IN THE SUPREME COURT OF OHIO

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

FOURTH MERIT BRIEF OF APPELLEES/CROSS-APPELLANTS CITY OF CLEVELAND, CLEVELAND PUBLIC POWER, CUYAHOGA COUNTY, AND CITY OF BROOKLYN

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I. INTRODUCTION

This Court should reject Appellant/Cross-Appellee, the Cleveland Electric Illuminating Co.'s ("CEI") arguments because they lack merit. It is unfortunate that CEI (and its parent company, FirstEnergy Corp. ("FirstEnergy")) continue to attempt to use its economies of scale, financial and political advantages, favorable tax and regulatory treatment, and monopoly/market power to bully municipalities into not exercising their 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 under the guise of unfair competition. Recent events have highlighted the financial, political, and power advantages that CEI and FirstEnergy yield in this state and the tactics that CEI and FirstEnergy will use to get what they want at any cost, including putting others out of business or at a competitive disadvantage.[1] Allowing Appellees/Cross-Appellants, the City of Cleveland and Cleveland Public Power (collectively, the "City"), to operate a public utility in compliance with the plain language of the Ohio Constitution is not tantamount to unfair competition and certainly does not violate the Ohio Constitution. CEI's narrative about unfair competition, while a familiar tactic for CEI and FirstEnergy, is simply inaccurate and ultimately a distraction from the key question here, which is one of interpretation of the plain language of the Ohio Constitution.

[1] The 2019 Am.Sub.H.B. No. 6 scandal is the perfect example of the bullying tactics by FirstEnergy and its subsidiaries. *See State of Ohio v. FirstEnergy Corp., et al.*, Case No. 20-CV-6281 (Franklin Cty. Comm. Pl.); *USA v. Householder et al.*, Case No. 1:20-cr-00077-TSB (S.D. Ohio). *See also* Caniglia, *Statehouse Bribery Scandal Now in Cleveland, FirstEnergy's Dark Money Used to Attack CPP*, Cleveland Plain Dealer (Dec. 24, 2020) (available at 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).

The language of Sections 4 and 6 of Article XVIII of the Ohio Constitution is unambiguous. These Sections unequivocally grant authority to municipalities to own and operate a public utility under Home Rule: "A municipality's power to own and operate a public utility is ' * * * derived directly from the people, pursuant to the provisions of Sections 4 and 6 of Article XVIII of the Ohio Constitution, and not from the General Assembly.' . . . The General Assembly may not attempt to limit or restrict a municipality's power to operate a public utility." *City of Columbus v. Pub. Utilities Comm.*, 58 Ohio St. 2d 427, 431, 390 N.E.2d 1201 (1979) (quoting *State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313, 315, 148 N.E.2d 221 (1958)). And while there may be limitations inherent in a grant of authority, those limitations must be consistent with the plain language of the text and may not prohibit that which has been expressly authorized.

The facts before the Court on this appeal tell the story of a municipality that acted in accordance with the authority expressly granted to it in Sections 4 and 6 of Article XVIII of the Ohio Constitution and an electric distribution utility who seeks to rewrite the Ohio Constitution in order to unlawfully constrain those constitutionally authorized actions and garner a competitive advantage. Bottom line: CEI wants to be able to compete freely within the City's boundaries, but wants to prohibit the City from serving even one customer outside the City's boundaries.

