this type of temporary and unpredictable surplus. Short-term energy-only sales can be accommodated in this market, and separate dedicated capacity or distribution infrastructure is not required. The wholesale markets are designed to accommodate short-term spot sales of electricity.[2]

Further, the Ohio Constitution, Article XVIII, Section 6, permits sales of surplus electricity outside of municipal boundaries to "others," but does not require that such sales be made only at retail. Indeed, this Court has made clear that sales of surplus electricity at wholesale should be counted for purposes of calculating the 50% limit. Now that a robust wholesale market has developed in the State of Ohio, there is no reason that this Court cannot and should not limit sales of surplus energy to the wholesale market. Appellees have failed to refute, or even address, this argument, and, as discussed below, these arguments can and should be addressed in the scope of this case and under the framework created by the parties' propositions of law.

Accordingly, the Court should hold that any electricity surplus obtained by a municipal utility should be sold into the wholesale market, and not to end-use customers at retail. This would

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[2] This is another way of saying that any hypothetical true surplus generated by a municipal utility would also be sold by the municipal utility into the PJM wholesale market in actual fact, rather than be used to serve firm retail loads located outside municipal boundaries. Rather, separate and purposeful arrangements would need to be made to serve those retail loads on a firm, 24/7 basis, thus in violation of this Court's holding in *Bryan*.

alleviate the need to determine whether surplus is true or artificial, *i.e.*, whether the excess electricity was purchased or obtained for the sole purpose of reselling to a retail customer outside the municipality. This rule is easy to apply and is consistent with this Court's prior precedent, Ohio law, and the Ohio Constitution, including prior concerns expressed by this Court that municipalities should not compete with other public utilities in the retail market.

Appellees have failed to effectively refute the arguments presented by Amici, Buckeye and OREC, and the other Appellants, and instead raise a number of "red herring" arguments that are irrelevant and serve to distract the Court from the core issues involved in this case.

- CPP downplays the significance of this case, arguing that as the largest municipal utility in the state, only 3% of its load is sold to retail customers outside its municipal boundaries—while in the same breath asking this Court to allow it to increase this number to 50%, with no other limitations (at least no other limitations outside the unfettered control of the municipal utility). (CPP Brief at 10.) Contrary to CPP's assertions, this case will have a substantial impact on electric cooperatives and investor owned utilities ("IOUs") if Appellees' request is granted.

- This is no "one off" request. As addressed below, this case is part of a pattern of overreach and expansion of municipal power contrary to existing case law, state statutes, and the Ohio Constitution.

- Municipal utilities have extensive powers within their municipal boundaries and, contrary to CPP's argument, fairness and equity do not support allowing CPP or other municipal utilities to expand and compete outside their boundaries.

- Contrary to CPP's position, retail competition in Ohio does not open the door to competition for retail electric distribution service—which is at issue here. Ohio law and public policy do not permit competition for retail distribution service.

- Appellees mischaracterize the nature of the wholesale electricity market, in an attempt to muddy the definition of artificial surplus. Appellees argue that the Court should consider the other components of electric service—specifically, capacity—when determining whether true surplus exists. (CPP Brief at 14.) However, this Court made clear in the *Hance* case that only electric energy (kilowatt hours) should be considered in the surplus analysis. *Hance*, 169 Ohio St. at 461-462, 159 N.E.2d 741 (1959).

This Court should reject Appellees' proposition of law and instead accept Appellants' propositions of law, and specifically hold that: (i) under the facts of this case, Appellants have demonstrated that any surplus generated by CPP is avoidable and therefore artificial, and thus under the holding of *Bryan* is not permissibly sold at retail in competition with other utilities in the general public utility business, (ii) with the development of the PJM wholesale market and the availability of spot market purchases and requirements contracts, and absent a showing to the contrary, any municipal utility's surplus is avoidable and artificial and impermissibly sold at retail; and (iii) most importantly, a municipal utility's hypothetical true surplus, if any, based on its nature as a short-term, intermittent, and unpredictable surplus, can, should, and would only be sold in the wholesale market, not in the retail market, and any surplus used to serve retail load outside municipal boundaries on a firm basis would, therefore, necessarily be purposefully acquired for that reason in clear violation of this Court's holding in *Bryan*.

ARGUMENT IN SUPPORT OF THE APPELLANT/CROSS-APPELLEE

I. APPELLEES' ARGUMENT READS THE "SURPLUS PRODUCT" LIMITATION OUT OF ARTICLE XVIII, SECTION 6, AND RENDERS THE COURT'S HOLDING IN *BRYAN* MEANINGLESS.

A. CPP Fails to Rebut CEI's Showing that CPP's Surplus Product is Avoidable and Artificial and Therefore Impermissibly Sold at Retail Outside Of Municipal Boundaries.

CPP does not dispute that a portion of its electricity is purchased solely for the purpose of supplying service to customers located outside of municipal boundaries. It relies instead on illogical and irrelevant arguments that would gut this Court's precedent in *Bryan* and read the meaning of "surplus product" out of the Ohio Constitution.

CPP admittedly ceased generating any significant amount of electricity in 1977. (*See* CPP MSJ, Dkt. 59, at 4.) Over 99% of its electric supply is purchased, primarily through transactions

carried out in the wholesale electric market (the PJM Market). (Appellant/Cross-Appellee The Cleveland Electric Illuminating Company Merit Brief ("CEI Merit Brief") at 12 (citing CEI MSJ Dkt. 90, Ex. AA).) A small portion of CPP's load is the result of electric supply from behind the meter resources.[3] (*Id.*) The overwhelming majority of CPP's municipal load is supplied through requirements contracts or real time market purchases to meet the City's incremental and variable needs for electricity. (*Id.*) CPP has structured its supply this way specifically to avoid having any excess power beyond the requirements of its municipal customers unless it purposefully wants to have excess power.

CPP has a variety of arrangements to meet its municipal electric load—each of which are extremely flexible and are easily tailored to avoid the purchase of excess energy. For example, CPP has agreements to purchase the output of certain generating facilities owned and operated by AMP. (CPP MSJ, Dkt. 59, at 4; CEI Brief at 12.) Based on information from 2017, CPP also has approximately 15 contracts for purchase of electricity supplied through the PJM market. (CEI Brief at 13.) The factual record shows that there are no minimum purchase quantities identified in

[3] CPP refers to behind the meter generation – *i.e.*, resources such as rooftop solar that are located at a customer's property and "behind" the customer's retail meter or larger renewable facilities located behind the utility's wholesale meter – in its brief in support of its argument that the 50% limitation is the sole limit on municipalities' ability to sell load outside of municipal boundaries. (CPP Brief at 15, 27.) CPP's suggestion that behind the meter resources dedicated to serve municipal load could be used to serve load outside the municipality does not make any sense and is contrary to the very definition and meaning of behind the meter generation. These resources are designed only to reduce a retail customer's or utility's electric load and requirements for energy at the specific location where the generation is located -- that is the very meaning of "behind the meter" generation. However, these resources are a small portion of CPP's overall generation assets, as is the case with most utilities. Furthermore, this generation by definition is not available to serve load other than that which it is dedicated to serve. It only serves to reduce the need for other generation or supply that would otherwise serve the load. In the case of CPP, production from behind the meter generation simply allows CPP to reduce its incremental purchases through its flexible requirements contracts and market purchases, which accounts for the majority of CPP's portfolio. There is no basis to argue that these minor resources create excess energy that must be or even can be unloaded to retail customers outside municipal boundaries.

