**IN THE SUPREME COURT OF OHIO**

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| The Cleveland Electric Illuminating Company, | ) | |
| Appellant/Cross-Appellee, | ) | Case No. 2020-0277 |
| -vs- | ) | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District |
| City of Cleveland, et al., | ) | |
| Appellees/Cross-Appellants. | ) | |

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# THIRD MERIT BRIEF
# FILED BY APPELLANT/CROSS-APPELLEE THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**CONSTITUTIONAL PROVISIONS**



**STATUTES**

## INTRODUCTION

Every year, Appellee/Cross-Appellant the City of Cleveland ("CPP") buys tens of millions of kilowatt-hours of electricity solely for the purpose of reselling it to customers outside Cleveland. If it were not serving those non-municipal customers, CPP would not buy those kilowatt-hours, for any reason. No one expects at any time that those kilowatt-hours might be delivered or consumed within city limits.

As this Court explained in 2000, such *de facto* brokering outside city limits by a municipal utility violates the law of Ohio as it has stood since 1912. As 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). CPP seeks with its Cross-Appeal to eliminate that constitutional constraint.

Erasing the limiting language from Article XVIII, Sections 4 and 6 — whether directly through the Cross-Appeal or indirectly through affirmance of the Eighth District's novel "other purposes" theory of municipal power — would give Ohio's 85 municipal utilities free rein to target preferred customers anywhere in the state; to sign them up by undercutting the rates carefully set by the Public Utilities Commission of Ohio ("PUCO"); and then to acquire and resell artificial surpluses of electricity to supply those customers. That is exactly the competition that this Court and the framers identified as presumptively "unfair." *Toledo Edison Co. v. City of Bryan*, 90 Ohio St. 3d 288, 293, 737 N.E.2d 529 (2000); 2 *Proceedings and Debates of the Constitutional Convention of the State of Ohio* 1862 (Day 77) (1912) ("Competition under such conditions is morally wrong and most unfair * * * ."). And it flies in the face of the clear limitation set by Article XVIII: namely, that all municipal-utility operations must be undertaken to supply the city and its inhabitants. A surplus acquired for delivery outside the city is "artificial," and the Constitution does not authorize its acquisition or resale. *Toledo Edison* at 293.

Nothing in the Second Merit Brief of CPP (the "Response") justifies a change to the meaning of the Ohio Constitution or to this Court's clear mandate against "artificial surplus" as a way to circumvent the constraints of Article XVIII. Although CPP strives to link its purchasing "portfolio" with its true agenda as an electricity broker, the Response never explains how CPP complies with Section 4's procurement constraint. CPP's side agendas in purchasing are irrelevant to that question. CPP's procurement mix could be exactly the same if it simply bought marginally fewer kilowatt-hours — achieving whatever reliability level and diversity of sourcing it prefers — then delivered all that product within city limits. Indeed, the expert testimony is uncontroverted: given the choices CPP has made as a market participant, there is no reason it should ever have electricity in excess of what Cleveland uses. (CEI's Motion for Summary Judgment ("CEI MSJ"), Dkt. 90, Ex. A, Affidavit of Brian Farley ("Farley Aff."), ¶ 4.) The Response's discussion of extra "resources" or "capacity," rather than actual kilowatt-hours of electricity, is misleading.

Since at least early 2018, CPP has openly disregarded *Toledo Edison*. In March of that year, its then-Commissioner, Ivan Henderson, wrote to a potential customer outside Cleveland and misrepresented the governing law on the legality of sales outside the city. (CEI MSJ, Dkt. 90, Ex. W, Henderson Letter.) Citing an inapposite forty-year-old federal case instead of the 2000 holding of this Court, CPP falsely depicted a legal regime in which it could sell hundreds of millions of kilowatt-hours anywhere in the state, without constitutional constraints. CEI brought its claims here in response, to enforce the letter of the Ohio Constitution and this Court's clear interpretation of it.

With its Cross-Appeal and its embrace of the Eighth District's unfounded "other purposes" doctrine, CPP now asks to make the real world conform to the fictional one that Commissioner Henderson envisioned. To do so would require gutting a twenty-year-old precedent and rewriting

Article XVIII. The Court should decline the invitation; reaffirm its prior holdings; and continue its long tradition of rejecting municipal utilities' attempts to circumvent constitutional limits. A municipal utility, which exists to serve in-city demand, may not refashion itself as a "de facto broker" of utility products outside city limits. *Toledo Edison*, 90 Ohio St. 3d 288 at 293, 737 N.E.2d 529.

## ARGUMENT IN OPPOSITION TO CPP'S PROPOSITION OF LAW

*CPP's Proposition of Law:* A Municipal Corporation Has The Right To Sell Electricity To Extraterritorial Customers So Long As the Amount Sold to Extraterritorial Customers Does Not Exceed Fifty Percent Of The Total Electricity Consumed Within The Municipal Corporation's Limits, And So Long As The Municipal Corporation Does Not Purchase Electricity Solely For The Purposes Of Reselling The Entire Amount Of That Electricity Extraterritorially.

The Cross-Appeal urges a new and unworkable "entire amount" standard for Section 6 surplus. Relying correctly on Article XVIII and this Court's governing precedent, the Eighth District flatly rejected that proposal as irreconcilable with both of them. Appx. 25–26 (¶ 34–35) (holding that *Toledo Edison's* holding is "clear": selling artificial surplus outside the city is forbidden "*regardless* of whether * * * the municipality purchased [that] excess electricity in order to resell 'the entire amount' " outside city limits) (emphasis added). CPP's Proposition of Law would effectively erase language from the Ohio Constitution that this Court has called "critical." *See Toledo Edison*, 90 Ohio St. 3d at 293, 737 N.E.2d 529 (underscoring the importance of the constitutional term "surplus" in Section 6).

### A. The Eighth District Correctly Rejected CPP's Misreading of Article XVIII and *Toledo Edison*.

Article XVIII creates two constraints on municipal-utility activity outside city limits, and both of them must be given effect. ***First***, Section 6 strictly forbids resale outside city limits, even of true surplus, if it exceeds a certain quantity. ***Second***, Sections 4 and 6, together and separately, both prohibit acquisition of any amount of product by a municipal utility unless that product is "to

be supplied to the municipality or its inhabitants." Ohio Const., Art. XVIII, Sections 4 and 6. As CPP admits, this language plainly contemplates resale outside city limits only if product initially acquired for delivery and use within the city later "becomes surplus." (Resp. at 20.) The corollary is clear: a surplus must come from product acquired to supply the municipality or its inhabitants, and may not be created on purpose. A municipal utility violates Article XVIII whenever it chooses to acquire electricity — in any amount — that is *already* identified as surplus at the time of purchase.

Heeding this Court's precedent and the plain constitutional text, the Eighth District properly rejected CPP's proposal to render Article XVIII's language meaningless.

### 1. CPP's Misreading Would Gut Section 6 by Effectively Overruling *Toledo Edison*.

*Toledo Edison* is the authoritative interpretation of Article XVIII, Sections 4 and 6. CPP seeks to have the precedent overruled, whether explicitly or in effect. To that end, the Response misreads both the case and the Ohio Constitution.

#### a. *Article XVIII Sets a Constraint Besides the 50-Percent Limitation: Electricity Resold Outside City Limits Must Be Genuine "Surplus"*

CPP has abandoned its primary argument, which was the original basis for its Proposition of Law on the Cross-Appeal. CPP argued in its first filing in this Court (as it did repeatedly below), that "the fifty percent limitation regarding the total service or product is the *only* constitutional restriction imposed upon municipal utilities for its extraterritorial sales." (CPP Mem. in Supp. of Jurisdiction at 25 (emphasis in original).) This theory was the basis for CPP's conduct as of 2018, and essentially amounted to the pretense that *Toledo Edison* never existed or had been overruled. But not even CPP's *amici* could support this claim. (*See* Mem. in Support of Cross-Appeal of *Amicus Curiae* AMP ("AMP Mem.") at 16 (acknowledging "two legitimate constraints" to Section 6 resale).) As the Court of Appeals recognized, "Section 6 does not simply authorize a

municipality to sell 'product' outside its municipal boundaries up to the fifty percent limitation; it authorizes municipalities to sell a certain amount of *'surplus'* product." Appx. 25 (¶ 33). (Emphasis added.)

CPP has now dropped its primary argument. It concedes that its Section 6 power to sell its product outside city limits is "subject to *two* restrictions." (Response at 9.) The Constitution limits what a municipal utility may resell outside the city based both on quantity and on the nature of the product. It must be a cognizable Section 6 "surplus."

Having abandoned its primary basis for the Cross-Appeal, CPP's fallback agenda is now to redefine "surplus" in a way that somehow excuses its opportunistic expansion outside city limits.

b. *A Surplus Is Artificial unless the Product Was Acquired to Supply In-City Demand*

The question in *Toledo Edison* was whether any and all extra electricity a municipal utility acquires, beyond that supplied within the municipality, should automatically be deemed a Section 6 "surplus" eligible for resale outside the city. This Court said no. Under Article XVIII, municipal utilities are not allowed to acquire electricity without an anticipated in-city use for it. Thus extra electricity that is acquired solely for customers outside the city, even if the municipality arbitrarily labels it "surplus" when reselling it outside the city, violates the Constitution.

If not acquired for the purpose of in-city use, a surplus is "artificial" and constitutionally illegitimate for resale outside the city. Thus the *Toledo Edison* holding stated a rule of law: "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." *Toledo Edison*, 90 Ohio St. 3d at 293, 737 N.E.2d 529. This rule applies to any amount of extra electricity, no matter how the transaction is structured. But CPP wants to replace this rule with a much narrower one. (*See* Resp. at 6 (claiming

that *Toledo Edison*'s analysis of the text "merely precluded purchases of electricity that the entire amount would be sold entirely [*sic*] extraterritorially").) Citing no constitutional or practical rationale, the Cross-Appeal urges this Court to adopt an "entire amount" rule to identify artificial surpluses. This rule, with which CPP would replace the *Toledo Edison* holding, has no basis in the text of Sections 4 and 6.

Under CPP's proposed new rule, a municipal utility can purchase electricity for any purpose, and its dealings will automatically be deemed legitimate unless the transaction constitutes a single block of power that is "entirely" destined for sale outside the city. Thus in CPP's view, as long as some token fraction (however small) of each of its purchase contracts is used within Cleveland, the Constitution authorizes CPP to deem all the remaining kilowatt-hours to be Section 6 "surplus product." (*See* Resp. at 41 (courts should only question a transaction if it is improper "in its totality").) The municipal utility will be immune from constitutional challenge, regardless of whether it bought that electricity for the constitutionally illegitimate purpose of brokering virtually all of it to customers outside the city.

