**IN THE SUPREME COURT OF OHIO**

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

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# BRIEF OF *AMICI CURIAE* BUCKEYE POWER, INC. AND OHIO RURAL ELECTRIC COOPERATIVES, INC. IN SUPPORT OF APPELLANT/CROSS-APPELLEE, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY

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Gregory J. Phillips (0077601) (COUNSEL OF RECORD)
Michael J. Montgomery (0070922)
Michael D. Meuti (0087233)
James E. von der Heydt (0090920)
James J. Walsh, Jr. (0096660)
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114
Telephone: (216) 363-4500
Facsimile: (216) 363-4588
gphillips@beneschlaw.com
mmontgomery@beneschlaw.com
mmeuti@beneschlaw.com
jvonderheydt@beneschlaw.com
jwalsh@beneschlaw.com

*Counsel for Appellant/Cross-Appellee The Cleveland Electric Illuminating Company*

Kimberly W. Bojko (0069402) (COUNSEL OF RECORD)
Angela Paul Whitfield (0068774)
Stephen E. Dutton (0096064)
CARPENTER, LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 3650-4100
Facsimile: (614) 365-9145
bojko@carpenterlipps.com
paul@carpenterlips.com
dutton@carpenterlipps.com

*Counsel for Appellees/Cross-Appellant City of Cleveland and Cleveland Public Power*

James E. McLean (0046868)
DUKE ENERGY OHIO, INC.
139 East Fourth Street, M/C 1212-Main
Cincinnati, Ohio 45202
Telephone: (513) 287-4341
Facsimile: (513) 287-4386
James.McLean@duke-energy.com

*Counsel for Amicus Curiae Duke Energy Ohio, Inc.*

Steven T. Nourse (0046705)
AMERICAN ELECTRIC POWER CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com

*Counsel for Amicus Curiae Ohio Power Company*

Stephanie M. Chmiel (0087555) (COUNSEL OF RECORD)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Telephone: (614) 469-3247
Facsimile: (614) 469-3361
Stephanie.Chmiel@ThompsonHine.com

and

Kevin M. Butler (0074204)
Law Director
CITY OF BROOKLYN, OHIO
7619 Memphis Avenue
Brooklyn, Ohio 44144
Telephone: (216) 621-9610
Facsimile: (216) 226-4749
kbutler@brooklynohio.gov

*Counsel for Appellee/Cross-Appellant City of Brooklyn*

Drew H. Campbell (0047197) (COUNSEL OF RECORD)
Elyse Akhbari (0090701)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
dcampbell@bricker.com
eakhbari@bricker.com

*Counsel for Appellee/Cross-Appellant Cuyahoga County*

Lisa G. McAlister (0075043) (COUNSEL OF RECORD)
Gerit F. Hull (0067333)
AMERICAN MUNICIPAL POWER, INC.
1111 Schrock Road, Suite 100
Columbus, Ohio 43229
Telephone: (614) 540-1111
lmcalister@amppartners.org
ghull@amppartners.org

*Counsel for Amicus Curiae American Municipal Power, Inc.*

Kurt Helfrich (0068017)
General Counsel
Lija Kaleps-Clark (0086445)
Associate General Counsel
BUCKEYE POWER, INC.
OHIO RURAL ELECTRIC
COOPERATIVES, INC.
6677 Busch Blvd
Columbus, OH 43229
Telephone: (614) 681-5151
Facsimile: (614) 846-7108
khelfrich@ohioec.org
lkaleps@ohioec.org

*Counsel for Amici Curiae Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc.*

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## INTRODUCTION

Appellees, City of Cleveland, Cleveland Public Power ("CPP"), City of Brooklyn ("Brooklyn"), and Cuyahoga County (collectively, "Appellees"), ask this Court to allow municipalities to provide firm retail electric service to customers located outside of their municipal boundaries and in the exclusive certified service territories of other electric suppliers in an amount up to 50% of their total municipal electric load, without limitation, and without regard to whether the service being provided outside municipal boundaries is being supplied by the municipality with true surplus or artificial surplus. This request is in direct contradiction of this Court's prior rulings, the Ohio Constitution, Ohio's current statutory scheme for electric utility service, and the realities and nature of municipal surplus product, if any, long-term firm retail service obligations, and the current wholesale electric market.

This Court is being asked to interpret Article XVIII, Section 6, of the Ohio Constitution, which allows municipalities to sell and deliver to "others" "the surplus product" of the municipal electric utility up to 50% of the total electric service provided within municipal boundaries. Importantly, in *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288, 737 N.E.2d 529 (2000), this Court further defined the meaning of "surplus product" for purposes of Article XVIII, Section 6. This Court clarified that the surplus product referred to in Article XVIII, Section 6, is "true surplus," meaning only the surplus product left over after the municipal electric utility undertakes its primary right and obligation to provide retail electric service to its municipal inhabitants under Article XVIII, Section 4, of the Ohio Constitution, and not "artificial surplus" created for the purpose of serving retail customers located outside of municipal boundaries.

In *Bryan,* this Court made specific reference to the Certified Territories for Electric Suppliers Act, codified at Ohio Revised Code Sections 4933.81 et seq., recognizing that Article XVIII, Section 6, was not intended to allow municipal utilities to compete with electric suppliers

at retail under the Certified Territories Act. The service obligation imposed on electric suppliers under the Certified Territories Act requires electric suppliers to build and invest in infrastructure necessary to serve both existing and planned future customers. Municipalities, on the other hand, have no obligation at all to serve any customers located outside municipal boundaries. The relationship between municipal utilities and their customers located outside municipal boundaries is purely bilateral and contractual in nature. Municipal utilities, therefore, use their authority to "cherry pick" only the best type of customers and electric loads to serve, leaving the certified electric suppliers with stranded investments in the generation, transmission and distribution facilities that they have built to serve their existing and planned future customers located in their service territories. This issue of stranded investment is of particular concern for electric cooperatives in Ohio, none of whom have opted into retail competition for generation service.[1]

In addition, since *Bryan*, a robust market for open access transmission service, and wholesale electric capacity, energy and other services through the PJM Interconnection, LLC ("PJM") regional transmission organization and energy market has developed, giving municipalities a ready market to both purchase electric capacity and energy necessary to serve their municipal inhabitants, and dispose of any "surplus product" left over after undertaking the primary obligation to serve municipal inhabitants. The wholesale market, therefore, allows municipal utilities to dispose of their surplus energy, if any, without implicating any of the concerns associated with stranded investments in generation, transmission and distribution facilities associated with competition for retail service under the Certified Territories Act.

[1] The investment of Ohio electric cooperatives in their service territories thus includes generation, transmission and distribution facilities, whereas the generation component of stranded investment is less of a concern for Ohio's investor-owned utilities ("IOUs"), all of whom are subject to retail competition for generation service.

A major flaw in the Appellees' position is that the type of true surplus, if any, created by a municipal electric utility that is left over after a municipal utility undertakes its primary obligation to serve its municipal inhabitants is completely incompatible with the type of electric service needed to serve customers at retail.[2] A retail service obligation is a long term and "firm" service obligation meaning that the utility must supply power 24 hours per day, 7 days per week, 365 days per year, including at the peak power demand, and without interruption, and requires a corresponding long-term investment in electric distribution infrastructure, i.e. poles and wires, to extend retail service to the customer. On the other hand, surplus product, if there is any at all, would be left over after first meeting a firm retail service obligation; thus, it would necessarily be short-term, intermittent and unpredictable, and consist only of the off-peak valleys left over after first serving the firm retail load of municipal inhabitants. This type of hypothetical true surplus is perfectly matched to the wholesale market, which allows for excess energy to be disposed of intermittently, on short notice, and on a short term and as available basis, and without any investment in electric distribution infrastructure. Conversely, the type of surplus necessary to meet a long-term firm retail obligation is necessarily the type of artificial surplus prohibited by this

[2] It is Buckeye's and OREC's understanding that, in this case, CPP has failed to establish that it has any true surplus at all, which makes perfect sense in circumstances where CPP, although it may own *some* dedicated generating facilities, i.e. iron in the ground, or dedicated contractual entitlements to power, is fulfilling its incremental requirements through the market, i.e. is "short" on owned or contracted supply. True surplus would only arise where a municipality procured total owned or contracted generation supplies above and beyond its requirements (beyond even its PJM required reserve capacity) in order to meet anticipated requirements of its municipal inhabitants and was not procuring its entire or incremental requirements in the market, i.e. if a municipality was "long" on owned or contracted supply. Furthermore, CPP's references to required PJM reserve capacity are inapposite – capacity is a completely different product from energy in PJM, capacity when purchased from PJM does not automatically translate to energy, capacity is not the type surplus product referred to in Article XVIII, Section 6, and reserve capacity dedicated to municipal inhabitants may not be transferred to others or used twice.

Court in *Bryan*, i.e. surplus that must be purposefully acquired for serving retail customers located outside municipal boundaries.

The question then is, with the advent of a robust wholesale market available for the disposal of any hypothetical surplus product of the municipal utility, why are retail sales outside municipal boundaries needed at all? And why should municipalities be permitted to engage in competitive retail sales in the certified service territories of electric cooperatives and IOUs, when electric cooperatives and IOUs are not permitted to make retail sales within municipal boundaries without the consent of the municipality? The answer is simple: these sales should be disallowed because they are no longer needed, and wholesale sales better reconcile the requirements of Article XVIII, Section 6, i.e. that sales of true "surplus product" to "others" outside municipal boundaries be permitted, with the concerns about unnecessary retail competition as expressed by this Court in *Bryan*.

Accordingly, this Court should hold that Ohio municipalities, because they have access to a liquid wholesale market in PJM, are prohibited from disposing of excess electricity at retail like CPP seeks to do here. A municipality that does have true surplus can dispose of it in the wholesale market, up to the 50% limitation established by Article XVIII, Section 6, of the Ohio Constitution. Such a holding fully reconciles the requirements of Article XVIII, Section 6, which only requires that municipal utilities have some viable option to sell "surplus product" to "others," without specifying the nature of those others as wholesale or retail, with the holding of the *Bryan* case and the concerns about stranded investments and retail competition expressed therein, as well as the nature of long-term firm retail service obligations, the wholesale market, and true surplus, which if any exists, would be temporary, short-term, unpredictable, and intermittent.

Furthermore, such a bright line test will eliminate the need for Ohio courts to make potentially complicated factual determinations each time a municipal utility tries to make sales outside its municipal boundaries at retail.