these contracts that would create any unavoidable excess or surplus. (*Id.*) Rather, these contracts are arranged so that CPP often does not have to purchase electricity until it is actually used by its load. (*Id.*) CPP commits to procuring the vast majority of its electricity in the real time market, on a day-to-day basis that corresponds directly to its customers' real-time usage. (*See* CEI Brief at 12-13.) Indeed, CPP's largest electric procurement contracts allow it to adapt its purchases to real-time demand. (*Id.*)

The record here shows that, as a result of these flexible contracts, CPP has structured its energy supply to avoid purchasing excess power over what is needed to supply its municipal inhabitants. If CPP has excess power beyond the needs of its municipal inhabitants, it is intentional and, therefore, artificial for purposes of Article XVIII, Section 6. This means that CPP is in violation of *Bryan*: any purchases CPP makes to purposely exceed the amount needed to supply its inhabitants are necessarily *solely* for the purpose of providing service to customers outside its municipality.

B. CPP's Argument that None of its Generation Resources are Explicitly Designated to Serve Extraterritorial Customers is Artificial, Irrelevant, and Self-Serving.

CPP attempts to rebut the fact that a portion of its supply is purchased solely to serve customers outside of municipal boundaries, arguing that the Ohio Constitution only limits municipal sales of electricity outside its boundaries if the "entire" generation resource, purchase contract, or market purchase is designated solely for sale outside of municipal boundaries. Thus, CPP argues that its sales are permissible because none of its underlying assets or contracts are explicitly "earmarked" to solely serve customers outside municipal boundaries. (CPP Brief at 10-13, 21, 43.) According to CPP, as long as it does not explicitly designate a contract or asset to supply a load outside the City boundaries, it can procure excess electricity solely for the purpose

of selling it to extraterritorial customers up to 50% of its municipal load. There is no such power granted to a municipal utility in the Ohio Constitution or any of this Court's precedent. *See Bryan*, 90 Ohio St. 3d 288, 737 N.E.2d 529 (2000); *Hance*, 169 Ohio St. at 463, 159 N.E.2d 741 (1959).

CPP incorrectly reads *Bryan* as applying only if an entire purchase is dedicated to sales outside of municipal boundaries. *Bryan* is not so limited. Rather, pursuant to *Bryan*, any purchase of electricity made solely "for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries" violates the Ohio Constitution. *Bryan*, 90 Ohio St. 3d. at 293, 737 N.E.2d 529. CPP is indisputably buying electricity solely for the purpose of meeting its firm commitment to serve outside entities such as Brooklyn.

Further, the entire concept that CPP would designate any particular contract or resource to serve a specific load, except for the self-serving purpose of meeting its own proposition of law that CPP has also created out of whole cloth for self-serving reasons, is not supported by the facts . There is no requirement anywhere, nor is it electric utility industry practice, for a utility to designate a particular generation resource, contract or market purchase to a specific retail customer. As a result, it is entirely within CPP's unbounded discretion, and for its own self-serving reasons to determine whether, if, or how it designates a particular asset, contract, or purchase to a specific retail customer. Indeed, electric energy is fungible and designating it would be a meaningless exercise.

CPP's argument is manufactured to distract from the holding in *Bryan*. It has no basis in Ohio law, PJM market rules, or electric industry practice. If accepted it would render meaningless both the "surplus product" limitation in Article XVIII, Section 6, and the Court's holding in *Bryan*. It would be entirely within CPP's or any municipal utility's control, without any external requirements or guidelines, to designate, for its own self-serving reasons, a portion, however small,

of every generation resource, supply contract, or market purchase. With no constraints on these empty gestures, a municipality could claim to satisfy *Bryan* so long as in its sole and absolute discretion any minimal portion of a specific resource was deemed to supply power to municipal inhabitants. No generation resource or power supply contract would ever be deemed solely dedicated to customers located outside the municipal boundaries.

If it is necessary at all for purposes of this case to determine which of CPP's contracts and resources are used to serve load located outside its municipal boundaries, then it makes more sense to focus on which resources actually generate the kilowatt-hours used to serve those customers, than on CPP's self-serving designations. Thus, a better way to view CPP's portfolio of generation resources, power supply contracts, and market purchases is as a stack of kilowatt-hour resources. At the "bottom" of the stack would be fixed and inflexible assets such as behind the meter renewable generation or fixed supply contracts where the output or supply cannot be controlled or avoided and must be taken. All of this energy, and more, is used to meet CPP's base load requirements — *i.e.* the amount of municipal customer requirements for electricity that is certain and remains constant. On the other hand, at the top of the stack would be the flexible requirements contracts and spot market purchases, which account for the vast majority of CPP's kilowatt-hours. CPP or any municipal utility uses these transactions to meet their incremental requirements for electricity that are variable and change over time. These variable resources can be easily tailored to meet and match real-time demand and can be easily adjusted to meet the incremental and variable demand of the municipality's load. These are the resources at issue in this case because they determine whether the municipal utility, in this case CPP, has surplus product or not. The resources at the bottom of the stack, which might have less flexibility, are irrelevant to that analysis because they meet the base requirements of the utility that are present at all hours.

The Court should reject CPP's attempt to circumvent the clear limitations in Article XVIII, Section 6 and the rule of law that this Court announced in *Bryan*.

C. CPP's Purchase Of Additional Energy Solely To Create A Surplus With Which To Serve Customers Located Outside The Municipality Cannot Be Justified under the Guise of "Necessity."

Appellees seek to deflect from CPP's clear violation of the Ohio Constitution and this Court's precedent by arguing that CPP's purchases of surplus product under its requirements contracts and market purchases are necessary for flexibility and to protect its customers from "excessive costs and risks." (CPP Brief at 16.) While CPP's argument may have had some credence before the advent of the PJM wholesale market,[4] it has no validity now, where a robust and liquid energy market is available in PJM to meet instantaneous requirements for power.

The record demonstrates the fallacy of CPP's argument. As CEI established, CPP has purposefully structured its power supply portfolio to avoid the need for any surplus product. It has flexible requirement contracts and spot market purchases so that it can match its electric supply directly to its municipal customers' needs in real time. The entire point of these contracts is to avoid purchasing surplus product that must then be disposed of.

Further, contrary to the assertions of Appellees, there is nothing in Appellants' position that would prevent CPP or other municipal utilities from still owning or contracting for long-term fixed assets or power contracts, such as renewable behind the meter generation, to meet a portion of their load obligation, as CPP has done. Where they exist in meaningful amounts, these resources

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[4] Before the advent of the PJM market, CPP and other utilities may have needed long-term fixed investments in generation assets and power contracts in order to ensure that reliable supply of electricity would be available to serve their municipal load. But CPP no longer makes such fixed kilowatt-hour commitments in any meaningful amount. This is because with the advent of the PJM market, it is up to PJM to ensure that adequate generation supplies are available to serve the load of all customers located in the PJM footprint on a reliable basis, and CPP and other utilities in PJM can and do rely on the PJM market for capacity and energy necessary to serve their load.

can still be used to meet all or a portion of CPP's or any municipal utility's fixed base load requirements. However, CPP's or any municipal utility's incremental requirements, those that change depending on the time of day, the season, etc. can, should be, and are met with flexible requirements contracts and market purchases in PJM.