CPP's misreading relies on a single phrase that appears in one place in *Toledo Edison* (not in any expression of the holding), where this Court applied to the facts of that case its reading of Article XVIII, Sections 4 and 6. In that sentence of the opinion, the Court explained that its "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. The Court of Appeals rightly saw that this is not *Toledo Edison*'s holding — it merely applies the rule to the facts alleged against the City of Bryan and its neighbors. Appx. 25 (¶ 34) (emphasizing the word "necessarily" as the key for interpreting this sentence, as an application of law to fact).

A city that does what the City of Bryan and its co-conspirators allegedly had done in the 1990s "necessarily" commits a constitutional violation. But *Toledo Edison*'s holding, by its terms, equally disallows many other violations arising from municipal brokering that differs in superficial form but not in substance. While other cities might create artificial surpluses in other ways, Sections 4 and 6 must be read to "comport[] with" the framers' "'inten[t] to … prevent … municipalities from entering into the general public-utility business outside their boundaries in competition with private enterprise.'" *Toledo Edison*, 90 Ohio St. 3d at 292–293, 737 N.E.2d 529 (quoting *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461, 159 N.E.2d 741 (1959)). As the record here reveals, even if CPP were obeying the "entire amount rule" (it is not), its conduct would violate Sections 4 and 6 based on the rule handed down in *Toledo Edison*. Even in a hypothetical scenario in which every purchase had some nominal in-city purpose, CPP's resales outside city limits would be improper. CPP cannot legitimize intentionally acquired surplus for brokering merely by adding on a few additional kilowatt-hours for in-city use.

The Court of Appeals read the precedent correctly, and it had no difficulty rejecting CPP's attempt to eliminate the logic of *Toledo Edison*. It found the holding of the 2000 case "clear": Sections 4 and 6 forbid "the creation of *any* 'artificial surplus' of electricity" to be sold outside city limits "*regardless* of whether * * * the municipality purchased excess electricity in order to resell 'the entire amount' of the purchased electricity outside its municipal boundaries." (Emphases added.) Appx. 35 (¶¶ 34–35). Under *Toledo Edison*, a municipal utility may not buy electricity, in any quantity, "solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits." *Toledo Edison* at 293; *see also id.* (defining "artificial surplus"). CPP disagrees with this 2000 result, but in 2020 its Cross-Appeal brief provides only six pages of argument in support of the alternative. (Resp. at 36–41.)

CPP contends that there should never be litigation over a municipal utility's "purpose" for acting — even though that is the test this Court laid down in *Toledo Edison*'s holding — and warns of dire consequences for the docket workload of Ohio's courts. (Response at 1.) CPP's proposed solution to the hypothetical onslaught of litigation (nowhere in evidence since 2000) is straightforward: total deference by all Ohio courts to the labels used by municipal utilities. (In one place, momentarily forgetting its change of strategy at the merits stage, CPP champions the idea that every city has a "Constitutionally protected right to sell electricity to customers outside the municipal bounds subject to the 50 percent limitation [only]." (Response at 3.)) In CPP's view, any justification for the acquisition of extra electricity will do, regardless of what Section 4 says: for example, CPP insists that excess electricity should be considered legitimate surplus if it comes from what any of the state's 85 municipal utilities deem to be "rational[], cost justified extensions of service inside and outside the City" that will help a utility realize its "entitle[ment] to a reasonable profit." (Response at 18.) That is not the law. *See Toledo Edison* at 290 (rejecting any claim of a "right to sell surplus electricity [where] the municipality bought the electricity for the purpose of resale").

CPP reveals its agenda almost immediately in the six pages it offers in support of its Cross-Appeal. According to its version of events, in *Toledo Edison*, "the Court" — that is, this Court — "*created* a very narrow exception to the broad Constitutional authorization to allow municipal utilities to sell excess service or products." (Resp. at 37 (emphasis added).) This is false. As explained in *Toledo Edison*, this Court's holding is an interpretation of the constitutional text, not a judge-made doctrine. This Court does not "create" constitutional law: it explains it based on the text. But CPP's formulation is a telling one. Only by casting the 2000 holding of this Court as

illegitimate — a judicial "creat[ion]" rather than the framers' intent as embodied in Sections 4 and 6 — can CPP sustain its Cross-Appeal.

Whether explicitly or implicitly, CPP aims to overrule *Toledo Edison*. Lacking a rationale for this outcome, CPP misrepresents the substance of the precedent, urging this Court to effectively eliminate what the Response misleadingly calls "the exception created by the Court in *Toledo Edison*." (Resp. at 38.) CPP suggests the surplus constraint should be diminished to apply "only when a municipal utility purchases electricity solely and specifically for resale of *the entire purchased amount* to a customer outside the municipal's boundaries." (*Id.* (emphasis added).)

This is wrong in two important ways. First, the Section 6 prohibition of de facto brokering explained in *Toledo Edison* was not "created" by this Court, but by the framers and by the Ohio citizens who adopted Article XVIII. Second, as the text shows, that prohibition applies whenever a municipal utility acquires product other than that which "is or is to be supplied to the municipality or its inhabitants." Appx. 49 (Ohio Constitution, Article XVIII, Section 4) (cited with emphasis in *Toledo Edison*, 90 Ohio St. 3d at 291, 737 N.E.2d 529). The Eighth District read it correctly, and declined to eliminate the constitutional language that dictated the result in *Toledo Edison*.

Despite CPP's labels, the rule against acquiring and reselling "artificial surplus" is not an "exception" to Sections 4 and 6. It arises from the text adopted by the framers and by Ohio's citizens. And this Court in 2000 did not "create[] an exception" to a constitutional principle; it enforced the rule that has been there, in black and white, since 1912. That rule forbids all artificial surpluses that municipal utilities might create.

c. *If CPP's Reading Were Adopted, Circumventing Toledo Edison's "Surplus" Requirement Would Always Be Extremely Easy*

CPP is fully aware that nothing would be left of *Toledo Edison* once its core holding is ignored — indeed, the Response claims that this would be fine, because the precedent supposedly

did not prohibit the conduct it clearly prohibited. (*See* Resp. at 40 ("Nor did the Court say that a municipal utility lacked authority to sell any artificial surplus.").) And CPP professes to be confused. Because it cannot find "clarity as to the meaning or restriction of a supposed 'artificial surplus,'" CPP urges the Court to develop a new reading of Article XVIII that would not "negatively impact municipal utilities." (Resp. at 41.) This true goal — total freedom of action for municipal utilities regardless of where they choose to operate — aptly describes the practical effect of CPP's proposed "entire amount" rule. It would eliminate the constraint the framers created.

To see the radicalism of CPP's proposed rewriting of Article XVIII, the Court need only envision a municipal utility that would like to serve a new customer outside the city, in the certified territory of a public utility. Under CPP's rule, the city knows that it cannot admit to buying an "entire amount" in a distinct "transaction" that will serve that customer. It *can*, however, purport to redirect some of its existing supply to that customer, then buy a new and supposedly distinct block of electricity to replace the amount no longer serving the city. Or it can identify a small customer within the city, and buy electricity on a daily basis that is purportedly split between the two destinations. CPP asks this Court to authorize all such sham arrangements — even though they are in every meaningful sense exactly the same as the "entire amount" transaction that CPP would acknowledge to be forbidden under its toothless new construction of the rule. (*See, e.g.*, Resp. at 21 (urging that "[i]f a municipality enters a contract for the purchase of electricity, and if *some* of that electricity is going to be used within the municipality," there is no constitutional violation) (emphasis added); *see also* Appx. 41 (trial court finding that, under the proposed rule, CPP "can manipulate their contracts and accounting procedures in such a way as to avoid the

constitutional limitations as to surplus").) Under CPP's proposed regime, no ingenuity will be needed to circumvent Section 6: the "surplus" requirement adopted by the framers will be gone.

d. *CPP's Arguments Were Made and Rejected in 2000*

Rather than citing evidence or law, CPP continually relies on the affidavit of John Bentine, who plays the role of its industry expert. But twenty years ago, Mr. Bentine was one of the attorneys who represented the municipal utilities in *Toledo Edison*. And CPP's arguments rehash the ones this Court considered and rejected the last time it addressed these issues. Tellingly, much of CPP's brief simply recapitulates the losing briefs, and the single-justice dissent, in *Toledo Edison*. *See, e.g.*, 90 Ohio St. 3d 288 at 295, 737 N.E.2d 529 (Hadley, J., dissenting) (contending that "a municipality has full and complete power to enter into whatever arrangement it deems necessary" for its utility).

CPP argues, for example, that it cannot be a *de facto* broker, as prohibited by *Toledo Edison*, because it is not a "broker" within the meaning of the Ohio Administrative Code. (*See* Resp. at 39.) This argument failed in 2000, but it appears here again. (*Compare* Brief of Municipalities in *Toledo Edison*, 2000 WL 34335447 at 8 (Mr. Bentine arguing municipal utilities cannot be brokers because they "take title to the electricity" in the process of circumventing Section 6)*, with* Resp. at 39 (the "City gains title to the power supplied" and does not technically qualify as a broker under the Code) (citing affidavit of Mr. Bentine).) In response to this theory in 2000, this Court pointedly used the phrase "de facto broker" to make it clear that technical, de jure broker status and legal definitions do not matter. *Toledo Edison*, 90 Ohio St. 3d 288 at 293, 737 N.E.2d 529; *see* "De Facto," Black's Law Dictionary (10th ed. 2014) ("1. Actual; * * * having effect even though not formally or legally recognized; 2. Illegitimate but in effect"). Indeed, CPP's argument about brokering falls apart completely when confronted with the language of *Toledo Edison* that disapproves of *de facto* brokering. CPP asserts baldly that "[t]he City is also not acting

as a de facto broker in that it is not participating in the direct resale of purchased electricity to any entity outside the municipality." (*Id.* (citing no evidence).) This sentence is simply and indefensibly false. The present litigation exists precisely because of CPP's direct resales to its 99 customers outside Cleveland.