## IDENTITY AND INTEREST OF AMICI CURIAE

Buckeye Power, Inc. ("Buckeye") and Ohio Rural Electric Cooperatives, Inc. ("OREC" and collectively, "Amici Curiae") are Ohio non-profit corporations located in Columbus, Ohio. OREC is the statewide trade and services association representing the interests of the 24 electric distribution cooperatives based in the state of Ohio.[3] Buckeye is a generation and transmission cooperative that produces, procures, and provides at wholesale all of the electric capacity and energy required by its member electric distribution cooperatives to serve their retail customers in Ohio and a small portion of Indiana.[4] In addition, Buckeye arranges transmission services for the delivery of generation to its member electric distribution cooperatives. Those member distribution cooperatives serve nearly 400,000 residential, commercial, and industrial customers in service

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[3] The 24 distribution cooperative members of Ohio Rural Electric Cooperatives, Inc. are: Adams Rural Electric Cooperative, Inc.; Buckeye Rural Electric Cooperative, Inc.; Butler Rural Electric Cooperative, Inc.; Carroll Electric Cooperative, Inc.; Consolidated Cooperative, Inc.; Darke Rural Electric Cooperative, Inc.; Firelands Electric Cooperative, Inc.; The Frontier Power Company; Guernsey-Muskingum Electric Cooperative, Inc.; Hancock-Wood Electric Cooperative, Inc.; Holmes-Wayne Electric Cooperative, Inc.; Licking Rural Electrification, Inc.; Logan County Cooperative Power and Light Association, Inc.; Lorain-Medina Rural Electric Cooperative, Inc.; Mid-Ohio Energy Cooperative, Inc.; Midwest Electric, Inc.; North Central Electric Cooperative, Inc.; North Western Electric Cooperative, Inc.; Paulding-Putnam Electric Cooperative, Inc.; Pioneer Rural Electric Cooperative, Inc.; South Central Power Company; Tricounty Rural Electric Cooperative, Inc.; Union Rural Electric Cooperative, Inc.; and Washington Electric Cooperative, Inc.

[4] Buckeye has the same 24 electric distribution cooperative members as Ohio Rural Electric Cooperatives, Inc. plus Midwest Energy & Communications, which is based in Michigan. Buckeye only serves the Ohio customers of Midwest Energy.

territories encompassing parts of 77 of Ohio's 88 counties. Buckeye owns power generation resources with nameplate capacity totaling approximately 2,400 megawatts.

This case is of interest to the Amici Curiae because it will impact the rights and obligations of Buckeye's and OREC's members under the Certified Territories Act. This decision, in fact, may have a greater impact on the electric cooperatives in Ohio than the IOUs given the nature of how electric cooperatives operate.

Electric distribution cooperatives are unique entities distinct from IOUs like the Cleveland Electric Illuminating Company ("CEI"), AEP-Ohio ("AEP"), Duke Energy Ohio, Inc. ("Duke"), and The Dayton Power and Light Company ("DP&L"). Electric cooperatives are owned and operated by their customers, referred to as their members. The cooperatives' members elect their boards of directors, who in turn set the rates and terms and conditions for electric service. Electric cooperatives are operated on a not-for-profit and cooperative basis so that any margins (income over expenses) are allocated and paid to their members as patronage capital. As a result, electric cooperatives are run solely for the benefit of their members—not shareholders.

Unlike IOUs, electric cooperatives were not subject to electric deregulation that occurred in 2001 and are not subject to competitive retail electric choice for generation. (*See* Sub. Senate Bill 3, the Ohio Electric Restructuring Act; R.C. 4928.03.) Rather, electric cooperatives continue to provide bundled distribution, generation and transmission services for their retail customers. Each individual cooperative provides distribution services to all customers in its certified territory, while Buckeye Power, Inc., which is owned and operated by the 25 electric distribution cooperatives collectively, provides electricity and transmission functions for each distribution cooperative pursuant to a long-term wholesale power contract. Buckeye Power, Inc. is also

operated on a not-for-profit cooperative basis so that any margins generated through its power plant operations are passed on to its electric cooperative members.

Buckeye and OREC agree with CEI that the rule of law proposed by Appellees regarding the application of Article XVIII of the Ohio Constitution to sales of electricity outside of municipal boundaries is contrary to this Court's prior rulings, the Ohio Constitution, Ohio's statutory scheme for electric utility service, and the realities and nature of true municipal surplus product, long-term firm retail service obligations, and the current wholesale electric market. Buckeye and OREC submit this brief to highlight for the Court the impact that this decision will have on the electricity market in Ohio generally and the potential for inequitable cost shifting for electric cooperatives and their members, specifically, which, unlike IOUs, remain vertically integrated.

Amici Curiae therefore respectfully request the Court to reject Appellees' Proposition of Law No. 1 and adopt Appellant's Propositions of Law Nos. 1, 2 and 3.

## STATEMENT OF THE FACTS

Amici Curiae adopt and incorporate by reference the Statement of Facts set out in the Appellant's Merits Brief.

## ARGUMENT IN SUPPORT OF APPELLANT

### I. Appellees Ask The Court To Endorse A Rule of Law That Would Expand Their Rights and Allow Them to Directly Compete In The Retail Energy Market In Contravention of This Court's Prior Rulings. (Appellant's Propositions of Law Nos. 1, 2, and 3, and Appellees' Proposition of Law No. 1.)

#### A. The Ohio Constitution Gives Municipalities Limited Rights To Serve Customers at Retail Located Outside of Municipal Boundaries.

##### 1. IOUs and Electric Cooperatives Have Service Territories under the Certified Territories Act.

The Certified Territories Act grants IOUs and electric cooperatives the exclusive right, and obligation, to serve all retail electric customers within a specified geographical area, referred to as

certified territories or service territories, which are specifically mapped by the Public Utilities Commission of Ohio ("PUCO") and cover the entire State of Ohio. R.C. 4933.82(F) and 4933.83(A). Because IOUs and electric cooperatives were granted exclusive rights to serve retail customers within their certified territories, they also undertook an obligation to "furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories." R.C. 4933.83(B). Thus, electric suppliers have both the right and mandatory obligation to serve retail customers within their certified territories. *See* R.C. 4933.83 and 4933.87.

### 2. Municipalities Have No Service Territories under the Certified Territories Act.

Municipalities have no service territories, service rights, or obligations under the Certified Territories Act.[5] However, the rights granted under the Certified Territories Act are subject to a municipality's home rule authority under Article XVIII of the Ohio Constitution. *See* R.C. 4933.83(C) and 4933.87. Thus, municipalities' ability to provide electric service derives from the Ohio Constitution.

All of the parties to this litigation recognize that municipalities enjoy unconstrained freedom to provide public electric utility services *within municipal boundaries*:

> 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.

[5] The Certified Territories Act applies to "electric suppliers," which are defined as electric light companies as defined in R.C. 4905.03, including those operating as nonprofit corporations; it specifically excludes "municipal corporations or other units of local government that provide electric service." R.C. 4933.81(A). Thus, the Certified Territories Act only applies to IOUs and electric cooperatives. *See id.*; R.C. 4905.03.

Ohio Constitution, Article XVIII, Section 4 (emphasis added). Thus, pursuant to their home rule authority, municipalities can set up a utility to provide service to their residents or contract for utility service for the purpose of serving municipal inhabitants.

### 3. The Limited Right of Municipalities to Sell Surplus Power Outside Municipal Boundaries is Established Under Article XVIII, Section 6 of the Ohio Constitution.

Municipalities have limited rights to sell surplus product outside of their boundaries. Pursuant to Article XVIII, Section 6 of the Ohio Constitution, municipalities may engage in extra-municipal sales only if the product is surplus and only if the surplus does not exceed 50% of the municipality's load:

> 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.

Article XVIII, Section 6.

Importantly, municipal utilities have no obligation to serve any customers located outside municipal boundaries, and no right to force utility service on any customers located outside municipal boundaries. The relationship between municipal utilities and customers located outside municipal boundaries is solely contractual in nature. *See Bakies v. City of Perrysburg*, 108 Ohio St. 3d 361, 2006-Ohio-1190, 843 N.E.2d 1182; *Fairway Manor, Inc. v. Board of Commrs.*, 36 Ohio St. 3d 85, 521 N.E.2d 818 (1988).

Since municipal utilities have no obligation to serve outside municipal boundaries, they tend to only serve customers in circumstances where the service is economically beneficial to the municipal utility. In practice, this means that municipal utilities are likely to "cherry pick" only

the best (i.e., largest) electric loads located outside municipal boundaries, leaving the electric suppliers, who have the obligation to serve any and all customers in their service territories, with the obligation to serve the remaining customers, sometimes resulting in stranded investments (as discussed in more detail in Section III below). This means they must spread the cost of those investments across fewer remaining customers.

Article XVIII, Section 6, which is at the heart of this dispute, was meant to provide a safety net for true surplus generation -- it was not an open invitation to engage in retail competition with neighboring electric suppliers. Yet that is exactly what CPP seeks to do.

### B. Article XVIII, Section 6 Was Not Intended To Allow Municipalities To Compete at Retail With IOUs and Electric Cooperatives.

CPP and Appellees attempt to use the limited exception in Article XVIII, Section 6 of the Ohio Constitution to expand the scope of the municipal utility business and allow municipal utilities to compete at retail outside municipal boundaries. In addition to running directly contrary to the purposes of the Certified Territories Act, CPP's actions exceed the clearly limited authority to sell outside municipal boundaries set forth in the Ohio Constitution as interpreted by this Court.

In *Toledo Edison Co. v. Bryan*, this Court held that municipalities could not compete by purposefully purchasing electricity through bilateral contracts to sell power to a retail load located outside of its boundaries:

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

90 Ohio St. 3d 288, 293, 737 N.E.2d 529 (2000). Thus, pursuant to *Bryan*, a municipal utility is not permitted to acquire electricity for the purpose of selling it to meet retail load commitments outside the municipal boundaries.

CPP's argument that municipalities can sell any excess power at retail up to 50% of its municipal load, regardless of whether that power is a true surplus, runs directly contrary to the rule in *Bryan* and repeated recognition by this Court that municipalities should not be in the business of providing retail service outside their boundaries, and that such conduct violates the careful balance created by the Certified Territories Act. *See Bryan*, 90 Ohio St. 3d 288; *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959); *Britt v. Columbus*, 38 Ohio St. 2d 1, 309 N.E.2d 412 (1974).

As far back as 1959, this Court recognized that the framers of the Ohio Constitution did not intend for Article XVIII, Section 6 to allow municipalities to compete to provide retail service outside of municipal boundaries:

> It is obvious from a consideration of that constitutional limitation that, although the framers of the Constitution believed that it would be advantageous for municipal corporations to have the power to provide public-utility services to their inhabitants and recognized that such an operation could create a surplus product which could be disposed of outside the corporate limits of the municipality, they clearly intended to limit municipalities primarily to the furnishing of services to their own inhabitants and to prevent such municipalities from entering into the general public-utility business outside their boundaries in competition with private enterprise.