Regardless, under the facts of this case, CEI has shown that CPP has not, in fact, made large, fixed investments in generating assets or long-term power supply contracts with unavoidable purchase requirements. Whether other municipal utilities might hypothetically have made such investments, or desire to make such investments in the future, CPP has not done so in this case.

Furthermore, as Buckeye and OREC have shown, even if a municipal utility might hypothetically have made (or might hypothetically make in the future) large fixed investments in generating assets or purchase contracts with unavoidable purchase requirements, for whatever reason, any surplus product generated by such assets, even if true surplus, should be short-term and intermittent. This is because a municipal utility has no legitimate reason to purposely plan for long-term commitments to serve load located outside municipal boundaries. Any hypothetically generated true surplus would be a perfect match for the wholesale energy market, which easily accommodates these types of sales. But it would be useless in the retail market, which requires long-term firm commitments to supply each customer's needs, including the acquisition of dedicated supplies of additional capacity and fixed investment in electric distribution infrastructure, *i.e.* poles and wires.

Based on the actual circumstances of CPP's power supply portfolio, the only rational explanation for its clearly proven purchase of excess electricity is to manufacture a surplus solely to serve long-term firm commitments to retail customers outside the municipality. As noted by this Court in *Hance*, where "the city already has adequate facilities to service its own inhabitants,"

the acquisition or operation of additional supply or resources "can only be for the creation of a greater surplus for sale outside the city, which is completely contrary to the constitutional limitation on the sale of surplus of a service or product supplied by a municipally owned public utility to noninhabitants of the municipality." *Hance*, 169 Ohio St. at 463, 159 N.E.2d 741. The Court should similarly reject CPP's attempt to cloak its improper creation of an artificial surplus under the guise of necessity.

D. PJM's Required Capacity Reserve Margins Do Not Create Unavoidable Surplus Energy Because Capacity is a Completely Different Product from Energy in the PJM Market.

CPP further argues that it has an unavoidable surplus of energy as a result of the 13-15% capacity reserve margin required by PJM, which "can result in a surplus of *energy* far beyond what the City currently sells to outside customers." (CPP Brief at 15 (emphasis in original).) This argument is not only irrelevant, it lacks any foundation in the record. And it incorrectly describes how reserve capacity works in the PJM market.

First, CPP's discussion of reserve *capacity* is irrelevant. This Court has held that the only component of electricity relevant to the Court's inquiry is energy, *i.e.* kilowatt-hours—*not* capacity, *i.e.* kilowatts. In *Hance*, the City of Piqua relied on a similar argument that because it had surplus "capacity" it could sell extra electricity outside its municipal boundaries. *Hance*, 169 Ohio St. at 461, 159 N.E.2d 741. This Court rejected Piqua's argument to determine the surplus based on "capacity." *Id.* The Court held instead that only electricity (measured in kilowatt-hours) should be considered in the surplus analysis. *Id.* CPP's contention should be rejected on the same basis.

Second, CPP's argument fails because it incorrectly characterizes capacity[5] in the PJM wholesale market. Capacity, particularly reserve capacity, cannot be the basis for "surplus" energy sold to non-municipal customers. Capacity and energy are completely separate products that are transacted in separate markets in PJM. (*See* Buckeye and OREC Merit Brief at 18-20; PJM Interconnection, LLC — Learning Center, Fact Sheet: Understanding the Differences Between PJM's Markets, https://learn.pjm.com/-/media/about-pjminewsroom/fact-sheets/understandingthe-difference-between-pjms-markets-fact-sheet.ashx (last visited August 29, 2020).) Utilities are required to purchase capacity to ensure they will have the resources necessary to meet their customers' demands. (*See* Buckeye and OREC Merit Brief at 18-20; PJM Manual 18: PJM Capacity Market, Section 2: Resource Adequacy and Section 7: Load Obligations, available at https://www.pjm.comi-Imedia/documents/manuals/m18.ashx (accessed August 26, 2020).) Capacity reserve is required to ensure that a utility will have access to enough electricity to meet its customer's peak demand under any contingency.

The capacity reserve cannot be used twice and, thus, cannot be committed to supply other resources. By way of example, commitments to supply electricity at retail, like the one CPP has with Brooklyn, require separate capacity commitments with their own reserve margin of 13-15%. CPP cannot use any capacity reserve margin acquired to serve its municipal retail customers to also provide dedicated capacity to other and different retail customers located outside the

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[5] CPP also contends that other factors involved in electricity services including "generation capacity, interconnection capacity, transmission and distribution system capacity, transformation and metering" should be considered. (CPP Brief at 14.) Most of these items are essentially forms of capacity; the others have little relevance to justifying why CPP would need to obtain additional electric surplus. For example, meters and transformers relate to electric distribution service, not generation supply, and have no bearing on the issue at hand. They can certainly provide no justification for CPP's purchase of excess electricity solely to provide service to a non-municipal load.

municipality, like Brooklyn. Therefore, it is not only unsupported by the record, but categorically incorrect for CPP to say that its surplus energy used to serve retail customers located outside municipal boundaries somehow results from excess capacity reserves that are required to be exclusively dedicated to its retail customers located inside municipal boundaries.

II. ALL SURPLUS IS INCOMPATIBLE WITH FIRM, LONG-TERM, FIXED CONTRACTS AT RETAIL AND SHOULD BE SOLD IN THE WHOLESALE MARKET.

As discussed above, 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 meet their needs through flexible requirements contracts, as CPP has done here. Even if a municipal utility might hypothetically acquire a true surplus by acquiring a long-term fixed resource or an unavoidable contract commitment that exceeds the municipal utility's incremental requirements to serve its municipal load — as CPP plainly has never done in recent years according to the record here — there is a wholesale market readily available to sell any excess that might exist. Not only is it unnecessary to sell any true surplus directly to end-use customers at retail, but such incremental excess electricity is not appropriate for firm, long-term retail service commitments as explained in Buckeye's and OREC's initial brief. (*See* Buckeye and OREC Brief at 21-25.)

The retail market (selling directly to end-use customers) does not accommodate the type of excess that might hypothetically be generated as a true surplus. Capacity must be available to serve existing load if there are unexpected increases in demand or loss of supply. "True" surplus is that which would result from unanticipated changes in customer demand due to weather, normal variations in use, or other unanticipated events. This type of excess generation is by its nature intermittent, unplanned, uncertain, and temporary.

Retail loads require a firm commitment to supply energy on a 24/7 basis. Retail loads, such as the long-term commitment to supply firm power to Brooklyn, require separate dedicated capacity including a reserve margin. Retail sales also require long-term fixed investments in distribution facilities (poles and wires), to provide these services. Any sale at the retail level is thus, by its nature, wholly incompatible with the type of excess and surplus that might hypothetically be available in circumstances other than those present in this case. The wholesale market, on the other hand, is perfectly matched for short-term excess because it does not require a firm commitment of dedicated capacity or electric distribution infrastructure and is available at any time to unload excess energy. This means that not only can and should any hypothetical true surplus product be sold into the wholesale energy market, rather than sold at retail, but that because of its nature it *necessarily would* be sold in the wholesale energy market. As a result, the capacity and energy used to serve customers at retail located outside municipal boundaries would be purposefully acquired for that purpose in violation of *Bryan*.