The City operates a public utility "the product or service of which is . . . supplied to the municipality or its inhabitants" and the City contracts with others for such products or services as authorized by Section 4 of Article XVIII of the Ohio Constitution. All of the City's purchases of electricity were used in part or in whole to supply residents. Section 6 of Article XVIII of the Ohio Constitution provides that while operating a public utility for the purpose of supplying electricity to the municipality or its inhabitants, it "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 . . . ." Ohio Const., Art. XVIII, § 6. And, as CEI acknowledges, the City's sales to nonresidents totaled a mere 3 percent of its sales within the City's boundaries. (*See* CEI's First Merit Brief at 12; Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 37). The sales to customers outside the City's boundaries do not even threaten to approach the limitation expressly set forth in Section 6 of Article XVIII of the Ohio Constitution enabling sales of utility surplus service or product in an amount equaling up to 50 percent of the total supplied within the municipality. Indeed, there is really no question that the primary purpose of the City's public utility operation is to supply the municipality and its inhabitants. Serving 3 percent of its surplus product outside its municipal boundaries can in no way be seen as the City operating a "general public-utility business outside of their boundaries in competition with private enterprise." (CEI's Third Merit Brief at 7 (citing *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288, 292–293, 737 N.E.2d 529 (2000) (quoting *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461, 159 N.E.2d 741 (1959))). If that is the City's competitive business model, it has failed miserably and is not really a threatening competitor to anyone, let alone CEI, a subsidiary of a large corporation FirstEnergy, that serves two-thirds of the City's residents within the City's boundaries.

Because no violation of the Constitution by the City exists, CEI is forced to seek to have this Court expand its narrow ruling in *Toledo Edison* in such a way that it would (1) undermine the text and intent of the Ohio Constitution, (2), disregard the express language of the Constitution, and (3) invent a distinction between an intentional and accidental surplus that is not supported by the text. However, nothing more is needed than to read the constitutional text and this Court's interpretation of the text, which demonstrate that the trial court accurately held that the City's actions were constitutional.

II. ARGUMENT IN SUPPORT OF THE CITY'S PROPOSITION OF LAW

The City's Proposition of Law sets forth the holding of *Toledo Edison* and the correct statement of Ohio Constitutional law:

> Proposition of Law No. 1: A Municipal Corporation Has The Right To Sell Electricity To Extraterritorial Customers So Long As The Amount Sold To Extraterritorial Customers Does Not Exceed Fifty Percent Of The Total Electricity Consumed Within The Municipal Corporation's Limits, And So Long As The Municipal Corporation Does Not Purchase Electricity Solely For The Purposes Of Reselling The Entire Amount Of That Electricity Extraterritorially.

As discussed below, the City has complied with the constitutional requirements of Sections 4 and 6 of Article XVIII of the Ohio Constitution.

A. The Ohio Constitution Permits Transactions That Will Supply, at Least in Part, the Municipality or Its Inhabitants, Even if the Transactions Also Supply Customers Outside the Municipality's Boundaries

The question of whether electricity purchases that are not solely for the purpose of reselling the entire amount extraterritorially are constitutional is a question of constitutional interpretation, which begins with *reading* the text, not rewriting the text as CEI asks this Court to do. In its Third Brief, CEI asserts that Section 4 says something that neither the text itself nor this Court's interpretation of the text has said. CEI writes: "[a]s a core constraint on their powers under the Ohio Constitution, municipal utilities may *only* buy electricity that 'is or is to be supplied to the municipality or its inhabitants.' Appx. 49 (Ohio Constitution, Article XVIII, Section 4)." (Emphasis added.) (CEI's Third Merit Brief at 1). The actual text states:

> (4) Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service.

Ohio Const., Art. XVIII, § 4. By adding the "only" before quoting a portion of Section 4 of Article XVIII of the Ohio Constitution, CEI changes the meaning entirely. Saying "you may marry

someone from Idaho" is very different from "you may *only* marry someone from Idaho;" saying "you may have chickens as pets" does not have the same meaning as "you may *only* have chickens as pets;" and saying a "municipality may . . . operate a public utility the product or service of which is or is to be supplied to the municipality or its inhabitants" is a far cry from municipal utilities "may only" buy electricity that is to be supplied to the municipality or its inhabitants.