In another place, CPP urges the Court to grant it plenary power because it is operating in what it labels a "proprietary" capacity. (Resp. at 9.) That theory, too, is a retread from twenty years ago. (*See* Brief of Municipalities in *Toledo Edison*, 2000 WL 34335447 at 21 (claiming "a municipality acting in a proprietary capacity has the same freedom of action as a private corporation," and should never be hindered by a court's reading of the law).) As it was wrong then, it is wrong today. (*See* Reply of Toledo Edison Co., 1999 WL 33841084 at 8 (explaining that all the cases Mr. Bentine cited in 2000, and that CPP cites here, "arise in the context of Section 4 cases involving internal municipal actions and service to inhabitants," not customers outside the city).) *See generally Beachwood v. Cuyahoga Cty. Bd. of Elections*, 167 Ohio St. 369, 370–371, 148 N.E.2d 921 (1958) (emphasis added) ("The power of local self-government granted to municipalities by Article XVIII relates solely to the government and administration of the *internal* affairs of the municipality."). Outside city limits, municipal power is constrained by the text that confers it. Even if the city has a profit motive, it can only act for the sole constitutional purpose of supplying the city or its inhabitants.

Nothing has changed to make Mr. Bentine's arguments better now than they were in 2000. *See, e.g. Athens v. McClain*, 2020-Ohio-5146, __ Ohio St.3d __, __ N.E.2d __, ¶ 66 (confirming that Article XVIII boundaries on municipal power are enforced as written). In 2000 or today, a profit motive espoused by a utility conceived under Article XVIII solely to supply the "municipality and its inhabitants" cannot expand the narrow power to sell outside the city its

incidental "surplus product" from such operations. *See Toledo Edison*, 90 Ohio St. 3d at 293, 737 N.E.2d 529 (Sections 4 and 6 must be read to be consistent with each other, "*in pari materia*").

Under the Cross-Appeal's proposed "entire amount" rule, there would be no effective constraint on municipal-utility brokering. CEI respectfully asks this Court to affirm the Court of Appeals on this straightforward principle; decline the invitation to overrule *Toledo Edison*; and reject CPP's Proposition of Law.

**2. CPP Would Lose Even under Its Misreading of *Toledo Edison***

Even if CPP's proposed rule of law had any merit, this case would provide no vehicle for it. The record shows that CPP does not even abide by its own extremely lenient "entire amount" rule. Since CPP provides no countervailing interpretation of the facts about how it procures electricity, and no identifiable facts in rebuttal, summary judgment would be required for CEI even under the misguided and constitutionally unfounded rule that CPP proposes. It was CPP's burden to identify facts showing the constitutionality of its conduct, but the Response makes no attempt to explain how its proposed test would exonerate all its sales to customers outside the city, totaling nearly fifty million kilowatt-hours of electricity each year. In the case of the City of Brooklyn, an example of an extraterritorial customer that signed a ten-year supply contract with CPP, CPP must buy electricity for the purpose of supplying that customer for the next decade. (See CEI MSJ, Dkt. 90, Ex. M, Brooklyn Contract, Article 9.) And CEI has already proven that a number of transactions (because CPP has not even nominally structured them to circumvent *Toledo Edison*) violate CPP's own standard.

a. *Every Purchase Transaction Is an "Entire Amount"*

CPP admitted below that it routinely "performs a financial true up after the fact to reflect the actual amount of electricity consumed." (Consolidated Reply Brief of City of Cleveland and Cleveland Public Power in Support of Their Motion for Summary Judgment, and Response in

Opposition to CEI's Cross-Motion for Summary Judgment ("CPP MSJ Reply"), Dkt. 96, at 38.) Although the Response focuses on its master contracts rather than subsequent kilowatt-hour purchases, the record shows that these after-the-fact "true-ups" constitute the actual purchases under CPP's requirements contracts. CPP does not purchase electricity under the relevant contracts until after CPP has determined each customer's exact consumption for a given time interval. *Cf. In re Complaint of Direct Energy Bus., L.L.C. v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, __ Ohio St.3d __, __ N.E.2d __, ¶ 6 (describing how utility "submits daily estimates of load data [but] thereafter submits actual meter data to PJM that can be used to adjust the initial invoices"), *reconsideration denied*, 2020-Ohio-5332, 160 Ohio St. 3d 1462. This means that CPP buys the excess kilowatt-hours of electricity only after providing it outside the city — where it has already been delivered at the time of the "true-up" purchase.

b. *The Small Contracts Are an "Entire Amount"*

Even if CPP's procurement conduct were scrutinized on the basis of its "contracts" rather than its actual purchases (an approach CPP does not even try to support with law), CEI still prevails on the record adduced below. The documents show, and CPP does not deny, that in recent years,

[redacted]

[redacted] CPP purchases an amount of electricity that it proceeds to sell — that "entire amount," and more — outside city limits. In response to this point, CPP protests that nothing CPP has put in writing definitively proves that these amounts are destined for resale outside the city. (Resp. at 16 (protesting that tabulation of kilowatt-hours "does not indicate any earmarking of these contracts for customers outside of the City's boundaries"); *id.* at 43 (contracts do not explicitly say that "purchases are being made solely for resell [sic] beyond the municipal limits").) CPP seems to assume that a municipality can immunize any transaction from challenge

simply by declining to announce the constitutional violation in a formal document. But CPP cites no law to suggest a municipality may justify an artificial surplus merely by refraining from expressly designating in advance which excess electricity will be resold to customers outside the city. The only reason CPP purchases *any* excess electricity is to supply customers outside the city, in violation of Sections 4 and 6.

## FURTHER ARGUMENT IN SUPPORT OF CEI'S PROPOSITIONS OF LAW

As CEI noted in its First Brief, the Court of Appeals cited no law in support of its promulgation of a new "other purposes" doctrine, which appears in paragraphs 36 through 41 of its ruling. The parties had not briefed this legal concept below, and the Eighth District's remand arose from a rationale of its own unsupported by the record. Appx. 27 (¶ 37). CPP had the burden, therefore, to provide some constitutional foundation for the "other purposes" doctrine to defend it in this appeal. Yet CPP's Response does not do this, and does not even attempt to do it. That is because there is no such foundation in the constitutional text or in any Ohio precedent for the "other purposes" doctrine. Indeed, the law forbids the extrapolation in which the Eighth District engaged in creating new municipal powers from constitutional silence.

### A. CPP Musters No Defense of the Eighth District's Novel Doctrine

Although CPP champions a broad concept of municipal "rights," none of its theories arises from any constitutional principle or precedent. Indeed, CPP admits that in *Toledo Edison*, this Court held that "certain purchases of surplus are prohibited." (Resp. at 18.) Instead of trying to understand why that is so, or to explain why any other intentional purchases of utility-product surplus should supposedly be allowed, CPP changes the subject. It attacks straw men by exaggerating CEI's views on legitimate surplus (a circumstance which is certainly still possible, especially where municipal utilities generate meaningful amounts of their own electricity).

Nowhere does the Response cite law to support the Eighth District's novel doctrine that "other purposes," besides in-city demand, can justify a municipal utility's acquisition of electricity.

### 1. No Constitutional Precedent Justifies the Implied Powers the Eighth District Created

CEI maintains that municipal-utility purchases of electricity may be undertaken only to meet in-city demand. The law CPP cites in opposing CEI's Propositions of Law is consistent with CEI's position. The Response's cited cases hold that (1) municipal utility rates may be set to support a "reasonable profit"[1]; (2) the Ohio Constitution means what it says[2]; (3) the judiciary is sworn to uphold the Constitution[3]; and (4) the relevant metric for Section 6 "surplus" is "kilowatt hours" of "product," "not customer count."[4] CEI agrees with the Response's cited holdings of all those cases, and none of them weakens any of CEI's Propositions of Law. CPP cites no other case law in opposition to CEI's Appeal, except for the cases CPP tries to distinguish as "irrelevant" because they support CEI's position. (*See, e.g.*, *id.* at 21.)

The Response therefore reveals a massive void where there should be some law to support the Eighth District's ultimate holding: namely, that a trial is needed on CEI's constitutional claim to address whether CPP supplies customers outside the city to promote "considerations of cost, risk mitigation, economies of scale, environmental impact, and reliability." *CEI* at ¶ 39. CPP has cited no law to support such an expansion of its limited enumerated power to supply electricity to

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[1] Resp. at 19 (citing *Niles v. Union Ice Corp*. 133 Ohio St. 169, 170, 12 N.E.2d 483 (1938) and *Orr Felt v. Piqua*, 2 Ohio St. 3d 166, 443 N.E.2d 512 (1983)). *But cf. Orr Felt* at 170 (setting context: municipal utility is authorized "to establish, maintain and operate municipal lighting, power, and heating plants, for the generation, transmission and supplying of electricity *to the municipal corporation and its inhabitants*") (emphasis added).

[2] Resp. at 19 (citing *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 16).

[3] Resp. at 25 (citing *City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St. 3d 1, 7, 539 N.E.2d 103, 108 (1989)).

[4] Resp. at 35 (citing *Hance*, 169 Ohio St. at 642, 159 N.E.2d 741).

"the municipality and its inhabitants." *See* Ohio Const., Article XVIII, Sections 4 and 6. That is because Ohio law, both in the constitutional text and under the principles laid down by this Court, mandates the opposite result.

In an attempt to mount an argument from constitutional law, CPP distorts both *Toledo Edison* and Article XVIII by quoting them selectively. For example, CPP quotes *Toledo Edison* as recognizing an untrammeled Section 6 "right to sell limited amounts of surplus electricity to entities outside the geographic boundaries of the municipality." (Resp. at 25.) But this phrasing assumes there is a cognizable "surplus" in the first place. Indeed, as this Court explained in the very same sentence from which CPP quotes, cities have the power "to purchase or produce electricity *for their inhabitants*, as well as the right to sell limited amounts of *surplus* electricity" elsewhere. *Toledo Edison*, 90 Ohio St. 3d at 288, 737 N.E.2d 529 (emphases added). CPP simply ignores the qualifying context.

Reading further into *Toledo Edison* underscores CPP's error. In the body of the Court's opinion, the logic gets clearer and clearer with each formulation: the Court explains (i) that a municipal utility "may acquire or produce utility services or products *for the municipality and its inhabitants* and sell surplus product or service," *Toledo Edison* at 291; (ii) that Section 6 allows a municipality that owns or operates a utility *for the purpose of generating its own electricity* to sell surplus electricity," *id.* (emphasis added); and finally (iii) that having made a legitimate Section 4 purchase, a municipal utility may resell "only surplus electricity *from that purchase* to entities outside the municipality," *id.* at 292 (emphasis added). All these qualifiers derive from the constitutional text. CPP does not and cannot explain away these constraining clarifications of its supposedly inborn "right" to sell whatever it wants outside city limits.