Furthermore, Article XVIII, Sections 4 and 6 of the Constitution do not state that any surplus must be sold at the retail level, only that surplus product may be sold to "others." In fact, this Court acknowledged that sales of surplus can be made at the wholesale level. *See Hance*, 169 Ohio St. at 461-462, 159 N.E.2d 741 (when considering whether a municipal utility exceeded the 50% limitation, the Court considered sales outside of the municipal boundaries made at the wholesale and retail levels).

Appellees' purported concern that CEI's position would prevent CPP from selling behind the meter generation into the wholesale market seeks to inject an irrelevant issue into this litigation. Because behind the meter resources serve only to reduce the load of the retail customer or utility in the location where the behind the meter generation is located, behind the meter generation is not

by definition available for sale to others. Accordingly, this generation can be used by CPP to reduce its or its municipal customers' load requirements, but it is not intended to be sold by the municipality as surplus or excess generation. That is true regardless of the outcome of this case.

Behind the meter generation is irrelevant. CPP, like most utilities, simply adjusts its incremental market purchases to compensate and account for any load reduction resulting from the presence of the behind the meter generation.

III. THIS COURT SHOULD REJECT APPELLEES' ATTEMPTS TO DISRACT THE COURT WITH IRRELEVANT SIDE ARGUMENTS.

A. Appellees Intentionally Downplay The Impact Their Proposed Rule Of Law Would Have On Cooperatives And Their Customers.

Appellees ask this Court to allow each municipality to have the unfettered ability to serve up to 50% of their load outside their municipal boundaries, while downplaying the significance of this request, arguing that as the largest municipal utility in the state, only 3% of its load is sold to retail customers outside its municipal boundaries. (CPP Brief at 10.) CPP also seeks to characterize itself as being at a disadvantage against investor owned utilities ("IOUs"). (CPP Brief at 7-8.) These arguments, however, are irrelevant and factually flawed. And they simply do not apply to rural electric cooperatives.

Appellees' position, if accepted by this Court, would have a substantial impact on rural electric cooperatives. Cooperatives are nonprofit entities owned by the customers they serve. They are also vertically integrated: cooperatives own generation, transmission, and distribution resources that are dedicated to serve all customers in the cooperative's service territories. The significant expansion of municipal power that CPP seeks would result in increased costs to cooperative customers who have acquired generation, transmission, and distribution resources to serve loads that, under CPP's approach, would be opened up for municipal poaching as

municipalities seek to serve the most attractive loads with the highest margins outside their boundaries. This overreach would put cooperative members, the residents of areas abutting the municipalities, at risk of bearing stranded costs created by the municipalities' unconstitutional expansion.

B. Appellees' Proposition Of Law Would Allow Municipalities To Expand Further Into The General Utility Business Outside Of Municipal Boundaries, And Is Part Of A Pattern And Practice Of Overreach By Municipal Utilities.

This case is part of a pattern of overreaching by municipalities in an effort to expand the scope of municipal electric sales outside of municipal boundaries. Time and again municipalities have attempted to expand and abuse the limitations on municipal utilities provided for in the Ohio Constitution and enumerated by this Court. While Appellees claim only to request the right to serve customers who want their services outside their municipal boundaries, another municipality recently and unsuccessfully argued that municipalities have the right to force service on an unwilling customer outside of municipal boundaries. (*See* Merit Brief of *Amici Curiae* AMP and OMEA at 2.)

In *City of St. Clairsville v. South Central Power Company*, the owner of an undeveloped property located within South Central Power Company's service territory and outside the City of St. Clairsville's municipal boundaries requested service with South Central Power Company, an electric cooperative. *City of St. Clairsville v. South Central Power Co.,* Belmont County Case No. 17-cv-0218. The City filed an injunction in Common Pleas Court and a complaint at the Public Utilities Commission of Ohio (PUCO) arguing that it had the exclusive right to provide electric service to the property outside of its municipal boundaries. The City made this claim even though the property owner did not want to take service from the City—essentially attempting to force service upon an unwilling customer outside its boundaries. The PUCO and the Common Pleas

Court rejected the City's argument, correctly recognizing that neither the Certified Territories Act nor the Ohio Constitution grants the City an exclusive right to serve outside their municipal boundaries. *Id.*

In another case currently pending before the Butler County Common Pleas Court, the City of Hamilton has argued that the 50% limitation on sales of surplus outside municipal boundaries should only apply to municipal sales at retail, not at wholesale. *Duke Energy Ohio, Inc. v. Hamilton*, Case No. CV17 01 0163, Butler County Common Pleas Court, Decision and Entry at 3-5 (Dec. 11, 2019) (unpublished and attached as Appx. A-1). In other words, a municipality could sell as much electricity as it wishes at wholesale without any constraint—only retail sales would count towards the 50% limitation. This contention is not only in direct contradiction with the *Hance* case, in which this Court explicitly held that the 50% calculation applied to wholesale and retail sales, but would greatly expand the number of kilowatt-hours a municipality could sell outside its boundaries. *Hance*, 169 Ohio St. at 461-462, 159 N.E.2d 741. Such an argument, coupled with CPP's argument in this case asking the court to ignore the definition of "surplus product" under *Bryan*, shows an agenda to erode the clear limitations on a municipal utility's role outside its boundaries and the balance struck in Ohio law between municipalities and utilities with certified service territories.

The Court should reject the municipalities' overreaching attempts to expand their power and get into the general public utility business outside their boundaries, and should reaffirm the long-standing, well-recognized constitutional limits on municipal utilities when serving customers located outside their municipal boundaries.

C. It Is The Public Policy Of the State of Ohio That Municipalities Are Not Permitted To Compete In The Distribution Utility Business Outside Their Boundaries.

Appellees argue that because CEI can compete with CPP within the municipality, fairness dictates that CPP should also be able to compete with CEI outside the municipality. This is a deeply flawed argument that goes against decades of established policy. Municipalities were given expansive powers under Article XVIII, Section 4, of the Ohio Constitution to provide service within municipal boundaries—*not* outside their boundaries.