*Hance*, 169 Ohio St. at 461. This Court reiterated that same concern in *Bryan*: "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." *Bryan*, 90 Ohio St. 3d at 293; *see also Britt*, 38 Ohio St 2d at 9 (rejecting argument that a municipality has the power of eminent domain to build facilities for the purpose of supplying power outside of municipal boundaries, reasoning that "[t]he 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.") (internal quotations omitted; emphasis in original).

By entering into a long-term firm commitment to supply retail electric service to Brooklyn, CPP is doing exactly what the Ohio Supreme Court has warned against – getting into the general public utility business outside its boundaries in competition with utilities subject to the Certified Territories Act. *State ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St. 3d 508, 668 N.E.2d 498 (1996) citing *Indus. Gas Co. v. Public Utilities Comm.*, 135 Ohio St. 408, 21 N.E.2d 166, paragraph two of the syllabus (1939) ("Utilities cannot selectively pick out the best customers to serve and then refuse to serve the remaining customers in its service territory.").

## II. Municipalities Must Necessarily Rely On Artificial Surplus To Meet Long-Term, Firm Retail Service Obligations Outside Municipal Boundaries. (Appellant's Propositions of Law Nos. 1, 2, and 3.)

This dispute asks the Court to consider what qualifies as a "surplus product" and to which "others" surplus product may be sold, in the context of Article XVIII, Section 6, of the Ohio Constitution. Since the time Article XVIII of the Ohio Constitution was implemented, the development of the wholesale electricity market has drastically changed the universe of "others" to whom any hypothetical "surplus product" may be sold. Today, electric utilities, including municipal electric utilities, buy and sell energy and capacity on the wholesale market to meet their firm load obligations in the retail market.[6]

### A. Retail Service is a Long-Term, Firm Commitment.

Appellees' position ignores the reality that when a utility, such as CPP, commits to providing electric supply to a customer at retail, this is a long-term, firm commitment, requiring the utility to match electric supplies to electric load 24 hours per day, 7 days per week, 365 days per year, on a reliable basis and without interruptions, including during peak demand hours.

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[6] A firm obligation to serve a load means an obligation to meet all of a customer's electric power demands. (*See* PJM Interconnection, LLC, *PJM Glossary*, https://www.pjm.com/Glossary.aspx#index_L (accessed August 26, 2020).)

Accordingly, the utility must purchase dedicated generating capacity and energy to meet that peak demand, as well as a reserve margin to cover unexpected potential increases in peak demand, such as during unexpected hot and cold weather events or during interruptions or outages of electric supply. This requires advance planning and forecasting to ensure that the load is met. These retail customers must then be incorporated into the utility's total load obligation and planned for on a long-term basis. These customers cannot properly be served, directly or indirectly, by "true surplus" because additional generating capacity and energy must be procured for and dedicated to these retail customers, in addition to the electric generating capacity and energy already procured for and dedicated to the municipal utility's inhabitants. These customers need dedicated sources of power around the clock, not sporadic leftovers from a supply procured for others. Accordingly, retail load obligations, by nature, must be served by the type of artificial surplus that this Court determined in *Bryan* was impermissible.

In addition, in order to serve customers at retail, the municipal utility must build out electric distribution infrastructure, i.e. poles and wires, outside of municipal boundaries to connect to and serve the customers at retail. This investment in distribution infrastructure means that municipal utilities must necessarily view these customers as a long-term firm commitment, part of long-term planning, or the investment in distribution infrastructure would not be made. One municipal utility has gone so far as to assert, albeit unsuccessfully, that once the municipal utility builds distribution infrastructure and serves retail customers outside municipal boundaries, then the municipal utility establishes a form of exclusive service territory outside municipal boundaries in which only the municipal utility has the right serve customers. *See In the Matter of the Complaint of the City of St. Clairsville v. South Central Power Company*, No. 17-1750-EL-CSS, 2018 Ohio PUC LEXIS 402, ¶¶ 6-9, 16, 21 (Ohio P.U.C. April 11, 2018); *City of St. Clairsville v. South Central Power*

*Co.*, Belmont County Case No. 17-cv-0218, Entry on Summ. J. at 7-15 (attached as A-1). This assertion, although incorrect as a matter of law, emphasizes the way that municipalities view the retail customers that they serve outside municipal boundaries and the way that these customers are incorporated into a municipality's long-term planning.

### B. True Surplus is Short-Term, Intermittent and Unpredictable by Nature.

In other words, because retail sales are long-term firm obligations to serve load, they are simply not appropriate for being served by the type of true surplus that a municipal utility might hypothetically have available from sources that it procured to serve its municipal inhabitants. Such true surplus would have to be, by nature, short-term, intermittent and unpredictable. If a municipality is not matching its entire or incremental requirements for power in the market, and has procured more owned or contracted resources in total than it anticipated would be required to meet the needs of its municipal inhabitants, then true surplus could theoretically arise during those hours when peak generating capacity is not needed, i.e. the off-peaks valleys during the day and during the year, such as nights and mild weather. But the moment when peak supply would be required to meet the firm retail load obligation outside municipal boundaries would also be the same moment that the supply acquired to serve municipal inhabitants is fully needed. Therefore, the only way that a municipal utility can serve a retail load obligation outside municipal boundaries is by arranging for additional dedicated power sources, i.e. artificial surplus, beyond that already acquired and dedicated to serving the utility's municipal inhabitants.

Furthermore, the development of the wholesale electricity market has made it easy for municipalities to dispose of any true surplus they might hypothetically obtain, without the need to serve any customer outside municipal boundaries at retail, thereby avoiding all of the concerns about municipalities engaging in retail competition outside municipal boundaries that this Court

expressed in the *Bryan* case, and without having to build the expensive distribution infrastructure necessary to serve retail customers. The inflexible market that existed at the time Section 6 was implemented is no longer an issue.

### C. The Historical Context of Article XVIII, Section 6 of the Ohio Constitution Did Not Include a Robust Wholesale Market for the Sale of Surplus Power.

Significant changes have occurred in the electric market since the passage of Sections 4 and 6 of Article XVIII of the Ohio Constitution in 1912. Today, electricity is bought, sold and traded in wholesale and retail markets. The purchase and sale of electricity between generators and resellers occurs in the wholesale market, while the purchase and sale of electricity between utilities and ultimate consumers takes place in the retail market. (*See* PJM Interconnection, LLC – Learning Center, *Market for Electricity*, https://learn.pjm.com/electricity-basics/market-for-electricity.aspx (accessed August 10, 2020).)

Prior to the development of robust wholesale electricity markets in the 2000s, utilities typically generated their own electricity locally or entered into bilateral power purchase contracts with nearby generating facilities. (CEI Mot. For Summ. J. ("MSJ"), Dkt. 90, Ex. A, Farley Aff. at ¶ 9.) During this time, transmission services were not open access which limited a utility's ability to transmit generation to (or from) its distribution system. (*Id.* at ¶¶ 7, 8, 10.) As a result, for much of the twentieth century, utilities relied on their own local generation or inflexible bilateral contracts to meet customer demand for electricity. (*Id.* at ¶ 9.) The underdeveloped wholesale market and limited access to the transmission grid made it practically difficult for utilities to match generation to customer demand and rendered the resale of excess generation in the wholesale market impracticable. (*Id.* at ¶ 10.)

Municipalities that operated their own generation facilities often built generating facilities that were oversized, i.e., generated surplus electricity, in order to meet future load growth within

the municipality. With the limitations that existed in the wholesale market to match generation to load, the framers of the Ohio Constitution implemented Section 6 of the Ohio Constitution. (*See* Ohio Constitutional Revision Commission, Part 8 (Local Government) (Mar. 15, 1975); 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912), at 1458, available at http://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/day64.pdf.) This provision allowed municipalities to sell inevitable excess generation from their generating facilities to prevent waste. Because the wholesale market was simply not developed enough to allow for easy sales of this excess electricity, municipalities needed the flexibility to sell this excess production from its generating facilities in the retail market and outside municipal boundaries.

Many utilities, including CPP, transitioned in the late twentieth century to meeting their load requirements primarily through bilateral contracts or block power contracts for generation, rather than on their own generating facilities. (CEI Mot. For Summ. J. ("CEI MSJ"), Dkt. 90, citing Ex. A, Farley Aff. ¶¶ 7-10 and Ex. X, 2018 Bond Indenture (CLE003255-CLE003256).) Under these contracts, a utility could purchase power from an electric generator or generators for a specified period of time and would arrange for transmission service to schedule the transmission and delivery of the electricity to serve its load. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶ 8.) However, with the underdeveloped wholesale market, these bilateral contracts were generally inflexible and illiquid, limiting a utility's ability to match the generation with demand and thus potentially creating excess generation. (*Id.* at ¶ 9.)

The Ohio Supreme Court addressed this issue in *Bryan.* There, the City of Bryan was not selling surplus from a generation facility that it owned and operated for the purpose selling power to its inhabitants; it purchased power through bilateral contracts. Although *Bryan* was decided in

2000 prior to the full development of the wholesale market, the Court nonetheless recognized that the City could not purposefully purchase electricity for the purpose of providing retail supply to a load outside of its boundaries, whether or not the 50% threshold was exceeded. *Bryan*, 90 Ohio St. 3d at 292-293.

As discussed below, that is exactly what CPP is doing now. By entering into a long-term contract to provide electric supply to the City of Brooklyn, CPP is necessarily purchasing electric generating capacity and energy to meet that commitment, in addition to and above and beyond the capacity and energy that is needed to serve its municipal inhabitants. In today's wholesale market, CPP's conduct unquestionably violates Ohio law because it now has the flexibility both to purchase electric generating capacity and energy in the wholesale market to match the electric demand of its municipal inhabitants, which Buckeye and OREC understand that CPP has done in this case, and to resell in the wholesale market any hypothetical excess from owned or contracted generation resources that might be available during off-peak hours. In other words, as the Appellant notes, it is no longer necessary for municipalities to acquire surplus supply, and such surplus is avoidable, however, even if such surplus hypothetically exists, it can easily be disposed of in the wholesale market rather than at retail.

### D. Development of the PJM Wholesale Market Allows Utilities, Including Municipal Utilities, To Efficiently Sell Surplus Power Back Into The Wholesale Market.