When this Court interpreted Section 4 of Article XVIII of the Ohio Constitution, it did not insert an "only" in Section 4, rather it found that Section 4 "intends to limit a municipality's authority to produce or acquire electricity primarily for the purpose of serving it or its inhabitants' needs." *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288, 292, 737 N.E.2d 529 (2000). As a result, this Court, reading Sections 4 and 6 of Article XVIII of the Ohio Constitution *in pari materia*, explained that the Constitution did not require purchases to be made *only* to supply a municipality and its residents, but rather required a municipality to "purchase electricity *primarily* for the purpose of supplying its residents and reselling only surplus electricity from that purchase to entities outside the municipality." (Emphasis added.) *Id.* The term "primarily," by definition, ranks something first among multiple, and requiring that purchases be "primarily" for one purpose acknowledges that it may be secondarily for another purpose. As a result, not only is there nothing to support CEI's assertion that purchases must solely or only be for the purpose of supplying the municipality or its residents, both the text of the Ohio Constitution and this Court's interpretation of the Constitution foreclose such an assertion. Purchases that are primarily for the purpose of supplying the municipality or its residents are constitutional whether or not they include a surplus.

On the other hand, pursuant to *Toledo Edison*, purchases made "solely" for the purpose of reselling the entire amount of the purchased electricity outside of the municipality were not primarily for the purpose of supplying the municipality or its residents. *Toledo Edison* explained

that construing Sections 4 and 6 of Article XVIII of the Ohio Constitution *in pari materia*, "necessarily precludes a municipality 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*, 90 Ohio St. 3d at 292. While CEI dislikes the fact that the Court used the words "entire amount,"[2] those terms are consistent with all of the other language in that opinion explaining that a transaction is unconstitutional if the purchase is "solely" for the purpose of resale outside the municipality (*i.e.*, the entire amount was purchased explicitly for resale outside the municipality). CEI claims that the "entire amount" language from *Toledo Edison* would permit municipalities to manipulate purchases to comply with the letter of the law while still purchasing surplus electricity. (CEI's Third Merit Brief at 5-6). However, as discussed further below, the text of the Ohio Constitution already has a safeguard that prevents the City from selling too much electricity outside its boundaries: it limits the sale of surplus electricity outside a municipality's boundaries to 50 percent of what is supplied within the municipality's boundaries. In using the words "entire amount" and "solely" for the purpose of resale, it appears that the Court carefully chose those words to comport with the letter of Sections 4 and 6 of Article XVIII of the Ohio Constitution.

CEI argues that Section 4 of Article XVIII of the Ohio Constitution "clearly forbids" the purchase of "excess product on purpose." (CEI's Third Merit Brief at 18). However, nothing in the plain language of the Ohio Constitution forbids the purchase of excess product and, in fact, this Court concluded that Sections 4 and 6 of Article XVIII of the Ohio Constitution permit "a

[2] CEI's Third Merit Brief at 3 (stating "The Cross-Appeal urges a new and unworkable 'entire amount' standard for Section 6 surplus.") and 5-6 (stating "Citing no constitutional or practical rationale, the Cross-Appeal urges this Court to adopt an 'entire amount' rule to identify artificial surpluses.")

municipality to purchase electricity primarily for the purpose of supplying its residents and reselling only surplus electricity from that purchase to entities outside the municipality." *Toledo Edison*, 90 Ohio St. 3d at 292. A municipality can only resell surplus "from that purchase" if that purchase included a surplus. In addition, as discussed further below, nothing in the text of Sections 4 and 6 of Article XVIII of the Ohio Constitution suggests that a surplus must be acquired "accidentally" as CEI suggests. (CEI's Third Merit Brief at 36). Nor is there any basis for imposing a duty on municipal utilities to avoid acquiring a surplus. Contrary to CEI's assertions in support of its own propositions of law,[3] there is no affirmative duty to avoid a surplus either in the text of the Ohio Constitution or in *Toledo Edison.*[4] As a result, CEI's arguments as to whether the City could have avoided its 3 percent surplus by reallocating purchases and avoiding purchases smaller than that amount are irrelevant and inconsistent with how the industry operates and obligations that a utility must satisfy when delivering electric service, including generation, distribution, and transmission, to customers. (CEI's Third Merit Brief at 14-15). Rather than inventing a requirement that municipalities refrain from acquiring a surplus intentionally or inventing a requirement that municipalities avoid any surplus, the Court in *Toledo Edison* decides that the key to constitutionality is whether a municipal utility is acting primarily to further its Section 4 of Article XVIII of the Ohio Constitution purpose of supplying itself or its inhabitants.

