IN THE SUPREME COURT OF OHIO

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.	)	

MERIT BRIEF OF APPELLANT/CROSS-APPELLEE THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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INTRODUCTION

Cleveland Public Power ("CPP"), the largest of Ohio's 85 municipal-electric utilities, is defying the Ohio Constitution and this Court's precedent. CPP is allowed to sell outside the City of Cleveland only "surplus product." Appx. 50 (Ohio Constitution, Article XVIII, Section 6). This Court explained, twenty years ago, why that constitutional constraint is "critical." *Toledo Edison Co. v. City of Bryan*, 90 Ohio St.3d 288, 292, 737 N.E.2d 529 (2000). Yet each year, CPP sells tens of millions of kilowatt-hours of electricity to customers outside Cleveland—even though it has the ability, through its flexible purchase contracts and access to wholesale electricity markets, to buy only the amount of electricity its customers in Cleveland actually consume. Since CPP has no legitimate "surplus product," its *de facto* brokering outside city limits is unlawful.

On the record established in the trial court, Plaintiff-Appellant The Cleveland Electric Illuminating Company ("CEI") is entitled to summary judgment and a declaration to stop CPP's unconstitutional conduct. CPP, which generates virtually no electricity, does not have a genuine surplus within the meaning of Article XVIII, Sections 4 and 6. *See* Appx. 49–50. Its sales outside Cleveland to 99 customers (and counting) derive from an "artificial surplus" as defined by this Court. *Toledo Edison* at 293. CPP's conduct violates the Ohio Constitution, undermines Ohio's regulatory framework, and disrupts the balance the constitutional framers carefully struck.

The Court of Appeals erred by identifying potential excuses for CPP's constitutional violation. Article XVIII grants a municipal utility a limited power to deal in electricity—namely, in addition to generating electricity at its own facilities, a municipality may purchase only electricity that "is or is to be supplied to the municipality or its inhabitants." Appx. 49 (Ohio Constitution, Article XVIII, Section 4). As this Court confirmed in 2000, the only constitutional purpose for municipal electricity procurement is to supply the city's internal demand. If there is

no excess left over from those operations, a municipality cannot sell anything outside the city. Yet the Eighth District held that CPP may also procure and resell electricity for "some other purpose"—not named in the Ohio Constitution, defined by any principle or precedent, or identified as a reason for any surplus in the evidentiary record. Appx. 26–27 (¶ 36). The Court of Appeals' opinion identified no textual basis for this implied municipal power to advance "other purpose[s]" through Article XVIII procurement or resale of electricity. *Id.* The Eighth District's novel doctrine empowers CPP and the other 84 municipal electric utilities to devise pretexts and circumvent the Ohio Constitution. Under a potentially boundless set of rationales, each municipal utility can purchase more than the "amount of electricity needed by its inhabitants," in order to sell it outside city limits. *Id.*; *see* Appx. 28–29 (¶ 39). That is exactly what *Toledo Edison* and the Ohio Constitution forbid.

CPP has no constitutionally authorized reason to buy or resell any extra electricity. As the trial court found, "CPP has the flexibility to increase or reduce its electrical supply through its various contracts and commitments" and "has the ability to sell [any] excess power to [the wholesale] markets." (Appx. 36 (Finding of Fact No. 7).) Although CPP can easily avoid purchasing any excess electricity, it has contracted for the next decade to supply electricity to customers like the City of Brooklyn. CPP has thus been brokering electricity outside city limits. Yet the Eighth District remanded for trial to determine if CPP can establish other "considerations such as cost, risk mitigation, economies of scale, environmental impact, and reliability" to justify its excess purchases and resales. Appx. 29 (¶ 39). None of these considerations is rooted in the constitutional text.

The Eighth District's new, policy-driven standard eviscerates *Toledo Edison*'s core logic by permitting a municipal utility to create and broker an "artificial surplus" outside the city, so

long as the municipality invokes "considerations such as" the five policy justifications identified by the Court of Appeals. *Id*. Each of the justifications listed is a vague and malleable concept that municipalities can deploy to justify unconstitutional brokering. But in reality, the sole reason a municipality ever purchases electricity is to sell it to customers or use it itself. Any other rationale or excuse for a municipal electricity purchase is pretext. The Eighth District's newly announced doctrine all but guarantees fact-intensive litigation, for decades to come, over municipal motives for expanding extraterritorial sales. Meanwhile, municipal utilities will cherrypick large, energy-intensive customers outside city limits—as CPP is already doing—inevitably driving up administratively-mandated rates for the remaining customers.

Reversing this errant doctrine will safeguard the text of the Ohio Constitution and the General Assembly's codified policy judgments, which favor the uniform, statewide regulation of Ohio's retail electric service, as implemented through the Public Utilities Commission of Ohio ("PUCO"). Because municipal utilities govern themselves, free from PUCO oversight, the only protection against municipal overreach is the Constitution. Unregulated competition by municipal utilities across the state, under the Eighth District's novel rationales, would disrupt the PUCO's regulatory framework. And the consequences would unfold erratically, punctuated by piecemeal litigation in the lower courts over how to interpret and apply the Eighth District's new standard.

CEI respectfully requests that this Court reject the Eighth District's expansive policy-driven re-reading of Article XVIII and reverse its decision affirming the trial court's denial of partial summary judgment for CEI. That is the only result that will reaffirm *Toledo Edison*'s core principle—under Article XVIII, a municipality may not "engag[e] in the business of brokering electricity to entities outside the municipality." 90 Ohio St.3d at 293, 737 N.E.2d 529.

STATEMENT OF THE CASE AND FACTS

A. The Constitution Constrains Municipal-Utility Purchases and Sales.

The municipal power to buy and sell utility products arises under Article XVIII, Sections 4 and 6 of the Ohio Constitution. Appx. 49–50. The parties to this litigation agree that those two clauses, read together, enable and constrain CPP's participation in the electricity market.

Each provision identifies one solitary purpose for all municipal-utility operations. A municipal electric utility must function with a single aim—namely, to supply electricity to "the municipality or its inhabitants":

> Any municipality may * * * operate * * * any public utility *the product or service of which is or is to be supplied to the municipality or its inhabitants*, and may contract with others for any such product or service.
>
> * * *
>
> Any municipality, owning or operating a public utility *for the purpose of supplying the service or product thereof to the municipality or its inhabitants*, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility [up to a prescribed maximum] amount * * * .

Ohio Const., Art. XVIII, §§ 4 and 6 (emphasis added).

The language of these clauses was carefully chosen. *See* 2 *Proceedings and Debates of the Constitutional Convention of the State of Ohio* 1458 (1912) ("Now, we took a great deal of time in getting the correct phraseology for this section [6 of Article XVIII]. The members will recall how every word was weighed, what its effect was in relation to what we had in mind * * * ."). The allowance for sales outside city limits is deliberately narrow. Only "surplus product" can be sold to customers outside the city, and it must be "surplus" from what is acquired for in-city use. *Toledo Edison*, 90 Ohio St.3d at 292, 737 N.E.2d 529.

Article XVIII was designed to encourage municipal utilities to supply in-city demand, while at the same time minimizing any effect on utility markets outside city limits. Under the balance the framers struck, whether utility products are generated or purchased, they can be acquired for no purpose other than to "be supplied to the municipality or its inhabitants." Appx 49 (Ohio Constitution, Article XVIII, Section 4). With such a supply in hand, a municipal utility's sales to outside customers cannot exceed its unavoidable "surplus" that is left over once the city's internal demand is met. Appx. 50 (*id.* at Section 6).

Over the 108 years since its adoption, this Court has consistently defended these Article XVIII constraints on municipal-utility authority, even as, from time to time, various municipalities sought to circumvent and erode them. This case is another episode in the history of municipal-utility attempts to circumvent Article XVIII constraints. It arises in a market context in which municipal surpluses of electricity are more easily avoidable than ever.

B. Changes to the Electricity Industry Have Eliminated the Potential for Legitimate Surpluses.

Although Article XVIII's meaning never changes, its practical implications have evolved with time. Market changes call upon municipal utilities to adapt within clear constitutional guardrails. Historically, a municipal utility's potential "surplus" of electricity, within the meaning of Article XVIII, has taken two distinct forms.

1. To Encourage Cities to Build Generation Facilities For Growing Populations, Article XVIII's Framers Permitted Municipalities to Sell a Limited Surplus Outside the City.

In 1912, a primary goal of the Home Rule Amendment framers was to encourage municipalities to construct and own complete utility systems. At the time, this meant mitigating the capital risk attendant to entering the utility business. The framers endowed each municipal utility with the right to sell excess electricity—power that it generated with new facilities but did

not currently need to serve inhabitants. The associated revenue from customers outside the city, during the years when generated power exceeded in-city demand, would allay the substantial capital investment required to develop or acquire by condemnation a complete municipal utility. *See generally* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 8 (Local Government) (Mar. 15, 1975) (hereinafter, the "Revision Comm'n Rpt."), at 63 (*available at* CEI's Motion for Summary Judgment ("CEI MSJ"), Dkt. 90, Ex. Y). Accordingly, the framers enacted Article XVIII, Section 6, which allows municipalities to sell "surplus product" outside the city, but caps the amount at "fifty percent of the total service or product supplied by the utility within the municipality." Appx. 50.

When municipalities generate their own electricity, it makes little sense to invest in a small plant if municipal growth will soon outstrip generation capacity. To justify the investment required to build a plant, it must be large enough to serve the municipality's reasonably foreseeable demand. As the Revision Commission explained: "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.) (Dkt. 90, Ex. Y, Revision Comm'n Rpt. at 63.) Such a surplus arose from necessity, not discretion.

In the early days of the Home Rule Amendments, genuine municipal-utility surpluses could result from the economics of constructing new generation facilities, with the associated imprecisions, inefficiencies, and capital risk. But then the market shifted.

2. By the *Toledo Edison* Era, Municipalities Had Shifted to Purchasing Electricity Through Long-Term, Imprecise Contracts.

By the turn of the twenty-first century—when this Court decided *Toledo Edison v. Bryan*—municipalities had gradually shifted to purchasing electricity through long-term contracts directly with third-party generators. To make purchasing arrangements, utilities had to forecast far into

the future, making it difficult to match supply precisely with their customers' demand. Further, utilities also had to purchase transmission service, which involved a complex process of scheduling transactions over transmission paths. These challenges led to new inefficiencies. (*See* CEI MSJ, Dkt. 90, Ex. A, Affidavit of Brian Farley ("Farley Aff.") ¶¶ 7–9.)

Because municipal utilities purchased electricity through bilateral transactions directly with generators—as opposed to wholesale markets—the "market for these bilateral transactions was generally illiquid, with a limited number of buyers and sellers." (*Id.* ¶ 8 ("Purchases and sales were not developed using market or competitive mechanisms, but rather through bilateral transactions"); *id.* ¶ 9.) This illiquidity, compounded by imprecision in planning, could lead to surpluses even for municipalities that did not generate electricity.

As a simplified example, a small municipality with a fixed commitment to buy electricity necessary to supply its inhabitants might lose a major in-city customer to bankruptcy or otherwise, radically changing its internal needs. Alternatively, population and industry levels might fall generally, causing the projections that supported a fixed, long-term purchase commitment to outstrip actual demand. In such a case, Article XVIII would not forbid the municipality from selling the unavoidable surplus outside the city. The surplus would legitimately derive from the municipality's operations for an appropriate purpose, not an avoidable "artificial surplus" the municipality acquired to sell outside the city.

Under the state of affairs in 2000, even if municipalities no longer invested in generation infrastructure, they could find themselves with genuine surpluses arising from inflexible contracts. Given this illiquid market structure, a municipal utility's bilateral, long-term contracts with generators could create a legitimate surplus. But since then—as the record in this litigation

shows—the market has shifted further for municipal utilities, like CPP, making a legitimate surplus avoidable except in extraordinary circumstances not present here.

3. Modern Liquid Markets Allow Municipal Utilities to Precisely Match Supply and Demand in Real Time.

Today, most electricity provided within Ohio's cities is generated by merchant generators and then transmitted to the national transmission grid, from which distribution utilities pull electricity to supply to end users. Indeed, "very few Ohio municipal systems" rely on generation facilities owned and operated by the municipality "without market purchases." (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, Ex. A, Affidavit of John Bentine ("Bentine Aff.") ¶ 30.)

The national transmission grid is divided into nine regions, connecting generators with utilities across wide geographic territories with the involvement of Regional Transmission Organizations ("RTOs"). The RTOs operate wholesale electricity markets, which have obviated many of the inefficiencies of the past. Purchasing electricity has become significantly easier: municipal utilities now have open access to the transmission grid and wholesale markets, allowing them to easily buy and dispose of electricity in real time. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶¶ 3, 7–11, 15, 17.)

Federal policy changes around 2000 led to the development of RTOs. Buying and selling electricity in real time made utilities more efficient, coordinated, and reliable. RTOs allow utilities to precisely match supply and demand, saving consumers billions of dollars each year. Both CEI and CPP are members of an RTO called "PJM." PJM operates wholesale electricity markets and oversees the transmission grid across thirteen states and the District of Columbia. (*Id.* ¶¶ 5, 6, 11–15, 22; CPP MSJ Reply, Dkt. 96, Ex. 1 to Ex. A, Bentine Aff. ¶ 11.)

Critically, PJM enables utilities to purchase the exact amount of electricity their customers use. This occurs in daily auctions where generators offer electricity into the market and utilities place bids based on real-time demand. Algorithms then match the least-expensive generation resources to utilities' bids, determining the market-clearing price paid to all generators. These dynamics require generators to keep prices low, so their electricity will "clear the market" and sell. Efficiency is enhanced because utilities bid in real time, so they can purchase exactly the amount of electricity their customers are using. If a utility inadvertently arranges to purchase more electricity than it needs, it can readily avoid receiving the excess, which results in lower prices and improved reliability, inuring to the ultimate benefit of consumers. The inefficiencies caused by local generation and long-term contracts are a thing of the past. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶¶ 3–4, 12–17, 24–26, 22–29.)

In this context, utilities can now function fully and efficiently without generating (or even possessing) any significant amount of electricity. Indeed, CPP chooses to operate in just this way, through flexible contracts and membership in PJM. Under these circumstances, CPP's "surplus" can arise only from electricity purchases made for resale outside city limits, in violation of Article XVIII. *See Toledo Edison*, 90 Ohio St. 3d at 291, 737 N.E.2d 529 (holding squarely that, under Article XVIII Sections 4 and 6, a municipal authority has no "constitutional authority to purchase electricity solely for direct resale" outside city limits).

C. Artificial Surpluses Threaten Ohio's Competitive Balance Between Public and Municipal Utilities.

Through a series of carefully calibrated trade-offs, the constitutional framers and the General Assembly have established a balance between regulation and competition for Ohio's electricity customers. Public utilities like CEI are subject to close supervision by the PUCO, including through regulation of rates. In return for submitting to this regime, the General

Assembly afforded public utilities the exclusive right to provide distribution service within designated areas under the Certified Territories Act ("CTA"), subject to a limited home-rule exception. *See* R.C. 4933.83.