The vertically integrated electric utilities changed dramatically with the market restructuring that occurred in the late 1990s and early 2000s. In 1996, the Federal Energy Regulatory Commission required vertically integrated electric utilities (that is, electric utilities that owned generation, transmission, and distribution as one entity) to unbundle and provide open access to their transmission facilities. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶ 9; FERC Orders

888 and 889.) These orders, along with one issued in 1999, encouraged the creation of Regional Transmission Organizations ("RTOs") — which are entities that manage the purchase, sale, and transmission of wholesale power in specific geographic areas. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶ 5; FERC Order 2000.) PJM Interconnection, LLC ("PJM") operates the transmission grid and wholesale electricity markets in thirteen states and D.C., including Ohio. CPP, CEI, and Buckeye are members of PJM. The creation of RTOs provided a robust wholesale market in which utilities, including municipalities, could both acquire and sell power at wholesale to provide power supply to meet the demands of their retail electric load and to dispose of any excess power. (CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶ 11.)

The open access to transmission and the robust wholesale markets have allowed utilities to easily, and efficiently, match the electricity demand of their customers with electric power and energy from the market, either entirely, or supplementing some owned or contracted for generating resources, and to sell excess, if any, back into the wholesale market. In other words, there is no longer a need for any PJM market participant to purchase excess electricity from oversized generation units or inflexible bilateral contracts, i.e. to take a "long" position in owned or contracted generation resources. In addition, no utility ever needs to sell any excess, if it exists for any reason, into retail markets. This change occurred not only because many utilities began to buy generation from more efficient wholesale markets, but because reselling hypothetical excess electricity at wholesale is more efficient and a better match for the type of excess available than retail markets, which as mentioned above, require long-term, firm commitments of power.

### E. Utilities Purchase Capacity and Energy in the Wholesale Market to Meet and Match Their Retail Load Commitments.

A utility's load is the total electricity demand of all the utility's customers at any given time. A load curve reflects anticipated demand throughout a typical day, which varies by season

and by time of day. Typically, demand peaks in the afternoon/early evening, and drops off at night. Demand is also generally lower during mild weather. In order to meet the demand of its customers at any given time, utilities must purchase both capacity and energy to ensure enough electricity is available to meet the instantaneous demand of the utility's load.

Capacity is a commitment by and capability of a power supply resource (a generator such as a coal power plant or solar facility) to provide energy needed at a specific moment in time. (PJM Interconnection, LLC – Learning Center, *Capacity Market (RPM)*, https://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx (accessed August 10, 2020).) Utilities that provide electricity to consumers must ensure that enough power supply resources, i.e. electric generating capacity, is available to meet their customers' needs, including at moments of peak demand —both now and in the future. (*Id.*)

Utilities secure these resources for the future through PJM's capacity market. In the PJM capacity market, capacity reserves are purchased three years in advance, but a utility can adjust its anticipated load through incremental auctions. (*Id.*)[7] A utility is required to purchase enough capacity to meet its anticipated firm load at peak demand, plus a required reserve margin. (*See* PJM Manual 18: PJM Capacity Market, Section 2: Resource Adequacy and Section 7: Load Obligations, available at https://www.pjm.com/~/media/documents/manuals/m18.ashx (accessed August 26, 2020).) This reserve margin ensures that enough energy will be available to meet the peak demand, that is, electricity demand of the utility's customers at its highest level. The reserve margin is also intended to account for situations where there is a limitation in supply (such as an unanticipated generation plant shutdown), or there is an unusually high demand of electricity (such

[7] Capacity is expressed in kilowatts and megawatts to reflect how much electricity could be available, whereas energy is expressed in kilowatt hours or megawatt hours to reflect how much electricity is generated during a given time period.

as during a polar vortex or heat wave). However, it is critical to note that the capacity reserve margin must be maintained and available to meet potential excess demand (or limits in supply) for a utility's existing retail load *and cannot be committed to serve other customers.*

The utility must also ensure that its customers' electricity demand in real-time is met through the energy markets. Energy is the actual electricity produced during a period of time, generally expressed in kilowatt hours (kWh) or megawatt hours (MWh). (PJM Interconnection, LLC – Learning Center, *Energy Market*, https://learn.pjm.com/three-priorities/buying-and-selling-energy/energy-markets.aspx (accessed August 10, 2020).) Energy is sold in day ahead or daily "spot" markets for immediate delivery. (*Id.*). Excess energy occurs if the amount of energy purchased on the market exceeds anticipated demand. The utility can also sell that excess energy through the day ahead or spot wholesale markets. In addition, a bilateral market is still available for the purchase of electricity between two parties in which the price for wholesale electricity can be predetermined by a buyer and seller. Utilities, such as CPP, can use the PJM auction market and bilateral markets to acquire and sell excess power at wholesale. (*See* CEI MSJ, Dkt. 90, Ex. A, Farley Aff. ¶ 17.)

In PJM, the capacity and energy markets are completely separate, and a purchase of capacity in the PJM capacity market does not guarantee the buyer any corresponding amount of energy to serve load. Instead, energy must be separately acquired in the energy market. (PJM Interconnection, LLC – Learning Center, *Fact Sheet: Understanding the Differences Between PJM's Markets*, https://learn.pjm.com/-/media/about-pjm/newsroom/fact-sheets/understanding-the-difference-between-pjms-markets-fact-sheet.ashx (accessed August 29, 2020).)

### F. CPP Has Not Established True Surplus in this Case.

It is Buckeye's and OREC's understanding that, in this case, CPP has failed to establish that is has any true surplus at all. This makes perfect sense in a context where CPP has some owned or contracted generation resources, but not enough to meet its complete electric load obligation. In such circumstances, CPP would be purchasing from the market to meet its incremental obligations, and, in such circumstances, CPP would be able to, and would strive, to match its incremental market purchases to match its total load obligation, thereby resulting in no "true surplus" available for resale in the wholesale market or at retail. Any surplus acquired in the market to serve retail customers in Brooklyn or elsewhere would, by definition, be the type of artificial surplus prohibited by this Court in *Bryan.*

### G. A Hypothetical True Surplus Would Be Perfectly Suited For Resale In The Wholesale Markets, Not To Meeting Firm Retail Load Obligations.

Because CPP has not established that it has any true surplus available, Appellees are left to argue that CPP's reserve capacity (i.e., the capacity required by PJM for CPP to meet the seasonal, daily and hourly fluctuations in load as a result of changing demand for electricity, weather or other events) can be committed to meet the energy requirements of retail customers located outside of municipal boundaries. This is simply not true. First, capacity is not the same thing as energy, particularly in the PJM market, where capacity and energy are treated as completely different products, and any capacity purchased in the PJM market carries no corresponding entitlement to energy. Furthermore, as mentioned above, a contract for retail sale of electricity creates a long-term, firm service obligation that utilities must then plan for – it becomes a permanent part of their load obligation that utilities must then procure capacity, plus a required reserve margin to serve, in addition to building out electric distribution infrastructure to serve. The reserve capacity required to meet CPP's load obligation within municipal boundaries

cannot, therefore, be redirected to the load obligation of customers located outside municipal boundaries. Any load obligation in PJM requires its own commitment of capacity plus required reserve margin.

This concept is exemplified by the long-term nature of CPP's contract with Brooklyn. For CPP to provide reliable retail electric service to Brooklyn, CPP must include and plan for Brooklyn's retail load in and as part of CPP's total load obligation, including its municipal inhabitants, and resulting required purchases of both energy and capacity. Once CPP and Brooklyn have a contract, Brooklyn's load becomes part of CPP's permanent load that CPP plans for and purchases energy and capacity to meet. Thus, the capacity and energy supplied by CPP to the City of Brooklyn cannot be served by the same capacity and energy that CPP has acquired to serve its municipal inhabitants. Rather the capacity and energy brokered by CPP to serve the City of Brooklyn is the type of artificial surplus prohibited by this Court's holding in *Bryan*, i.e. surplus by definition purposefully acquired to serve load located outside of municipal boundaries. This is particularly evident in a case where a municipality is matching its load obligation to generation in the market, either entirely or incrementally.

The capacity reserve margins that PJM requires CPP to maintain to support its obligation to serve its municipal inhabitants is by definition not available to support its obligation to provide long-term firm service to Brooklyn at retail. CPP argues that its supply to Brooklyn is supported by "surplus" electricity created by its required capacity reserve margins of 13-15%. (Consolidated Reply Br. In Supp. Of The City's MSJ, And Response In Opp. to CEI's Cross-Mot. For Summ. J. On Constitutional Claim, Dkt. 96, at 21, 28-29.) However, as mentioned above, in PJM, capacity and energy are completely different products, therefore any excess capacity that CPP has available does not carry any associated rights to energy. This is important when considering the

determination of this Court in *Hance* that the type of surplus product referred to in Article XVIII, Section 6, means surplus energy and not surplus capacity. *Hance*, 169 Ohio St. at 461-462 (focusing on actual "kilowatt hours of electricity supplied" over a period of time as the test for determining a violation of Article XVIII, Section 6). Accordingly, any surplus capacity that CPP has available would not automatically translate into energy, and it is only surplus energy that may be used to serve others located outside municipal boundaries.

Further, any reserve capacity that CPP has acquired is necessary to meet the fluctuations in peak load associated with the requirements of its municipal inhabitants. It is because peak load may fluctuate based on the requirements of municipal inhabitants, weather, season and time of day that PJM requires independent committed capacity for all retail load obligations, plus a reserve margin. In other words, once a utility has entered into a firm obligation to serve a retail customer, that commitment becomes part of its permanent load obligation. Additional capacity plus an additional 13-15% of capacity reserve margin must then be obtained to serve any new customers on top of the capacity that the utility has already obtained to serve its existing retail customers. As a result, the 13-15% reserve margin acquired to meet the load obligation associated with retail load within municipal boundaries simply cannot be used to meet an additional capacity obligation associated with retail customers located outside municipal boundaries, and any capacity that CPP acquires to serve retail load located outside municipal boundaries must be considered "artificial surplus" of the type forbidden by this Court in *Bryan*.

The capacity reserve margin must be available to serve existing load if there are unexpected increases in demand or loss of supply—it cannot be committed to other retail loads. The same is true for energy. Purchases in the energy market are made to meet anticipated load, which as mentioned above follows a generally predictable load curve during the day. Therefore, if energy

is being purchased in the market to meet load, either incrementally or entirely, no true surplus results. In order for excess energy to hypothetically result, it would be because a municipality purchased owned or contracted generating resources in excess of current load requirements in order to meet anticipated future load requirements of municipal inhabitants (it is Buckeye's and OREC's understanding that there is no evidence that CPP has done so in this case).[8] Further, any such excess energy created would result from unanticipated changes in customer demand, weather, or other unanticipated events. Any excess energy that is thus created would, therefore, by definition, be temporary, unpredictable and intermittent and not at all appropriate for meeting a long-term firm commitment of supply to a retail customer. In fact, excess energy and true surplus, if any, is likely to be available only during those periods of time when excess energy is not needed, i.e. during off peak hours, and excess energy is unlikely to be available at all when it is most needed, i.e. during peak hours.