CPP's powers and authority within its municipal boundaries, like that of any municipal utility, are expansive. CPP can prevent CEI from competing and has total control over who can serve within its boundaries. *See* Ohio Revised Code Sections 4933.81 et seq. and Article XVIII, Section 4 of the Ohio Constitution. Municipalities can also take over existing facilities and customers of any utility serving within its borders. *See* Article XVIII, Section 4 of the Ohio Constitution. Municipalities have the power to annex property and expand their municipal boundaries, and with it the area in which they have exclusive rights to serve. *See* Ohio Revised Code Chapter 709. In addition, municipalities have the right to keep the kilowatt-hour tax generated through its electric sales (a right neither cooperative nor IOUs have).[6]

CPP has chosen to allow CEI to serve customers in the City of Cleveland. Thus, the only reason CEI can compete within Cleveland, and the only reason customers can switch from CPP to CEI, *is because CPP allows this to happen.*

The Ohio Constitution balances this broad authority within municipal boundaries by putting clear limitations on a municipal utility's authority to do business or compete *outside* its boundaries. The Certified Territories Act prohibits competition for electric distribution service

[6] While CPP points to tax advantages by IOUs as a basis for its fairness argument, it is important to note that the kilowatt-hour tax maintained by CPP from its sales within its municipal boundaries is a significant boon to expanding customer base. (CPP Brief at 3, 7-8.)

within the certified service territory of another utility.[7] And, this Court has made clear that municipal utilities should not be in the general public utility business. *Hance*, 169 Ohio St. at 461-462, 159 N.E.2d 741 (the framers of the Ohio Constitution "intended to . . . prevent such municipalities from entering into the general public-utility business outside their boundaries in competitions with private enterprise"); R.C. §§ 4933.81 *et seq.*

Yet, this is exactly what Appellees attempt to accomplish with this case. CPP explicitly asks this court to allow it to extend service outside the City so that it may "operate as a business," allowing increased profits to justify any activities at all. (CPP Brief at 18; AMP/OMEA Brief at 14 (arguing that "revenue enhancement" is the "very essence" of Article XVIII, Section 6 of the Ohio Constitution).) CPP's goal to make a profit does not allow it to circumvent the limitations of the Ohio Constitution and expand the purpose of municipal utilities.

Appellees try to skirt these clear limitations by arguing that since IOUs are subject to retail competition for generation, this somehow justifies municipal competition outside its municipal boundaries for distribution service. (CPP Brief at 6-7.) While the legislature has accepted competition for generation services for IOUs, no such competition is contemplated for distribution services.[8]

And, even if Appellees' argument has some relevance to IOUs because of the availability of retail competition for generation service in IOU service territory, the argument is entirely inapplicable to cooperatives, who will be more significantly impacted by the Court's decision than

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[7] Although competition for generation service is permitted in the certified territories of investor-owned utilities, it is not allowed in the service territories of the electric cooperatives unless they elect to permit such competition, which none have.

[8] In other words, while an end-use customer can shop for its electric generation supplier, *i.e.* the utility that provides its energy (kilowatt-hours), end-use customers do not have the ability to switch distribution suppliers, *i.e.* the utility that delivers the energy through poles and wires.

IOUs. Electric cooperatives are not subject to retail competition for generation or distribution service. Like municipal utilities, cooperatives are still vertically integrated and procure all the generation and transmission services necessary to serve the retail load within their service territories. Appellees' overreach will result in cost shifting to other cooperative customers of not just the cost of distribution infrastructure, but generation and transmission assets as well, as municipalities seek to serve the most attractive loads with the highest margins outside their boundaries.

D. Appellees' Position Would Result In More Litigation, Not Less.

CPP wrongly suggests that CEI's and its supporting Amici's approach would result in additional litigation by "second guessing the business decisions of the municipal utilities." (CPP Brief at 41-42.) Appellants simply seek to enforce the existing precedent of this Court. The position of the Buckeye and OREC Amici is a clear cut and simple rule that would significantly limit the burden on judicial resources. Because the PJM wholesale market is available for sales of surplus product, there is simply no need for municipal utilities to sell "surplus" electricity at retail where permanent distribution infrastructure must be built and firm 24/7 commitments must be made and dedicated capacity must be acquired. The rule suggested by Buckeye and OREC does not require a fact intensive review by courts; comports with the Ohio Constitution, this Court's rulings, and Ohio law; and would not require second guessing municipalities' business decisions.

E. Buckeye's and OREC's Arguments Fall Squarely Within The Propositions of Law Presented by Both Appellants and Appellees in this Case.

Appellees AMP and OMEA suggest that Buckeye's and OREC's arguments fall outside of the broad Propositions of Law accepted for review by this Court. (AMP/OMEA Brief at 17-18.) This is incorrect and merely an attempt to deflect from the valid arguments that Buckeye and OREC raised in their brief.

CEI's Propositions of Law Nos. 1, 2 and 3, focus on whether CPP or any other municipal electric utility acquires an artificial or avoidable surplus and sells said artificial surplus to customers outside of municipal boundaries. CPP's Proposition of Law No. 1 is even broader, arguing that a sale by a municipal utility outside municipal boundaries is permissible (up to the 50% limit) so long as the municipal utility did not purchase the surplus product solely for the purpose of selling the entire amount of that surplus outside municipal boundaries. Through these propositions of law, Appellants and Appellees are fighting about the ability of CPP to serve retail customers like Brooklyn in CEI's certified territory, outside of Cleveland municipal boundaries. Further, the concern expressed by this Court in *Bryan* and other cases is even broader: it speaks to the general issue of municipal electric utilities competing at retail in the general public utility business.

Buckeye's and OREC's comments are entirely relevant to the propositions of law and fall squarely within the issues of law and fact presented in this case. Buckeye and OREC supported CEI's arguments regarding whether CPP's surplus product used to serve load outside the City of Cleveland's municipal boundaries is entirely avoidable and purposefully acquired to serve load outside municipal boundaries in violation of *Bryan* and the Ohio Constitution. Buckeye and OREC provided additional context regarding why retail sales like those between CPP and Brooklyn are necessarily at odds with the concept of a surplus in the Ohio Constitution and *Bryan*. Buckeye and OREC, like CEI, also addressed the impact that the advent of the PJM wholesale energy market has had on the concept of a surplus, arguing that the impermissible sales of artificial surplus at retail outside municipal boundaries are avoidable for an additional reason: any hypothetical excess power that a municipal utility may somehow have can and should be easily and appropriately sold into the wholesale market, as Article XVIII, Section 6 already allows. Not only can and should

such hypothetical true surplus be sold into the PJM wholesale energy market – it *would* be so sold, given its nature as a short-term, unpredictable and intermittent product. Thus, Buckeye's argument is not a separate or different proposition of law from CEI's, rather, it supports the proposition of law that any sales made by CPP or any other municipal utility to retail customers located outside municipal boundaries would be separately and purposefully acquired for that reasons in violation of this Court's holding in *Bryan*.

This case will have statewide impact not only on IOUs, but on the electric cooperatives as well. Thus, Buckeye and OREC have addressed a key viewpoint that was missing from this case – that of Ohio's electric cooperatives. Similarly, electric cooperatives have greater concerns regarding competition: except for municipalities, there is no competition permitted within their service territories. And, because cooperatives are vertically integrated, the potential for stranded costs to electric cooperatives from expanded municipal competition is even greater than for CEI or the other IOUs.