While the PUCO closely oversees public utilities, municipalities may operate their own utilities, like CPP, which are entirely free from PUCO oversight and rate-setting. But to maintain the stability of the public utilities, the constitutional and statutory scheme is designed "to prevent such municipalities from entering into the general public-utility business outside their boundaries in competition with private enterprise." *See State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461, 159 N.E.2d 741 (1959). As this Court reaffirmed twenty years ago, this constitutional requirement serves an important practical purpose: "[t]o allow municipalities the unfettered authority to purchase and then resell electricity to entities outside their boundaries could create unfair competition for the heavily regulated public utilities." *Toledo Edison* at 293.

Municipal utilities are free to adjust their rates however they want, and can price-discriminate among their customers in ways that public utilities cannot. If municipal utilities compete on price outside their boundaries, it harms the remaining customers of PUCO-regulated utilities, who must ultimately pay higher tariff rates because the costs of regulated utilities must be recovered from a smaller group of customers. Plucking more energy-intensive customers out of a market thus disturbs the PUCO's rate-setting decisions, much like taking healthy customers out of a health-insurance market. (Opp. to Mot. to Bifurcate, Dkt. 44, Ex. A, Expert Report of Santino Fanelli ("Fanelli Rpt.") at 4, 8–12.)

In addition to being exempt from PUCO rate-setting, municipal utilities like CPP gain an advantage to the extent they do not pay the federal, state, and local taxes that CEI pays. (*Id.* at 12–13.) The framers of the Home Rule Amendment were acutely aware of this asymmetry,

recognizing that "[c]ompetition under such conditions is morally wrong and most unfair * * * because it confers a special privilege on the users of the municipal service at the expense of the users of the private service and of nonusers." *See* 2 *Proceedings and Debates of the Constitutional Convention of the State of Ohio* 1862 (1912). Municipal utilities are also exempt from PUCO oversight of their service standards. Public utilities like CEI must complete service requests in specified timeframes, meet strict reliability requirements, present clear and understandable bills, and disclose various costs. (Opp. to Mot. to Bifurcate, Dkt. 44, Ex. A, Fanelli Rpt. at 5–6.) Municipal utilities like CPP have no such obligations under Ohio law.

In the twenty years since *Toledo Edison*, the threat of unfair competition from municipal brokering has not diminished, but grown. In 2000, Ohio municipalities did not yet participate in the wholesale electricity markets operated by PJM. Today, however, those wholesale markets enable municipal utilities to purchase electricity in virtually unlimited amounts, allowing them to effortlessly create artificial surpluses of any size. As a result, a municipal utility with an exemption from the rate-setting process can significantly distort the marketplace, undermining public-utility economies of scale. This can set off cascading rate increases: if large, energy-intensive customers in the suburbs defect to receive discounted rates from unregulated and untaxed brokers like CPP, remaining public-utility customers will then pay higher prices. The resulting spiral of unfair competition would gradually leave behind smaller customers to defray the public utilities' infrastructure costs, as required by law. Under future PUCO-set tariffs, that diminished base would inevitably pay higher prices than they currently do under the balanced regime created by the CTA. (Opp. to Mot. to Bifurcate, Dkt. 44, Ex. A, Fanelli Rpt. at 4, 8–12.)

D. CPP Creates Artificial Surpluses So It Can Sell Excess Electricity to Customers Outside Cleveland.

In each of the past several years, CPP's putative "surplus" has been foreseeable and avoidable. CPP could easily have received and paid for less electricity, and served only its customers within Cleveland. Nonetheless, in 2017, CPP delivered 49.7 million kilowatt-hours, 3.23% of its sales, outside Cleveland. (CPP MSJ, Dkt. 59, at 12.) *See also* Appx. 37 (Finding of Fact No. 10) (estimating the current figure at "4 to 5%"). CPP has advocated that it can sell much more outside Cleveland, up to 50% of its total sales inside Cleveland. (CPP MSJ Dkt. 59, at 2–3.) But CPP does not have a genuine surplus of electricity.

1. CPP Buys Nearly All Its Electricity.

CPP ceased generating any significant amount of electricity in 1977. (*See* CPP MSJ, Dkt. 59, at 4.) It 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; *id.* Ex. J, Deposition of Pamela Sullivan ("Sullivan Dep.") at 78:24–79:15.) CPP characterizes its strategy for procuring electricity as a "portfolio approach" (CPP MSJ, Dkt. 59, at 19), involving contracts with "various quantities and terms from a variety of wholesale market-based suppliers" (CPP MSJ, Dkt. 59, at 6, 19; CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2.) *See also* Appx. 36 (Finding of Fact No. 6).

CPP also has contractual relationships with certain generating facilities owned and operated by American Municipal Power, Inc. ("AMP"), a consortium of municipalities that owns and operates power plants and provides management and consulting services. In addition to selling CPP electricity from its plants, AMP consults for CPP on its electricity-procurement approach, PJM-market transactions, and hedging strategies. (CPP MSJ, Dkt. 59, at 4; CPP MSJ Reply, Dkt.

96, Ex. A, Bentine Aff. at ¶¶ 5–6; CEI MSJ, Dkt. 90, Ex. A, Farley Aff. at ¶ 22; *id.* Ex. C, 2018 AMP Memo at 2; *id.* Ex. B, Deposition of Christopher Williams ("Williams Dep.") at 84:1–8.)

In 2017, CPP purchased electricity under approximately 15 distinct contracts. (*See* CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2.) In each instance, CPP's suppliers provided the electricity through the PJM market. (*Id.* Ex. J, Sullivan Dep. at 78:24–79:15.) CPP's contracts provide guaranteed access to electricity, but CPP often does not actually purchase electricity until after the fact, when PJM reconciles CPP's day-ahead forecast with actual usage. (*Id.* Ex. A, Farley Aff. at ¶ 28; *id.* Ex. B, Williams Dep. at 22:3–7; *id.* Ex. A, Farley Aff. ¶ 28.) CPP commits to procuring the overwhelming majority of its electricity on a day-to-day basis, in amounts that correspond perfectly to its customers' real-time usage. (*Id.* Ex. A, Farley Aff. ¶¶ 15, 31.)

2. Most of CPP's Electricity Procurement Contracts Impose No Minimum Requirement for Any Time Period.

Several of CPP's largest procurement sources are requirements contracts that allow it to adapt its purchases to real-time demand. For example, CPP's Master Services Agreement with AMP mandates no minimum CPP purchases. (CEI MSJ, Dkt. 90, Ex. I.) Under it, "AMP agrees for all hours during the Term to provide as a Reseller, firm remaining *requirements energy* for the benefit of the Purchaser." (Emphasis added.) (*Id.* at Section D.1.) Under this language, if demand in Cleveland is lower than expected, CPP simply receives (and pays for) less electricity. (*Id.* Ex. J, Sullivan Dep. at 58:2–3 (explaining that "requirements energy" "means energy to meet [demand] above and beyond any * * * other resources"); *see also* Appx. 36 (Finding of Fact No. 7).)

In 2017, CPP sold tens of millions of kilowatt hours outside Cleveland to 99 customers. These sales, representing approximately 3% of CPP's total sales, were completely avoidable under CPP's flexible requirements contracts, under which CPP received roughly [redacted] of its electricity—far more than it sold outside Cleveland. (*See* CEI MSJ, Dkt. 90, at 20–21; Ex. C, 2018 AMP

Memo at 2 (showing amounts provided by requirements contracts labeled as "Net Market" (1.2%); "Nextera 2013-2017 7x24" (22.1%); "Morgan S 2015-2019 7x24" (1.0%); "Morgan Stanley 2015-2020 7x24" (8.8%); "Morgan Stanley 2010-2019 7x24" (3.1%); "Morgan Stanley 2010-2019 5x16" (0.6%); and "BP 2017" (8.9%).)

3. CPP Can Readily Escape Its Purchase Commitments under Other Procurement Contracts.

Requirements contracts liberate CPP from any commitment to purchase electricity unless and until it is actually needed in Cleveland. (CEI MSJ, Dkt. 90, Ex. J, Sullivan Dep. at 79:12-15.) Under this framework, a large proportion of CPP's purchases are tailored in real time to match its customers' usage. (*See id.* Ex. I, AMP Svcs. Agt.; Ex. B, Williams Dep. at 22:3-7; Ex. C, 2018 AMP Memo at 2.) *See also* Appx. 36 (Finding of Fact No. 7). This includes a protocol in which AMP retroactively fine-tunes CPP's purchase amounts the day after the electricity is used, so CPP's "scheduled" purchases perfectly match the actual amount it has sold. (CEI MSJ Dkt. 90, Ex. B, Williams Dep. at 84:1–8.) But even CPP's non-requirements contracts contain provisions that render nonbinding all but a single-digit percentage of the city's usage.

In many cases, CPP has escape clauses that allow it simply to receive less electricity than it has planned to buy. In some of its [redacted] contracts, CPP can scale back or eliminate purchase obligations entirely. [redacted] (CEI MSJ, Dkt. 90, Ex. O, [redacted] at Section XII (CLE002618); *see also id.*, Ex. P., [redacted] at CLE002641.) [redacted]

(CEI MSJ, Dkt. 90, Ex. Q, R, S, T, U (all containing substantively identical clauses).)

CPP's contracts are therefore extremely flexible. [redacted] CPP can avoid receiving or paying for any unneeded electricity. Moreover, many CPP contracts expire within a year or two and need not be renewed. (*See* CEI MSJ, Dkt. 90, Ex. A, Farley Aff. at ¶ 27; *id.* Ex. C, 2018 AMP Memo at 2.) As the trial court found, "CPP has the flexibility to increase or reduce its electrical supply through its various contracts and commitments" and "has the ability to sell [any] excess power to RTO administered markets." Appx. 36 (Finding of Fact No. 7).

4. Participating In The RTO System Allows CPP to Match Supply Perfectly to Customer Demand.

In the RTO system, forecasting does not dictate CPP's actual purchases, which are matched precisely to demand. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶¶ 13–15.) CPP's forecasts do not bind CPP to purchasing a specific amount of electricity. Instead, the real-time market exists as [redacted] (CEI MSJ, Dkt. 90, Ex. B, Williams Dep. at 22:3-7.) PJM reconciles CPP's daily forecasts with the amount of electricity CPP's customers actually consume, and then, [redacted] (*Id.*) No electricity or money is wasted. [redacted] (*Id.* at 84:1–8.) [redacted]

None of CPP's forecasting actually dictates how much electricity CPP purchases in any hour or minute. (*See, e.g.*, *id.* at 86:11–13.) [redacted] (*Id.* at 22:3–7.) This all occurs in a context in which CPP's contracts involve relatively small

amounts of in-advance purchase commitments. (*See* CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2; *see also id.* Ex. L, [redacted].) Indeed, the trial court found that "the various purchasing agreements with outside electricity providers would lead one to the conclusion that [CPP] can manipulate their contracts and accounting procedures in such a way as to avoid the constitutional limitations as to surplus." Appx. 41.

5. CPP Enters Long-Term Contracts To Sell Electricity To Customers Outside Cleveland.

[redacted] (CEI MSJ, Dkt. 90, Ex. L, Projection.) There is no possibility that CPP has a future surplus.[1] [redacted] despite its ability to avoid purchasing any electricity that is not needed in Cleveland, CPP solicits and enters into sales contracts with customers outside Cleveland that extend far into the future. CPP even commits to supply customers outside Cleveland for terms of a decade or more. (*See id.* Ex. M, Brooklyn Contract, Article 9.) Then, *after* signing long-term contracts with suburban customers, CPP [redacted] (*id.* Ex. L) and fulfill those sales. As the trial court found in the example of CPP's relationship with the City of Brooklyn, CPP agreed to purchase "electricity that would serve Brooklyn" and help "CPP to compete for customers in the city of Brooklyn." Appx. 35 (Finding of Fact No. 2).

[1] Indeed, in 2017, only [redacted] involved a firm commitment to buy any amount of electricity. But it totaled a mere 1.6% of CPP's portfolio. (*See* CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2.)

E. Relevant Procedural History

1. The Trial Court Granted CPP's Motion for Summary Judgment and Denied CEI's.

CPP's motion for summary judgment relied solely on legal arguments at odds with *Toledo Edison*. CPP urged that it did not violate the Constitution because it never sold electricity to customers outside the city totaling more than 50% of its in-city sales; or, in the alternative, because it never sold the "entire amount" of any given purchase of electricity outside city limits. (Dkt. 59.) The Eighth District later rejected both of these arguments as incorrect statements of law. Appx. 24–26 (¶¶ 32–35).

CEI's cross-motion in the trial court relied on extensive expert testimony and internal CPP memos and emails, and made factual arguments consistent with *Toledo Edison*. CEI contended that it was entitled to partial summary judgment as to CPP's sales outside city limits, which indisputably came from electricity CPP purchased for such resale. (Dkt. 90.)

Applying a rule of law later reversed on appeal, the trial court granted CPP's motion in its entirety and denied CEI's motion in its entirety. *See generally* Appx. 31–48. CEI appealed. (Dkt. 100.)

2. On Appeal, the Eighth District Corrected the Initial Legal Error, but Denied Judgment for CEI Based on a New "Other Purposes" Doctrine.

The Eighth District correctly held that the trial court misapplied Article XVIII and this Court's precedent, and that misapplication required it to reverse the grant of summary judgment in CPP's favor. But instead of addressing both cross-motions *de novo*, the Eighth District incorrectly found CEI was not entitled to summary judgment. It relied on an argument CPP had not made, and it failed to apply the law to the undisputed facts.

Indeed, the Eighth District found a new implied power in Article XVIII:

> This is not to say that a municipality is required to procure the exact amount of electricity needed by its inhabitants — and only the exact amount of electricity needed by its inhabitants — at any given time. Consistent with the Ohio Constitution, a municipality may acquire a surplus of electricity for *reasons other than* "solely for the purpose of reselling" surplus electricity outside its municipal boundaries and, if it does so, the municipality may then resell the surplus to others outside its municipal boundaries. * * * Accordingly, whether the city in this case violated the Ohio Constitution by reselling electricity to Brooklyn or other customers outside its municipal boundaries hinges on the purpose for which the electricity was purchased, i.e., whether it was purchased "solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits," or whether it was purchased in whole or *in part for some other purpose*.

(Emphasis added.) Appx. 26–27 (¶ 36) (quoting *Toledo Edison*, 90 Ohio St.3d at 293, 737 N.E.2d 529).

The Eighth District then remanded the case for trial to determine CPP's hypothetical "other purposes" for purchasing excess electricity for resale outside the city.