That is not to say that municipalities have no ability to resell any hypothetical true surplus resulting from unpredictable demand. The wholesale market is perfectly suited for the

[8] Appellant argues that given the existence of a robust capacity and energy market in PJM, it is not *necessary* for any municipality to acquire owned or contracted generations resources in excess of the load of municipal inhabitants, and Appellant is correct in this regard. Accordingly, Appellant argues that if a municipality chooses to acquire owned or contracted generation resources in excess of load of municipal inhabitants, such as to plan for future load growth of municipal inhabitants, then any such surplus should be deemed artificial surplus because it could be avoided by using the PJM market to more perfectly match generation to load. Appellant's arguments, and Buckeye's and OREC's are very similar. Where Appellant argues that any such surplus should be deemed artificial surplus because it could be avoided, Buckeye and OREC argue that even if true surplus might hypothetically be created under some circumstances (just not under the facts of this case), it nevertheless should be disposed of in the wholesale market, rather than sold at retail, for all of the reasons described herein. This may be a distinction without a difference as both Appellant and Buckeye and OREC argue at core that the PJM wholesale market has fundamentally changed the practical application, but not the meaning, of Article XVIII, Section 6, such that this court should hold as a matter of law, and without need for further factually inquiry, that municipalities should no longer be permitted to make sales at retail outside municipal boundaries.

advantageous offloading of any excess energy not needed to meet the firm demand of a municipal utility's municipal inhabitants, particularly in the day-ahead or spot markets. Importantly, sales of excess energy into the wholesale market also do not require the long-term and costly investments in electric distribution infrastructure that are required to serve retail customers. Accordingly, any hypothetical surplus energy that results from a municipality's efforts to meet the firm retail load obligation of its inhabitants should be sold in the PJM wholesale market, up to the 50% threshold. The short-term and flexible nature of wholesale market is best for offloading excess power that is, by its nature, temporary, intermittent and unpredictable. Conversely, retail sales are long-term firm obligations, requiring corresponding long-term investments in electric distribution infrastructure that are not appropriate for offloading true surplus.

### H. The "Others" to Whom Surplus Power May Be Sold Includes Wholesale Customers.

A requirement that any true surplus of a municipal utility be sold into the wholesale market is completely consistent with Article XVIII, Section 6 of the Ohio Constitution. Article XVIII, Section 6 only requires that municipal electric utilities be permitted to sell surplus product to "others," meaning others than its municipal inhabitants, but without specifying that those others consist of retail or wholesale customers. In fact, in the case of *State ex rel. Wilson v. Hance*, the court determined that sales of surplus to "others" under Article XVIII, Section 6 includes sales of electricity in the wholesale market. 169 Ohio St. 457, 461-462, 159 N.E.2d 741 (1959) (in determining whether the municipality exceeded the 50% limit, the Court considered sales outside the city limits at both retail and wholesale).

## III. Municipalities' Retail Competition Outside Municipal Boundaries Is Particularly Harmful to Electric Cooperatives.

CPP's efforts to rely on an artificial surplus to enter into contracts for the sale of power outside of municipal boundaries in competition with the IOUs and cooperatives is not only

unconstitutional under this Court's holding in *Bryan*, it is also against public policy as reflected in the Certified Territories Act because it is harmful to IOUs and particularly to electric cooperatives who have built, and are required to build under the Certified Territories Act, the necessary infrastructure to provide service to all the load within their certified territories, both existing and anticipated future customers.

Electric cooperatives and IOUs build and purchase infrastructure to meet their obligation under the Certified Territories Act to serve all inhabitants, existing and future, within their certified territories. The Certified Territories Act grants monopoly service territories to electric suppliers in order to avoid the unnecessary duplication of facilities, among other reasons. If municipalities are allowed to serve at retail outside municipal boundaries and to cherry pick only the best loads to serve, then the costs of the utility assets and infrastructure that electric cooperatives and IOUs built to meet the existing and anticipate load obligations under the Certified Territories Act shifts to the remaining customers served by the IOUs and electric cooperatives, increases their costs, and can result in stranded assets.

These actions are particularly harmful to electric cooperatives which remain vertically integrated. The Ohio electricity marketplace for IOUs was deregulated effective January 1, 2001 with Senate Bill 3. *See* Sub. Senate Bill 3, the Ohio Electric Restructuring Act; R.C. 4928.03. After this transition, IOUs could no longer provide bundled distribution, generation, and transmission service.[9] These utilities were required to sell off or own generation and transmission

[9] Generation, transmission and distribution are three stages of creating and transporting electricity to the end-user or customer. Generation occurs when an electric power plant (such as a nuclear power plant, coal power plant, or wind turbines) generates the electricity. This electricity is then transported from the generating facility to the point of end use through transmission and distribution wires and poles, commonly called "the grid." The transmission system moves electricity at a high voltage from the generation plant closer to the points of use. The voltage is then stepped down at a substation and transported through lower-voltage distribution system to

assets separately and provide only distribution services to customers. In addition, generation became a competitive retail electric service and distribution customers of these utilities were given the choice to obtain their generation from competitive suppliers. *See* R.C. 4928.01 et seq.

This is not the case with electric cooperatives because they are not subject to deregulation or retail choice.[10] Electric cooperatives continue to provide bundled generation, transmission, and distribution services for their members. Buckeye Power, Inc., which is owned by its member cooperatives, owns and operates generation facilities (i.e., power plants) that were purchased or built to provide sufficient capacity to meet the demand of the members within the electric cooperatives' service territories. Buckeye also obtains transmission service for each of the electric delivery points within cooperative territories (i.e., it delivers the electricity to its members).

Thus, electric cooperatives not only build out distribution infrastructure necessary to serve their members, but they also build and purchase generation and transmission necessary to serve the load within their certified territories through their power supplier, Buckeye Power. These services—the distribution assets maintained by the electric cooperatives and the generation facilities and transmission costs maintained by Buckeye—are paid for by all the retail members of the electric distribution cooperatives. When a municipal utility cherry picks loads (often profitable, large loads) from cooperative territory, the remaining cooperative customers must bear increased costs of generation, transmission, *and* distribution assets. Municipalities' unconstitutional

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homes and businesses. (PJM Interconnection, LLC – Learning Center, *Transmission & Distribution*, https://learn.pjm.com/electricity-basics/transmission-distribution.aspx (accessed August 16, 2020).)

[10] Electric cooperatives are not subject to competitive retail electric markets unless an electric cooperative opts into such obligations. R.C. 4928.03. Currently, no electric cooperative has opted into retail competition.

expansion into cooperative territory are thus particularly burdensome to electric cooperatives and their members.

This is particularly egregious from a public policy perspective when electric cooperatives and IOUs are not permitted to compete for retail customers in municipal boundaries absent the consent of the municipality because of the constitutional home rule authority granted to municipalities under Article XVIII, Section 4, of the Ohio Constitution. Furthermore, electric suppliers under the Certified Territories Act have fixed service territories (absent mutual agreement between electric suppliers to change boundaries), whereas municipalities may extend their municipal boundaries, and scope of municipal utility service territory, at any time by annexing additional land (and electric supplier service territory) into municipal boundaries.

## CONCLUSION

Two relatively recent developments have had a significant impact on the practical application of Article XVIII, Section 6, of the Ohio Constitution under current circumstances.

The first was the enactment of the Certified Territories for Electric Supplier Act. This Court grappled with the impact of the Certified Territories Act in its *Bryan* decision, where the Court recognized that municipalities should not be competing at retail with electric suppliers outside municipal boundaries for all of the reasons described above and in the *Bryan* case. The Court created a distinction between true surplus and artificial surplus and stated that only true surplus could be used by a municipal utility to serve retail customers located outside municipal boundaries.

Municipalities that purchase capacity and energy in the PJM market to meet their load obligations, even if they own *some* generation or contractual entitlements to generation, will not have true surplus because the PJM market allows these municipalities to match their total load obligations with their capacity and energy purchased from the market. To the extent that PJM

requires municipalities to maintain a capacity reserve margin to meet the load obligations of municipal inhabitants, this margin is required to meet the variations in load of such inhabitants and cannot be used for other purposes. Furthermore, in PJM, capacity is a completely different product from energy, and purchased capacity does not automatically carry associated rights to energy. To the extent that a municipality hypothetically acquired owned generations assets or generation contractual entitlements exceeding its total load obligation in order to meet the anticipated load growth of its municipal inhabitants, the type of surplus energy available would, by nature, not be the type of surplus that can be used to serve retail customers. Such true surplus would be intermittent, short-term and unpredictable, whereas a retail customer requires a service commitment that is long-term, firm, reliable and predicable. On the other hand, the type of surplus necessary to serve at retail is by nature and by definition, the type of artificial surplus that the Court in *Bryan* deemed impermissible. A utility must incorporate retail customers into its total load obligation, procure additional capacity to meet that load obligation, plus a reserve margin, build out electric distribution infrastructure, i.e. poles and wires to serve these customers, and plan on a long-term basis for such firm electric load. These purposeful steps are completely incompatible with the idea of a true, and *temporary*, surplus.

The second development, not yet fully realized at the time of the *Bryan* decision, was the creation and development of a robust wholesale market for electric capacity, energy, transmission and other services through PJM. As opposed to the retail market, the wholesale market is a perfect match for the type of true surplus that a municipality might hypothetically have available. The wholesale market easily accommodates short-term, intermittent and unpredictable supplies of electricity of the type that a municipality might hypothetically have available, i.e. the off-peak hours when the full amount of municipal utility's owned or contracted electric generating capacity

is not needed to serve municipal inhabitants, and does not require investments in electric distribution infrastructure that are necessary to serve retail customers.

For these reasons and for all of the reasons set forth in this brief, the Court should require municipal utilities to dispose of any of their surplus product in the wholesale market. Doing so will eliminate the need for this Court or lower courts, in this case or any future case, to distinguish between true surplus and artificial surplus, between capacity and energy, and the municipality can sell any surplus into the wholesale market up to the 50% limit, as municipal utilities already do on a regular basis.

The existence of a vibrant wholesale market raises a question for this Court and for CPP and the other Appellees to answer, regardless of whether CPP does or does not have true surplus product, regardless of whether such surplus product, if it exists, consists of capacity or energy or both, which is this: why is the wholesale market not adequate for the disposal of a municipal utility's surplus product, if any, and why are retail sales outside municipal boundaries ever necessary, given the availability of the wholesale market, and when wholesale sales can resolve all of the concerns about retail competition expressed by this Court in *Bryan*? Electric cooperatives, CEI and other IOUs are not permitted to compete at retail within municipal boundaries without the consent of the municipality. Municipal utilities thus should not be permitted to compete at retail with other electric suppliers in their certified service territories, when it is completely unnecessary for municipal utilities to do so given the existence of a vibrant wholesale market, which municipal utilities admittedly already use.