CPP's selective quoting of the key precedent mirrors its selective reading of Article XVIII. The Response repeatedly accuses CEI of undercutting Section 6 by attacking the option of resale outside the city — an option that Section 6 provides only for municipal utilities who hold a legitimate product surplus. CPP accuses CEI of "merely ignor[ing] the fact that … Section 6 … expressly grants that exact power [of resale] to municipal utilities." (Resp. at 32.) But in insisting that it has the express power to *resell* a surplus, CPP has skipped an important step in the analysis: how does it acquire that surplus in the first place? The right to acquire utility product is created in Section 4, not in Section 6. Neither provision creates an express power to *buy* excess product on purpose, and the language of Section 4 clearly forbids it. Yet the Response completely ignores Section 4 — the clause that directly defines how a municipal utility can acquire utility product within the authority granted by the framers.

The implied power that CEI has challenged is the power to *acquire* electricity outside the constraints of Sections 4 and 6, for resale outside city limits. There is no enumeration of such a power in Article XVIII. To be sure, once a municipality holds a legitimate surplus, no one challenges the resale power of Section 6 that CPP stridently defends. But what authority or compelling necessity allows CPP to *buy* kilowatt-hours other than those that are "to be supplied to the municipality or its inhabitants"? *See Britt v. City of Columbus*, 38 Ohio St. 2d 1, 10, 309 N.E.2d 412, 417 (1974) (holding that implied municipal-utility powers can only be found by "compelling necessity" to support express ones). CPP never explains how Section 4 creates, expressly or implicitly, the right to acquire electricity for other purposes. And the Response cites no law supporting the idea that anything in Article XVIII confers that right.

### 2. All Relevant Constitutional Precedents Foreclose the Implied Powers the Eighth District Created

CPP is seeking to re-litigate issues that were laid to rest in *Toledo Edison*. Its Response backs the Eighth District's novel "other purposes" doctrine as another path to CPP's goal of circumventing the rule against "artificial surplus." If successful with either argument, CPP would do violence to decisions made by the constitutional framers and the people of Ohio in 1912.

#### a. *The Constitutional Text Mandates a Sole Legitimate Purpose for Municipal-Utility Purchasing Conduct*

CPP makes no effort to reconcile its approach with what the framers wrote. After quoting the relevant provisions, CPP simply says that "[t]he Ohio Constitution, on its face, permits municipalities to have and sell surplus product," unconditionally. (Resp. at 19.) The text does not support this claim.

To be sure, Article XVIII grants a narrow express power to acquire utility product. Section 4 states that a city can operate a utility, and that utility can acquire product, "for the municipality and its inhabitants" — not for others. In particular, it authorizes a city to operate a utility "the product or service of which is or is to be supplied to the municipality or its inhabitants, and * * * contract with others for *any such product* or service." Appx. 49 (Ohio Constitution, Article XVIII, Section 4). (Emphasis added.) Because this case is about contracting for the purchase of product (not self-generation in any meaningful amount), the word "such" is important. It narrows the contracting power: no Section 4 contract can be entered for utility products unless they are "such product" — i.e., the kind of products identified in the previous clause. If a city contracts to receive utility product under this authority, it must be product that "is or is to be supplied to the municipality or its inhabitants."

CPP offers no reading of Section 4's grammar that can authorize purchase of utility product other than "such product," the kind intended for in-city use. All product a city chooses to acquire

must be intended at the time of purchase for delivery and use within the city. Thus despite CPP's claims, nothing in the Constitution permits municipal utilities to "have" at will — much less to purchase intentionally — excess utility product with no in-city purpose, of the kind suitable for brokering. (*Cf.* Resp. at 19.)

b. *The Constitutional Text Mandates a Sole Legitimate Source for Electricity Resold Outside City Limits*

Nor does Article XVIII "on its face" authorize resale of utility products, at the pleasure of a municipality, outside city limits. Although it says that "surplus product" may be resold, this Court has clarified that such sales may not include "artificial surplus" acquired in violation of Section 4. *Toledo Edison*, 90 Ohio St. 3d at 293, 737 N.E.2d 529. And *Toledo Edison* identified that constraint not from a policy preference, but from the text itself. After crafting the Section 4 contracting power narrowly, the framers were careful to ensure that they created no freestanding Section 6 power to get and sell extra product, of the kind CPP purports to describe. Indeed, the framers added a phrase in Section 6 that serves no other purpose than to prevent such a reading:

> 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 … the surplus product of [that non-transportation] utility * * *.

Appx. 50 (Ohio Constitution Article XVIII, Section 6). (Emphasis added.) With the bolded language, the framers ensured that again, the word "operate" would be modified by the only authorized purpose of such operations — to "supply" in-city demand. Somehow, CPP claims to find here an implication that surplus may be acquired for the purpose of selling it outside the city, if the city could benefit monetarily by entering that line of business. (*See, e.g.*, Resp. at 23 (claiming Article XVIII authorizes "acquiring a surplus of electricity [to be sold outside the city] for the immediate purpose of generating capital"). But the sentence plainly forecloses that reading.

Section 6, on its face, reiterates the constraint of Section 4: none of the operations of a municipal utility may be for a "purpose" other than "supplying… the municipality or its inhabitants." If the framers had intended this Section to authorize acquisition of a surplus unrelated to in-city demand, independent of the constraints of Section 4, they would not have reiterated here Section 4's phrasing about the sole authorized "purpose" of all the utility's operations. That language appears again in order to eliminate any doubt, by underscoring where the "surplus product" must come from — legitimate Section 4 operations for the sake of supplying in-city demand. *See Northeast Ohio Regional Sewer Dist. v. Bath Twp.*, 2015-Ohio-3705, 144 Ohio St.3d 387, 144 Ohio St. 3d 387, 44 N.E.3d 246, ¶ 13 (courts' "duty is to 'give effect to the words used, not to delete [them]'") (quoting *Columbus–Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969)).

CPP is adamant that it can do what it likes: "The Ohio Constitution expressly permits the City to sell its surplus up to the 50 percent limitation. Period." (Resp. at 24.) But CPP's reading of the text completely fails to account for the multiple places where the framers carefully specified the only legitimate purpose for municipal-utility operations, specifically including all acquisitions. The purpose of such activity must be to supply electricity to the city itself or its inhabitants.

c. *The Framers Authorized Surpluses Only out of Necessity*

In addition to misreading the text, CPP misrepresents the history of Article XVIII and badly distorts CEI's discussion of it. According to CPP, the framers intended for municipal utilities to do whatever it took to make extra money, from whatever source, if that would ultimately put them on stronger financial footing. (Resp. at 23.) CPP says the framers intended for municipal utilities "to *intentionally* generate more electricity than could be used to supply the municipality and its residents," and to do so "for the purpose of selling that surplus *to raise money*." (*Id.* 24 (emphasis added).) No basis for this theory can be found in the text, in any secondary source, or in any body

of law, and it ignores the language of the authorities CEI cited to explain the aims of the "surplus product" resale authorization.

As CEI acknowledged in its first merit brief, it is possible for a municipal utility to have a legitimate surplus — actual electricity acquired for use in the city, through a commitment in advance, that has no in-city purpose by the time it is actually generated and delivered. (Although CPP and its *amici* repeatedly accuse CEI of demanding a categorical ban on surpluses eligible for resale, CEI has never denied that such surpluses remain possible today.) Such a surplus, where it arises unavoidably, may be resold outside the city just as in 1912. *See Zangerle v. City of Cleveland, Div. of Mun. Transp.*, 145 Ohio St. 347, 352, 61 N.E.2d 720, 723 (1945) ("The Constitution is a written instrument and its meaning does not change. That which it meant when adopted, it means now. Those things which are within its grants of power [to municipalities], as the grants were understood when made, are still within them and those things not then within them remain still excluded.").

At the time of Article XVIII's framing, a legitimate kilowatt-hour surplus was especially likely, because arrangements and fixed commitments for electricity had to be made many years in advance, at significant cost. For example, a rapidly growing Ohio city in 1915, seeking to ensure it would have electricity "for its inhabitants" in 1930, might need to build a plant much larger than its current demand — and might need to break ground in 1917. In the process of providing for its 1930 needs, it had to commit to possessing electricity in 1922 that could probably not be used at that time. (*See* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 8 (Local Government) (Mar. 15, 1975) (hereinafter the "Revision Comm'n Rpt."), CEI MSJ, Dkt. 90, Ex. Y, at 63 (such a plant is built to meet "future electrical needs of [municipal] residents" that otherwise could not be met).)

To be clear, such electricity arising from construction begun in 1917 would indeed have been acquired for the purpose of serving the city's inhabitants — not for someone else. It would meet the *expected future* demand of inhabitants and growing businesses, in an era when municipal population and industrial growth were elemental facts of life in Ohio. If construction was complete in 1918 or 1920, the city's anticipated larger population might be reached by 1921 or by 1925. Above all, the framers did not want municipal utility plants to begin operating and immediately become inadequate to municipal needs. As the definitive history explains, "[t]he framers of the section [6] realized that economically, a municipality had to build in a surplus electric capacity when it erected its generating facility *in order to be able to meet future electrical needs of its residents* without expansion."). (Emphasis added). (Revision Comm'n Rpt. at 63.) In such a case, Section 6's "surplus product" resale provision prevents a legitimate 1922 surplus from going to waste. 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. There is no long-term purpose to serve customers elsewhere. Contrary to CPP's suggestion, therefore, Section 6's resale provision does not simply grant municipalities boundless authority to create an alternative revenue stream.

CPP goes further astray in trying to explain, based on no source of law or commentary, what the framers had in mind when they encouraged new facility construction. The Response posits that the framers "would have permitted municipalities in 1912 to generate a surplus in any given facility that also supplied its residents, and only prohibited the creation of a facility that was created solely for the purpose of generating electricity to be sold outside the municipality." (Resp. at 23–24.) This is unfounded and wrong. CPP ignores the requirement that the facility be intended for the use of future inhabitants, once the city's needs have grown as expected — i.e., that it be built for the "future electrical needs of its inhabitants." *See* Revision Comm'n Rpt. at 63. That

requirement to focus all operations on "inhabitants" is expressed in Article XVIII's text in two different places. Any ambition to serve customers outside the city for the long term is prohibited by the exclusive enumerated purpose in Sections 4 and 6.