STANDARD OF REVIEW

This Court reviews the trial court's summary-judgment determination *de novo*. *Fradette v. Gold*, 157 Ohio St. 3d 13, 2019-Ohio-1959, 131 N.E. 3d 12, ¶ 6 (citing *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St. 3d 314, 2002-Ohio-2220, 767 N.E. 2d 707, ¶ 24). Rule 56(C) provides that a court must grant a motion for summary judgment if:

> … the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Here, the trial court erroneously denied summary judgment for CEI. Because there is no genuine dispute that CPP is selling from an "artificial surplus" under *Toledo Edison*, this Court should reverse.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

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

Proposition of Law No. 2

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

This case turns on the interpretation of two interlinked provisions in Ohio Constitution Article XVIII—Sections 4 and 6. Appx. 49–50. These provisions create and limit CPP's authority to sell electricity outside Cleveland. They also define the legitimate purposes of a municipal utility, authorizing conduct from which CPP might acquire a genuine "surplus." In 1912, municipal sales of surplus electricity outside the city were "*an absolute necessity* in order to make municipal ownership feasible," because of the practical economics and inefficiencies involved in constructing sizable projects. (Emphasis added.) 2 *Proceedings and Debates of the Constitutional Convention of the State of Ohio* 1458 (1912). The framers expected municipalities to sell this necessary excess supply while their populations were growing into their facilities, helping to recoup the cost of building plants that were scaled appropriately for a growing city. (*See* CEI MSJ, Dkt. 90, Ex, Y, Revision Comm'n Rept. at 63.[2])

But the framers also knew the dangers of municipal overreach. The final text allows sales outside city limits only from legitimate "surplus product." Appx. 49–50 (Ohio Constitution, Article XVIII, Sections 4 and 6.) *See Toledo Edison*, 90 Ohio St.3d at 291–92, 737 N.E.2d 529.

[2] This Court has often relied upon the Constitutional Revision Commission as persuasive authority in interpreting the Ohio Constitution. *See, e.g.*, *Ohio Trucking Ass'n v. Charles*, 134 Ohio St. 3d 502, 2012-Ohio-5679, 983 N.E.2d 1262, ¶¶ 13–14 (adopting Revision Commission view as an accurate reflection of the "objectives of the voters who approved" a constitutional provision).)

Twenty years ago in *Toledo Edison Co. v. Bryan*, this Court authoritatively interpreted Article XVIII, Sections 4 and 6.

A. The Ohio Constitution Forbids Municipal Utilities from Purchasing Electricity for Resale Outside the City.

As laid out above, *Toledo Edison* provides a roadmap for the analysis here, one that follows the constitutional text. First, Section 4 authorizes a municipal utility to acquire electricity if it "is or is to be supplied to the municipality or its inhabitants." Appx. 49 (Ohio Constitution, Article XVIII, Section 4). Then Section 6 grants an additional enumerated power to a municipality operating a public utility—the power "to sell and deliver to others … the *surplus product* of [such] utility," up to a certain quantity. (Emphasis added.) Appx. 50 (Ohio Constitution, Article XVIII, Section 6). The *Toledo Edison* Court explained that the word *surplus* was "critical" to understanding these provisions. *Toledo Edison* at 292.

In applying these rules, an Ohio court must read the two sections *in pari materia*. *Id.* To comply with Section 6, a municipality's sales of "product" outside the city must derive from a "surplus"—i.e., an amount left over from its authorized Section 4 operations for in-city use. As a matter of language and common sense, "surplus product" arises secondarily from actions a municipality takes under Section 4 to supply its own demand and that of its inhabitants. *See Toledo Edison* at 292. By contrast, product acquired to sell outside city limits is "artificial surplus," illegitimate inventory under Section 4; so Section 6 does not authorize its resale. *Id.* at 293. In other words, the framers of Article XVIII envisioned "surplus product" as unavoidable excess incidental to electricity procured to serve a municipality or its inhabitants.

CPP's sales to customers outside Cleveland fail the *Toledo Edison* standard. The claimed surplus from which they are derived is not necessary to supply any Cleveland customer. Indeed, [redacted] acquiring extra power destined for

delivery outside Cleveland is the only way CPP will be able to perform its decade-long contracts with customers like the City of Brooklyn. (*See* CEI MSJ, Dkt. 90, Ex. M, Brooklyn Contract.) Acting as a broker, CPP commits to sell electricity first, and only then arranges to procure it.

The anti-brokering rule of *Toledo Edison*, authoritatively interpreting the scope of the Article XVIII power to buy and sell electricity, decides this case. *Toledo Edison*'s holding is decisive on its face, and it is reinforced by the Court's earlier anti-circumvention decisions consistently rejecting municipal efforts to bypass the Constitution.

1. This Court Has Repeatedly Prevented Municipal Utilities from Circumventing Article XVIII Constraints.

As discussed above, during and after the time Article XVIII was enacted, surplus electricity arose from inefficiencies in securing "generation resources to meet long-term, forecasted growth in electric power demand." (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. at ¶ 3.) Such inefficiency might take the form of capital risk in building generating facilities for the future (*see* CEI MSJ, Dkt. 90, Ex. Y, Revision Comm'n Rept. at 63) or illiquid markets characterized by long-term contracts to ensure adequate future supply. In each case, a surplus arises unavoidably from efforts to supply actual in-city demand. Without such unavoidable surplus, municipal utilities like CPP may not sell outside the city.

In an unbroken line of rulings, this Court has invalidated attempts by municipal utilities to expand Article XVIII's limited grant of power. In the leading case, in 1959, this Court blocked a municipality's plan to provide electricity to a middleman within city limits, who would then relay it to suburban consumers. *See Hance*, 169 Ohio St. at 463–64, 159 N.E.2d 741 (rejecting city's pretext that the power at issue was technically "delivered and metered within the city"). The municipality was already generating more electricity than it needed to supply its in-city customers, but it developed a plan to generate even more extra electricity and sell it to customers

outside the city. *Id* at 463. This Court held that the city's tactic violated the Ohio Constitution, reasoning that "the city already has adequate facilities to service its own inhabitants," so "the contemplated [new] plant can only be for the creation of a greater surplus for sale outside the city, which is completely contrary to the constitutional limitation on the sale of the surplus." *Id*.

In the process of finding the City of Piqua's plan unlawful, this Court rejected a proposed accounting technique that sought to create a loophole in Article XVIII. Piqua had teamed with private partners to go into business with a profit motive, co-generating large amounts of electricity to sell outside city limits. *Id.* at 458–49. It argued that because it had surplus "capacity," it could sell extra electricity. *Id.* at 461. This Court stopped the plan, however, by determining that Piqua never expected to need that "surplus product" for in-city use, and its extra "capacity" was not electricity that counted when calculating surplus under Article XVIII. *Id.* (rejecting municipal utility's proposal to calculate surplus based on abstract "capacity" rather than actual kilowatt-hours of electricity supplied).

The principles laid down in *Hance* are as correct and important as when it was decided, and they derive straightforwardly from the constitutional text. Electricity that might count as "surplus product" is measured in kilowatt-hours supplied. *Id.* Municipalities may sell electricity outside city limits only to the extent that their operations, undertaken for the sole authorized "purpose of supplying" in-city demand, unavoidably create such "surplus product." Appx. 50 (Ohio Constitution, Article XVIII, Section 6.)

In the same vein, in 1974, this Court rejected the argument that municipal utilities have an implied right under Article XVIII to exercise sovereign power outside city limits. *See Britt v. City of Columbus*, 38 Ohio St. 2d 1, 10, 309 N.E.2d 412, 417 (1974) (finding no such implied power, even if it would be "undoubtedly economically and, possibly, politically advantageous"). It held

that Article XVIII neither contained nor implied a broad extraterritorial eminent-domain power for municipal utilities. *Id.* at 10–11.

As with *Hance*, the principles of *Britt* apply squarely here. Interpretations of Article XVIII that expand municipal-utility powers by implication

> [are] foreclosed by the decisions of this court holding that 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*.* * *
>
> We conclude, therefore, that since the power of eminent domain claimed in this appeal is for *purposes other than supplying a public utility product or service to a municipality or its inhabitants*, such claimed power is not within the eminent domain authority granted municipalities by Section 4.

(Emphasis added.) *Britt,* 38 Ohio St.2d at 9, 309 N.E.2d at 417 (citations omitted). Implied powers under Article XVIII may not be created by judicial extrapolation, and municipal utilities have no power to operate outside the city for "purposes other" than the sole purpose enumerated in the Ohio Constitution. As explained in more detail below, *Britt*'s reasoning—forbidding implied power for "purposes other" than to supply in-city demand—cannot be reconciled with the Eighth District's erroneous "other purposes" doctrine. *See* Proposition of Law No. 3, *infra*.

In 1996, presented with another attempt to expand municipal-utility power, this Court ordered the PUCO to probe behind an alleged sham transaction. There, a public utility used the City of Cleveland as "a straw man to effectuate a sale of electricity for the sole purpose of circumventing the Certified Territory Act." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm'n.*, 76 Ohio St. 3d 521, 526, 668 N.E.2d 889 (1996). The plaintiff alleged that a PUCO-regulated utility sold electricity to the City of Cleveland, which then resold the electricity under supposed Article XVIII powers. *Id.* at 521. At the pleading stage, this Court held that those allegations were enough

to state a colorable claim that the City of Cleveland abused its Article XVIII power to facilitate a PUCO-regulated utility's violation of the Certified Territories Act. *Id.* at 526.

Before *Toledo Edison*, this Court consistently discouraged attempts to circumvent the Ohio Constitution's limitations on the commercial power of municipal utilities. It construes municipal-utility powers narrowly to prevent disruptions of the state's carefully regulated markets for utility service. *Toledo Edison* stands squarely within that tradition.

2. This Court Held in *Toledo Edison* that Article XVIII Prohibits Sales Outside City Limits from an Artificial Surplus.

The Court's unbroken chain of precedents narrowly construing municipalities' Article XVIII power continued in *Toledo Edison*. There, the central question was whether Article XVIII, Sections 4 and 6 empower a municipal utility to serve customers outside the city through a three-step artifice: purchasing excess electricity that was not needed within the city; calling that electricity a "surplus"; then reselling it outside municipal boundaries. *See Toledo Edison*, 90 Ohio St.3d at 291–92, 737 N.E.2d 529. The answer, based on the Ohio Constitution's plain language through the textual analysis laid out above, was no. *See id.* at 293 ("[W]e 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."). Such a transaction creates and then draws on an "artificial surplus"—which is no surplus at all for purposes of Article XVIII. *Id.* With that in mind, this Court held that the constitutional "prohibition includes a de facto brokering of electricity, *i.e.*, where a municipality purchases electricity solely to create an artificial surplus for the purpose of selling the electricity" outside the municipality. *Id.*

Under *Toledo Edison*, if a municipality acquires electricity to sell it outside the city, it has created an artificial surplus that threatens to circumvent the aims of Article XVIII. *Id.* Such a

utility effectively converts itself into an unregulated "de facto broker" of electricity, competing unfairly with heavily regulated public utilities like CEI. *Id.* Municipal utilities, like all other state instrumentalities, are not allowed to evade clear constitutional text—including the word "surplus," which this Court expressly held was "critical" to the meaning of Section 6. *Id.* at 292.

Toledo Edison aligns with the long line of Supreme Court authority discussed above, carefully confining a municipal utility's right to compete outside city limits. That right extends only to surplus electricity that arises incidentally or unavoidably from the utility's service of municipal customers. *See also Ohio Power Co. v. Vill. of Attica*, 23 Ohio St. 2d 37, 44, 261 N.E.2d 123 (1970) (holding that under Section 4, "a municipality may contract with … a corporation to supply electric power *for the use of the municipality and its inhabitants*") (emphasis added). As this Court has repeatedly insisted, the framers gave municipal utilities the power to serve suburban customers only if a genuine surplus arises from the utility's operations to supply the city's own inhabitants. *Toledo Edison* at 292–93.

B. CPP Can Readily Avoid Purchasing Any Excess Electricity.

As the trial court found, "CPP has the flexibility to increase or reduce its electrical supply through various contracts and commitments." Appx. 36 (Finding of Fact No. 7). CPP has never contested this finding or argued that it was against the weight of the evidence. That is because the record conclusively establishes that CPP has no generation facilities imposing capital risk, and no significant inflexible contracts that might create a kilowatt-hour supply outstripping actual demand. CPP's only effective commitment is to purchase what its customers use, as determined on the real-time market.

Never in this litigation has CPP claimed that it is ever stuck with extra electricity. Nor could it. CPP can avoid purchasing every kilowatt hour of its putative electricity "surplus." The only reason it purchases that electricity is to supply customers like the City of Brooklyn.

Indeed, as just one example, the record is clear that CPP entered into a ten-year contract to supply Brooklyn despite [redacted]. (*See* CEI MSJ, Dkt. 90, Ex. M.)

Accordingly, the record developed in the trial court makes plain that any surplus CPP possesses is an "artificial surplus"—an amount CPP acquires only so it can resell it outside Cleveland's boundaries. On a daily basis, CPP buys electricity that immediately flows outside Cleveland. CPP does not buy that excess for any constitutionally authorized purpose. These showings compel the conclusion that CPP is violating Article XVIII, entitling CEI to summary judgment.

1. CPP's Flexible Portfolio Shows That Any Surplus Must Be Artificial.

CPP consistently touts the diversity and flexibility of its "supply portfolio," which "consists of a variety of market energy purchases of various quantities and terms from a variety of wholesale market-based suppliers." (CPP MSJ, Dkt. 59, at 6.) But this portfolio approach to building CPP's electricity supply has another effect: it ensures that CPP's electricity supply never needs to be any larger than what its customers in Cleveland will use.

CPP's portfolio consists of [redacted]. (*See* CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2; *see also* CPP MSJ Reply, Dkt. 96, Ex. A, Bentine Aff. ¶ 24.) This diversified portfolio allows CPP to effortlessly reduce supply in real time, rendering a genuine electricity surplus impossible. And CPP's expert admits that, if CPP found itself with less electricity than required to supply Cleveland, it could make "spot market purchases * * * on the PJM market to make up for any shortfalls." (CPP MSJ Reply, Dkt. 96, Ex. 1, Bentine Aff. ¶ 29.) *See also* Appx. 36 (Finding of Fact No. 7). Further, CPP "could rely totally on PJM's market to purchase power for its residents." (*Id.*, Ex. 1 to Ex. A, Bentine Report at 31.) Because the PJM

market is entirely liquid, this fact by itself shows that CPP never needs to purchase more electricity than the amount used inside Cleveland.

Indeed, "[a]voiding the potential for excess supply has become significantly easier for electric utilities in the last twenty years, such that a competently run utility now faces no likelihood of such an excess supply." (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶ 4.) CPP's supply never needs to grow above 100% of Cleveland's in-city demand, and any excess supply is artificial: created on purpose to serve customers outside Cleveland. (*Id.* ¶ 20.)

CPP can readily tailor its procurement portfolio to match actual municipal demand. The portfolio's current size—larger than the amount that CPP's customers in Cleveland consume—is readily avoidable, and is constitutionally ineligible for resale.

2. Without Any In-City Need to Do So, CPP Continues to Enter New Transactions that Give It Access to Even More Electricity.

Even as CPP's existing arrangements are more than sufficient to procure the electricity used by CPP's in-city customers, CPP continues to enter new contracts to give it access to still more electricity. And it resells large amounts of the resulting electricity to customers outside Cleveland—a fact that CPP does not dispute.

In a clear example of CPP's unconstitutional brokering, it arranged to purchase some of the electricity from a new generation project expressly to serve customers outside Cleveland. (CEI MSJ, Dkt. 90, Ex. D, Henderson E-mail.) CPP's records establish that it knew that it was buying this additional electricity for that purpose, and indeed would have had no use for it otherwise. On December 20, 2016, a Cuyahoga County official wrote CPP to propose the following option: "An additional amount of solar (up to 1Mw) is added to the project and Brooklyn agrees to be the customer/buyer for it through a long term contract and to help market CPP to residents." (*Id.*) CPP's then-Commissioner, Ivan Henderson, responded: "Looks good from

CPP's point of view." (*Id.*) He did not acknowledge that the Ohio Constitution prohibits CPP from arranging to acquire electricity only to sell it to a customer, like the City of Brooklyn, outside Cleveland.