[3] CEI's First Merit Brief at 19-20; CEI's Third Merit Brief at 26.

[4] In the past, this Court has declined to create new meanings for Sections 4 and 6 of Article XVIII of the Ohio Constitution beyond their textual construction. For example, the Court has found that the provisions only create the authority, not the obligation, for municipal utilities to serve extraterritorial customers. *See Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty.*, 36 Ohio St.3d 85, 90, 521 N.E.2d 818 (1988), *citing State, ex rel. Indian Hill Acres, Inc., v. Kellogg*, 149 Ohio St. 461, 79 N.E.2d 319 (1948). Similarly, in the present case, CEI asks the Court to insert a new provision into Sections 4 and 6 of Article XVIII of the Ohio Constitution that has no basis in textual construction.

This requirement applies to individual transactions because it arises from the grant of authority to municipalities to enter into contracts under Section 4 of Article XVIII of the Ohio Constitution. Section 4 of Article XVIII of the Ohio Constitution sets forth the overall purpose of a utility that may be operated by a municipality, and it grants municipalities the authority to contract with others for products or services that supply the municipality or its inhabitants. We know from the text of Section 6 of Article XVIII of the Ohio Constitution that a utility acting for the purpose of supplying itself and its inhabitants "may also" sell a surplus, so it is not possible to read a general absence of authority to possess a surplus into Section 4 of Article XVIII of the Ohio Constitution. However, because Section 4 of Article XVIII of the Ohio Constitution grants municipalities authority to enter a contract, that may imply an absence of authority to enter a contract unless such contract is for a product or service to be supplied to the municipality or its inhabitants: "Any municipality . . . may contract with others for any such product or service." Ohio Const., Art. XVIII, § 4. As a result, in interpreting Sections 4 and 6 of Article XVIII of the Ohio Constitution, it appears that this Court in *Toledo Edison* applied the not-solely-for-the-purpose-of-resale limitation to the power of the municipality to enter contracts or agreements to purchase: "This interpretation necessarily precludes a municipality 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*, 90 Ohio St. 3d 288 at 292. Therefore, *Toledo Edison* considers whether the sole purpose of a transaction is to resell the entire amount of the surplus extraterritorially.

In contrast, the Eight District declined to look at individual transactions to see if the entire amount was for resale, rather it held that "a municipality violates the Ohio Constitution if it purposely purchases more electricity than it needs for its inhabitants 'solely' so that it can resell

electricity to customers outside its municipal boundaries . . ." (City Appx. 0027). In considering whether the City "purposely purchases more electricity than it needs" overall, the Eighth District was looking at the purpose of the *surplus* rather than the purpose of the *contract*. There is no basis in Section 4 or 6 of Article XVIII of the Ohio Constitution for that type of a limitation on a surplus, and, Section 6 of Article XVIII of the Ohio Constitution expressly provides that a municipality 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 . . . the surplus product* [not exceeding 50 percent]." (Emphasis added.) Ohio Const., Art. XVIII, § 6. Therefore, there is no constitutional basis for finding that a purchase of more electricity than needed, *i.e.*, a surplus, conflicts with the "purpose of supplying . . . the municipality or its inhabitants." *Id.* In contrast, *Toledo Edison* correctly considered the purpose of a purchase based on the grant of authority to a municipality to contract under Section 4 of Article XVIII of the Ohio Constitution, and concluded that if a contract is solely for the purpose of resale of the entire amount outside of the municipality, it could not also be for the purpose of supplying the municipality and its residents and therefore has not been authorized under Section 4 of Article XVIII of the Ohio Constitution.