CPP tries to buttress its theory of the framers' intent by invoking statutes that supposedly encourage extraterritorial sales by municipal utilities. (Resp. at 24.) According to the Response, CEI *must* be wrong about how to read Article XVIII, because three pieces of Ohio's statutory law supposedly imply free rein for municipal utilities. CPP says that those statutes "rest[] upon that [Article XVIII] constitutional framework" laid down in 1912. (Resp. at 25.) But CPP does not explain — nor can it — how these statutes can possibly reveal something about a constitutional amendment that *did not exist* when they were enacted, and did not come into being until half a century later. Simply put, these three nineteenth-century statutes — R.C. 743.12, enacted in 1868 (as Gen. Laws 348); R.C. 743.13, enacted in 1893 (as Gen. Laws 2421); and R.C. 743.18, enacted in 1854 (as Gen. Laws 147) — do not "rest" on the 1912 "framework" of Article XVIII, Sections 4 and 6. In large part, Article XVIII *replaced* these artifacts of a bygone age before home rule was made part of the Ohio Constitution. Yet CPP cites all three of them, and no others, to explain what Section 6 must mean.

It is fundamental constitutional law that statutes must be read if possible to harmonize with the Constitution, and, if they cannot be reconciled, must yield to it. In Ohio, to the extent any conflict existed, on January 1, 1913, the Home Rule Amendment repealed as "repugnant" all pre-existing statutes inconsistent with it. *See* General Schedules 1912 Constitution (promulgating the Home Rule Amendment, with previously existing Ohio laws to survive only if not "inconsistent therewith"); *Dravo-Doyle Co. v. Vill. of Orrville*, 93 Ohio St. 236, 243, 112 N.E. 508 (1915) ("All laws then in force which were inconsistent with the new Constitution fell because they were

inconsistent."). Moreover, since 1912, it has been well understood that the scope of municipal utility authority is simply not a matter of statute. *See Ottawa Cty. Bd. of Commrs. v. Marblehead*, 102 Ohio App. 3d 306, 313, 657 N.E.2d 287 (6th Dist.1995) ("[A] municipality's powers, rights and privileges are derived from the people, pursuant to the provisions of Sections 4 and 6 of Article XVIII of the Constitution, and not from the General Assembly."); *City of Grandview Heights v. Redick*, 79 Ohio Law Abs. 59, 154 N.E.2d 180, 183 (C.P. 1955), *aff'd*, 154 N.E.2d 183 (10th Dist.1956)) ("Since the adoption of the Home Rule Amendments to the Constitution in 1912, the municipality's power regarding public utilities is no longer derived from … the legislature."). CPP's cited provisions, largely moribund, are left over from the patchwork of regulation before Article XVIII was enacted. The Response's reliance on them is misplaced.

Nothing in the record suggests that CPP has confined its resale activity outside city limits to municipal customers. But focusing solely on the example of Brooklyn as a customer, CPP's *amicus* the Ohio Municipal League ("OML") makes a mistake much like CPP's. OML contends that R.C. 715.02(A) defeats Article XVIII by authorizing municipalities to do together what neither could do alone. (OML Brief at 7–9.) But that 1925 statute, while generally encouraging cooperation, says nothing to create an independent grant of extra-constitutional power for any municipality. And OML's interpretation is wrong as a matter of constitutional doctrine. *See State ex rel. Mitchell v. Council of Vill. of Milan*, 133 Ohio St. 499, 505, 14 N.E.2d 772 (1938) (holding that constitutional rules governing a public utility "must be followed to the exclusion of that prescribed by the provisions of" statutory law); *Wagner v. City of Youngstown*, 49 Ohio Law Abs. 186, 75 N.E.2d 724 (7th Dist. 1946) (utility contract between municipalities valid only "as long as ***surplus water*** is available for sale for the purpose named in such contracts"); *accord* Ohio Attorney General Opinion 1928 OAG 1684 (Electric Power Plant-Municipality — Extension Of

Transmission Lines Outside Corporate Limits — Limitation on Amount of Power Supplied). Further, as a matter of logic, no customer's ability to *receive* a surplus can create municipal authority to *acquire* a surplus through a violation of Article XVIII, Section 4.

None of the statutory misreadings proposed by CPP and its allies can outweigh the constitutional text. Where a utility-product surplus can be avoided because no necessity dictates acquiring it, Article XVIII forbids a municipal utility from purchasing or reselling that product.

d. *No Implied Municipal Power to Act Outside City Limits Can Exceed the Enumerated Statement of That Power*

According to CPP, its power to deal in utility products is boundless by default, unless something in the constitutional text prohibits it from acting — thus it has no "duty" to avoid a surplus, unless the framers spelled out such an obligation with words of prohibition. This approach is backwards. When a constitution grants limited power to an artificial entity, it creates at the same time an intrinsic duty to avoid overstepping the stated limitations. A municipality, unlike a natural person, can only act if it has a basis in law to do so. *See City of Cincinnati v. Rosi*, 92 Ohio App. 8, 10, 109 N.E.2d 290 (1st Dist.1952) (all municipal "authority must be found in the express provisions of the state Constitution and the statutes made in pursuance thereof"); *see also Northeast Ohio Reg'l Sewer Dist. v. Bath Twp.*, 2015-Ohio-3705, 144 Ohio St. 3d 387, 44 N.E.3d 246, ¶ 8 (a state instrumentality's conduct must "have its basis" in the only specified "valid purposes" for the operation of that entity). In the Response, CPP simply ignores its obligation to cite a constitutional basis for the purchasing power that it claims.

Logic, not ingenuity, dictates the avoidability standard that CPP protests so vehemently. (*See, e.g.*, Resp. at 19–22 (bemoaning what CPP calls a "Novel Avoidance Requirement" that would prevent it from taking actions outside city limits unauthorized by Article XVIII).) The test for proper acquisition of surplus utility product, for purposes of Sections 4 and 6, must be whether

acquisition can be avoided without undermining supply to meet in-city demand. This is not because of a freestanding duty or proscription (novel or otherwise), but because the constitutional structure simply forbids *any* exercise of municipal authority without a basis in law. What CPP frames as a negative prohibition — a "novel" "duty" to avoid surplus — is simply the flipside of the positive authority Section 4 creates. Excess must be avoided, if it has no anticipated in-city purpose, for a simple reason: CPP's purchasing authority exists only where the product it is buying "is or is to be supplied to the municipality or its inhabitants." Appx. 50 (Ohio Constitution, Article XVIII, Section 4). If surplus can be avoided in the course of serving the city's legitimate utility needs, it must be avoided, because otherwise the municipal utility oversteps the enumerated power that makes acquisition possible in the first place.

Nor can CPP derive a power to act by implication from the constitutional text— including from Section 3, which CPP attempts to rely on here for the first time in this litigation. (*See* Resp. at 2.) That general clause grants municipalities the "authority to exercise all powers of local self-government … *within their limits*." Appx. 49 (Ohio Constitution Article XVIII, Section 3.) (Emphasis added.) But CPP is expressly aiming its sales efforts at retail utility markets *outside* city limits. In doing so it disrupts the General Assembly's chosen policies favoring the uniform, statewide regulation of electricity markets subject to regulation by the PUCO.

Indeed, as a matter of law, Sections 4 and 6 preempt any theory of implied Section 3 power in this area. *See State v. Anderson*, 2016-Ohio-5791, 148 Ohio St. 3d 74, 68 N.E.3d 790, ¶ 30 (a generally phrased clause is "not controlling when a more specific constitutional provision is applicable"). Even if no extraterritorial effects arose from CPP's agenda of acquiring excess electricity without any possible in-city use, such conduct could not be authorized by implication. As a utility, CPP can only contract for and resell utility product in the way Sections 4 and 6 specify

— it cannot interpret a general Section 3 grant of power in a way that contradicts the specific grant of Sections 4 and 6, with their explicit constraints that the purpose of all activity be directed to "the municipality or its inhabitants." *See State ex rel. Maxcy v. Saferin*, 2018-Ohio-4035, 155 Ohio St. 3d 496, 122 N.E.3d 1165, ¶ 10 ("Special constitutional provisions relating to a subject will control general provisions in which, but for such special provisions, the subject might be regarded as embraced.") (quoting *Akron v. Roth*, 88 Ohio St. 456, 461, 103 N.E. 465 (1913)).

e. *No Implied Municipal Power to Act Outside City Limits Exists Unless Compellingly Necessary to Enable an Enumerated Power*

CPP's last recourse is to suggest that it has implied power to act outside city limits because doing so will help it with an agenda it has underway for the sake of Cleveland. (*E.g.*, Resp. at 29 (implying that somehow generalized efforts to "hedge against * * * volatility" are relevant to CPP's surplus).) The record reveals no such project that actually relates to any electricity surplus, and CPP cites no evidence that any in-city agenda leads in any way to a surplus of kilowatt-hours. But even if it did, this theory would run afoul of well-established constitutional law.

Again, any generalized municipal power granted by Article XVIII, Section 3 "relates to local matters," not activities outside the city, and is subject to an additional constraint beyond that: "even in the regulation of such local matters [the] municipality may not infringe on matters of general and statewide concern." *Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75 (1968). So CPP is forced back to Sections 4 and 6. With their clear and carefully-crafted constraints on brokering, those clauses defeat CPP's argument, as they have the ambitions of many municipal utilities over the decades.

Although CPP strives to distinguish the case on irrelevant grounds, a key precedent of this Court speaks directly to the question of implied powers in the context of Article XVIII, Sections 4 and 6. In *Britt*, the Court held that implied extrapolations of municipal-utility powers outside

city limits cannot expand Article XVIII's enumerated powers absent very particular circumstances. *Britt*, 38 Ohio St. 2d at 10, 309 N.E.2d 412. The doctrine set forth in *Britt* is squarely on point here. Where a municipality claims authority to acquire product "for purposes other than supplying a public utility product or service to [itself] or its inhabitants," *Britt* holds that "such claimed power" cannot be found in the express language of Section 4. *Id.* If a municipal utility, in response, claims that an extraterritorial power is necessarily implied from elsewhere in Article XVIII, such as Section 6, it must clear a high hurdle. According to this Court, it is difficult to imagine that "the framers of Section 6, and the people in its adoption, intended to leave to implication a conferral of power upon a municipality of substantial impact beyond the municipality, with the attendant right of the municipality to exercise such power for its own benefit unfettered by any legislative control." *Id.* at 10–11.