Nor can Appellees AMP and OMEA avoid Buckeye's and OREC's arguments by claiming that they rely on evidence that is not in the record. Rather, as established herein and in CEI's briefing, Buckeye's and OREC's arguments are based on the actual contracts that CPP has entered into, not some hypothetical set of facts. The broader principles and facts regarding the PJM market are basic principles taken from PJM's website, www.pjm.com. Buckeye and OREC cited relevant, publicly available information providing basic, undisputed market principles of which this Court can take judicial notice. *Disciplinary Counsel v. Weithman*, 143 Ohio St.3d 84, 2015-Ohio-482, 34 N.E.3d 865, ¶ 26 n.4 (taking judicial notice of information on the Mayo clinic website); *Malone v. Berry*, 174 Ohio App.3d 122, 2007-Ohio-6501, 881 N.E.2d 283, ¶ 13 (10th Dist.) (taking limited judicial notice of website, quoting case law stating that "[i]t is not uncommon for courts to take

judicial notice of factual information found on the world wide web" (quoting *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007))). Neither Appellees nor AMP or OMEA claim that Buckeye and OREC misquote the PJM website, that the PJM website is inaccurate, or that the principles upon which Buckeye and OREC rely are incorrect. That is because they cannot dispute the truth and validity of these basic market principles. *See State v. Serna*, 2019-Ohio-4102, 134 N.E.3d 294, ¶ 15 (2d Dist.) (trial court had discretion to take judicial notice of recommended use of medication where the information "was 'not subject to reasonable dispute' because it was susceptible to 'ready [confirmation] by resort to sources whose accuracy [could not] reasonably [have been] questioned'" (quoting Ohio Evid. R. 201(B)-(C)).

Appellees' failure to address the merits of Buckeye's and OREC's arguments is particularly telling. It is a tacit admission that Appellees have no response. Indeed, they have not yet answered the questions raised by Buckeye and OREC: why is it not sufficient, with the advent of the PJM wholesale energy market, for CPP and any other municipal utility to dispose of any surplus product at wholesale? And why is the wholesale energy market, not the retail market, not the proper market for any temporary, intermittent, unpredictable and short-term surplus product that a municipal utility may acquire? Finally, why is it not true that any hypothetical true surplus that a municipal utility might have (none shown under facts of this case) would, in fact, be sold into the PJM wholesale energy market given its nature, and any capacity and energy necessary to serve firm retail commitments would be purposefully and separately acquired for that reason?

IV. CONTRARY TO THE ASSERTIONS OF THE OHIO MUNICIPAL LEAGUE, CPP CANNOT RELY UPON PROVISIONS PASSED BY THE LEGISLATURE TO OVERRIDE CLEAR PRESCRIPTIONS ON AUTHORITY CONTAINED IN THE OHIO CONSTITUTION.

In its Amicus Brief, the Ohio Municipal League argues, among other things, that municipalities such as the City of Cleveland, and the City of Brooklyn, are permitted to work together pursuant to statute, Ohio Revised Code Section 715.02(A). However, it is axiomatic that the Ohio Constitution controls over legislation by the General Assembly. As noted by this Court as recently as 2019:

> "[t]he purpose of our written Constitution is to define and limit the power of government and secure the rights of the people. It controls as written unless changed by the people themselves through the amendment procedures established by Article XVI of the Ohio Constitution. The Ohio Constitution is the paramount law of this state, and we recognize that the framers chose its language carefully and deliberately, employed words in their natural sense, and intended what they said."

Cleveland v. State, 157 Ohio St. 3d 330, 2019-Ohio-3820, P 16.

The legislature is not empowered to abrogate restrictions or limitations placed upon a municipality by the Constitution:

> The Constitution is either superior law, unchangeable except by extraordinary means, or it is on a level with ordinary legislative acts and, like other acts, is alterable at the pleasure of the legislature. If the Constitution is a superior law, then a legislative act that is contrary to the Constitution is not the law, If the Constitution is on the level of ordinary legislative acts, then written constitutions are absurd attempts, on the part of the people, to limit a power which is, by its own nature, illimitable.

See Monimee v. Sherbarth, 28 Ohio St.3d 270, 291-292, n.18 (Douglas, J. concurring).

Furthermore, the argument of the Ohio Municipal League was addressed and rejected in *Britt v. City of Columbus*, 38 Ohio St. 2d 1, 309 N.E.2d 412 (1974). There, the city argued that it could use its eminent domain power under Revised Code Chapter 719 to appropriate property outside its municipal boundaries for the purpose of providing service outside of municipal

boundaries. The Court rejected this argument, finding that the power of eminent domain, though granted by the legislature, exceeded the authority granted to the municipalities under Article XVIII, Section 4 of the Constitution because it was being used "for purposes other than supplying a public utility product or service to a municipality or its inhabitants . . . ." *Id.* at 9.

Similarly, CPP is not permitted to use legislation permitting contracting between municipalities under R.C. 715.02(A) to override the clear limitations in Section 4 and Section 6 on extraterritorial sales of electricity. R.C. 715.02(A) does not immunize CPP from constitutional limitations contained in Article XVIII, Section 6, nor does it legislatively overrule *Hance* or *Bryan.*

CONCLUSION

Notwithstanding contrary authority from the Ohio Constitution, General Assembly, and this Court's precedent, Appellees ask this Court to expand their power to allow municipalities to provide firm retail electric service to customers located outside of their municipal boundaries in an amount up to 50% of their total municipal electric load, with no other limitation.

This Court should reject Appellees' proposition of law and accept Appellants' propositions of law. Amici, Buckeye and OREC, believe the proper holdings would be as follows: (i) under the facts of this case, Appellants have demonstrated that any surplus generated by CPP is avoidable and therefore artificial, and thus under the holding of *Bryan,* is not permissibly sold at retail in competition with other utilities in the general public utility business, (ii) with the development of the PJM market and the availability of spot market purchases and requirements contracts, and absent a showing to the contrary, any municipal utility's surplus is avoidable and artificial and impermissibly sold at retail; and (iii) a municipal utility's hypothetical true surplus, if any, based on its nature as a short-term, intermittent and unpredictable surplus, can, should, and would only be sold in the wholesale market, not in the retail market, and any surplus used to serve retail load

outside municipal boundaries on a firm basis would, therefore, necessarily be purposefully acquired for that reason in clear violation of this Court's holding in *Bryan*.

These holdings would alleviate the need to determine whether surplus is true or artificial, *i.e.*, whether the excess electricity was purchased or obtained for the sole purpose of reselling to a retail customer outside the municipality. In contrast to Appellees' position, this rule is easy to apply and is consistent with this Court's precedent, Ohio law, and the Ohio Constitution, and the Court's concern about municipal utilities getting into the general public utility business outside municipal boundaries.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of *Amici Curiae* Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc. in Further Support of Appellant/Cross-Appellee, The Cleveland Electric Illuminating Company and Brief in Response to Appellees' Brief on Their Cross-Appeal was sent by ordinary U.S. Mail, postage prepaid, this 9th day of December, to the following:

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IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO

DUKE ENERGY OHIO, INC.	*	Case No.: CV17 01 0163
Plaintiff	*	JUDGE: J. GREGORY HOWARD
vs.	*	**DECISION AND ENTRY DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
CITY OF HAMILTON, et al.	*	**DENYING DEFENDANT CITY OF HAMILTON, OHIO'S MOTION FOR SUMMARY JUDGMENT**
Defendants	*	**DENYING DEFENDANTS FAIRFIELD TOWNSHIP AND BOARD OF TOWNSHIP TRUSTEES OF FAIRFIELD TOWNSHIP'S MOTIONFOR SUMMARY JUDGMENT**

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This cause comes before the Court upon competing motions for summary judgment. Plaintiff, Duke Energy Ohio, Inc. ("Duke") filed its motion for partial summary judgment August 30, 2019. Defendants, City of Hamilton, Ohio ("Hamilton") and Defendants Fairfield Township and Board of Township Trustees of Fairfield Township (collectively "Fairfield") also filed their motions for summary judgment August 30, 2019. Duke filed its brief in opposition to Hamilton's motion for summary judgment and its brief in opposition to Fairfield's motion for summary judgment September 23, 2019. Fairfield filed its memorandum in opposition to Duke's motion for partial summary judgment September 23, 2019. Hamilton filed its memorandum in

Judge
J. Gregory Howard
Common Pleas Court
Butler County, Ohio

opposition to Duke's motion for partial summary judgment September 23, 2019. Hamilton and Fairfield filed their reply memorandums in support of their motions for summary judgment October 10, 2019. Duke filed its reply brief in support of its motion for partial summary judgment November 4, 2019. Oral argument on the motions took place November 20, 2019.