Later, [redacted] (*See* CEI MSJ, Dkt. 90, Ex. V, [redacted] E-mail.) [redacted]

3. Several CPP Purchase Contracts Are Completely Unnecessary to Serve Cleveland's Residents, Irrefutably Demonstrating CPP's Unconstitutional Artificial Surplus.

[redacted] In each instance, CPP purchases an amount of electricity that it proceeds to sell outside city limits, violating Article XVIII, Sections 4 and 6.

CPP admits that in 2017, of its total sales to all customers, it delivered 3.23%, or 49.7 million kilowatt-hours, to customers outside Cleveland. (CPP MSJ, Dkt. 59 at 12.) [redacted]:

> [redacted] *See* CEI MSJ, Dkt. 90, Ex. C, 2018 AMP Memo at 2.) CPP had the option to forgo those purchases without any shortfall in service to its Cleveland customers.

[redacted] (*Id*.) CPP had the option to forgo this contract or any purchases under it.

[redacted] (*Id*.) Again, CPP could have forgone this contract or any purchases under it.

[redacted] (*Id*.) CPP had the option to forgo this contract.

Each of these contracts did nothing to help Cleveland serve its municipal needs. Instead, they served only to enable CPP to sell electricity to customers outside city limits.

Again, Section 6 authorizes a public utility to operate only "for the purpose of supplying the service or product thereof to the municipality or its inhabitants." Appx. 50 (Ohio Constitution Article XVIII, Section 6). Likewise, Section 4 permits a public utility to acquire electricity product only "to be supplied to the municipality or its inhabitants." Appx. 49 (*id.* Section 4). CPP's purchases under each of these contracts violates the Ohio Constitution, because it did not need to buy electricity under any of these five contracts in order to serve its customers within city limits. (*See, e.g.*, CEI MSJ, Dkt. 90, Ex. I, AMP Svcs. Agt. (allowing for more electricity orders to the extent of CPP's requirements).) Each of them could only serve the purpose of creating an artificial surplus for resale outside city limits. *See also Hance*, 169 Ohio St. at 463, 159 N.E.2d 741 (finding unconstitutional further acquisitions of electricity once the city's needs were met, since it "can only be for the creation of a greater surplus for sale outside the city").

4. Even as CPP Acquires More Long-Term Suburban Customers, [redacted] It Can Serve Them Only By Building on Its Unconstitutional Artificial Surplus.

The record shows that CPP enters into long-term contracts with customers outside Cleveland, promising to provide electricity for a decade or even more. (*See, e.g.*, CEI MSJ, Dkt. 90, Ex. M, Brooklyn Contract.) It does so without any basis to anticipate possessing any "surplus

product" within Article XVIII's meaning. In the Brooklyn contract, for example, CPP agreed to provide electricity for ten years (with options to extend the term) at prices guaranteed to undercut CEI's state-mandated rate. (*Id*. Ex. M, Brooklyn Contract at Article 9.) The contract provides CPP no option to terminate; in every relevant sense, this sale to a customer outside Cleveland has already been made. (*Id*.) [redacted] (*Id.* Ex. L, [redacted].)

Under the Ohio Constitution, sales outside city limits are allowed only if a surplus exists in the first place. CPP's extraterritorial sales put the constitutional cart before the horse. Rather than finding itself stuck with excess power that it cannot use within Cleveland—a genuine surplus—and then seeking to sell that excess, CPP commits to sell outside Cleveland first, and then arranges to obtain the electricity it has already pledged to supply. That approach inverts the logic of Article XVIII, Section 6, and is precisely what *Toledo Edison* forbids. *See Toledo Edison*, 90 Ohio St.3d at 293, 737 N.E.2d 529 ("prohibition" on "*de facto* brokering" by municipal utilities).

C. CPP's Constitutional Violation Causes Exactly the Unfair Competition Feared by the Framers and This Court.

CPP never attempted to defend its surplus under the correct reading of *Toledo Edison* and *Hance*. As shown above, that surplus is plainly artificial: CPP never has to possess any electricity beyond what its customers in Cleveland use. Even if by chance CPP obtained extra, the wholesale markets allow CPP to return it readily. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶¶ 24–25, 29.)

CPP cannot pass the *Toledo Edison* test. But the Eighth District's holding, with its new "other purposes" doctrine, gave CPP a new path to engage in the same unfair competition that the Constitution and *Toledo Edison* forbid. Specifically, if the Eighth District's doctrine were to stand,

CPP and other municipal utilities could circumvent Article XVIII with a menu of pretexts for artificial surpluses, citing "other purposes" not authorized by the Ohio Constitution. Not only does this doctrine lack any basis in the text of Article XVIII or this Court's precedent; the Court of Appeals also failed to acknowledge the highly disruptive impact its new rule would have on the market and Ohio's regulatory framework.

1. CPP Cherrypicks Large, Energy-Intensive Customers Outside the City.

Ohio's Certified Territories Act prohibits public utilities like CEI from picking and choosing their customers. Instead, public utilities must serve all customers within their assigned territories equally. Moreover, public utilities are subject to extensive PUCO regulation, including rate regulation. By contrast, when operating outside municipal limits, municipal utilities like CPP can choose the customers to which they offer electricity. Further, municipal utilities are exempt from the PUCO's rules and regulations. *See* R.C. 4933.83(A). (CPP MSJ Reply, Dkt. 96, Ex. 1 to Ex. A, Bentine Report at 18 ("[t]he PUCO does not regulate rates or service of municipal electric systems").) They receive this exemption so they can readily serve their municipal customers, with direct accountability to voters within the municipality.

Here, CPP is exploiting its municipal exemption to target large commercial customers outside Cleveland, with no accountability to others outside Cleveland not offered discount incentives. This disrupts the mix of customers in CEI's certified territory, in a way the PUCO cannot predict or manage. Such an expansion of CPP's footprint undermines the PUCO's role in regulating electricity service and prices. Cherrypicking preferred customers, while undercutting tariff prices without the regulatory burden that CEI must shoulder, is exactly the unfair competition the *Toledo Edison* Court foresaw and sought to prevent.

2. CPP's Unregulated Activity Outside City Limits Disrupts the Competitive Balance and Harms the Public Interest.

In *Toledo Edison*, this Court observed that public utilities like CEI "are subject to substantial regulatory controls by the Public Utilities Commission of Ohio, including regulation of rates." 90 Ohio St.3d at 293, 737 N.E.2d 529. CPP, on the other hand, can set prices without outside supervision, and can even guarantee a fixed discount off the CEI tariff rate for former CEI customers who sign long-term CPP contracts. (CEI MSJ, Dkt. 90, Ex. M, Brooklyn Contract at Article 9.) The "other purposes" doctrine will unleash municipal competition outside the cities, beyond the reach of the PUCO, disrupting Ohio's regulatory regime.

This Court has held that decisions of this significance, with ripple effects throughout the marketplace, must conform to the constitutional text rather than arise from judicial inference. *Britt*, 38 Ohio St. 2d at 10–11, 309 N.E.2d 412 (rejecting the theory 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") (emphasis added). The Eighth District's "other purposes" doctrine for municipal-utility power, derived with no explanation from constitutional text that does not support it, cannot stand. Instead, the Court should enforce existing law to prevent the "unfair competition" foreseen by the framers and by this Court in 2000. *See Toledo Edison* at 293.

D. Because There Is No Genuine Dispute That CPP Buys Electricity Solely for Resale Outside Cleveland, Summary Judgment for CEI is Appropriate.

Article XVIII requires that *all* CPP's purchases be made for the purpose of providing electricity within city limits. *See* Appx. 49 (Ohio Constitution, Article XVIII, Section 4). But as the record shows, CPP's chosen procurement strategy effectively guarantees that *all* of CPP's surpluses are artificial—among other reasons, because CPP can meet its demand by purchasing

electricity in real time, under its requirements contracts. CPP simply has no reason to purchase the electricity it sells outside Cleveland, other than to sell it outside Cleveland. In light of the overwhelmingly clear record on this point, the Court of Appeals should have remanded to the trial court with instructions to (a) grant summary judgment for CEI and (b) issue a declaratory judgment in CEI's favor.

Instead of allowing municipal utilities to devise "other purposes" to circumvent the Ohio Constitution, the appropriate declaration would give effect to *Toledo Edison*'s anti-brokering rule in the context of today's highly liquid wholesale markets. Given the current undisputed facts about CPP's conduct, the declaration should state that CPP may not sell electricity outside Cleveland's municipal limits unless one of the following conditions is met: (1) CPP owns and operates the generation facilities that produce the electricity to be sold outside the City of Cleveland (and none of CPP's customers within the City of Cleveland is being served with electricity purchased from a separate entity); or (2) the electricity to be sold outside Cleveland derives from an unavoidable surplus left over from a transaction necessary to supply customer needs within the City of Cleveland. Overwhelming evidence establishes CPP's constitutional violation and entitles CEI to summary judgment as to liability, and a declaration such as the one proposed by CEI enforcing Article XVIII's constraints.

Proposition of Law No. 3

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

At its core, the Eighth District's denial of summary judgment to CEI stemmed from its view that the Ohio Constitution authorizes municipal utilities to purchase electricity for "other purposes" besides supplying a municipality or its inhabitants. Appx. 27 (¶ 36). This was error.

As this Court has made clear, implied municipal-utility powers cannot be so easily inferred. *Britt*, 38 Ohio St.2d at 10, 309 N.E.2d 412. Such powers do not arise merely because an activity outside city limits may be "economically [or], possibly, politically advantageous." *Id.* Instead, the law requires a "compelling necessity" for the activity, so that the utility may fulfill its only purpose, to "provide services to the municipality or its inhabitants." *Id.* And the circumstances creating that necessity must be unavoidable, not contrived by the municipality itself. *Id.*; *see also id.* at 9 (holding that "since the power * * * claimed in this appeal is for *purposes other than* supplying a public utility product or service to a municipality or its inhabitants, such claimed power is not within the eminent domain authority granted municipalities by Section 4") (emphasis added).

Here, even if some "other purpose" besides actual necessity to supply the municipality and its inhabitants motivated CPP's acquisition of excess electricity (of which there is no evidence in the record to support), that rationale could not justify the constitutional violation. The Eighth District erred in holding otherwise. This Court has identified the narrow conditions under which a court may derive any implied municipal-utility power from the text of the Ohio Constitution, and those conditions are not met here.

A. Half a Century Ago, *Britt* Foreclosed the Eighth District's "Other Purposes" Doctrine.

The effect of the Court of Appeals' ruling was to identify new "purposes" for municipal procurement of utility products: by way of example only, "considerations such as cost, risk mitigation, economies of scale, environmental impact, and reliability." Appx. 29 (¶ 39). These considerations stray far beyond the only purpose authorized by Article XVIII—namely, acquiring supply for "the municipality or its inhabitants." Whether or not they represent good policy, they do not arise from the text of the Ohio Constitution. *See generally Ohio River Power Co. v. City of Steubenville*, 99 Ohio St. 421, 424–25, 124 N.E. 246 (1919) ("grants of power must be strictly

construed, * * * the enumeration of certain powers presupposes the exclusion of all others, and * * * an incident to a grant does not imply a grant of power" to a municipality); *cf. Johnson v. Microsoft Corp.,* 106 Ohio St St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 14 ("The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.").

In discovering new purposes for municipal-utility operations, the Eighth District failed to use the framework for analysis that this Court has established for implied municipal powers under Article XVIII of the Ohio Constitution. *See Britt*, 38 Ohio St.2d at 10–11, 309 N.E.2d 412 (rejecting proposed implied municipal power outside city limits, for lack of any "compelling necessity" for it in order to serve enumerated constitutional purposes). Indeed, with its praise for "economies of scale," Appx. 29 (¶ 39), the Court of Appeals effectively held that CPP could do whatever was economically advantageous, even though this Court explicitly rejected such reasoning a half century ago. *See Britt* at 10 (a municipal power may not be implied from the fact that it is "undoubtedly economically * * * advantageous").

In *Britt*, a municipal utility claimed that its power of eminent domain allowed it to "appropriate property outside the municipality for the purpose of [selling more] services[] solely to nonresidents." *Britt* at 5. It drew this inference from a pair of constitutional phrasings, even though neither of them endowed the utility with any purpose besides the power to supply in-city demand. This Court rejected that adventurism, holding in no uncertain terms that the utility's power to operate was "expressly restricted" to obtaining "products or services [that are] to be supplied to the municipality or its inhabitants." *Id.* at 8. A municipal utility simply may not operate "for purposes other than supplying a public utility product or service to a municipality or its inhabitants." *Id.* at 9.

The *Britt* Court explained clearly, almost a half-century ago, that municipalities can have unenumerated powers only when exercising the power in question is actually *necessary* to serve a constitutional purpose. *Id.* at 10. And the Court confined any such implied power carefully: the implied 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)). Discretionary initiatives cannot give municipalities unenumerated power beyond their borders.

Here, the text of Section 4—the sole source of municipal-utility purchasing power—cannot reasonably be construed as the Eighth District read it. *See* Appx. 49. When, as here, a municipality can buy the exact amount of electricity consumed, Section 4 does not empower a municipality to purchase more electricity than its constituents use in order to enhance revenue or advance other objectives through extraterritorial sales. Because there is no explicit power to pursue those "other purposes," such a power can be implied only under the *Britt* framework. Accordingly, a municipal utility may acquire a genuine surplus only when it is "necessary" for supplying the municipality and its inhabitants, and "only to the extent of the necessity." *Id.*

Britt forecloses the Eighth District's discovery of expansive municipal-utility powers. The lower court hypothesized, for example, that "economies of scale" from an unbounded growth strategy outside the city could lead to lower prices for Cleveland ratepayers. Appx. 29 (¶39). No record evidence supports this idea. But even if true, that hypothesis does not give CPP a basis to go beyond what Article XVIII allows, or enhance its profits through unconstitutional brokering. This Court has specifically held that considerations of economy or profit cannot create municipal authority to acquire utility products to sell outside the city. *Id.* The sole constitutional purpose of

the municipal utility is to acquire supply for "the municipality or its inhabitants." *Britt*, 38 Ohio St.2d at 10, 309 N.E.2d 412. Only activities that are truly necessary for that aim, without factoring in the city's discretionary preferences, are allowed outside city limits.

As the *Britt* Court put it: "the [Section 4] power to 'contract with others for any such product or service' confers" upon a municipality the authority to purchase "utility products or services *for its inhabitants*." (Emphasis added.) *Id*. at 9. CPP is overstepping its constitutional bounds, and no "other purpose" untethered to in-city demand for electricity can justify it. Thus even if they were shown to exist, no benefits associated with any "other purposes" could excuse CPP's constitutional violation. Under the Ohio Constitution, serving in-city demand is the only purpose that justifies a municipal utility's purchase of electricity. Neither a municipal utility, nor the Eighth District may infer from constitutional silence any other authorized purposes.