*Britt* sets a very high standard for deriving an implied municipal power outside city limits, even to serve an enumerated constitutional purpose. Even if CPP had identified such an enumerated purpose for its acquisitions of surplus electricity (it has not), the implied power could only come from a "compelling necessity." *Id.* And even then, as explained by this Court, the resulting power "can reach 'only to the extent of the necessity, *and* that necessity must arise from the nature of things over which the [municipality] has no control, and not from a necessity created by such [municipality] for its convenience or economy.'" (Emphasis added.) *Id.* (quoting *Vill. of Blue Ash v. City of Cincinnati*, 173 Ohio St. 345, 352, 182 N.E.2d 557 (1962)). As CPP concedes, it cannot meet this burden.

The *Britt* approach — finding implied power only when and as necessary to serve an enumerated power — follows both the letter and the spirit of the Ohio Constitution. The framers designed Article XVIII using exactly such an approach: they knew that certain accommodations

truly had to be made to allow municipalities to enter the utility business in the first place, which in 1912 meant constructing and financing costly generating facilities. Section 6 met that necessity, creating a constitutional power to sell outside city limits, only when and as a municipal utility "*had to* build in a surplus" in order to serve its future needs. (Emphasis added.) (CEI MSJ, Dkt. 90, Ex. Y, Revision Comm'n Rpt. at 63.) In the framers' own words, they created the Section 6 resale power because such sales were "*an absolute necessity* in order to make municipal ownership feasible." (Emphasis added.) 2 *Proceedings and Debates of the Constitutional Convention of the State of Ohio* 1458 (1912). The Ohio Constitution impliedly authorizes activity outside the city only if it is "absolute[ly]" or "compelling[ly]" necessary — in other words, if it is unavoidable for the municipality to carry out a constitutionally enumerated role.

CPP thus faces three insurmountable obstacles. First, under Section 4's plain language, "the power to 'contract with others for any such product or service' confers authority to contract solely for the purchase by the municipality of utility products or services *for its inhabitants*." *Britt*, 38 Ohio St. 2d at 9, 309 N.E.2d 412. (Emphasis added.) Next, under Section 6, only surplus from such operations may be resold, and there is no freestanding right to buy excess product. And finally, even if these explicit provisions were somehow overlooked, *Britt*'s "compelling necessity" test would apply to electricity purchasing — and CPP cannot satisfy that constitutional burden for exercising implied power, to justify its intentional acquisitions of excess kilowatt-hours with no in-city purpose.

CPP admits that "*Britt* does require a 'compelling necessity' for an implied power of a municipal utility." (Resp. at 33–34.) Yet for the extra kilowatt-hour purchases at issue, the Response makes no attempt to identify any such necessity to buy excess for the sake of an enumerated municipal-utility purpose. CPP insists that it need not satisfy the *Britt* test, because it

is relying only on an express power. (*Id.*) The Response changes the subject by pointing to the explicit surplus-*resale* power of Section 6 (*see id.*) — but of course a Section 6 resale only becomes possible after excess product is legitimately acquired. And although it has the burden to justify its purchases of extra product, CPP cites no basis in Section 4, in any other constitutional clause or law, or in any "compelling necessity" arising from authorized in-city operations. *See Britt* at 10.

The Response's concessions and salient omissions resolve the question of whether CPP's purchases of extra kilowatt-hours, electricity to serve neither the municipality or its inhabitants, are constitutional. They are not. Such purchases derive neither from an express power nor from any possible implied power arising, as *Britt* requires, from any "compelling necessity." *Id.* These purchases of excess can be avoided without compromising service to the city, and thus are not authorized by Article XVIII. Conversely, to state the same rule in CPP's language: because they are unconstitutional, CPP has a "duty" to avoid these purchases. The record shows it can easily do so.

*Britt* forecloses CPP's arguments about the asserted worthiness of various aspects of its conduct outside city limits. When a municipal utility would like to direct its operations outside city limits, it is not enough for that conduct to be useful or laudable for some purpose or another. Unless the Constitution authorizes it in an express enumeration of municipal power, such conduct must be "compelling[ly] necessary" in making possible a specified Article XVIII purpose. *Britt* at 10. Here, the record establishes that — to adapt the phrasing this Court employed in *Britt* — CPP's exercise of electricity-purchasing "authority in the sale of surplus public utility products or services to noninhabitants, [even if it is] economically and, possibly, politically advantageous * * *, rests upon no * * * compelling necessity." *Id.*; *see also id.* at 9 (under Sections 4 and 6, no power can be implied where it "is for purposes other than supplying a public utility product or

service to a municipality"). Because CPP can readily avoid all the challenged purchases of extra kilowatt-hours, it cannot make a showing of the "compelling necessity" *Britt* requires.

### B. The Factual Record Belies CPP's Attempts to Excuse Its Conduct

CPP cannot change the constitutional rules as it would like to do. Even as it advocates for such a change, the Response repeatedly distorts the facts to make CPP's conduct appear more legitimate. But these distortions do not change the rule, and do not satisfy it. If CPP had a viable factual case to make under the existing standards, it would have made it in the trial court, with real evidence to support it. It would not be asking this Court to overrule or eviscerate the holding of *Toledo Edison*.

Although it was its burden, in the trial court CPP failed to provide evidence supporting the constitutionality of its actions under *Toledo Edison*. Its belated efforts to confuse the record here are unsupported by the evidence, and do nothing to rectify that shortcoming.

#### 1. CPP Has No Electricity Surplus for Section 6 Purposes

##### a. *CPP Fails to Acknowledge All the Ways It Can Readily Avoid Surplus*

The key facts laid out in CEI's Merit Brief are not in dispute — the Response simply ignores them rather than rebutting them with evidence. Virtually all the documents CPP cites are vague hearsay, rather than the sworn evidence and internal memoranda that show how its purchases and resales work. As CEI has explained, the record demonstrates five dispositive facts.

*First,* CPP now purchases over 99% of its electricity supply, primarily through transactions carried out on the PJM market. (See CEI MSJ, Dkt. 90, Ex. AA, Resp. to Interrog. No. 10; [redacted].)

*Second*, CPP's contracts provide guaranteed access to all the electricity that CPP's customers actually use — i.e., CPP's requirements at any given time, not any amount identified in

advance. [redacted] As CPP admitted below, "The City * * * settles its energy accounts on a real-time basis," which is when it actually buys the electricity. (CPP Motion for Summary Judgment ("CPP MSJ"), Dkt. 59 at 28–29.)

[redacted] *see also* Order, Dkt. 99 at 5, finding of fact 7.) It purchases nothing extra. In 2017, [redacted].[5]

*Fourth*, even when CPP's contracts require it to purchase certain amounts of electricity, the commitment is almost always nonbinding. [redacted].[6]

[redacted]

[5] *See* CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2 (showing amounts provided by requirements contracts [redacted]

[6] CEI MSJ, Dkt. 90, Ex. O, [redacted] Contract at § XII (CLE002618); *see also id.*, Ex. P, [redacted] Contract at CLE002641; Ex. Q, [redacted] Contract at CLE001642; *id.* Ex. R, [redacted] Contract at CLE001769; *id.* Ex. S, [redacted] Contract at CLE002033; *id.* Ex T, [redacted] Contract at CLE002134; *id.* Ex. U, [redacted] Contract at CLE002239[redacted].

[redacted]

Nowhere in the Response does CPP explain how, given this configuration in its procurement strategy, it can possibly have extra electricity, above 100% of what is needed at any moment. Every time the Response seems ready to identify the origin of an actual electricity surplus, CPP changes the subject. And the Response ignores the factual findings of the trial court that confirm its lack of any excess supply or kilowatt-hour inventory. (See Order, Dkt. 99, findings of fact 6 & 7.)

In sum, nothing in the Response does anything to rebut the core of CEI's argument — that CPP never needs to buy more kilowatt-hours than its customers in Cleveland consume. If not for CPP's 99 customers outside Cleveland, its excess purchases could and would be forgone. They are easily avoidable: in light of actual demand, CPP can simply reduce the amount of electricity it purchases under its requirements contracts and [redacted]. (*See, e.g.*, CEI MSJ, Dkt. 90, Ex. B, [redacted] CPP routinely buys quantities of electricity that are less than its total sales to customers outside the city. Instead of rebutting these facts, CPP repeatedly tries to imply that other factors make them unimportant, then changes the subject to other concepts besides the one that matters — its acquisition of actual electricity for resale.

b. *CPP's Insinuations about an Actual Electricity Surplus Have No Grounding in the Record*

When confronted with CEI's Motion for Summary Judgment, CPP made no factual case that it ever possesses extra electricity needing an escape valve in the form of Section 6 resale outside city limits. In the statement that came closest to such an assertion, CPP's expert opined that "the lumpy nature of investment in generation combined with the potential loss of load through improvements in energy efficiency or customer loss *can* result in municipal systems holding excess power." (Opp. Ex. 1 to Ex. A at 24 (emphasis added).) This is misleading. The requirements contracts that supply more than half of CPP's inventory can create no "lumpiness." And neither this expert nor anyone else has ever testified, averred, or opined that a material unforeseen "loss of load" *actually happens* to CPP. No document suggests that it does. It is a purely theoretical possibility, and in CPP's case in the current era, an extremely remote one. As explained in CEI's First Brief, the "loss of load" involved [redacted] The record reveals no prospect of Cleveland's demand for electricity ever dwindling that far, much less in the foreseeable future.

There is a void in the factual record where CPP's surplus rationale should be. The Response seeks to fill it with irrelevancies (especially with arguments about "capacity," which is addressed below). But in a few places, CPP relies on misleading language. It says, for example, that "tailoring the exact amount of kilowatt hours to the actual amount of demand consumed by consumers is not nearly as simple as CEI * * * suggests." (Resp. at 14.) This sentence implies that CPP tries to tailor its purchases to what is consumed in Cleveland, and cannot do so. But neither of these implications is true. Indeed, CPP *currently* tailors its kilowatt-hour supply

precisely to the actual amount of electricity consumed by all its customers, including the ones outside Cleveland. It receives no extra. If all CPP's customers were inside Cleveland, such tailoring would be equally easy. Indeed, there is not a shred of evidence suggesting that CPP has wasted any electricity in recent years, or that CPP has ever found itself with kilowatt-hours it could not use inside Cleveland. It could operate in exactly the same way without serving its 99 current customers outside the city. In doing so, it would avoid all surplus entirely, would waste no resources — and would no longer daily violate the Ohio Constitution.