To the extent that the Court intends the "primarily for the purpose of" and "solely for the purpose of" language to essentially look at the *mens rea* of the municipal utility – what the intention of the municipality was when entering a given transaction – then the Eighth District's decision to look at the purposes of each purchase would naturally follow. However, *Toledo Edison* did not signal an intention for lower courts to engage in the type of difficult line drawing and expensive fact finding that both Appellants and Appellees have cautioned against (CEI's First Merit Brief at 3; City's Second Merit Brief at 1-2). Instead, *Toledo Edison* appears to have contemplated a narrow ruling limited to the facts before it in that case where multiple

municipalities jointly purchased electricity (to avoid any one municipality from violating the 50 percent limitation) for the sole purpose of reselling the entire amount of the electricity to one customer outside their boundaries. Specifically, the Court did not remand for the trial court to determine whether the electricity purchased was *partially* for the purpose of resale outside the municipality, but rather held that "determination of this issue requires fact-finding by the trial court as to whether the electricity purchased by the municipalities herein was *solely* for the purpose of resale to an entity outside the geographic boundaries of the municipalities." (Emphasis added.) *Toledo Edison*, 90 Ohio St. 3d 288 at 293. In other words, to the extent that a purchase is made in part to supply those within the boundaries of the municipality, the purchase is not solely for the purpose of resale to non-residents and would be permitted by Section 4 of Article XVIII of the Ohio Constitution.

In the present case, by entering into various contracts, each of which supplied electricity to the City and its residents, and by only selling the surplus amounts (if any) of electricity to customers outside the municipality's boundaries after the needs of the City and its residents were met, and because sales outside the municipality's boundaries only amounted to 3 percent of its sales within the City's limits, the City's actions conform with both Sections 4 and 6 of Article XVIII of the Ohio Constitution.

B. Selling Surplus Service or Product below the 50 Percent Constitutional Limitation Does Support the Primary Purpose of Serving the City and Its Residents

Inherent in each of CEI's arguments is the assumption that sales of surplus services or products are in tension with the proper purpose of municipal utilities and should only be permitted where unavoidable. This assumption is not supported by the text of the Ohio Constitution. As discussed above, the language of Section 6 of Article XVIII of the Ohio Constitution explicitly

provides that a municipality "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" surplus service or product to customers outside the municipal boundaries. (Emphasis added.) Ohio Const., Art. XVIII, § 6. Supplying the municipality and its inhabitants and selling surplus services or products extraterritorially are not mutually exclusive – rather they are constitutionally compatible. Likewise, Section 4 and Section 6 of Article XVIII of the Ohio Constitution together demonstrate that the sale of surplus services or products can be within the municipality's grant of authority in Section 4 of Article XVIII of the Ohio Constitution. In fact, rather than being in tension, Sections 4 and 6 of Article XVIII of the Ohio Constitution indicate that the sale of a surplus service or product can be consistent with (and perhaps even advance) the primary purpose of serving the municipality and its residents. This is consistent with CEI's discussions of the framers' intent regarding surplus.

CEI's briefs point to the intent of the framers to allow municipalities to sell surplus electricity in order to finance the construction of plants large enough to meet their future needs. CEI argued that the original purpose of Sections 4 and 6 of Article XVIII of the Ohio Constitution was to permit municipalities to "mitigat[e] the capital risk attendant to entering the utility business." (CEI's First Merit Brief at 5). Each municipality was able to generate more power than it needed to serve its inhabitants and to sell that power to customers outside the city:

> The framers endowed each municipal utility with the right to sell excess electricity – power that it generated with new facilities but did not currently need to serve inhabitants. The associated revenue from customers outside the city, during the years when generated power exceeded in-city demand, would allay the substantial capital investment required to develop or acquire by condemnation a complete municipal utility.