This result fits the constitutional order. In matters having effects outside their borders, municipalities are governments of enumerated and circumscribed powers. Historical shifts do not change this fundamental fact, and new policy agendas, whether related to economics, the environment, or looming new risks, do not alter the constitutional framework. "A constitution cannot be made to mean different things at different times. Although the policy of one age may ill suit the policy of another, the Constitution must not be subject to such fluctuations. If it becomes undesirable in a present age, it should be amended." *Blue Ash*, 173 Ohio St. at 350, 182 N.E.2d 557. Municipalities are authorized to advance social-policy agendas within their own borders. The Ohio Constitution does not empower municipal utilities to do so for the entire state.

B. Allowing CPP's Conduct Would Undermine the PUCO by Unleashing All 85 of Ohio's Municipal Utilities to Sell Product Anywhere.

The Court of Appeals relied on its expansive reading of "other purposes" in Article XVIII to deny summary judgment for CEI. Appx. 29–30 (¶¶ 39–42). But CPP never actually asserted

"other purposes" as a rationale for its acquisition of excess electricity. Instead, CPP relied on a different public-policy argument to justify its sales outside Cleveland from an artificial surplus: it contended that competition is always good in and of itself for the state. (*See* CPP MSJ Reply, Dkt. 59, at 38 ("the simple fact is that the public benefits when customers have choices, they win").) But in codifying the state's policy judgments in favor of regulated electricity markets, the General Assembly disagreed.

Rather than unfettered competition on price alone, the state's top policy priority is to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." R.C. 4928.02(A). Neither history nor law supports CPP's praise of conduct that amounts to unfair competition on price alone—all the more so because this Court already disapproved the "competition" that CPP touts. *See Toledo Edison*, 90 Ohio St. 3d at 293, 737 N.E.2d 529 ("To allow municipalities the unfettered authority to purchase and then resell electricity to entities outside their boundaries could create unfair competition for the heavily regulated public utilities.").

The constitutional drafters and Ohio's legislature established a balance between regulation and competition for Ohio's electricity customers. The General Assembly has enacted statewide policy through the Certified Territories Act, which seeks to ensure the viability of public utilities and empower the PUCO to protect Ohio's consumers and control prices. Market outcomes alone do not determine the fate of any ratepayer, and high standards of quality and reliability are mandated subject to the judgment of the General Assembly.

The State's policy thus favors regulation, not laissez-faire competition by unregulated entities who pick and choose their customers and their territories. The many public benefits of PUCO regulation are well-established. These include transparency and consistency in the

ratemaking process; the guarantee of reliable service for all customers, regardless of their location or size; and accountability for infrastructure investment, service, and safety. But importantly, this regime does not apply to municipal utilities, which enjoy a limited carve-out, subject to constitutional limitations on municipal power. *See* R.C. 4933.83(A). If the Eighth District's "other purposes" test is allowed to stand, nothing will stop municipal utilities from pursuing the ever-greater "economies of scale." *See* Appx. 29 (¶ 39). The Eighth District's non-textual exceptions will swallow the *Toledo Edison* rule.

Unregulated competition by municipal utilities, free from PUCO oversight, will disrupt the regulatory framework. Because they are exempt from the rate-setting process, if municipal utilities are allowed to compete unfettered across an unlimited territory, they will distort the marketplace, undermining public utilities' crucial economies of scale and leading to tariff increases. The Eighth District's "other purposes" theory will touch off a wave of unfair competition, gradually leaving behind customers who will have to pay higher prices to make up for the loss of larger, energy-intensive customers. The PUCO, lacking subject-matter jurisdiction over CPP and its 84 counterparts, will be powerless to intervene or control the effects on the market. The novel "other purposes" doctrine, unsupported by law, threatens to disrupt the market for electricity service statewide—a structure that grew from a series of tradeoffs and compromises that has been legislatively and administratively fine-tuned in Ohio over many decades. To prevent this unwinding of the framers' legacy, this Court should reverse the Eighth District's discovery of implied municipal power, without limit, in Article XVIII.

CONCLUSION

As it has so many times before, the Court is called on in this case to defend the constitutional balance between statewide and municipal authority, and to ensure that municipal utility powers are appropriately circumscribed. The text of the Ohio Constitution resolves the

dispute. Municipal utilities venturing outside city limits are limited to commercial activity that is unavoidable to advance their sole authorized purpose—supplying product to the municipalities and their inhabitants. CEI respectfully requests that the Court reverse the Eighth District's novel "other purposes" holding, and instruct the trial court to enter summary judgment for CEI.

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APPENDIX TABLE OF CONTENTS

IN THE SUPREME COURT OF OHIO

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

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Notice of Appeal of Appellant The Cleveland Electric Illuminating Company

Appellant The Cleveland Electric Illuminating Company hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals case No. CA-19-108560 on January 9, 2020.

This case raises a substantial constitutional question and is one of public or great general interest.

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COURT OF APPEALS OF OHIO

JAN 09 2020

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

THE CLEVELAND ELECTRIC ILLUMINATING CO.,	:	
Plaintiff/Counterclaim Defendant-Appellant,	:	No. 108560
v.	:	
CITY OF CLEVELAND, ET AL.,	:	
Defendants/Counterclaim Plaintiffs-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: January 9, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-897478

Appearances:

Benesch, Friedlander, Coplan & Aronoff L.L.P., Gregory J. Phillips, Michael J. Montgomery, Michael D. Meuti, James E. von der Heydt, and James J. Walsh, Jr., *for appellant.*

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Kevin M. Butler, *for appellee city of Brooklyn.*

Bricker & Eckler L.L.P., Drew H. Campbell, and Elyse Akhbari, *for appellee Cuyahoga County.*

EILEEN A. GALLAGHER, J.:

{¶ 1} This case involves a dispute as to whether defendants/counterclaim-plaintiffs-appellees the city of Cleveland and Cleveland Public Power ("CPP") (collectively, "the city") violated Sections 4 and 6, Article XVIII, of the Ohio Constitution by purchasing electricity and reselling it to customers outside Cleveland's municipal boundaries. Plaintiff/counterclaim defendant-appellant The Cleveland Electric Illuminating Co. ("CEI") appeals from the trial court's decision (1) granting the city's motion for summary judgment on CEI's claims for declaratory judgment, tortious interference with contract/business relations and unfair competition and (2) denying its own motion for summary judgment on its claim for declaratory judgment. CEI contends that the Ohio Constitution prohibits a municipality from purchasing more electricity than is needed by its inhabitants and reselling the excess electricity to customers outside the municipality. The city contends that the only constitutional restriction on its ability to sell electricity outside its municipal boundaries is a "fifty percent limitation," i.e., that the city may not sell more than "fifty per cent of the total service or product supplied by such utility within the municipality" to customers outside the municipality (the "50 percent limitation"), and that the trial court properly granted its motion for summary judgment and denied CEI's motion for summary judgment because there is no genuine issue of fact that the city's extraterritorial sales of electricity did not exceed the fifty percent limitation. For the reasons that follow, we reverse the trial

court's decision granting summary judgment in favor of the city on CEI's counterclaims and remand for further proceedings.

Factual and Procedural Background

The City's Purchase and Supply of Electricity to Customers

{¶ 2} CPP was established in 1906. CPP, a division of Cleveland's Department of Public Utilities, is a municipally owned electric company that supplies electric energy to its customers, most of whom are located in Cleveland. During the early years of its operation, CPP sold electricity to customers that it had generated from its own power plants. In 1977, CPP shut down most of its generating units and ceased generating any significant amount of electricity.

{¶ 3} CPP's primary competitor is CEI, a public utility regulated by the Ohio Public Utilities Commission ("PUCO") that distributes electric power to customers in northeast Ohio pursuant to the Certified Territory Act. As a regulated public utility, CEI has the exclusive right to provide electric service to customers within its assigned territory, subject to municipalities' "home rule authority" under Sections 4 and 6 of Article XVIII of the Ohio Constitution ("Sections 4 and 6"). *See* R.C. 4933.83; *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 521, 525-526, 668 N.E.2d 889 (1996), fn. 1; *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 288, 737 N.E.2d 529 (2000). Sections 4 and 6 grant municipalities the right to produce or purchase electricity for their inhabitants and the right to sell limited amounts of surplus electricity to entities outside the geographic boundaries of the municipality. *Id.*

{¶ 4} Today, most electricity is generated by large, privately owned facilities and then transmitted to resellers, e.g., electricity utility companies, which pull electricity from the national transmission grid and supply that electricity to end users. Regional transmission organizations ("RTOs") provide access to the transmission grid and enable participants to buy and sell electricity through these wholesale markets, matching demand for electricity with offers to provide it. PJM, the RTO in which CPP's and CEI's service territories are located, manages the transmission grid in 13 states and the District of Columbia. The price of electricity can be negotiated and predetermined by contract or determined by auction in the wholesale energy markets.

{¶ 5} CPP employs a "portfolio approach" to procure the electricity it needs to service its customers. According to Christopher Williams, CPP's manager for energy markets, CPP forecasts its electricity needs on both a monthly and annual basis, i.e., "we typically go about a year in advance in terms of an in-depth kind of look at where we expect our load to be," "analyze and look at our monthly peaks and then we make purchases according to meeting our needs." CPP's current "power supply portfolio" consists of: (1) contracts for energy purchases from certain renewable energy generation projects, including the Brooklyn solar project and a wind project,[1] (2) long-term contractual relationships with several generating

[1] In 2017, Cuyahoga County and Brooklyn partnered with IGS Solar, L.L.C. and Enerlogics Solar, L.L.C. to build a solar-powered electric generation facility on the site of a former landfill in Brooklyn to power county-owned office buildings in Cleveland (the "Brooklyn solar project"). In December 2017, Cuyahoga County and the city entered into various agreements pursuant to which the city agreed to purchase all of the power

facilities through its membership in American Municipal Power, Inc. ("AMP"), a consortium of municipalities that owns and operates power plants, (3) contracts of "various quantities and terms from a variety of wholesale market-based suppliers," including spot, medium and long-term market purchases from the PJM wholesale markets and (4) the energy generated by several combustion turbine generating units and diesel generators.

CPP Provides Electricity to Customers in Brooklyn

{¶ 6} In April 2017, the Brooklyn City Council passed an ordinance consenting to CPP's construction of distribution facilities in Brooklyn, Ohio and granting CPP a "nonexclusive franchise" to provide electricity service to customers in Brooklyn. In March 2018, Cleveland entered into a "customer agreement" with Brooklyn to provide electricity to seven of its municipal buildings located in Brooklyn with an anticipated "maximum demand or capacity of 1,000 kWd." The agreement was for an initial term of ten years "from the date permanent electric

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generated by the Brooklyn solar project and to supply electricity to various county-owned office buildings located in Cleveland. As specified in these agreements, the power the city supplied to the county-owned buildings in Cleveland was to come from the output of the Brooklyn solar project, a portion of the power output from a separate offshore wind-powered turbine generator project (the "wind project") and "other energy from CPP's supply portfolio." The power was to be delivered through power line extensions built by CPP. The parties have spent a considerable amount of time in their briefs discussing the Brooklyn solar project. However, other than to the extent it is one of several sources of electricity purchased by the city, the Brooklyn solar project is not at issue in this case. There is no dispute that the city was authorized to provide electric service to the county-owned buildings located within its municipal boundaries and to construct power line extensions to distribute power from the solar plant to those buildings in Cleveland. At issue in this case is the extent to which the city was authorized to resell electricity outside its municipal boundaries.

service is initially provided" at the rates specified in CPP's "capacity enhancement incentive rate schedule," i.e., the rate schedule "applicable to all new commercial customers who have not received Cleveland Public Power service at their present location in the preceding two years, who enter into a written 10-year contract for service anticipated to commence in 2010, who will be served by distribution capacity created as part of Cleveland Public Power's 'Capacity Enhancement Program,' and whose peak demand is equal to or in excess of 150 kilowatts." The agreement stated that it could be extended for an additional five years. The rate in effect during the five-year renewal period would be "the amount Consumer would have paid each year under the then-current standard tariff of the Cleveland Electric Illuminating Company" less "discounts" ranging from one percent to five percent. Under the terms of the agreement, CPP was to be Brooklyn's exclusive supplier, i.e., Brooklyn agreed that it would "not contract with any other electric utility for electric service to be supplied during the term of [the] [a]greement." Brooklyn further agreed that if it were to discontinue its service with the city in violation of the agreement, it would be "liable to repay CPP the savings that resulted from the discount," i.e., "the difference between the amount [Brooklyn] would have paid under the applicable CEI standard tariff and the amount [Brooklyn] paid under [the] Agreement," as well as installation costs and all damages sustained by the city. CPP thereafter began constructing distribution lines through Brooklyn to connect to CPP's lines in Cleveland.

{¶ 7} On May 9, 2018, CEI filed a complaint for a temporary restraining order and preliminary injunction, asserting claims of trespass, negligence/negligence per se and public and private nuisance against the city arising out of CPP's construction of distribution lines to service customers in Brooklyn. CEI alleged that CPP, without notice to CEI, had "begun affixing equipment to CEI's active power lines and placing CPP's new wires on top of — and in physical contact with — CEI's existing energized conductor lines." CEI claimed that this presented an "immediate risk of injury or death" as well as the potential for power losses to customers. CEI requested an injunction "preventing further work by CPP for a reasonable time to ensure that CPP adequately informs and involves CEI in the project to ensure that CPP performs the project safely and avoids injury to persons and damage to CEI's property." On May 15, 2018, the parties reached a settlement relating to CEI's request for a temporary restraining order.

{¶ 8} On July 2, 2018, CEI filed an amended complaint, asserting claims for declaratory judgment, tortious inference with contract/business relations and unfair competition against Cleveland and CPP. CEI alleged that CPP, through its purchases of electricity from the Brooklyn solar project and other sources, was "purchasing an 'artificial surplus' of electricity for resale outside its municipal territory at rates that undercut the statutory minimum rates for utilities regulated by [PUCO]" in violation of Sections 4 and 6 of Article XVIII of the Ohio Constitution. CEI further alleged that, by entering into an agreement with Brooklyn for the provision of electricity to Brooklyn municipal buildings to which CEI "had long

provided electricity," CPP had intentionally interfered in CEI's existing contracts and business relations without the privilege or legal right to do so and that CPP's "extraterritorial expansion" constituted unfair competition with CEI. CEI requested that the trial court (1) declare that "CPP's sale of electricity to Brooklyn, the inhabitants of Brooklyn, and all other extraterritorial sales derived from its artificial surpluses are unconstitutional" and that "CPP is not entitled to resell electricity extraterritorially to Brooklyn, the residents of Brooklyn, and all other customers located outside of Cleveland's municipal limits" and (2) grant CEI preliminary and permanent injunctive relief (a) enjoining CPP from "all extraterritorial sales of electricity that derive from artificial surpluses," (b) enjoining CPP's construction of the distribution lines in Brooklyn and "all other extraterritorial facilities, the purpose of which is to serve customers outside Cleveland's municipal limits" and (c) enjoining CPP from performing its agreement with Brooklyn.