Respectfully submitted,

*/s/ Stephanie M. Chmiel*
Stephanie M. Chmiel (0087555) (COUNSEL OF RECORD)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
Telephone: (614) 469-3247
Facsimile: (614) 469-3361
Stephanie.Chmiel@ThompsonHine.com

and

Kurt Helfrich (0068017)
General Counsel
Lija Kaleps-Clark (0086445)
Associate General Counsel
Buckeye Power, Inc.
Ohio Rural Electric Cooperatives, Inc.
6677 Busch Blvd
Columbus, Ohio 43229
Telephone: (614) 681-5151
Facsimile: (614) 846-7108
khelfrich@ohioec.org
lkaleps@ohioec.org

*Counsel for Amici Curiae Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc.*

## CERTIFICATE OF SERVICE

I certify that a copy of this Brief of *Amici Curiae* Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc. in Support of Appellant/Cross-Appellee, The Cleveland Electric Illuminating Company was sent by ordinary U.S. Mail, postage prepaid, this 31st day of August, to the following:

Gregory J. Phillips
Michael J. Montgomery
Michael D. Meuti
James E. von der Heydt
James J. Walsh, Jr.
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
200 Public Square, Suite 2300
Cleveland, Ohio 44114
gphillips@beneschlaw.com
mmontgomery@beneschlaw.com
mmeuti@beneschlaw.com
jvonderheydt@beneschlaw.com
jwalsh@beneschlaw.com

*Counsel for Appellant/Cross-Appellee The Cleveland Electric Illuminating Company*

James E. McLean
DUKE ENERGY OHIO, INC.
139 East Fourth Street, M/C 1212-Main
Cincinnati, Ohio 45202
James.McLean@duke-energy.com

*Counsel for Amicus Curiae Duke Energy Ohio, Inc.*

Steven T. Nourse
AMERICAN ELECTRIC POWER CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
stnourse@aep.com

*Counsel for Amicus Curiae Ohio Power Company*

Kimberly W. Bojko
Angela Paul Whitfield
Stephen E. Dutton
CARPENTER, LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com
paul@carpenterlips.com
dutton@carpenterlipps.com

*Counsel for Appellees/Cross-Appellant City of Cleveland and Cleveland Public Power*

Kevin M. Butler
Law Director
CITY OF BROOKLYN, OHIO
7619 Memphis Avenue
Brooklyn, Ohio 44144
kbutler@brooklynohio.gov

*Counsel for Appellee/Cross-Appellant City of Brooklyn*

Drew H. Campbell
Elyse Akhbari
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
dcampbell@bricker.com
eakhbari@bricker.com

*Counsel for Appellee/Cross-Appellant Cuyahoga County*

Lisa G. McAlister
Gerit F. Hull
AMERICAN MUNICIPAL POWER, INC.
1111 Schrock Road, Suite 100
Columbus, Ohio 43229
lmcalister@amppartners.org
ghull@amppartners.org

*Counsel for Amicus Curiae American Municipal Power, Inc.*

*/s/ Stephanie M. Chmiel*
Stephanie M. Chmiel (0087555)

4826-5132-0007.12

**IN THE COURT OF COMMON PLEAS**
**BELMONT COUNTY, OHIO**

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|---|---|
| CITY OF ST. CLAIRSVILLE and ST. CLAIRSVILLE MUNICIPAL UTILITIES, | CASE NO. 17-CV-0218 |
| Plaintiffs, | JUDGE FRANK FREGIATO |
| vs. | |
| SOUTH CENTRAL POWER COMPANY, | |
| Defendant. | |

**ENTRY ON SUMMARY JUDGMENT**

This matter is before the Court on the competing Motions For Summary Judgment filed by Plaintiffs, the city of St. Clairsville and St. Clairsville Municipal Utilities (collectively, "St. Clairsville"), and Defendant, South Central Power Company ("South Central").

Although the procedural history and nature of the parties' claims are more fully set forth below, the genesis of this dispute concerns a Verified Complaint and Motion for Temporary Restraining Order ("TRO") filed by St. Clairsville on June 21, 2017, which seek to prevent South Central from extending its electric facilities and providing electric service to a thirty-three (33) acre parcel of land, located in Belmont County, Ohio, outside of St. Clairsville's municipal boundaries, and identified as Tax Parcel No. 32-00429.000 (the "Property"). Specifically, the Verified Complaint contains three counts:

- In Count I, St. Clairsville sought an injunction prohibiting South Central from taking any acts to extend service to the Property until "St. Clairsville has exhausted the processes and procedures available to it under" the Certified Territory Act of Ohio, R.C. 4933.81 through 4933.90 (the "Certified Territory Act").

- In Count II, St. Clairsville sought a declaration that it has the right to serve the Property under the Certified Territory Act and the Ohio Constitution.
- In Count III, St. Clairsville claimed that South Central violated various municipal ordinances because it did not obtain a permit from St. Clairsville before beginning to bore a hole under the ground that St. Clairsville claims belongs to it. St. Clairsville sought an injunction and other relief on Count III requiring South Central to obtain a permit from St. Clairsville.

After carefully considering the parties' arguments in briefs, exhibits and evidence attached thereto, and hearing argument from the parties on June 15, 2018, this Court hereby ENTERS summary judgment in favor of South Central on all three counts of the Verified Complaint for the reasons set forth in this Judgment Entry and the Court's determination that genuine issues of material fact do not exist as to the issues that this Judgment Entry addresses and that, on those issues, South Central is entitled to judgment as a matter of law.

## PROCEDURAL HISTORY

On June 21, 2017, this Court granted St. Clairsville's Motion for a TRO, based in part upon the contention that the Public Utilities Commission of Ohio ("PUCO" or "Commission") retained exclusive jurisdiction to resolve St. Clairsville's claims under the Certified Territory Act ("Mapping Claim"). Similarly, on July 5, 2017, after a hearing, this Court issued a preliminary injunction to maintain the status quo until the PUCO could rule on the Mapping Claim alleged in the Verified Complaint.

On August 7, 2017, St. Clairsville filed a Petition with the PUCO, seeking a Commission order that ruled in favor of St. Clairsville on its Mapping Claim, which also included and referenced St. Clairsville's related state constitutional claims ("Constitutional Claim"). On August 31, 2017, South Central filed a motion for summary judgment, asking the Commission to deny St. Clairsville's requested relief. The PUCO treated South Central's motion for summary judgment as a motion to dismiss, which it subsequently granted on April 11, 2018. In granting

dismissal, the PUCO ruled in South Central's favor as to the provisions of the Certified Territory Act forming the basis of St. Clairsville's Mapping Claim, but determined that it did not have jurisdiction to determine St. Clairsville's Constitutional rights under both the Certified Territory Act and Article XVIII, Sections 4 and 6, of the Ohio Constitution.

As a result, the parties returned to this Court. On April 13, 2018, this Court dissolved the preliminary injunction it previously granted, and issued an order, agreed upon by the parties, for an expedited briefing and hearing on summary judgment. On May 4, 2018, St. Clairsville filed a Motion For Summary Judgment, pursuant to Civil Rule 56, on all three of its claims. On May 14, 2018, South Central filed its combined Cross Motion For Summary Judgment and Opposition to St. Clairsville's Motion For Summary Judgment. On May 21, 2018, St. Clairsville filed an Opposition to South Central's Motion for Summary Judgment and Reply in support of its Motion for Summary Judgment. On May 29, 2018 South Central filed a Reply in support of its Motion for Summary Judgment. On June 15, 2018, the parties participated in an oral argument on their cross motions for summary judgment.

## FINDINGS OF UNDISPUTED FACTS

The Property at issue is an undeveloped piece of land located off State Route 40 in Belmont County, outside of the city of St. Clairsville's municipal boundaries. The Property falls within South Central's certified service territory. St. Clairsville had provided electric service to the Property dating back to at least 1942, and St. Clairsville has been the only entity to provide electric service to the Property. Currently, no one is providing electric service to the now vacant Property, nor has service been provided to the Property for over 20 years.

In August 2014, the Property's owner asked South Central to supply electric service to the Property. South Central agreed and proposed extending its existing electric facilities some 1,500 feet to serve the Property. To do so, South Central would, in part, need to bore under the

intersection of State Route 40 (a state of Ohio right-of-way) and Mall Crossing Commons (previously known as Newlin Road) (the "Disputed Intersection"). As such, South Central obtained a permit from the State of Ohio and easements from neighboring landowners. However, South Central did not seek a permit from St. Clairsville because, at that time, although Mall Commons Crossing was a dedicated city right-of-way, it was not located within St. Clairsville's municipal boundaries. Since this Court granted the TRO, South Central halted all construction at the Disputed Intersection until this Court dissolved the preliminary injunction on April 13, 2018.

## ANALYSIS AND CONCLUSIONS OF LAW

Summary judgment is appropriate where:

> (1) No genuine issue as to any material fact remains to be litigated;
> (2) the moving party is entitled to judgment as a matter of law; and
> (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

*Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327, 364 N.E.2d 267, 274 (1977). Applying this standard to the facts and circumstances presented here, this Court finds that South Central is entitled to summary judgment on all claims.

### I. COUNT I: INJUNCTIVE RELIEF

In Count I of its Verified Complaint, St. Clairsville sought a preliminary injunction requesting that the Court maintain the "status quo" until St. Clairsville could pursue administrative remedies it believed were available to it under the Certified Territory Act. St. Clairsville claimed that the Property was within its certified territory, and but for a mapping error, the Property would have been included as part of the city's "service area" instead of South

Central's certified territory. St. Clairsville further claimed that it could challenge the PUCO-approved maps pursuant to the procedures set forth in R.C. 4933.82(C).

On April 11, 2018, the PUCO issued its decision on St. Clairsville's Mapping Claim under the Certified Territory Act. The Commission dismissed St. Clairsville's Petition, finding that the Certified Territory Act does not grant St. Clairsville an exclusive service area or the right to challenge the maps approving South Central's certified territory. As the Commission explained, "the Certified Territory Act did not contemplate and does not establish certified territories for municipalities." PUCO Order ¶ 36. The Commission explained that the Certified Territory Act only gives exclusive certified territories to "electric suppliers", and the city of St. Clairsville, as a municipality, is not an electric supplier. *Id.* "Because St. Clairsville is not an electric supplier, it cannot have a certified territory." The Commission determined that "[s]ince St. Clairsville is not an electric supplier and it does not have a certified territory, St. Clairsville does not have an *exclusive right*, under the Certified Territory Act, to serve any load centers outside of St. Clairsville's boundaries under the Certified Territory Act." (*Id.* (emphasis in original).)