CPP next objects that, because it enters multi-year requirements contracts as part of its procurement mix, "long-term energy contracts are not 'a thing of the past,'" as CEI supposedly claimed. (Resp. at 15.) But CEI never said they were — instead, CEI said the supply "*inefficiencies caused by* local generation and long-term contracts are a thing of the past" (quoted at Resp. 14 (emphasis added)). This is correct. CPP's long-term contracts create no possible supply inefficiency, and make all surplus avoidable given the choices CPP has made in structuring them. They flex to match actual electricity requirements, and CPP can forgo actual receipt of electricity if demand dwindles. CPP's implications to the contrary find no support in the record.

Lacking any evidence for real-life extra electricity, CPP tries to conjure a phantom surplus from a hypothetical in CEI's briefing. CEI pointed out that, in the counterfactual in which excess was accidentally acquired (which, as the record shows, has never happened to CPP at any relevant time), CPP could simply "return[] any excess it somehow ends up with." (CEI's Merit Brief at 15, quoted in Resp at 26.) This is a purely hypothetical description of final recourse that CPP would have, under the language of its contracts, if all its procurement safeguards against extra electricity failed (which they never have). But the Response treats it, bizarrely, as a factual concession. (*See* Resp. at 26 (asking rhetorically, "under CEI's flawed theory, if there is no surplus, *how can the*

*City sell the surplus* in the wholesale market?") (emphasis added).) To be clear once again: there is no surplus.

The Response goes further. It argues baldly in this passage — without pointing to any evidence — that "the *existence* of a need to sell or return or dispose of excess power *proves the existence of the surplus*." (*Id.* (emphasis added).) But neither thing actually exists. The only such "need" is in a hypothetical on paper, for the sake of discussion. In the actual record there is no evidence — none — of a need to return electricity, of any actual electricity surplus acquired for any purpose but to serve customers outside the city, or of any prospect of such a surplus unless Cleveland's demand were to shrink by more than 98%. CPP's arguments on this issue are non sequiturs that cannot forestall summary judgment to put a stop to its unconstitutional activities.

c. *No "Capacity" Surplus, Even if There Is One, Could Justify the Resales Shown in the Record*

CPP's contracts all show that no excess of kilowatt-hours will ever arise under any foreseeable circumstances. No expert says otherwise. Electricity surplus can always be avoided given CPP's current procurement mix. In various guises, though, the unrelated concept of "capacity" appears in the Response brief as the purported reason why CPP has, or might have, a relevant surplus. CPP contends that it has capacity (measured in kilowatts) in numbers beyond Cleveland's need — and yet, as explained above, CPP has not cited any evidence of any excess electricity (measured in kilowatt-hours) beyond what its actual customers consume.

This disconnect can be explained quite simply: "capacity" is not electricity. Indeed, earlier in the case, CPP vehemently *rejected* the idea that "electric energy and capacity are fungible." (CPP MSJ Opp at 2.) This means that a surplus of the one (which CPP has not ever shown with evidence) has nothing to do with a surplus of the other. As a matter both of fact and of law, CPP's capacity arguments fail to establish anything related to actual electricity, let alone a constitutional

surplus of kilowatt-hours to sell outside Cleveland. Capacity is simply irrelevant to actual utility product.

The Supreme Court of the United States has provided the concept that clears away all CPP's obfuscation of these two distinct concepts: "In a capacity market, in contrast to a wholesale-energy market, an electricity provider purchases from a generator *an option to buy a quantity of energy*, rather than purchasing the energy itself." (Emphasis added.) *NRG Power Mktg., LLC v. Maine Pub. Utilities Comm'n*, 558 U.S. 165, 168–69, 130 S.Ct. 693, 175 L.Ed.2d 642 (2010). The flexible option to acquire *future* electricity — an option exercised only if and as needed — is not electricity. It cannot justify a surplus of electricity. Indeed, it is not a constitutionally cognizable utility "product," supplied to end-user "inhabitants," for purposes of Section 4 and 6. Thus, it does not factor into the calculation of a Section 6 surplus of electricity. Indeed, as a mathematical matter, it cannot do so — as CPP has insisted, the two are not fungible.

These are not controversial propositions, or matters of first impression, under Ohio law: the important distinction between capacity (hypothetical kilowatts) and electricity (actual kilowatt-hours) stands at the core of one of this Court's most important and longstanding Section 6 precedents. *See Hance,* 169 Ohio St. at 461, 159 N.E.2d 741 (rejecting municipality's proposal to measure its Article XVIII surplus in kilowatts of accessible "capacity," because courts applying Article XVIII are called on "to measure electrical energy in kilowatt hours"). With its capacity arguments, CPP seeks to overrule that fifty-one-year-old precedent along with *Toledo Edison* and *Britt*.

It is not surprising that CPP relies heavily on "capacity," under various names, to try to forestall the summary judgment to which CEI is entitled. When it used this language in the Court of Appeals, the Eighth District was misled in its understanding of the so-called "energy reserve

margin" (as to which CPP proffered virtually no actual evidence). *See* Appx. 28 (¶ 37) (crediting CPP's claim that it is "required to maintain an energy reserve margin," but failing to recognize that this language refers to capacity, not electricity). Of course, any such "require[ment]" arises not from any necessity, but from CPP's voluntary decision to participate in the PJM markets. And crucially, despite its name, this "margin" is not energy. It is only capacity — an *option* to procure electric power if needed.

Indeed, PJM requires CPP to arrange a capacity reserve margin for each of its customers. (*See* MSJ Reply, Dkt. 96, at 21 (CPP admitting that PJM expects it to have "sufficient *capacity* resources to serve its customers" wherever they are, with an "energy reserve margin" available on top) (emphasis added); *see also* Brief of *amici curiae* Buckeye Power and the Ohio Rural Electric Cooperatives, Inc. ("Buckeye and OREC") at 19-20 (noting that the reserve margin is calculated "for a utility's existing retail load *and cannot be committed to serve other customers*") (emphasis in original).) But "resources" of capacity have nothing to do with possessing actual extra electricity. Although CPP repeatedly implies that these concepts overlap, they do not. A capacity reserve is a contract right, not a good or service. Capacity only relates to electricity if that contract right is exercised through an actual purchase, because the electricity is actually needed. And in that case, the kilowatt-hours that result are immediately consumed — by definition, they will never be left over. A reserve margin of capacity can never equate to extra electricity beyond actual demand.

Although it admits in plain language that the "reserve margin" is capacity (*see* Resp. at 27 (invoking the "capacity reserve margin")), CPP repeatedly encourages this Court to replicate the Eighth District's mistake — namely, regarding the "reserve margin" as somehow equivalent to actual electrical energy, rather than "an option to buy a quantity of energy," *see NRG Power Mktg.*,

558 U.S. at 168–69. In facilitating a reprise of this error, the Response uses phrasing that is increasingly vague and misleading:

- "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 (energy and capacity)* to fulfill their electricity needs plus a reserve margin" (Resp. at 7) (emphasis added);

- "the wholesale *electricity* market, and therefore, related surplus, cannot be measured simply in terms of kilowatt hours consumed" (*id*. at 14 (suggesting that kilowatt capacity is somehow a "related surplus" relevant to kilowatt-hours)) (emphasis added);

- "the City has a supply portfolio comprised of *resources* that provide reliable and competitively priced capacity and energy to its customers" (Resp. at 28 (failing to acknowledge the radical distinctions among different kinds of concededly non-fungible resources)); *see also id.* at 6 (ditto));

- "The *assets* required to meet capacity requirements of CPP's existing customers can *result in a surplus of energy* far beyond what the City currently sells to outside customers" (*id.* at 15) (emphasis altered);

- "municipalities *must generate some surplus capacity and typically generate surplus energy* in the course of serving their residents to satisfy their full electricity requirements at any given point in time, including at their peak load plus a reserve margin" (Resp. at 27–28) (citing no evidence).

Blurring key terminology, these loose claims in the Response about the significance of "capacity" drift further and further from the factual record. In the second to last example above, CPP contends that some amount of capacity (kilowatts) "can *result in*" a certain amount of energy (kilowatt-hours) — but it fails to disclose the actual conduct needed to bridge the two. That linkage can only be a municipal *purchase* of electricity, which exercises the option created by "capacity." The municipal utility acquires electricity only at this point, when it buys it — not as a "result" of any capacity transaction. (*See* Brief of Buckeye and OREC, at 21 (in the PJM market, "any capacity purchased in the PJM market carries no corresponding entitlement to energy" absent an additional purchase transaction).) Such a purchase, intentionally creating a kilowatt-hour surplus without any obligation or necessity of doing so, is how CPP oversteps its Section 4 authority. Capacity

"can result in" electricity only in the loosest possible sense of the phrase. This is equivalent to saying that tax dollars "can result in" municipal road repairs.

Then in the last bulleted example above, CPP simply invents a claim that somehow municipal utilities "typically generate surplus energy in the course of serving their residents." Absolutely no evidence supports this assertion. CPP built no record that speaks to this claim. Because "energy" is distinguished from "capacity" in this phrasing, the claim appears to be completely false. The Response's rhetoric ultimately crowds out reality.

Nothing in the record or the law supports CPP's agenda, made apparent by its hazy terminology — to erode the distinction between capacity and actual kilowatt-hours of electricity supplied to customers. This Court rejected exactly that proposal in 1959. *See Hance*, 169 Ohio St. 457 at 461, 159 N.E.2d 741 (rejecting the "contention of the [municipality's] Director of Law that the capacity" of a municipal utility should be "the basis for the determination of the 50 per cent limitation imposed by Section 6 of Article XVIII," and holding that the correct approach to utility product under Section 6 is "to measure electrical energy in kilowatt hours"). CPP's attempt to distinguish *Hance* (Resp. at 21–22) does not even try to explain how today's capacity is conceptually or constitutionally different from the capacity that this Court set aside as irrelevant in 1959.