(CEI's First Merit Brief at 5-6). While CEI has backed away from this argument somewhat in its Third Brief, critiquing the City's use of the word "intentionally" to describe the choice that the

framers were permitting municipal utilities to make to generate a surplus to help finance their primary goal of serving demand within the municipality's boundaries in the near future, they ultimately reach the same conclusion. In the example that CEI gives on page 22 of its Third Merit Brief, the municipality breaking ground in 1917 did not *accidentally* generate a surplus, rather it intentionally chose to run at full capacity rather than partial capacity in 1922 (even before the municipality reached the need forecast for 1930) in order to generate a profit that would help pay for the cost of the plant. As CEI ultimately states: "Resale is allowed to help offset the initial investment in a power plant that is large enough to serve actual in-city demand foreseeable in the near future." (CEI's Third Merit Brief at 23). Even though the example above is of an intentional surplus, the impact of that example is the same whether it is described as "accidental" or "intentional." The surplus sold had the same impact on competition whether it was intentional or not. The impact on competition primarily depends upon the amount of surplus sold, which is exactly what the Constitution limited.

Additionally, CEI's example focuses only on the energy generated and the surplus of energy. But Section 6 of Article XVIII of the Ohio Constitution contemplates and explicitly authorizes the resale of a utility service or surplus product. The purpose of constructing a power plant and/or entering into power purchase agreements for specific types or location of generating resources goes beyond generating and/or obtaining energy. The products and services that make up electric service include, among other items, capacity, energy, losses, transmission service and transformation. On the retail level, transmission (including transformation), distribution service, and billing and metering are provided and billed to customers. Each of those services are affected to some degree by the economies of scale described in CEI's example. Among other electric service components, the Ohio Revised Code recognizes generation, transmission, distribution

metering and billing as separate products and services. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 8-9).

Unlike CEI, the City continues to provide bundled distribution, generation, and transmission electric services through its own distribution and transmission systems. The City's generation supply portfolio is comprised of resources that provide reliable and competitively-priced *capacity and energy* to its customers. It consists of a diverse mix of resources, including new, state of the art coal-fired, natural gas-fueled, hydroelectric, bioenergy, solar, and wind generation. (Trial Dkt. 59 (10/26/18), Exh. A at 22). The City has committed to these generation resources and generation projects for the purpose of: (i) securing long-term stable sources of power; (ii) exploring local generation opportunities where transmission congestion costs are mostly avoided; (iii) mitigating the costs of meeting its resource adequacy obligations; and (iv) diversifying its generation supply portfolio and increasing its supply of renewable energy. (*Id.* at 22-23).

The City's generation supply portfolio also consists of a variety of market energy purchases of various quantities and terms from a variety of wholesale market-based suppliers. (Trial Dkt. 59 (10/26/18), Exh. A at 24). Residents within the City's municipal boundaries can and do switch between the City and CEI for electric service (and require the provision of all components of that electric service if switching to the City). (*Id.* at 32). And, at any given time, the City needs to be prepared to and have access to serve all of its customers with a sufficient amount of electricity (including all components such as energy and capacity) to fulfill their electricity needs plus a reserve margin. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶¶ 12, 31). As a result, these types of purchases are made in furtherance of the City's primary purpose of serving its residents within its boundaries.