{¶ 9} The city filed an answer, denying that its actions violated the Ohio Constitution or any law and asserting various affirmative defenses. Cleveland also filed a counterclaim against CEI, asserting three claims for declaratory judgment and a claim for unfair competition — malicious litigation and retaliation. The city asserted that its actions in providing electricity to county-owned buildings in Cleveland, providing electricity to Brooklyn subject to the 50 percent limitation and constructing the electric lines necessary to provide electric service to Brooklyn and the county-owned buildings in Cleveland were authorized under the Ohio Constitution and various statutory provisions. The city further alleged that (1) its

electric utility rates, set by city ordinances and approved by the legislature, were not subject to judicial review and could not constitute unfair competition and (2) CEI had engaged in "unfair commercial practices" by filing a "baseless" first amended complaint and using discovery in the litigation to access its "trade secret and competitively sensitive information." The city sought declarations in its favor on each of these issues. The city also sought a declaration that CEI had violated R.C. 4928.69 and 4928.37 by charging or threatening to charge "transition fees" or "switch fees" to customers who chose to receive their electric service from CPP and sought preliminary and permanent injunctive prohibiting CEI from interfering with the city's contractual relationships and from charging customers unreasonable "transition fees" or "switch fees" in violation of R.C. 4928.69 and 4928.37.

{¶ 10} CEI filed a motion to dismiss Cleveland's counterclaim for unfair competition (Count III of its counterclaim) and its counterclaims for declaratory judgment involving the city's electric utility rates and CEI's alleged practice of charging "transition fees" or "switch fees" (Counts II and IV of its counterclaim).

{¶ 11} After CEI amended its complaint, the trial court allowed Brooklyn, Cuyahoga County and several other parties to intervene in the action as defendants. Each of these entities also asserted counterclaims against CEI. Brooklyn and Cuyahoga County asserted a counterclaim for declaratory judgment against CEI, seeking declarations that (1) CPP is authorized to provide electricity service to county-owned buildings in Cleveland including electricity acquired from the solar project, (2) CPP is authorized to provide electricity service to Brooklyn from its

surplus product, (3) CPP is authorized to provide electric lines necessary to provide electric utility service to Brooklyn and the county-owned buildings in Cleveland and (4) the city's electric service agreements with Cuyahoga County and Brooklyn were "valid, enforceable, and within the [city's] lawful authority * * * pursuant to the Constitution and laws of the State of Ohio." Brooklyn and Cuyahoga County also sought preliminary and permanent injunctive relief "barring CEI from any further interference" in these contractual relationships. The counterclaims asserted by the other intervening defendants against CEI were later voluntarily dismissed.

{¶ 12} The city and CEI filed cross-motions for summary judgment. In its motion for summary judgment, the city argued that it was entitled to summary judgment on all CEI's claims because (1) it had acted "in accordance with the express and unambiguous language" of Sections 4 and 6, (2) it had the right to sell electricity to Cuyahoga County for its county-owned buildings in Cleveland and to customers outside its municipal boundaries subject only to the 50 percent limitation and (3) it was undisputed that the city's extraterritorial electricity sales had not exceeded the 50 percent limitation. The city further argued that it had the statutory right under R.C. 743.12, 743.13 and 743.18 to construct electric lines and to supply electric service to customers located both inside and outside its municipal boundaries.

{¶ 13} CEI opposed the city's motion and filed its own motion for summary judgment on its declaratory judgment claim. CEI argued that, based on the Ohio Supreme Court's interpretation of Sections 4 and 6 in *Toledo Edison,* 90 Ohio St.3d at 288, 737 N.E.2d 529, the city was prohibited from purchasing electricity "solely

to create an artificial surplus" for the purpose of selling electricity to an entity outside its municipal boundaries and that a genuine issue of material fact existed — based on evidence that the city was intentionally purchasing more electricity than it needed for its inhabitants in order to resell it to Brooklyn — as to whether CPP's sales of electricity to customers outside Cleveland were "drawn from * * * an 'artificial surplus.'"

{¶ 14} CEI requested that the trial court deny the city's motion for summary judgment and issue a declaration that:

> CPP may not sell electricity outside Cleveland's municipal limits unless one of the following conditions is met: (1) the electricity to be sold extraterritorially is produced by generation facilities owned and operated by CPP, and none of CPP's customers within the City of Cleveland is being served with power purchased from a separate entity; or (2) the electricity to be sold extraterritorially derives from an unavoidable surplus left over from a transaction necessary to supply customer needs within the City of Cleveland.

CEI asserted that "[o]nce the factual record is developed at trial, this declaratory judgment will guide the parties and the Court in crafting an injunction to stop CPP's violation of the Constitution."

{¶ 15} In January 2019, the trial court granted CEI's motion to dismiss Cleveland's counterclaim for declaratory judgment based on CEI's alleged violations of R.C. 4928.69 and 4928.37 (Count IV of Cleveland's counterclaim), concluding that it "patently and unambiguously lack[ed] jurisdiction" over the counterclaim because it involved a matter over which PUCO has "exclusive jurisdiction." The trial court denied CEI's motion to dismiss as to Cleveland's counterclaim for declaratory

judgment based on the city's electric utility rates (Count II of Cleveland's counterclaim) and its counterclaim for unfair competition (Count III of Cleveland's counterclaim).

{¶ 16} On May 10, 2019, the trial court issued its decision on the parties' cross-motions for summary judgment.[2] The trial court granted the city's motion for summary judgment on CEI's claims and denied CEI's motion for summary judgment on its declaratory judgment claim. The trial court further stated that "the Plaintiff's claims and the Defendants' counterclaims are found not to be well taken and are denied."

{¶ 17} The trial court interpreted Sections 4 and 6 of Article XVIII of the Ohio Constitution and *Toledo Edison, supra*, as precluding the city "only [from] purchasing electricity solely for the purpose of reselling the entire amount to outside customers" or from selling "surplus electricity" outside the city's geographic boundaries in excess of the 50 percent limitation. (Emphasis sic.) Because it found that there was no genuine issue of material fact that the city had not violated either of these prohibitions, the trial court granted summary judgment in favor of the city on CEI's claims. The trial court explained:

> As to the two dispositive facts the city submitted in the city's MSJ — that the city sells surplus electricity to customers outside of municipal limits at approximately 3%, well below the 50% limitation set by the Constitution, and that the city does not purchase electricity "solely for the purpose of reselling the entire amount of the purchased electricity

[2] The May 10, 2019 judgment entry states that it is a "nunc pro tunc entry as of & for 04/12/2019." It is unclear from the record why the trial court designated its May 10, 2019 judgment entry as a "nunc pro tunc entry." No orders were entered on April 12, 2019.

to an entity outside the municipality's geographic limits" — CEI does not offer any evidence to contradict the city. The Court's summary judgment determination should be driven exclusively by the law on the two relevant issues in this case:

> (1) whether Defendants have exceeded the fifty-percent (50%) limitation set by Article XVIII, Section 6, of the Ohio Constitution in selling or agreeing to sell service or products to the city of Brooklyn and/or other entities outside the municipal boundaries and
>
> (2) whether Defendants have purchased "electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits," *see Toledo Edison*, 90 Ohio St.3d at 292 (emphasis added), in selling or agreeing to sell electric service to the city of Brooklyn and/or other entities.

The city has met its burden of identifying evidence for each of these questions. In response, CEI has failed to "set forth specific facts showing that there is a genuine issue for trial" on this dispositive issue. *See Dresher* [*v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).]

In this case, the Court specifically finds that the amount of electricity to be generated by this project and utilized outside of the city of Cleveland does not exceed the 50% limitation imposed by the Ohio Constitution. With those findings it is abundantly clear that the Plaintiff has failed to establish the existence of a genuine issue of material fact in support of its claims.

{¶ 18} Based on its ruling on CEI's unfair competition claim, the trial court determined that Cleveland's "responsive" second counterclaim for declaratory judgment relating to the city's electric utility rates was "moot as a matter of law." The trial court also entered summary judgment against Cleveland on its counterclaim for unfair competition, finding that there was no genuine issue of material fact that CEI's action was "not objectively baseless," and, consistent with its prior ruling on CEI's motion to dismiss, held that it lacked jurisdiction to consider

Cleveland's fourth counterclaim (its counterclaim for declaratory judgment based on CEI's alleged imposition of unreasonable "transition fees" or "switch fees"). Finally, "[i]n view of [its] ruling on [CEI's], claims," the trial court "likewise grant[ed] summary judgment in favor of the intervening defendants on their counterclaim for declaratory judgment."[3]

{¶ 19} CEI appealed, raising the following two assignments of error for review:

> Assignment of Error No. 1: The Common Pleas Court erred as a matter of law by failing to grant summary judgment to CEI on its declaratory-relief claim, because reasonable minds could conclude only that CPP sells electricity outside Cleveland that it has bought for that purpose.
>
> Assignment of Error No. 2: In the alternative, the Common Pleas Court erred by granting summary judgment to CPP on CEI's claims for declaratory relief, tortious inference, and unfair competition because the record does not show that all CPP's electricity purchases were intended to supply customers within the city of Cleveland.

Law and Analysis

Standard of Review

{¶ 20} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and conduct

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[3] Although no party moved for summary judgment on Cleveland's counterclaims for declaratory judgment and unfair competition or Brooklyn and Cuyahoga County's counterclaim for declaratory judgment, the trial court, in its May 10, 2019 judgment entry, "resolve[d] all pending claims and counterclaims." CEI has not separately challenged, and the parties have not otherwise discussed, the trial court's rulings on the counterclaims in their appellate briefs. Accordingly, we do not further address them here other than to the extent that they are intertwined with the trial court's rulings on CEI's claims.

an independent review of the record to determine whether summary judgment is appropriate.

{¶ 21} Under Civ.R. 56, summary judgment is appropriate when no genuine issue exists as to any material fact and, viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party, entitling the moving party to judgment as a matter of law.

{¶ 22} On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party has the reciprocal burden to point to evidence of specific facts in the record demonstrating the existence of a genuine issue of material fact for trial. *Id.* at 293. Summary judgment is appropriate if the nonmoving party fails to meet this burden. *Id.*

{¶ 23} Resolution of this case turns on the interpretation and application of Sections 4 and 6 of Article XVIII of the Ohio Constitution and the Ohio Supreme Court's decision in *Toledo Edison*.

{¶ 24} CEI argues that the trial court erred in granting the city's motion for summary judgment and denying its own motion for summary judgment on its declaratory judgment claim because (1) the Ohio Constitution "forbids"

municipalities from selling electricity out of an "artificial surplus," i.e., purposefully purchasing more electricity than the city needs for its inhabitants in order to "resell" electricity to customers located outside the city's municipal boundaries, and (2) the record did not show that "all of [CPP's] electricity purchases" were intended to supply customers within its municipal boundaries, i.e., that reasonable minds could conclude that CPP purchased "some electricity" for the sole purpose of selling it to customers outside Cleveland in violation of Sections 4 and 6. The city responds that the trial court properly granted its motion for summary judgment and denied CEI's motion for summary judgment because (1) the city has a constitutional right to sell its surplus electricity to customers outside its municipal boundaries subject only to the fifty percent limitation, (2) there was no dispute that the city's extraterritorial electricity sales did not exceed the fifty percent limitation and (3) the city presented uncontroverted evidence that "[t]he City does not purchase electricity solely for the purpose of reselling *the entire amount* of that purchased electricity to an entity outside the City's geographical limits." (Emphasis added.)

{¶ 25} Section 4 authorizes a municipality to establish, maintain and operate a power plant to produce electricity and to contract with others to purchase electricity to be supplied to its inhabitants. The section states, in relevant part:

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

{¶ 26} "A municipality's authority to produce or purchase electricity is limited 'primarily to the furnishing of services to their own inhabitants.'" *Toledo Edison*, 90 Ohio St.3d at 291-292, 737 N.E.2d 529, quoting *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461, 159 N.E.2d 741 (1959). However, Section 6 authorizes a municipality that owns or operates an electric utility to sell "surplus" electricity to customers outside its municipal boundaries under certain circumstances. That section states:

> Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality * * *.

{¶ 27} In *Toledo Edison*, the Ohio Supreme Court interpreted these provisions in determining "whether a municipality has constitutional authority to purchase electricity solely for direct resale to an entity that is not an inhabitant of the municipality and not within the municipality's limits." 90 Ohio St.3d at 291, 737 N.E.2d 529. In that case, four municipalities that owned and operated their own electrical utilities entered into a joint venture to facilitate the purchase, transmission and resale of electricity. *Id.* at 288. The municipalities constructed an electric power transmission line from one of the municipalities' electrical substations directly to a smelting business located outside the municipalities' geographic limits. *Id.* at 289. The smelting business, which had been a long-term electricity customer of Toledo Edison, terminated its relationship with Toledo Edison and began purchasing

electricity from the municipalities. *Id.* The municipalities had to purchase electricity in order to fulfill their obligation to provide electricity to the smelting business. *Id.*

{¶ 28} Toledo Edison filed a complaint for injunctive and declaratory relief against the municipalities, alleging that the municipalities' purchase of electricity solely for the purpose of reselling it to the smelting business, a "noninhabitant" of the municipalities, violated Section 4. *Id.* Toledo Edison further alleged that the municipalities' sale of electricity to the smelting business violated Section 6 because the electricity sold to the smelting business was not "surplus" electricity generated by any of the municipalities' utilities but was electricity purchased by the municipalities specifically for resale to an entity outside the municipalities' geographic boundaries. *Id.* The trial court granted the municipalities' motion to dismiss for lack of standing and held that, even if Toledo Edison had standing, its claims were meritless. *Id.* at 289-290. Toledo Edison appealed.

{¶ 29} The court of appeals reversed the trial court on the standing issue. With respect to the constitutional issue, the court of appeals held that a municipality has the right under Section 6 to sell surplus electricity "without regard to whether the municipality bought the electricity for the purpose of resale" so long as the amount sold outside the municipality did not exceed fifty percent of the total electricity consumed in the municipality. *Id.* at 290. The court of appeals remanded the case for further proceedings based on Toledo Edison's claim that the

municipalities' sale of electricity to the smelting plant exceeded the fifty percent limitation. *Id.*

{¶ 30} The Ohio Supreme Court allowed a discretionary appeal and reversed the court of appeals. *Id.* at 290, 293. In its decision, the Ohio Supreme Court focused on the drafters' use of the term "*surplus* product" and concluded that Sections 4 and 6 "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":

> Section 6 allows a municipality that owns or operates a utility for the purpose of generating its own electricity to sell surplus electricity. Critical to our analysis of Section 6 is the meaning of the word "surplus." Language used in the Constitution should be given its usual and ordinary meaning. *Cleveland Tel. Co. v. Cleveland* (1918), 98 Ohio St. 358, 368, 121 N.E. 701, 704. "Surplus" is defined as "the amount that remains when use or need is satisfied." *Webster's Third New International Dictionary* 2301 (1993). Thus, a municipality may sell electricity that is in excess of what the municipality or its inhabitants use subject to any other limitations * * *.
>
> Section 4 intends to limit a municipality's authority to produce or acquire electricity primarily for the purpose of serving it or its inhabitants' needs. *Hance*, 169 Ohio St. at 461, 159 N.E.2d at 744. Section 6 intends to limit a municipality's ability to sell only that electricity that is in excess of what is needed by the municipality or its inhabitants. Read *in pari materia*, Sections 4 and 6 only allow a municipality to purchase electricity primarily for the purpose of supplying its residents and reselling only surplus electricity from that purchase to entities outside the municipality. This interpretation necessarily precludes a municipality from purchasing electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits.
>
> This holding comports with this court's determination that the framers "intended to * * * prevent * * * municipalities from entering into the general public-utility business outside their boundaries in competition with private enterprise." *Hance*, 169 Ohio St. at 461, 159

> N.E.2d at 744. * * * To allow municipalities the unfettered authority to purchase and then resell electricity to entities outside their boundaries could create unfair competition for the heavily regulated public utilities.
>
> Thus, we hold that Sections 4 and 6 of Article XVIII of the Ohio Constitution, read *in pari materia*, preclude a municipality from purchasing electricity solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits. In other words, a municipality is prohibited from in effect engaging in the business of brokering electricity to entities outside the municipality in direct competition with public utilities. This prohibition includes a de facto brokering of electricity, i.e., where a municipality purchases electricity solely to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries.