The Commission also rejected St. Clairsville's Mapping Claim as untimely, agreeing with South Central that "St. Clairsville's opportunity to raise any issues with the map filed by BEC [South Central's predecessor] was between March 24, 1981 and April 22, 1981." (*Id.* ¶ 37.) Thus, the Commission determined that "once the Commission approved the BEC maps, under the plain language of R.C. 4933.82(D), municipalities like St. Clairsville had no right to challenge the maps approved by the Commission." (*Id.* ¶ 40)

This Court adopts the PUCO's decision regarding St. Clairsville's Mapping Claim, in full, and holds that: (1) the Certified Territory Act does not give St. Clairsville an "exclusive

service area"; (2) St. Clairsville's challenge to the maps that the PUCO issued in the early 1980s when setting electric utilities' service territories is untimely; and (3) the Property is within South Central's certified territory.

Accordingly, because Count I sought injunctive relief based on St. Clairsville's claim that it had a superior right to serve the Property because the Property was within St. Clairsville's "service area" under the Certified Territory Act and/or that it had a right to challenge the PUCO-approved maps, Count I fails as a matter of law. South Central is, therefore, entitled to summary judgment on Count I.

## II. COUNT II: DECLARATORY RELIEF

In Count II, St. Clairsville sought a declaration that it has the right to serve the Property under the Certified Territory Act and the Ohio Constitution. To the extent Count II is based on the same grounds as Count I, it fails for the same reason that Count I failed, and South Central is entitled to summary judgment for all the reasons identified with respect to Count I. Thus, this Court must next address whether St. Clairsville is entitled to a declaration that St. Clairsville has an exclusive right and a right of first refusal to serve the Property pursuant to the Ohio Constitution, Article XVIII, Sections 4 and 6.

As a preliminary issue, South Central claims that St. Clairsville has not sufficiently pleaded a claim for relief based on an alleged violation of Ohio Constitution Article XVIII, Sections 4 and 6. The Court disagrees. The Verified Complaint contained multiple references to the Ohio Constitution, including in paragraphs 37 and 41 of the Complaint. This Court, therefore, finds that St. Clairsville has adequately pled its Constitutional Claim under Count II.

### A. Article XVIII, Section 4 of the Ohio Constitution.

Article XVIII, Section 4 of the Ohio Constitution states:

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

Ohio Const., Art. XVIII, Sec. 4. Under the Ohio Constitution, municipalities enjoy significant rights *within* their boundaries to provide utility service to municipal residents. As a result, municipalities have monopoly rights as to electric service within municipal boundaries even where the municipality falls within an electric supplier's certified service territory. *State ex. rel Toledo Edison Co. v. Clyde*, 76 Ohio St. 3d 508, 1996-Ohio-376, 668 N.E.2d 498, at 517-18 (1996); *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 1996-Ohio-336, 671 N.E.2d 241, 109 (1996). However, there is nothing in Section 4, or any case interpreting Section 4, that gives municipalities, such as the city of St. Clairsville, an exclusive right to serve customers outside of the municipality.[1] Here, there is no dispute that the Property falls outside of the city of St. Clairsville's municipal boundaries. Therefore, this Court holds that, as a matter of law, Ohio Constitution Article XVIII, Section 4 does not give St. Clairsville any exclusive right to serve the Property.

**B. Article XVIII, Section 6 of the Ohio Constitution.**

Next, the Court must address whether Article XVIII, Section 6 of the Ohio Constitution grants municipalities like St. Clairsville exclusive extraterritorial service rights. The Ohio Constitution Article XVIII, Section 6 authorizes the sale of electricity and other public utility services outside of municipal boundaries:

> 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

[1] The PUCO also recognized the limitations of Section 4 in its April Order.

> the surplus of its utility up to 50% of the total service or product supplied within the municipality.

Ohio Const., Art. XVIII, Sec. 6 (emphasis added); *City of Xenia v. State*, 140 Ohio App.3d 65, 69 (10th Dist. 2000). Importantly, Section 6 was not intended to give municipalities ***unlimited*** power or the general right to operate as public utilities and to compete with electric suppliers outside of municipal boundaries:

> It is obvious from a consideration of that constitutional limitation that, although the framers of the Constitution believed that it would be advantageous for municipal corporations to have the power to provide public-utility services to their inhabitants and recognized that such an operation could create a surplus product which could be disposed of outside the corporate limits of the municipality, they clearly intended to limit municipalities primarily to the furnishing of services to their own inhabitants and to prevent such municipalities from entering into the general public-utility business outside their boundaries in competition with private enterprise.

*State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 461 (1959); *Perrysburg v. Koenig*, No. WD-95-011, 1995 Ohio App. LEXIS 5334, at *14 (6th Dist. Dec. 8, 1995). Notwithstanding these constitutional limitations, St. Clairsville contends that Ohio Constitution Article XVIII, Section 6 confers upon municipalities the exclusive extraterritorial right or a right of first refusal to provide electric service to non-residents. The Court declines to adopt this view of the Ohio Constitution for the reasons set forth below.

*1. St. Clairsville's Interpretation of Article XVIII, Section 6 of the Ohio Constitution would lead to absurd results.*

St. Clairsville insists that Article XVIII, Section 6 confers upon municipalities the exclusive extraterritorial right or a right of first refusal to provide electric service to non-residents. Yet as St. Clairsville conceded during argument, if St. Clairsville's interpretation is true, St. Clairsville (or any municipality in Ohio operating a municipal utility) would have the legal right to force utility service on any non-resident consumer located *anywhere* in the state of

Ohio – no matter how far removed from the municipal boundaries of the city of St. Clairsville. For example, under St. Clairsville's view, St. Clairsville would have the ability to force the sale of its utility services to customers in or around the city of Toledo – even over those customers' objections to any terms and conditions imposed by St. Clairsville. Similarly, the city of Toledo would have its own corresponding right under Section 6 of Article XVIII of the Ohio Constitution to force the sale of its utility services to customers in Belmont County – even over those customers' objections to any terms and conditions imposed by the city of Toledo.

As a result, adopting St. Clairsville's interpretation of Section 6 would invariably open a floodgate of litigation over numerous issues such as how the alleged right of first refusal would even be monitored – i.e., would every customer in the state have to check with St. Clairsville (as well as all other municipalities in Ohio operating a municipal utility) before applying for utility service from another supplier? As between multiple municipalities competing for the same customer, which one would have the exclusive right to serve a property/right of first refusal? And what rate, terms and conditions apply to non-resident consumer service and how are those terms and conditions regulated, if not by contract and mutual consent? The Court declines to adopt an interpretation of Article XVIII, Section 6 of the Ohio Constitution that would produce such an absurd and unworkable outcome.

St. Clairsville claims that these concerns are speculative and unlikely to occur because practical realties and the 50% surplus limitation would prevent municipalities from seeking to impose electric service statewide. For example, St. Clairsville claims that its electric utility service offering would be limited by the location of its distribution network and the 50% surplus limitation in Article XVIII, Section 6. However, there is no requirement that a utility's electric distribution network be contiguous. Furthermore, it is entirely possible that a municipal utility

could purchase a distribution network or even subcontract for one in other parts of the state to solidify its extraterritorial rights throughout the state. In other words, there is no actual geographic limit on St. Clairsville's claimed constitutional right to force non-resident consumers to accept its utility services. Not only that, the 50% surplus limitation does not apply to municipal water and sewerage utility services, and, thus, would not act as a "practical" barrier to municipal utilities forcing customers outside of its municipal boundaries to accept municipal utility service as St. Clairsville argues. Thus, the Court declines to adopt St. Clairsville's interpretation of Article XVIII, Section 6.

2. *The Ohio Supreme Court has never granted municipal utilities exclusive extraterritorial rights to serve new, non-resident customers.*

Second, St. Clairsville claims that Section 6 affords it exclusive rights because the Ohio Supreme Court has already interpreted Section 6 as giving municipalities exclusive extraterritorial service rights. Specifically, St. Clairsville argues that in *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 2000-Ohio-169, 737 N.E.2d 529, 291-93 (2000) and *Miller v. Village of Orrville*, 48 Ohio App. 87 (9th Dist. 1934), the Ohio Supreme Court determined that municipalities have exclusive extraterritorial rights. However, South Central insists that there are no Ohio cases in which the courts have granted municipal utilities exclusive extraterritorial rights to serve new, non-resident consumers.

The Court agrees with South Central. In *Toledo Edison*, the Ohio Supreme Court examined a limitation on a municipal utility's ability to provide utility service to non-residents. It held that Sections 4 and 6 of Article XVIII, when read together,

> 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 limits.

*Id.* at 293. The Supreme Court recognized that pursuant to Section 6, a municipality may sell service outside of municipal boundaries subject to certain limitations, not all of which are expressly set forth in Section 6. *Id.* at 292-93. Thus, the Supreme Court in *Toledo Edison* never held that a municipality's extraterritorial service rights are exclusive.

Nor does *Miller* support St. Clairsville's position. The issue in *Miller* was whether a village exceeded its constitutional authority by extending electric facilities outside of municipal boundaries to serve non-residents. The plaintiff in that case claimed that the extension of service was illegal because the decision had to "be made by the board of trustees" and there must first be a demand from the non-residents for service. *Miller*, 48 Ohio App. at 88. The Court held that the village could provide service to non-residents without any further legislative authorization by the board of trustees. *Id.* at 91. Thus, contrary to St. Clairsville's argument, *Miller* did not address whether a municipality had an exclusive right or right of first refusal to force its service on non-residents at the municipality's will.

*3. Sections 4 and 6 are not identical and, when read together, do not grant municipalities exclusive extraterritorial service rights.*

Third, St. Clairsville claims that Section 6 affords it exclusive rights because when reading Article XVIII, Sections 4 and 6 together (as they must be according to St. Clairsville), the only reasonable interpretation is that Section 6 was intended to give municipalities exclusive rights. Specifically, St. Clairsville underscores that both Ohio Constitution Article XVIII, Sections 4 and 6 state that a municipality "may" provide electric service; therefore, since Article XVIII, Section 4 has been construed as giving municipalities exclusive rights so, too, must Section 6. South Central counters that the use of the permissive "may" language in Sections 4

and 6 regarding the provision of utility services does not mean that Section 6 provides exclusive rights outside municipal boundaries; rather, the word "may" in Section 6 simply means St. Clairsville is not obligated to provide service to non-jurisdictional customers, and the word "may" in Section 4 simply means that St. Clairsville is not obligated to form or operate a municipal utility.