C. An "Accidental" Surplus of 49 Percent Is Not More Constitutional Than An "Intentional" Surplus of 3 Percent

CEI has raised concerns about unfettered competition between municipal utilities and public utilities. Unfettered competition is not solved by creating an artificial distinction between an "intentional" surplus and an "accidental" surplus – it is solved with a numerical limitation. In their wisdom, the framers of the Ohio Constitution specifically included such a safeguard to make sure that the primary purpose of municipal utilities would be to serve itself and its residents: the 50 percent limit on surplus sales outside the municipality's boundaries. When interpreting the Ohio Constitution, courts are to give meaning to every word in a provision where possible. *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 521, 644 N.E.2d 369 (1994). "It is axiomatic in statutory construction that words are not inserted into an act without some purpose." *State ex rel. Carmean v. Bd. of Ed. of Hardin Cty.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960). The text of Section 6 of Article XVIII of the Ohio Constitution has a 50 percent limitation on sales of surplus services and products to customers outside the municipality's boundaries, so that number must have a purpose. The framers could instead have stated that municipal utilities could sell only an inadvertently generated surplus, or they could have included a 10 percent limitation or a 20 percent limitation. They did not. The framers could have prohibited municipalities from selling to customers outside their boundaries. They did not. The framers chose a 50 percent limitation, which effectively ensured that at least two-thirds of sales would be to the municipality or its residents. The framers gave municipal utilities the explicit right to sell and compete for customers outside their boundaries so long as the municipal utilities followed the constitutional limitation. As a result, most of Ohio's municipal electric systems provided, and continue to provide, extraterritorial service and have served those customers, along with other municipally-owned facilities such as water and wastewater facilities, for decades. Contrary to CEI's claims, any

competitive losses or gains that it has experienced through the years have been recognized by the financial rating agencies and their investors, and the regulatory agencies' allowed rates of return should reflect this alleged risk. CEI's rates contain a rate of return that assumes competition with municipalities. If not subject to competition, than CEI's rate of return should be decreased.

Additionally, if the City's 3 percent surplus product were generated by a City-owned generating plant rather than a purchased product, its level of competition with public utilities would be neither more nor less than it is now. Rather, the protection from "unfettered competition" is found in Section 6 of Article XVIII of the Ohio Constitution. *See City of Cleveland v. Cleveland Elec. Illum. Co.*, 538 F. Supp. 1303, 1306 (N.D. Ohio 1980) ("It is clear, from the Court's first observation, that the framers sought to prevent municipal utilities from engaging in unlimited competition with private utilities. It is equally clear…that the method by which the framers sought to limit municipal utilities was by a restriction on outside sales to 50 [percent] of service it supplied within the city."). As a result, there is no basis for prohibiting purchases that result in some surplus product, as long as each purchase is not solely to supply customers outside the municipality's boundaries and as long as the total surplus complies with the 50 percent limitation.

Further, as explained above, the City's generation supply portfolio, including market energy purchases, was created to provide reliable and adequate electric service (including all components of electric service) to its customers. To accomplish that goal, the City must commit to generation resources and products that: (i) secure long-term stable sources of power; (ii) avoid transmission congestion costs by securing localized generation; (iii) mitigate costs associated with meeting the City's resource adequacy obligations; and (iv) diversify the City's generation supply portfolio (Trial Dkt. 59 (10/26/18), Exh. A at 22-23).

Moreover, Ohio law gives municipal utilities the ability to earn a profit and compete against other electric distribution utilities. "When a municipal corporation chooses to operate a public utility pursuant to a constitutional grant of authority, it functions in a proprietary capacity and is entitled to a 'reasonable profit.'" *Orr Felt Co. v. Piqua,* 2 Ohio St. 3d 166, 170, 443 N.E.2d 521 (1983), *citing Niles v. Union Ice Corp*., 133 Ohio St. 169, 181, 12 N.E.2d 483 (1938). Thus, as long as a municipal utility operates within the specifically enumerated limitations of the Ohio Constitution, it is free to compete as it sees fit against other electric distribution utilities.

Toledo Edison's holding is consistent with this conclusion. While there is certainly language in *Toledo Edison* suggesting that municipal utilities should not be permitted "unfettered authority" to compete with business outside their boundaries, the actual holding of *Toledo Edison* is limited again and again to the constitutionality of purchases that are "solely for the purpose of reselling" outside the municipality's boundaries:

- "We are asked to determine whether a municipality has constitutional authority to purchase electricity *solely for direct resale* to an entity that is not an inhabitant of the municipality and not within the municipality's limits." (Emphasis added.) *Toledo Edison,* at 291.