Even as CPP attempts to blur the line between capacity and electricity, it ignores the cogent arguments advanced by *amici* Buckeye and OREC. The Eighth District assumed wrongly that the "capacity reserve margin" required for municipal needs had two features: (i) it was some quantity of actual electricity, and (ii) it could be repurposed outside the city. Buckeye and OREC point out that neither assumption is true. (*See generally* Buckeye and OREC Brief at 21-25.) As *amici* explain in depth, even if it were fungible with electricity, a capacity reserve acquired for in-city

customers could never be relevant to end-users outside the city. The same rules that bring the "reserve margin" into being forbid it from being delivered to additional customers. As *amici* explain, "[t]he capacity reserve margin must be available to serve existing load if there are unexpected increases in demand or loss of supply — it cannot be committed to other retail loads." (*Id.* at 23.) CPP completely ignores this point, which is independently fatal to its flawed theory that "capacity" can constitute or cause a Section 6 surplus.

d. *CPP's Own Supply Choices Are the Reason Its Surplus Is Artificial*

Although it repeatedly mentions the negligible amount of kilowatt-hours it actually generates as opposed to buying (*see* Resp. at 14, 15, 27), CPP produces almost no electricity. (*See, e.g.*, CEI MSJ Ex. AA, CPP Interrogatory Response 10 [redacted].) Beginning in the 1970s, instead of continuing to invest in long-term arrangements of inflexible supply, CPP adopted an approach to create maximum flexibility in its procurement strategy. (*See* Resp. at 5.) Although CPP repeatedly strives to conjure some kind of kilowatt-hour surplus into being, CPP's digressive mentions of minuscule amounts of self-generated electricity — one-twentieth of one percent of what CPP sells — betray the weakness of its factual case.

In voluntarily becoming a member of PJM and negotiating requirements contracts, CPP made rational economic decisions to better serve Cleveland's needs. It eliminated waste and inefficiency — and in doing so, it eliminated any foreseeable prospect of a legitimate electricity surplus. Yet CPP presents the constitutional dispute as if CEI were the one creating this circumstance, and aggressively shutting down CPP's constitutional "right" to sell any and all electricity outside Cleveland at will. CEI acknowledges readily that CPP could sell outside Cleveland, it if had a real surplus. But it does not.

CPP could have a genuine surplus, if it had a different kind of supply strategy. But here, CPP wants to have its cake and eat it too: it demands *both* the benefits of a maximally flexible approach to electricity procurement *and* the resale option that the framers created as a compensatory subsidy to provide extra help to municipal utilities for whom no such strategies existed.

### C. CPP Misrepresents the Record

In a number of places, CPP summarizes a story of electricity procurement that the record in the trial court contradicts. It was CPP's burden, in response to CEI's summary-judgment motion, to show that all the electricity it purchases is intended at the time of acquisition "for the municipality and its inhabitants." Appx. 49–50 (Ohio Const., Article XVIII, Sections 4 and 6). The Constitution authorizes resale outside city limits only if such kilowatt-hours are acquired and subsequently "become[] surplus" (as CPP accurately phrases it in one instance (Resp. at 20)). Artificial surpluses are not allowed and are ineligible for resale outside the city. *Toledo Edison*, 90 Ohio St. 3d at 293, 737 N.E.2d 529. But rather than showing its surplus to be legitimately acquired to supply in-city demand, CPP's Response uses misleading phrasing and unsupported, conclusory assertions — many of them never previously presented to the Court of Common Pleas nor to the Court of Appeals — to distort the record.

#### 1. CPP's Narratives Create False Implications

Even though the record here is essentially identical to the one in *Toledo Edison* — with no in-city purpose identified, even in theory, for the municipal utility's kilowatt-hour "surplus" — CPP provides an array of irrelevant facts to give the false impression that it stumbles into a surplus that would then go to waste if not resold outside city limits. In one place, in fact, CPP contends that "the various types of purchases of electricity at issue here were reasonable and prudent purchases made in the interest of supplying the municipality and its residents, and *the incidental*

*surplus that resulted from the City's activities* totaled a mere 3 percent." (Resp. at 30 (emphasis added).) But this is false. Nothing in CPP's transactions to serve in-city customers creates any excess of kilowatt-hours. CPP has never identified an "activity" that causes it to have extra electricity, beyond what its customers in Cleveland consume. Nothing in the record suggests that the acquisition of tens of millions of kilowatt-hours each year for 99 CPP customers outside Cleveland, in any way, is "incidental" to anything CPP does to provide electricity to Cleveland itself. As laid out above, all the evidence is to the contrary: the extra kilowatt-hours are acquired solely for delivery outside the city.

Claims of fact without any evidentiary foundation in the record multiply through the Response. Earlier in the case, CPP insisted that "[t]he City cannot 'earmark' electricity * * * — it is scientifically impossible to 'earmark' electrons." (CPP MSJ Reply, Dkt. 96, at 9.) But now somehow CPP insists that CEI has the burden to do the impossible, by proving in court where the electricity from each transaction goes. (*E.g.*, Resp. at 16.) Thus, unless a purchase contract specifies the destination for its kilowatt-hours, supposedly it cannot be used to show an intent to serve customers outside the city. Ignoring its prior position about the fungibility of all kilowatt-hours, CPP argues repeatedly that without explicit earmarking there can be no proof of its intentions. (*See id.* ("the report cited does not indicate any *earmarking* of these contracts for customers outside of the City's boundaries.") (emphasis added)); *see also id.* at 43 ("Not a single purchase contract referenced by CEI *provides* that those purchases are being made solely for resell [*sic*] beyond the municipal limits. The inquiry should end there.") (emphasis altered); *id.* at 9 (concluding that without such an admission from CPP, "CEI could not produce one single piece of record evidence to support its factual arguments").)

In other words, according to CPP, it is always an absolute mystery where any purchased electricity goes — but at the same time, if CEI cannot trace specific purchased electrons across city limits, it can never show that CPP procures kilowatt-hours without an in-city purpose. CPP cannot have it both ways. In any event, it was CPP's burden to show a constitutional purpose for its surplus kilowatt-hour purchases. But it has not even attempted to identify one, much less shown how Article XVIII authorizes any given purchase of excess electricity.

**2. There Is Definitive Proof Where CPP Says Evidence Is Lacking**

The Response insists that CEI has made no showing of the improper purpose to acquire electricity so that it can be sold outside city limits. But it does not deny that it has no long-term surplus of committed electricity purchases. (*See* Resp. at 29 (arguing that CPP has "committed" to certain "generation resources" by choosing its counterparties, but nowhere suggesting that the quantities involved are fixed in any way).) And it does not deny, or even address, the long-term contract that it made with the City of Brooklyn, to provide for the next decade electricity that it clearly has not yet purchased. (*See* CEI MSJ, Dkt. 90, Ex. M, Brooklyn Contract; [redacted].)

Brooklyn is only one example of CPP's multiple long-term customers outside Cleveland. And by themselves, these two facts about CPP's dealings with just this one customer show CPP is violating the Constitution. Because it has no commitment to acquire the electricity it will need to service the Brooklyn contract, CPP is making purchases this year, and must make them every year until 2027, to do so. No evidence suggests it will acquire this electricity accidentally. As the Court of Appeals rightly explained: "Assuming the city was complying with its contractual obligations to Brooklyn, since the city currently generates very little power of its own, arguably the only way the city could ensure that it had a sufficient supply of electricity to fulfill its contractual obligations

to Brooklyn was if it intentionally purchased some electricity solely for the purpose of reselling it to Brooklyn." (Appx. 28 (¶ 38).) Despite the qualifier "arguably," CEI submits that this is the only feasible interpretation of these facts.

The factual record is clear: under any reasonable definition, CPP brokers electricity to Brooklyn and many other customers outside Cleveland. In particular, it sells kilowatt-hours it has not yet purchased. Despite repeated opportunities to do so, CPP has provided no way to arrive at any other possible conclusion from the record. CPP does not describe any scenario in which it mismanages its flexible requirements contracts and somehow ends up with extra electricity. All its surpluses are avoidable, not incidental — which means their resale outside the city is not constitutionally authorized. This evidence alone justifies summary judgment for CEI in the form of the declaration it has sought.

### 3. CPP's Conclusory Affidavit Is Not Evidence

Time after time, in the Response, CPP claims that at the summary-judgment stage it put forth uncontroverted evidence that it is not committing any constitutional violation. (*E.g.*, Resp. at 10.) CPP says this "fact" is uncontested. Here is all of that evidence:

> 3. I am the Manager for Energy Markets for Cleveland Public Power, a division operated by the City of Cleveland's Department of Public Utilities (collectively, referred to as "the City").
>
> 4. The City does not purchase electricity solely for the purpose of reselling the entire amount of that purchased electricity to an entity outside of the City's geographical limits.

(CPP MSJ, Dkt. 59, Ex. C, at 1.) CPP's showcase affidavit ends there.

Even if it parroted the correct rule rather than the "entire amount" rule that the Court of Appeals rightly rejected, this affidavit would not be evidence for summary-judgment purposes.

*See Means v. Cuyahoga Cty. Dept. of Justice Affairs*, 8th Dist. Cuyahoga No. 87303, 2006-Ohio-4123, ¶ 25 ("bald self-serving and conclusory allegations are insufficient to withstand a motion for summary judgment") (citation omitted); *Stamper v. Middletown Hosp. Ass'n*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989) (an affidavit must state "supporting facts"). And it does not say what CPP repeatedly claims it says. In the Response, after citing it, CPP artfully rephrases this document, so that it appears to comply with a different rule not foreclosed by the Court of Appeals: "the City does not purchase electricity solely to resell the purchased power outside of its geographic limits. The factual inquiry should end there." (Response at 10; *see also* Resp. at 16 (distorting the language of the Williams affidavit, while insisting that it is "undisputed and indisputable"); *id.* at 49 (quoting the affidavit correctly, and again calling its assertion "undisputed, and indisputable").)

The conclusory Williams document, reciting the wrong rule and lacking any factual foundation to make it meaningful, should have been ignored — notwithstanding the fact that it was CPP's only purported evidence of constitutional compliance. None of the actual evidence in the record cuts against the inevitable result of this case: CPP's purchases of extra electricity are avoidable, and are not carried out to supply the city or its inhabitants. Because the facts reflecting actual purchases and sales conclusively establish the improper purpose and avoidability of CPP's conduct in selling electricity outside Cleveland, CEI respectfully requests that the Court instruct the trial court to enter summary judgment in its favor.

## CONCLUSION

For the foregoing reasons, CEI respectfully requests that the Court adopt CEI's Propositions of Law and, by rejecting CPP's sole Proposition of Law, decline the invitation to overrule its existing precedents.

Respectfully submitted,

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