The Court agrees with South Central. On its face, nothing in the language of Section 6 grants extraterritorial exclusivity to municipalities. The use of the permissive "may" in both Sections 4 and 6 does not somehow grant St. Clairsville exclusive service rights outside of municipal boundaries. There is no dispute that *within municipal boundaries*, municipalities have significant monopoly rights and rights of self-governance. Outside of municipal boundaries, however, those rights are diminished. For instance, while cities may exercise the right of eminent domain outside of municipal boundaries in furtherance of providing utility service to municipal residents, no such right exists to support a municipality's extraterritorial utility service. *Britt v. Columbus*, 38 Ohio St.2d 1, 9-11 (1974). In addition, the rates that municipalities may charge residents for the provision of utility services are set by ordinance and are reviewed only to ensure that they are not discriminatory. *City of Xenia v. State*, 140 Ohio App. 3d 65, 70-71, 746 N.E.2d 666, 670-71 (2000). Outside of municipal boundaries, those rates are set by contract and are reviewed under general contract principles. *Id.* As more fully discussed in Section III below, the rates, terms and conditions of utility service outside municipal boundaries must be governed by contract, as the home rule powers of municipalities under Section 3 of Article XVIII of the Ohio Constitution do not authorize municipalities to enforce their ordinances outside of municipal boundaries.

Also, within municipal boundaries, if a municipality exercised its option to operate a municipal utility, the municipal utility (or the utility to which the municipality has granted franchise rights) has an obligation to provide utility service to residents upon request. *VMJ Co. v. Lorain*, 105 Ohio App. 166 (9th Dist. 1957). As St. Clairsville concedes, this rule does not apply outside of municipal boundaries and, thus, non-residents cannot force municipalities to provide electric (or other utility) service outside of municipal boundaries. *Fairway Manor, Inc. v. Board of Commissioners of Summit County*, 36 Ohio St. 3d 85 (1988).

Accordingly, this Court rejects St. Clairsville's argument that the provisions of Sections 4 and 6 are identical and operate the same inside and outside of municipal boundaries. The Court finds that Sections 4 and 6 are not identical and, when read together, do not grant municipalities exclusive extraterritorial service rights. Indeed, were the Court to adopt St. Clairsville's position, it would have to read additional language into Article XVIII, Section 6 in violation of basic principles of statutory interpretation. *State v. Waddell*, 71 Ohio St. 3d 630, 631 (1995).

4. *Article XVIII, Section 6 of the Ohio Constitution does not conflict with the Certified Territory Act, and does not confer upon St. Clairsville a superior, exclusive right to serve the Property.*

Finally, St. Clairsville highlights that the language in the Certified Territory Act specifically acknowledges that Article XVIII is superior to the Certified Territory Act; as such, St. Clairsville contends that it enjoys a superior, exclusive right under the Ohio Constitution to serve the Property.[2]

[2] St. Clairsville cites two cases – *Bd. of Educ. of City Sch. Dist. of Columbus v. City of Columbus*, 118 Ohio St. 295, 160 N.E. 902 (1928) and *In the Matter of the Complaint of Ohio Power Co.*, Case No. 06-890-EL-CSS (July 25, 2007) – for the proposition that its rights are unaffected by the Certified Territories Act, and thus, its authority to provide service to non-resident consumers is superior to South Central's rights under the Certified Territories Act. However, both cases dealt with the rights of municipalities to serve their inhabitants under Section 4 of Article XVIII, which is inapplicable to the facts of this case.

It is true that the Certified Territory Act recognizes that under Ohio Constitution, Article XVIII, Sections 3, 4, and 6, municipalities are given certain home rule rights and that the Certified Territory Act "shall not in any manner prohibit or restrict the rights of municipalities under Article XVIII[.]" R.C. 4933.82(B), 4933.83(A), (C), 4933.84, and 4933.87. Furthermore, it is axiomatic that state statutes cannot operate in a manner that limit or abridge constitutional rights. And when interpreting the interplay of the Ohio Constitution and the Certified Territory Act, "we use the plain and ordinary meaning of the words in question and attempt to reconcile the words of the statute with the terms of the constitution whenever possible." *State v. Carswell*, 2007-Ohio-3723, ¶ 10, 871 N.E.2d 547; *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, P 14, 811 N.E.2d 68 ("Generally speaking, in construing the Constitution, we apply the same rules of construction that we apply in construing statutes." (internal quotations omitted)).

The Court disagrees with St. Clairsville that 1) there is a conflict between the Certified Territory Act and Article XVIII, Section 6 of the Ohio Constitution; and 2) St. Clairsville alone possesses the exclusive, superior right under the Ohio Constitution to serve the Property. Article XVIII, Section 6 and the Certified Territory Act can be read together in a manner that gives full meaning to the express language of both provisions. In doing so, the Certified Territory Act does not conflict with the Ohio Constitution. Reading Ohio Constitution Article XVIII, Section 6 and the Certified Territory Act together, both South Central and St. Clairsville have the right to serve non-resident consumers who are located within South Central's certified territory. In addition, South Central has the obligation under the Certified Territory Act to serve any customer in its service territory who requests service from South Central and is located outside St. Clairsville municipal boundaries. St. Clairsville has no such obligation. In addition, St. Clairsville is limited in its extraterritorial service by any limitations contained in Article XVIII, Section 6, including

the 50% surplus limitation and the consent of the customer. Here, the Property is located outside of the municipal boundaries of the city of St. Clairsville and in the certified service territory of South Central, and the customer has requested service from South Central. Accordingly, under these circumstances, South Central has both the right and the obligation to provide electric service to the Property.[3]

## III. COUNT III (VIOLATION OF CITY ORDINANCES)

In Count III, St. Clairsville claimed that South Central violated city Ordinances 1157.01(C), 1157.04, and 1157.06 because it did not obtain a permit from St. Clairsville before beginning to bore a hole under Mall Commons Crossing at the Disputed Intersection. St. Clairsville does not contend that South Central has engaged in any conduct requiring a permit since this Court issued its TRO and preliminary injunction.

Ordinance 1157.01(C) states:

> No person shall use, occupy, own or operate facilities in, under or over any rights of way within St. Clairsville unless such person first obtains a franchise and/or permits conforming to the requirements set forth therein and in this chapter.

(emphasis added). Ordinance 1157.04 establishes the procedure for obtaining such a permit and Ordinance 1157.06 sets forth conditions for obtaining permits to use rights-of-way within the city of St. Clairsville. Thus, an essential element of Count III is that the ordinances apply to the Disputed Intersection.

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[3] This Court further finds that allowing St. Clairsville to have exclusive service rights outside of municipal boundaries such that it could force non-resident consumers to accept service is inconsistent with case law establishing that outside of municipal boundaries, utility service is provided pursuant to contract. *See Bakies v. City of Perrysburg*, 108 Ohio St. 3d 361, 2006-Ohio-1190 (2006); *Xenia v. State of Ohio and Cent. State Univ.*, 140 Ohio App.3d, 70, 746 N.E.2d 666, 670 (10th Dist. 2000); *Fairway Manor, Inc. v. Board of Commissioners of Summit County*, 36 Ohio St. 3d 85 (1988).

South Central argues that the ordinances do not apply since the Disputed Intersection was outside of municipal boundaries and, thus, not "within" the city of St. Clairsville. South Central points out that it had a permit from the State of Ohio and private easements from neighboring property owners, which were sufficient to allow South Central to complete its construction activities at the Disputed Intersection.

It is undisputed that, at the time South Central began the construction activities that prompted St. Clairsville to seek a TRO and preliminary injunction, the Disputed Intersection was not within the municipal boundaries and, thus was not "within St. Clairsville." St. Clairsville argues that this is not dispositive, insisting that "rights of way" are defined as public land and essentially act as an extension of the municipal boundary. Hence, it claims that there is no requirement that the "right of way" must be within City limits – just that the right-of-way for which a permit is needed is above or below public land.

St. Clairsville is asking the Court to find that Ordinances 1157.01(C), 1157.04, and 1157.06 can be applied to public land located outside of municipal boundaries. The Court declines to do so. On its face, Ordinance 1157.01 only applies to rights-of-way that are "within St. Clairsville." Here, the Disputed Intersection was not "within St. Clairsville" at the relevant time, and so under the plain language of Ordinance 1157.01 St. Clairsville's claim fails.

In addition, St. Clairsville has not established that it has the constitutional authority to apply a municipal ordinance outside of municipal boundaries in this circumstance. The Ohio Constitution states that "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." Constitution Article XVIII, Section

3 (emphasis added). There is nothing in the text of this section which allows a municipality to enforce its ordinances outside of municipal boundaries.

The Ohio Supreme Court has also held that nothing in this section provides extra-territorial authority. *Prudential Co–Operative Realty Co. v. Youngstown* (1928), 118 Ohio St. 204, 207 ("The provisions of that article do not confer any extra-territorial authority. The direct authority given by that article is expressly limited to the exercise of powers within the municipality."); *see also Beachwood v. Board of Elections*, 167 Ohio St. 369 (1958). Other courts have also refused to apply ordinances outside of municipal boundaries in similar circumstances. *City of Springfield v. All American Food Specialists, Inc.*, 85 Ohio App.3d 464 (2nd Dist. 1993)(finding "the reach of that [Article 3] authority stops at the territorial limits of the municipality that elects to exercise it."); *City of Pepper Pike v. Garson*, 117 Ohio App.3d 473 (10th Dist. 1997)(refusing to enforce a criminal ordinance outside of municipal boundaries). St. Clairsville has failed to identify any authority justifying a departure from the well-established general rule. Accordingly, South Central is entitled to summary judgment on this claim.

Based upon the evidence submitted by the parties in connection with the parties' Motions For Summary Judgment, reasonable minds can come to but one conclusion and that conclusion is adverse to St. Clairsville. It is, therefore, ORDERED, ADJUDGED, AND DECREED:

A. That the Motion For Summary Judgment filed by St. Clairsville on May 4, 2018, be and hereby is denied;

B. That the Motion For Summary Judgment filed by South Central on May 14, 2018, be and hereby is granted; and

C. That the Verified Complaint be and hereby is dismissed with prejudice.

IT IS SO ORDERED this 9th day of July, 2018:

Hon. Frank Fregiato

ENDED

Respectfully submitted,

*N. Trevor Alexander*

Stephanie M. Chmiel (0087555)
THOMPSON HINE LLP
41 S. High Street, Suite 1700
Columbus, OH 43215
Tel: (614) 469-3247
Fax: (614) 469-3361
Stephanie.Chmiel@ThompsonHine.com

N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD, LLP
41 S. High St., 1200 Huntington Center
Columbus, Ohio 43215
Telephone: (614) 621-1500
Fax: (614) 621-0010
talexander@calfee.com

*Attorneys for South Central Power Company*