- "The question is whether a municipality can use this constitutional authority to purchase electricity *solely for the purpose of reselling it* to an entity outside the municipality's geographic boundaries." (Emphasis added.) *Id.*

- "This interpretation necessarily precludes a municipality 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." (Emphasis added.) *Id.* at 292.

- "Thus, we hold that Sections 4 and 6 of Article XVIII of the Ohio Constitution, read *in pari materia,* preclude a municipality from purchasing electricity *solely for the purpose of reselling it* to an entity that is not within the municipality's geographic limits." (Emphasis added.) *Id.* at 293.

- "This prohibition includes a de facto brokering of electricity, *i.e.,* where a municipality purchases electricity *solely to create an artificial surplus for the*

purpose of selling the electricity to an entity not within the municipality's geographic boundaries." (Emphasis added.) *Id.* at 293.

- "Ultimately, determination of this issue requires fact-finding by the trial court as to whether the electricity purchased by the municipalities herein was *solely for the purpose of resale* to an entity outside the geographic boundaries of the municipalities." (Emphasis added.) *Id.* at 293.

This intentional repetition makes it clear that a purchase must be "solely for direct resale" outside of the municipality's boundaries in order to be unconstitutional under *Toledo Edison.*

CEI cites to the language in *Toledo Edison* to suggest that any purchase and sale of a surplus would make the City an unconstitutional, *de facto* broker, but that is not what *Toledo Edison* says. The actual decision once again limits unconstitutional, *de facto* brokering to purchases that are "solely" to create an artificial surplus for the purpose of reselling to an entity outside the municipality's boundaries:

> In other words, a municipality is prohibited from in effect engaging in the business of brokering electricity to entities outside the municipality in direct competition with public utilities. This prohibition includes a de facto brokering of electricity, *i.e.,* where a municipality purchases electricity solely to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries.

Toledo Edison, 90 Ohio St. 3d 288, 293. In contrast with the Court's generous use of the word "solely," this is the only instance of the word "artificial" in the opinion, and does not suggest that the Constitution intended to draw a line between an artificial and a naturally occurring surplus when there is no such language in the Constitution. Indeed, the Court concluded its opinion, not by directing the trial court to make findings of fact as to whether any surplus was artificial, but by directing the trial court to determine "whether the electricity purchased . . . was solely for the purpose of resale to an entity outside the geographic boundaries of the municipalities," and in the context of the rest of the opinion, it is clear that was a determination of whether the entire amount was for resale extraterritorially. As a result, there is no basis for looking into whether a

municipality realized that a purchase would result in a surplus or whether a municipality could avoid a surplus, but merely (1) whether individual purchases, on their face, comply with Section 4 of Article XVIII of the Ohio Constitution by not being solely for resale to non-residents and (2) whether all sales to non-residents comply with Section 6 of Article XVIII of the Ohio Constitution by totaling 50 percent or less of the total utility service or product supplied within the municipality.

By requiring municipal utilities to limit the resale of surplus to not more than half of what they sell within their boundaries, the Constitution places a bright line limitation that requires municipal utilities to devote the bulk of their attention to the needs within their boundaries no matter how the sales are structured. Here, the City more than complies with the 50 percent limitation, selling surplus electricity totaling a mere 3 percent of its sales within the municipality's boundaries, and operates within its express Constitutional authority.

III. CONCLUSION

For the foregoing reasons, this Court should deny CEI's Appeal and grant the Appellees' Cross-Appeal, thereby reversing the Eighth District's Decision and reinstating judgment as a matter of law in favor of the City.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of December, 2020, a true copy of the foregoing Fourth Merit Brief of Appellees/Cross-Appellants City of Cleveland, Cleveland Public Power, Cuyahoga County, and City of Brooklyn was served by regular U.S. mail, postage prepaid, and electronically upon the following:

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