Duke is a public utility that provides natural gas and electric service in southwest Ohio, specifically including Fairfield Township, Butler County, Ohio. Hamilton is an Ohio municipal corporation located in Butler County, Ohio. Hamilton operates a municipal utility that provides natural gas and electric service, under authority of Article XVIII § 4 of the Ohio Constitution. Hamilton and Fairfield entered into an agreement authorizing Hamilton to expand its retail electric service and retail natural gas delivery service to new customers located within Fairfield Township ("the Added Area"). *See* Second Amendment to the Hamilton-Indian Springs Joint Economic Development District ("2nd Amended JEDD").

Duke filed its first amended complaint March 8, 2017, seeking declaratory judgment and permanent injunction. Duke alleges the proposed 2nd Amended JEDD is invalid because Hamilton is violating Article XVIII, §6 of the Ohio Constitution by supplying more electricity outside the City of Hamilton than constitutionally permitted and by creating artificial surplus for the sole purpose of selling it outside the city.

Duke seeks summary judgment on its amended complaint arguing it can be determined as a matter of law that Hamilton is violating the Ohio Constitution. Hamilton and Fairfield oppose Duke's motion arguing Duke has not met its burden of proof that

any violation of the Ohio Constitution is occurring. Additionally, they argue they are entitled to summary judgment on Duke's claims for three independent reasons: (1) Duke lacks standing to bring this action; (2) Hamilton is in full compliance with Article XVIII, §6 of the Ohio Constitution; and (3) even if Hamilton's sales outside the municipality exceed the fifty percent limitation imposed by Article XVIII, §6, it is authorized to do so by R.C. §715.72(T)(1).

It is appropriate for a trial court to grant summary judgment pursuant to Civ.R. 56(C) when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to only one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). A party seeking summary judgment bears the initial burden of informing the court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. *Id.*; Civ.R. 56(E).

Judge
J. Gregory Howard
Common Pleas Court
Butler County, Ohio

Article XVIII § 6 of the Ohio Constitution provides:

> 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, provided that such fifty per cent limitation shall not apply to the sale of water or sewage services.[Emphasis added]

"A contract by a municipality for the sale of surplus electricity for use and consumption outside the municipality is invalid where such municipality is already so selling more surplus electricity than is permitted under the provisions of Section 6, Article XVIII of the Constitution of Ohio." *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 457, 159 N.E.2d 741, 742 (1959), paragraph one of syllabus. Surplus is defined as "the amount that remains when use or need is satisfied." *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 292, 2000-Ohio-169, 737 N.E.2d 529, 532, quoting Webster's Third New International Dictionary (1993). To determine if a municipality is violating Section 6 of the Ohio Constitution, the number of kilowatt hours supplied outside the city within a given period of time should be compared with the number of kilowatt hours supplied within the municipality during the same period of time. *Id.* at 461-462. *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 457, 159 N.E.2d 741, 742 (1959) If the number of kilowatt hours supplied outside the municipality is in excess of fifty percent of the number of kilowatt hours supplied within the municipality, the municipality is violating the Ohio constitution. *Id.* at 462.

Judge
J. Gregory Howard
Common Pleas Court
Butler County, Ohio

Duke seeks summary judgment on its claims arguing that using the test adopted by the Ohio Supreme Court in *State ex. rel Wilson v. Hance*, it can be determined, as a matter of law, that Hamilton was in violation of Article XVIII § 6 of the Ohio Constitution at the time it agreed to enter into the 2nd Amended JEDD. Hamilton and

Fairfield move this Court to deny Duke's motion for partial summary judgment and grant their motions for summary judgment on this claim arguing Duke's use of the *Hance* test is not an appropriate way to measure compliance with the fifty percent limitation in Article XVIII § 6; and Hamilton is in full compliance with Article XVIII, § 6 of the Ohio Constitution.

The Court acknowledges all of the changes to the electric utility industry since the *Hance* decision. However, there have not been any changes to the law. Accordingly, the test used by the Ohio Supreme Court in *Hance* is the proper test to use in determining Hamilton's compliance with Article XVIII, §6. The trier of fact is to compare "the number of kilowatt hours supplied outside the city within a given period of time, such as a month, with the number of kilowatt hours of electricity supplied within the municipality during the same period of time." *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461-462, 159 N.E.2d 741, 744 (1959). The kilowatt hours supplied includes all kilowatt hours, retail and wholesale sales. *Id.* Accordingly, the sales to AMP are to be considered in this comparison.

Having determined the proper test to be applied, the Court must determine, if based upon the evidence presented, there is a genuine issue as to any material fact and if reasonable minds could come to only one conclusion.

Judge
J. Gregory Howard
Common Pleas Court
Butler County, Ohio

Duke supports its motion with several exhibits and depositions, all of which the Court has carefully reviewed. Duke's main support for its motion is James Logan's

deposition and two documents produced by Duke[1]: (1) a one page document titled "Generation Detail (Mwh)" that provides a monthly breakdown for calendar years 2012 through 2017 of Hamilton's share of the energy output of its generating resources. (Exhibit B to Duke's motion for summary judgment, Answer to Interrogatory 6. Bates stamped COH000403); (2) excerpts from the City of Hamilton's "Official Statement of Offering of Series 2018 Bonds" that provides an annual breakdown of electricity consumption figures for years 2012 through 2017 expressed in (Kw). (Exhibit G to Duke's motion for summary judgment, Nathan Perry depo. exhibit 1, Bates stamped COH002771).

Duke contends these documents and basic math conclusively establish that Hamilton's electric utility operations exceeded the constitutional limits at the time it agreed to enter into the 2nd Amended JEDD. Hamilton and Fairfield disagree with this contention and argue the opinion of John T. Courtney[2] establishes Hamilton's compliance with Article XVIII, §6. Courtney affirms that Hamilton is in compliance with the fifty percent limitation in Article XVIII, § 6. *Courtney report* p. 2.

Judge
J. Gregory Howard
Common Pleas Court
Butler County, Ohio

[1] Hamilton objects to these documents, arguing they do not conform to the requirements of Civ. R. 56(C) and (E) and must therefore be disregarded by the Court. Duke contends the documents were produced as interrogatory responses and were authenticated by deposition testimony of witnesses, therefore they are proper Civ.R. 56(C) evidence. Civ. R. 56(C) specifically states "summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Hamilton's objections are overruled.