(Emphasis added.) *Id.* at 292-293.

{¶ 31} The Ohio Supreme Court reversed and remanded the case to the trial court for a factual determination "as to whether the electricity purchased by the municipalities herein was solely for the purpose of resale to an entity outside the geographic boundaries of the municipalities." *Id.* at 293.

{¶ 32} The city contends that its practice of selling electricity outside its municipal boundaries does not violate Section 6, as interpreted in *Toledo Edison,* because (1) there is no genuine issue of fact that its extraterritorial electricity sales did not exceed the 50 percent limitation and (2) it presented uncontroverted evidence that "[t]he 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." (Emphasis added.) The city's arguments are unavailing.

{¶ 33} In *Toledo Edison,* the Ohio Supreme Court expressly rejected the proposition that the only limitation on a municipality's right to resell electricity

outside its boundaries was the fifty percent limitation, reversing the court of appeals' holding that municipalities had the right under Section 6 to sell surplus electricity regardless of whether the municipality bought the electricity for the purpose of reselling it so long as the amount sold outside the municipality did not exceed the fifty percent limitation. *Toledo Edison* at 290. As the court observed in *Toledo Edison*, 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. In other words, the court recognized that there were two constraints on municipalities' extraterritorial sales under Section 6. First, a municipality can sell only "surplus" product. Second, extraterritorial sales of that surplus product must not exceed the fifty percent limitation.

{¶ 34} Further, contrary to the city's assertion, the Ohio Supreme Court did not interpret Sections 4 and 6 as precluding a municipality from purchasing electricity solely for the purpose of extraterritorial resale only where it resells "the entire amount" of that purchased electricity to customers outside its geographic boundaries. Although the court stated that its interpretation of these sections "*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), the court was clear that the creation of any "artificial surplus" of electricity for resale outside a municipality's geographic limits, i.e., any purchase of electricity by a municipality

"solely for the purpose of reselling it" outside its geographic boundaries, was prohibited under Sections 4 and 6. *See id.* at 292 ("Read *in pari materia*, Sections 4 and 6 only allow a municipality to purchase electricity primarily for the purpose of supplying its residents and reselling only surplus electricity from that purchase to entities outside the municipality."); *id.* at 293 ("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."); *id.* (remanding for a determination "as to whether the electricity purchased by the municipalities herein was solely for the purpose of resale to an entity outside the geographic boundaries of the municipalities").

{¶ 35} Accordingly, based on the Ohio Supreme Court's interpretation of Sections 4 and 6 in *Toledo Edison*, a municipality violates the Ohio Constitution if it purposely purchases more electricity than it needs for its inhabitants "solely" so that it can resell electricity to customers outside its municipal boundaries — i.e., thereby creating an artificial surplus for resale outside its geographic limits — regardless of whether (1) the municipality's extraterritorial sales exceed the fifty percent limitation or (2) the municipality purchased excess electricity in order to resell "the entire amount" of the purchased electricity outside its municipal boundaries. The trial court erred in ruling otherwise.

{¶ 36} This is not to say that a municipality is required to procure the exact amount of electricity needed by its inhabitants — and only the exact amount of

electricity needed by its inhabitants — at any given time. Consistent with the Ohio Constitution, a municipality may acquire a surplus of electricity for reasons other than "solely for the purpose of reselling" surplus electricity outside its municipal boundaries and, if it does so, the municipality may then resell the surplus to others outside its municipal boundaries subject to the 50 percent limitation. It is only where a municipality purchases more electricity than it needs for its inhabitants "*solely* for the purpose of reselling it to an entity that is not within the municipality's geographic limits," that the municipality violates Sections 4 and 6 as interpreted by the court in *Toledo Edison*. (Emphasis added.) *Toledo Edison* at 293. Accordingly, whether the city in this case violated the Ohio Constitution by reselling electricity to Brooklyn or other customers outside its municipal boundaries hinges on the purpose for which the electricity was purchased, i.e., whether it was purchased "solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits," or whether it was purchased in whole or in part for some other purpose.

{¶ 37} CEI asserts that in today's energy market it is virtually impossible for a city to have "surplus" electricity within the meaning of Section 6. It contends that due to "flexible contractual arrangements" and the operation of the wholesale markets, the city (1) has the ability to tailor its electricity purchases to match actual demand to avoid purchasing excess electricity at any time and (2) can relinquish its claim to contracted electricity or resell excess electricity through the wholesale markets if it is not needed. The city disputes this claim. It asserts that it is required

to maintain an energy reserve margin that exceeds its customers' anticipated usage and states that it relies on multiple power sources, rather than just wholesale market transactions, to procure energy for its customers in order to have a "risk-mitigated, environmentally rational, and economical power supply that serves as a hedge against the volatility of the [wholesale] markets."

{¶ 38} Based on the record before us, we find that the trial court erred in granting summary judgment in favor of the city on CEI's claims. CEI presented evidence from which a reasonable factfinder could conclude that the city purchases at least some electricity solely for the purpose of reselling it to others outside its municipal boundaries. It is undisputed that the city has entered into a ten-year agreement with Brooklyn to serve as its exclusive electricity supplier. 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.

{¶ 39} However, we do not agree with CEI's assertion that any surplus electricity CPP possesses can only be an "artificial surplus," i.e., "an amount acquired only so it could be resold outside Cleveland's boundaries." As stated above, we do not read the Ohio Constitution and *Toledo Edison* as requiring a municipality to produce or purchase the precise amount — and only the precise amount — of electricity needed to satisfy the requirements of its municipal customers. What

Sections 4 and 6 aim to avoid is "unfettered authority" by municipalities "to purchase and resell electricity to entities outside their boundaries" so as to "create unfair competition for the heavily regulated public utilities." *Toledo Edison* at 293. A city is not required to forgo considerations such as cost, risk mitigation, economies of scale, environmental impact and reliability in favor of purchasing only the precise amount of electricity required for use by customers within the municipality at any given time.

{¶ 40} We likewise do not agree with CEI's assertion that the trial court erred in failing to issue a declaration that:

> CPP may not sell electricity outside Cleveland's municipal limits unless one of the following conditions is met: (1) the electricity to be sold extraterritorially is produced by generation facilities owned and operated by CPP, and none of CPP's customers within the City of Cleveland is being served with power purchased from a separate entity; or (2) the electricity to be sold extraterritorially derives from an unavoidable surplus left over from a transaction necessary to supply customer needs within the City of Cleveland.

{¶ 41} The declaration CEI contends the trial court should have entered does not comport with *Toledo Edison*. As stated above, it is only where a city purchases excess electricity *solely* for the purpose of selling it outside city limits or otherwise exceeds the 50 percent limitation that the city violates the Ohio Constitution. Based on the record before us, whether the city purchased excess electricity *solely* for the

purpose of selling it to others outside municipal limits is a matter to be resolved by the trier of fact.[4]

{¶ 42} We overrule CEI's first assignment of error and sustain its second assignment of error. We reverse the trial court's decision granting summary judgment in favor of the city on CEI's claims and remand for further proceedings.

{¶ 43} Judgment reversed; remanded.

It is ordered that appellant recover from appellees the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN A. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR

[4] As stated above, the 50 percent limitation is not at issue in this case. There is no dispute that the city's extraterritorial sales of electricity do not exceed the 50 percent limitation.

CV18897478 108642666

CASE NO. CV 18 897478 ASSIGNED JUDGE ROBERT POLLEX

CLEVELAND ELECTRIC ILLUMINATING CO. VS CITY OF CLEVELAND, ET AL.

CIVIL CASE STATUS FORM

DISPOSITION

☐ 02 REASSIGNED	☐ 81 JURY TRIAL	☐ 89 DIS. W/PREJ
☐ 03 REINSTATED (C/A)	☐ 82 ARBITRATION DECREE	☐ 91 COGNOVITS
☐ 04 REINSTATED	☐ 83 COURT TRIAL	☐ 92 DEFAULT
☐ 20 MAGISTRATE	☐ 85 PRETRIAL	☐ 93 TRANS TO COURT
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☐ 65 STAY	☐ 87 DIS. W/O PREJ	☐ 96 OTHER
☐ 69 SUBMITTED	☐ 88 BANKRUPTCY/APPEAL STAY	

NO. JURORS _____

START DATE _____/_____/_____

END DATE _____/_____/_____

COURT REPORTER _____

START DATE _____/_____/_____

END DATE _____/_____/_____

☐ PARTIAL
☒ FINAL
☒ POST CARD

JOURNAL

DATE 05/10/2019 (NUNC PRO TUNC ENTRY AS OF & FOR 04/12/2019)

CLERK OF COURTS

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, THAT THE PLAINTIFFS CLAIMS AND THE DEFENDANTS' COUNTERCLAIMS ARE FOUND NOT TO BE WELL TAKEN AND ARE DENIED. COSTS ARE TO BE SPLIT BETEEN PARTIES EQUALLY.

OSJ

OSJ

JUDGE

CPC 43-2

FILED
2019 MAY 10 P 2:07
CLERK OF COURTS
CUYAHOGA COUNTY

08/15/2005 - 1051448.3

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CLEVELAND ELECTRIC ILLUMINATING CO.,	)	CASE NO. CV-18-897478
	)	
	)	JUDGE ROBERT C. POLLEX
Plaintiff,	)	
	)	
vs.	)	
	)	JUDGMENT ENTRY
CITY OF CLEVELAND, *et al.*	)	
	)	
	)	
Defendants.	)	

It appears to the Court that all necessary parties are before the Court and that all answers have been filed, and all pleadings and documents are submitted as to Motions for Summary Judgment filed by main parties; this case is decisional on motions. The Court, having reviewed all of the briefs and supporting factual documentation, finds that there is a no substantial and material issue as to the facts, but that there is a substantial legal issue due to the Constitutional provisions and the associated case law.

Statement of Case

The primary issue in this case centers on the definition of *surplus* in view of the facts of this case. The Defendants primarily purchase electricity rather than generate electricity on their own, and the contracts of purchase to supply their

customers with electricity permit the Defendants to vary the amount of electricity that they buy and control the amount they sell to outside customers. The Defendants' view of this situation would be that they are merely controlling their costs and profits by selecting electrical providers and being flexible as to the amount of electricity they purchase. The Plaintiff argues that this is manipulation permitting Defendants to be a broker of electricity to the customers outside of the city of Cleveland, for purposes of avoiding the constitutional limitation discussed extensively in the briefs. Cuyahoga County, the city of Brooklyn, and Enerlogics Solar, LLC have intervened and pleaded a counterclaim for declaratory judgment.

This Court and the parties agree that the most significant case precedent as to the facts and issues in this case is *Toledo Edison Co. v. City of Bryan*, 90 Ohio St.3d 288 (2000). This case held that the Ohio Constitution "precludes a municipality from purchasing electricity solely for the purpose of reselling the entire amount to an entity outside the municipality's geographic limits." *Id.* at 292. This conclusion would appear to favor the Plaintiff, but the language in the precedent (*Toledo Edison v. Bryan)* only prohibits purchasing electricity solely for the purpose of reselling the entire amount to outside customers under the Ohio Constitution. The primary focus in this case is the purchase of solar electricity for purposes of sale to the municipality of Brooklyn. But it is also to be used to serve 12 Cuyahoga County properties from the same source (solar farm). This single fact would appear to favor the Defendants

in that the purchased electricity is not solely to be sold outside of the city of Cleveland. However, as maintained by the Plaintiff, this is just a ruse to avoid compliance with the constitutional limit; the Defendants may be manipulating contracts and service areas in sort of a shell game in order to demonstrate compliance with the constitutional limit, and the *Toledo Edison v. Bryan* precedent. The ultimate purpose of this is to permit the Defendants to be a powerbroker with respect to electricity. There is some factual support for this argument in that the city of Cleveland purchases all or most of its electricity rather than producing electricity. By the use of accounting methods and flexible purchase agreements, the city can disguise what portion that is sold outside of the city versus to its own customers, making it difficult to measure the surplus.

Defendants and intervening defendants have filed counterclaims. Plaintiff and Defendants have filed cross Motions for Summary Judgment with extensive documentation and exhibits. The Court must first determine if there is significant and material factual issues.

Findings of Fact

The Court makes the following Findings:

1. This litigation began when the City of Cleveland, through its electrical utility known as CPP entered into agreements and construction plans for a solar farm

to be constructed on the city of Brooklyn's landfill. The advantage is to utilize the landfill real estate to construct a solar farm, which would provide electricity to Brooklyn's residents and city-owned buildings as well as to provide electricity for Cuyahoga County's buildings.

2. Initially the project would provide one mega-kilowatt of electricity that would serve Brooklyn and bring power to Cuyahoga County buildings (12 buildings) via virtual net metering allowing CPP to compete for customers in the city of Brooklyn, which is currently being served by subsidiaries of the Plaintiff.
3. Eventually the project would provide for 4MWhs of solar power, and the solar panels would be purchased from Ohio providers such as First Solar. CPP purchases electricity from hydro and wind (Blue Creek) sources currently, and this would add solar energy to the system, an environmental advantage.
4. The LEEDCO Lake Erie offshore wind turbine project, as it is called, would save Cuyahoga County approximately $3 million in electric energy costs for the 17 buildings that would be serviced under this contract as well as the Brooklyn solar farm.
5. This would provide competition for electrical service with the Plaintiff and its subsidiaries as to Brooklyn residents. As a result, this action was instituted to seek injunctive and declaratory judgment preventing this project from completing.

6. Currently CPP serves its customers primarily through wholesale power purchases and interests in generating plants through its membership in the American Municipal Power Inc., a nonprofit corporation comprised of municipal utilities in Ohio. The balance of CPP's power and energy are satisfied through its combustion turbine generating units, although these do not function well and are out of date equipment.
7. CPP can and regularly does purchase and sell electricity on the PJM wholesale markets. It also has the ability to sell excess power to RTO administered markets. CPP has the flexibility to increase or reduce its electrical supply through various contracts and commitments.
8. Nearly all of CPPs customers are located within the Cleveland City limits, but CPP does serve a small number of customers in adjacent suburbs as is permitted by the Ohio Constitution to sell surplus electricity outside of the city's corporate limits up to a 50% limitation.
9. CPP had revenues from electricity sales in the amount of approximately $192 million in 2017. This amounts to approximately 1,650,000 MWh supplied each year for the years 2015 to 2017. So, it is clear that the 1MKh to 4MKh electrical supply generated by this project is a very small percentage of that total amount. Thus, it is nowhere near the 50% limitation provided by the Constitution of Ohio.

10. The Court has reviewed extensive exhibits and documents concerning the factual issue in calculating the amount of surplus available to the defendants to provide electrical service outside of the municipal limits of Cleveland. In summary, it is estimated approximately 4 to 5% of the city's annual electrical usage supplied by CPP to outside customers. The Court finds that this does not exceed the constitutional limitation of 50%.

11. The Court further finds that there are really no significant differences in factual data as to the essential issue in this case, that is *surplus.*

12. Therefore, the Court finds that this case can be resolved by summary judgment.

Conclusions of Law

Article XVIII, of the Ohio Constitution provides in section 6 that a municipality may sell electricity outside its borders up to 50% of the "total service or product supplied by the utility within the municipality[.]" A narrow reading of this provision would lead to the conclusion that Cleveland through its utility, CPP, can sell up to 50% of its approximately total 1,650,000 MKhs per year outside the city of Cleveland. As most of the documents and testimony contained in the depositions and exhibits demonstrate, the project in dispute would provide 2 to 5% of this amount rather than the 50% limitation. This would lead to the conclusion

that this is a relatively simple decision. However, as are most things in life, this is not all that simple.

The Plaintiff alleges that the limitation prohibits the provision of electricity by this project is prohibited by the Ohio Supreme Court decision in *Toledo v. Bryan* case. In that case, the municipalities of Bryan, Pioneer, Montpelier, and Edgerton combined in a joint venture to sell electricity to the Chase Brass Company who was building a plant outside of city limits of any of those municipalities. The municipalities pooled their surpluses to make a "super surplus" to sell to the Chase Brass Co. *Toledo Edison Co. v. City of Bryan*, 91 Ohio St.3d 1233 (2001) (Pfeifer, Concurring). In that case, the Court did decide that the provision of this electricity violated the Constitution as it was **solely for the purpose of providing electricity to a customer located outside of the municipality**. The Defendants counter that argument with the fact that this project will also serve Cuyahoga County properties (12 or 17 depending on which document you consider), and the county has entered into an agreement to participate in this project and the electrical solar plant. Thus, the county is also a party to this litigation. The *Toledo v. Bryan* case does specifically state the keyword *solely* when discussing the issue of surplus in connection with the constitutional limitation. Thus a literal and restrictive interpretation of both the constitutional provisions and the decision in *Toledo v.*

Bryan case would lead to a judgment for the Defendants in this case. But again, things are not all that simple.

The Plaintiff argues that the purpose of the constitutional limitation is to prohibit the city of Cleveland in this case from brokering or expanding its sale of electricity beyond its borders in direct competition with the Plaintiff. CPP serves its customers primarily through wholesale power purchases rather than electrical generation and regularly does purchase most of the electricity that it provides to its customers through various contracts in the electrical markets. Only a small portion is generated by CPPs turbines, which are outdated and expensive to operate. Thus, in theory, Cleveland could purchase up to 50% of its total sales per year for purposes of providing electricity outside the city. This violates the policy contained in the *Toledo v. Bryan* case, in essence permitting the Defendants to broker electricity outside of its jurisdiction resulting in unfair competition to the Plaintiff, contrary to *Toledo v. Bryan*. The amount of electricity generated by this project is relatively small when you consider the total operations of the parties to this litigation, and it is the opinion of this Court that the circumstances do not lead to a conclusion that the Defendants are unfairly competing with the Plaintiff. Nor are the Defendants really brokering electricity, although they are competing for the customers in the city of Brooklyn. That competition does not appear to be unfair, however.

The Plaintiff is concerned about the precedent of a decision permitting the Defendants to construct this project and enter into the agreements to supply electricity to the county and to the city of Brooklyn. The Court certainly understands that position. When considering that issue, the Court may look to public policy considerations. This project expands the use of solar, wind, and hydro electrical generation plants. This is a plus from an environmental aspect. Also, the fact that the project is constructed on a former landfill, which has limited feasible uses, seems to again favor the Defendants from an environmental standpoint. Even the Plaintiff indicates in its briefs that the City only buys the electricity it needs. As a result, when the City purchases the solar generated electricity for 12 or 17 County buildings that electricity replaces some from another provider (presumably a less environmentally friendly one). To this extent, the purchase of solar generated electricity from Brooklyn solar farm represents a change in type of source not an overall expansion of capacity, which should not affect the Plaintiff. The extraterritorial expansion would not happen until new customers outside Cleveland entered into contracts with CPP.

If the Plaintiffs arguments are correct that regardless of the contracts with providers the City enters into, the City only actually purchases the electricity it uses then the focus shifts from capacity that the City obtains from Brooklyn solar to the actual electricity provided by CPP. Nothing ties this purchase to be used by

Brooklyn customers, so it is equally possible that the solar energy will be used to power the County's 17 buildings, thus no harm to Plaintiff. Thus, there is no reason to restrain the Solar plant in Brooklyn. The purchase of electricity is not limited by the Ohio Constitution but rather providing or selling so all Plaintiffs arguments as to purchase contracts is irrelevant.

This brings us back to the facts that the Defendants no longer generate any significant amount of the electricity that they supply to their customers. Plaintiff is correct that by the use of the various purchasing agreements with outside electricity providers would lead one to the conclusion that they can manipulate their contracts and accounting procedures in such a way as to avoid the constitutional limitations as to surplus. One may come to the conclusion after reading the testimony, depositions, and exhibits, that the concept of surplus no longer has relevance. When electrical supplies are purchased and are contained in various large electrical grids there is no way that the electricity generated by a project like this one can be traced once it is entered into the electrical grid. Thus, the concept of owning a surplus seems to be outdated in view of the current electrical market conditions. Those market changes have benefited the customers by preserving lower prices and providing adequate supplies of electricity, making the whole concept of surplus limitation somewhat meaningless. However, this is a constitutional provision and it cannot be ignored by this Court or the parties in this case. It is not the role of the trial court at this level

to change the law, particularly one created in the Ohio Constitution. The Court is not in a position to rule on the validity or irrelevance of the 50% limitation imposed in Ohio Constitution. The Court does have concerns like the Plaintiff, but there is no evidence that show that the acts of the Defendants do violate either the Ohio Constitution or the *Toledo v. Bryan* case established by the Ohio Supreme Court. The Court does not find a brokering situation or an abuse of the competitive processes by the establishment of this project, as alleged by the Plaintiff. Court will restrict its decision to the actual facts in this case without attempting to change public policy as to the constitutional limitation.

The Court does find that the purchase of the equipment and the construction contracts establishing this project are not for the sole purposes of providing electricity to the city of Brooklyn, or other outside customers. The contracts between the city of Brooklyn, Cuyahoga County, and the city of Cleveland are valid municipal uses of its powers under the Ohio Municipal code, Chapter 7 of the Ohio Revised Code.

Looking at the caselaw cited by the parties, the first case cited by CEI, *State ex rel. McCann v. City of Defiance*, 167 Ohio St. 313 (1958), this case validates the city's position not CEI's in that Ohio Rev. Code 743.13 reinforces the rights which are provided to the city by the Constitution. In *City of Defiance*, the Supreme Court of Ohio held it is apparent that Section 743.13, Revised Code, is intended only to

and does limit and restrict the power of a municipality, such as the city of Defiance, to do what Section 6 of Article XVIII of the Constitution empowers it to sell and deliver to others than its inhabitants a substantial portion of its surplus product. Such others necessarily include relator and other noninhabitants of the city. *City of Defiance*, 167 Ohio St. at 313 (emphasis added). Notably, the Ohio Supreme Court did not hold that Ohio Rev. Code 743.13 was "unconstitutional as to its sole purpose, and is a dead letter," it only held that, to the extent Ohio Rev. Code 743.13 was used to require a city to provide utilities to noninhabitants, or to limit the price the city could charge to noninhabitants, that would be unconstitutional. *Id.* at paragraph two of the syllabus. Because that is not how the city in this case is using the statute — since it is not being forced to provide electricity to nonresidents, and it is not being limited in how it prices its electricity — the statute is still effective and Constitutional.

The second case cited by CEI, *City of Wooster*, likewise does not support CEI's arguments, and confirms the city's position by noting that "[a] city may choose to serve only its inhabitants, or can provide extraterritorial service subject to any constitutionally permissible restriction." *Sproul v. Wooster*, 840 F.2d 1267, 1269 (6th Cir. 1988) (emphasis added). As for the statutes cited by the city, *City of Wooster* does not mention any of them, get alone hold that any of them are unconstitutional. CEI's reliance on *City of Wooster* is unfounded.

Finally, the third case on which CEI relies, *City of Grandview Heights*, is consistent with *City of Defiance* case, which is to say it supports the city's argument. *Grandview Heights v. Redick*, 79 Ohio L. Abs. 63, 154 N.E.2d 183 (2nd Dist. 1956). As the *City of Defiance* Court did, the *City of Grandview Heights* Court held that only a limitation on a city's right to charge for services provided would be unconstitutional: "Under the compulsion of these authorities, we hold that, insofar as the provisions of Section 743.13, Revised Code of Ohio, purport to limit the amount which a municipality (the city of Columbus) may charge for water furnished to the inhabitants of an adjoining municipality (the city of Grandview Heights) to rates which shall not exceed the rates to those within the municipal corporation (Columbus), by more than one tenth is unconstitutional and unenforceable even though that statute, or its predecessors, has been in existence as statutory law in Ohio for some 62 years. *Grandview Hts.*, 154 N.E.2d at 183.

The summary judgment standard requires the Court in this case to hold that the city must not only prove it is entitled to judgment as a matter of law, but also, as part of that determination, that there are no genuine issues of material fact. *See* Civ.R. 56(C) ("Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law."). "A genuine issue of material fact exists when the relevant factual allegations contained in the documentary evidence attached to a summary judgment motion and opposition brief are in conflict." *Saunders v. McFaul*, 71 Ohio App.3d 46, 50, 593 N.E.2d 24, 26 (8th Dist. 1990) (emphasis added), citing *Duke v. Sanymetal Co.*, 31 Ohio App.2d 78, 60 0.0.2d 171, 286 N.E.2d 324 (1972). Because the city, as the moving party, met its burden of "specifically point[ing] to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that [CEI] has no evidence to support [CEI's] claims," the burden shifted to CEI "to set forth specific facts showing that there is a genuine issue for trial." *Dresher*, 75 Ohio St.3d at 293.

CEI has failed to identify any relevant factual allegations that are in conflict, or to set forth any specific facts showing that there is a genuine issue for trial. While CEI spends nearly the entirety of its brief discussing "factual" issues, the "facts" identified by CEI are either (i) not relevant to this case, (ii) or not in dispute. As to the two dispositive facts the city submitted in the city's MSJ — that the city sells surplus electricity to customers outside of municipal limits at approximately 3%, well below the 50% limitation set by the Constitution, and that the city does not purchase electricity "solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits." — CEI does not offer any evidence to contradict the city. The Court's summary

judgment determination should be driven exclusively by the law on the two relevant issues in this case:

> (1) whether Defendants have exceeded the fifty-percent (50%) limitation set by Article XVIII, Section 6, of the Ohio Constitution in selling or agreeing to sell service or products to the city of Brooklyn and/or other entities outside the municipal boundaries and

> (2) whether Defendants have purchased "electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits," *see Toledo Edison*, 90 Ohio St.3d at 292 (emphasis added), in selling or agreeing to sell electric service to the city of Brooklyn and/or other entities.

The city has met its burden of identifying evidence for each of these questions. In response, CEI has failed to "set forth specific facts showing that there is a genuine issue for trial" on this dispositive issue. *See Dresher*, 75 Ohio St.3d at 293.

In this case, the Court specifically finds that the amount of electricity to be generated by this project and utilized outside of the city of Cleveland does not exceed the 50% limitation imposed by the Ohio Constitution. With those findings it is abundantly clear that the Plaintiff has failed to establish the existence of a genuine issue of material fact in support of its claims. In view of the Court's ruling on the Plaintiff's claims, the Court likewise grants summary judgment in favor of the intervening defendants on their claim for declaratory judgment. The city's second counterclaim for Declaratory judgment is responsive to Count three of the Plaintiff's Amended Complaint. (city's Counterclaim ¶ 55). Accordingly, the Court's grant of

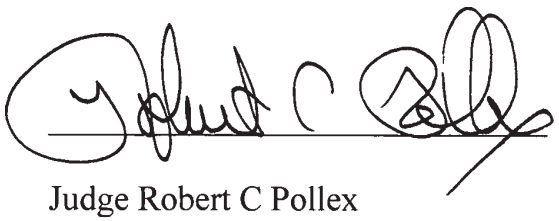
summary judgment against Plaintiff on Count Three of Plaintiff's Complaint renders this counterclaim moot as a matter of law.

Finally, the city's third counterclaim for Unfair Competition would require a showing that "the legal action is objectively baseless and that the opposing party had the subjective intent to injure the party's ability to be competitive." *Am. Chem. Soc'y v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, ¶ 37. The Court finds on this record that there is no genuine issue of material fact but that Plaintiff's action is not objectively baseless. Accordingly, the Court enters summary judgment against the city on Count 3 of the city's counterclaim. *See Note Portfolio Advisors LLC v. Wislon*, 8th Dist. No. 97326, 2012-Ohio-2199, ¶ 9.

There is one exception as to the counterclaims, the fourth count of the city's Counterclaims. The Supreme Court of Ohio has adopted two-part test to determine whether PUCO has exclusive jurisdiction over an action: "First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute practice normally authorized by the utility?" *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, ¶ 12. "If the answer to either question is in the negative, the claim is not within PUCO's exclusive jurisdiction." In Count Four, the City alleged that "CEI has imposed upon or threatened to impose upon customers or potential customers of CPP, including but not limited to, Cuyahoga County, exorbitant and unreasonable 'transition fees'

or 'switch fees[,]'" which the City "contends . . . are in violation of Ohio Rev. Code §§ 4928.69 and 4928.37." Generally, PUCO has exclusive jurisdiction of an alleged service related violation of the public utilities statute. The transition fee which may violate PUCO decisions, so this Court is not ruling on this issue for lack of jurisdiction. Thus, this entry resolves all pending claims and counterclaims in this action. This is a final and appealable decision.

It is therefore Ordered, Adjudged, and Decreed that the Plaintiff's claims and the Defendants' counterclaims are found not to be well taken and are denied. Costs are to be split between the parties equally.



Judge Robert C Pollex

Sitting by Assignment

elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

(1905, am. 1947, 1954, 1970, 1976)

REPEALED. Referred to present incumbents.

§3

(1905, rep. 1953)

Article XVIII: Municipal Corporations

Classification of cities and villages.

§1 Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

(1912)

General laws for incorporation and government of municipalities; additional laws; referendum.

§2 General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

(1912)

Municipal powers of local self-government.

§3 Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

(1912)

Acquisition of public utility; contract for service; condemnation.

§4 Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

(1912)

Referendum on acquiring or operating municipal utility.

§5 Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

(1912)

Sale of surplus product of municipal utility.

§6 Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water or sewage services.

(1912, am. 1959)

Home rule; municipal charter.

§7 Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

(1912)

Submission and adoption of proposed charter; referendum

§8 The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be