[2] Duke seeks an order precluding Defendant City of Hamilton's experts, John Courtney and John W. Bentine from offering their opinions in support of summary judgment or at trial on the grounds that their reports and testimony and unreliable under Ohio Rule of Evidence 702, and do not assist the trier of fact. The Ohio Supreme Court set forth the appropriate test to use to calculate the constitutional limitation in *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461-462, 159 N.E.2d 741, 744 (1959). Defendant experts

Contrary to the parties contentions neither party has established, as a matter of law, Hamilton's lack of compliance or compliance with Article XVIII, §6. While, John T. Courtney affirms Hamilton is in compliance with Article XVIII, §6, the "Generation Detail (Mwh)" (Bates stamped COH000403) and the excerpts from the City of Hamilton's "Official Statement of Offering of Series 2018 Bonds" (Bates stamped COH002771), if accepted by the trier of fact, could establish that Hamilton is not in compliance with the fifty percent limitation.

However, reasonable minds could conclude that these documents do not establish that Hamilton is not in compliance with the fifty percent limitation; genuine issues of material fact exist regarding the accuracy of the figures relied on by Duke to calculate the amount of energy used and sold by Hamilton. The "Official Statement of Offering of Series 2018 Bonds" specifically references customers and usage. It is not clear if energy used by the municipality itself is included in these figures. This amount must be included in the calculation. *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 291, 2000-Ohio-169, 737 N.E.2d 529, 532. Additionally, there is discrepancy between the figures reported by Hamilton to establish the usage inside the City and the figures used by Duke to establish the energy supplied inside the City. The Official Statement of Offering of Series 2018 Bonds reports the annual usage inside the city for 2016 as 571,219,878(kWh) and 2017 as 552,949,132(kWh). John T. Courtney, utilizing data provided by the City of Hamilton, calculated the electric energy supplied to the City of Hamilton and its inhabitants for

will not be permitted to testify regarding constitutional limitation calculations that do not comply with the *Hance* test.

2016 as 568,965,210(kWh) and 2017 as 548,918,285(kWh). Courtney report p. 4. A genuine issue of material facts exists regarding the number of kilowatt hours of electricity supplied outside the City of Hamilton and the number of kilowatt hours of electricity supplied within the City Hamilton.

In addition to alleging Hamilton is violating Article XVIII, § 6 by selling more electricity than is permitted, Duke alleges Hamilton is violating Article XVIII, §6 by purchasing electricity solely for the purpose of reselling it outside the municipality; thus acting as a *de facto* broker. Article XVIII, §6 intends to limit a municipality's ability to sell only the electricity that is in excess of what is needed by the municipality or its inhabitants. *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 292, 2000-Ohio-169, 737 N.E.2d 529, 532-533. A municipality is precluded 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.

Duke contends the fact that Hamilton is obligating itself to have surplus energy to sell by entering into requirements contracts with AMP is proof that Hamilton is acting as a *de facto* broker in violation of Article XVIII, §6. Additionally, Duke contends the fact that Hamilton consistently maintains energy in excess of the amount used within the city is ample evidence that Hamilton is creating an artificial surplus for the sole purpose of resale outside the city.

Hamilton argues there is nothing "artificial" about its surplus and that Duke's contention that it is "artificial surplus" ignores evidence that Hamilton purchases electricity based on its forecasted needs but actual usage can fluctuate. Logan transcript

p. 18. "[L]oad additions or losses inside a community can radically affect the inside/outside percentage. Indeed, this has occurred in Hamilton." Bentine Report p. 13. "[W]e are constantly trying to match up our electric production of how our customers use it, which has really led to our portfolio being unbalanced." Logan transcript p. 18. A genuine issue of material facts exists whether Hamilton's surplus was created solely for the purpose of reselling it to an entity that is not within Hamilton's geographic limits.

When construing the evidence in favor of the non-moving party there is reasonable dispute regarding the energy supplied and used by the City of Hamilton and the reason for the City of Hamilton's generation and purchase of energy. Therefore, no party is entitled to summary judgment on Duke's claim that Hamilton was violating Article XVIII, §6 of the Ohio Constitution when Hamilton and Fairfield entered into the Agreement regarding the 2nd Amended JEDD.

Hamilton and Fairfield argue that even if Hamilton was violating Article XVIII, §6 of the Ohio Constitution when they entered into the 2nd Amended JEDD Agreement, Hamilton had independent statutory authority to do so pursuant to R.C. §715.72(T)(1).

R.C. §715.72(T)(1) provides as follows with respect to JEDDs:

> (T) The powers granted under this section are in addition to and not in the derogation of all other powers possessed by or granted to municipal corporations, townships, and counties pursuant to law.
>
> (1) When exercising a power or performing a function or duty under a contract entered into under this section, a municipal corporation may exercise all the powers of a municipal corporation, and may perform all the functions and duties of a municipal corporation, within the district, pursuant to and to the extent consistent with the contract.

Hamilton and Fairfield interpret this statute as authorizing Hamilton to violate the fifty percent constitutional limitation on the sale of electricity.

The purpose of the Ohio constitution is to "define and limit the powers of government . . . ." *City of Cleveland v. State of Ohio*, ___ Ohio St.3d ___, 2019-Ohio-3820, ___ N.E.2d ___, ¶16. The Constitution controls as written unless changed through the proper amendment procedures. *Id.* The powers granted municipalities under Article XVIII of the Ohio Constitution are subject to the restrictions or limitations contained in any other provision in the Constitution. *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 88, 100 N.E.2d 225, 229 (1951).

As written, Article XVIII § 6 limits Hamilton's sale of electricity to areas outside Hamilton's geographical limits. Sales by Hamilton to the Added Area are sales outside Hamilton's geographical limit. While R.C. §715.70 et. seq. authorizes municipal corporations and townships to enter into a contract to form a joint economic development district, R.C. §715.72(T)(1) does not authorize a municipal corporation to violate Article XVIII §6 of the Ohio Constitution.

Hamilton and Fairfield seek judgment on Duke's remaining claims arguing Duke lacks standing to assert the claims. Before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). The Ohio Supreme Court has defined standing as "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d550, ¶27 quoting Black's

Law Dictionary (8th Ed. 2004) 1442. To establish standing, "plaintiffs must show that they suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief". *Moore v. Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22; citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Duke, a utility regulated by the Public Utilities Commission of Ohio, is authorized to provide utility services to the Added Area by virtue of the Certified Territories Act. The 2nd Amended JEDD authorizes Hamilton to provide utility services to this same area. As Duke has a regulatory and economic interest is providing utility to service to the Added Area, its interest is affected by the 2nd Amended JEDD Agreement. Accordingly, Duke has standing to bring this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion for partial summary judgment of Plaintiff is hereby **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant City of Hamilton, Ohio's motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Fairfield Township and Board of Township Trustees of Fairfield Township motion for summary judgment is **DENIED**.

Judge
J. Gregory Howard
Common Pleas Court
Butler County, Ohio

SO ORDERED:

J. Gregory Howard, Judge

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