IN THE SUPREME COURT OF OHIO

CASE NO. 2020-0277

THE CLEVELAND ELECTRIC ILLUMINATING CO.,
Plaintiff-Appellant/Cross-Appellee,

-vs-

CITY OF CLEVELAND, *et al.*,
Defendant-Appellees/Cross-Appellants.

ON APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS
EIGHTH APPELLATE DISTRICT, CASE NO. CA-19-108560

BRIEF OF *AMICUS CURIAE*, OHIO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLEES/CROSS-APPELLANTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Municipal League ("OML") was incorporated in 1952 as an Ohio non-profit corporation by city and village officials who saw the need for a statewide association to serve the interests of Ohio's municipal governments. Currently, the OML represents 730 of Ohio's 931 cities and villages. Collectively, more than nine million Ohioans live in an urban setting.

The OML has six affiliated organizations: the Ohio Municipal Attorneys Association, the Municipal Finance Officers Association, the Ohio Mayors Association, the Ohio Association of Public Safety Directors, the Ohio City/County Management Association, and the Ohio Municipal Clerks Association. On a national basis, the OML is affiliated with the National League of Cities, the International Municipal Lawyers Association, the United States Conference of Mayors, and the International City/County Managers Association.

The OML represents the collective interest of Ohio cities and villages before the Ohio General Assembly and the state's elected and administrative offices. In 1984, the OML established a Legal Advocacy Program funded by its members' voluntary contributions. This program allows the League to serve as the voice of cities and villages before the Ohio Supreme Court, the United States Courts of Appeals, and the United States Supreme Court by filing briefs of *amicus curiae* on cases of special concern to municipal governments. The Ohio Municipal League has been accredited by this Court as a sponsor of both Continuing Legal Education programs for attorneys and the required Mayors Court training for mayors hearing all types of cases.

The Ohio Municipal Attorneys Association ("OMAA") is in support of the OML's efforts as *amicus curiae*. The OMAA was incorporated as an Ohio non-profit corporation in 1953 by city and village attorneys who saw the need for a statewide attorneys' association to serve the interests of Ohio municipal government. Currently, the OMAA

represents a majority of Ohio's cities including Columbus, Cleveland, and Cincinnati. The OMAA is closely aligned with the Ohio Municipal League. On a national basis, the OMAA is affiliated with the National League of Cities, and the International Municipal Lawyers Association. The Executive Director of the OMAA is a registered lobbyist and works with the Ohio legislature on matters of concern to municipalities. The Ohio Municipal Attorneys Association has been accredited by the Ohio Supreme Court as a sponsor for Continuing Legal Education Programs for municipal attorneys.

STATEMENT OF THE CASE AND FACTS

The OML adopts and incorporates the statement of the case and facts offered in the Briefs submitted by the Defendant-Appellees/Cross-Appellant municipalities. Of particular note, the OML wishes to highlight that this appeal arises out of a dispute over agreements between Cleveland Public Power ("CPP"), a division of the City of Cleveland, and the City of Brooklyn, a fellow municipality. *Cleveland Elec. Illum. Co. v. Cleveland*, 2020-Ohio-33, 139 N.E.3d 996, ¶ 6 (8th Dist.). By these agreements, CPP would "provide electricity service to customers in Brooklyn" and "seven of [Brooklyn's] municipal buildings located in Brooklyn." *Id.* Plaintiff-Appellant/Cross-Appellee Cleveland Electric Illuminating Company ("CEI") has even relied on these facts in its arguments to this Court. *Memorandum in Support of Jurisdiction of Appellant the Cleveland Electric Illuminating Company filed February 21, 2020, pp. 6-7.*

ARGUMENT

This Court has accepted four Propositions of Law for consideration. *06/23/2020 Case Announcements*, 2020-Ohio-3365, p. 1.

PROPOSITION OF LAW I: A MUNICIPAL UTILITY VIOLATES ARTICLE XVIII, SECTIONS 4 AND 6 IF IT SELLS ELECTRICITY OUTSIDE MUNICIPAL BOUNDARIES FROM AN ARTIFICIAL SURPLUS, INCLUDING ANY AVOIDABLE EXCESS ELECTRICITY A MUNICIPALITY PURCHASES THAT WAS NOT TO SUPPLY THE CITY OR ITS INHABITANTS

> **PROPOSITION OF LAW II: A MUNICIPAL UTILITY VIOLATES ARTICLE XVIII, SECTIONS 4 AND 6 IF IT CAN BUY ONLY THE AMOUNT OF ELECTRICITY NEEDED WITHIN THE CITY, BUT INSTEAD IT BUYS EXCESS ELECTRICITY AND SELLS ELECTRICITY OUTSIDE MUNICIPAL BOUNDARIES**
>
> **PROPOSITION OF LAW III: A MUNICIPAL UTILITY VIOLATES ARTICLE XVIII, SECTIONS 4 AND 6 IF IT BUYS ANY AMOUNT OF ELECTRICITY FOR A PURPOSE OTHER THAN SUPPLYING THAT ELECTRICITY TO ITSELF OR ITS INHABITANTS, THEN SELLS THE RESULTING EXCESS TO CUSTOMERS OUTSIDE CITY LIMITS**
>
> **CROSS-PROPOSITION OF LAW I: A MUNICIPAL CORPORATION HAS THE RIGHT TO SELL ELECTRICITY TO EXTRATERRITORIAL CUSTOMERS SO LONG AS THE AMOUNT SOLD TO EXTRATERRITORIAL CUSTOMERS DOES NOT EXCEED FIFTY PERCENT OF THE TOTAL ELECTRICITY CONSUMED WITHIN THE MUNICIPAL CORPORATION'S LIMITS, AND SO LONG AS THE MUNICIPAL CORPORATION DOES NOT PURCHASE ELECTRICITY SOLELY FOR THE PURPOSES OF RESELLING THE ENTIRE AMOUNT OF THAT ELECTRICITY EXTRATERRITORIALLY**

The OML urges this Court to accept and adopt Cross-Proposition of Law 1 and reject Propositions of Law I through III.

I. OHIO'S CONSTITUTIONAL PREFERENCE FOR HOME RULE BY MUNICIPALITIES

Not far up State Street from the steps of the Thomas J. Moyer Ohio Judicial Center, a plaque commemorates a famous 1859 speech given by Abraham Lincoln at Ohio's Statehouse before he was elected President of the United States, in which he declared:

> I believe there is a genuine popular sovereignty. I think a definition of 'genuine popular sovereignty,' in the abstract, would be about this: That each man shall do precisely as he pleases with himself, and with all those things which exclusively concern him. Applied to government, this principle would be that a general government shall do all those things which pertain to it, and all the local governments shall do precisely as they please in respect to those matters which exclusively concern them. (Emphasis added.)

Perrysburg v. Ridgway, 108 Ohio St. 245, 257, 140 N.E. 595 (1923). This general idea

found expression decades later in Ohio's Home Rule Amendment. *Id.; Article XVIII, Ohio Constitution*. The Home Rule Amendment was passed for the specific purpose of avoiding the inherent ills of suborning local issues to the control of the State's broader political will:

> Prior to 1912 there was no express delegation of power to municipalities in the Ohio Constitution. Under the decisions of our courts, it had been held again and again, *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445, being especially in point, that municipal power was delegated only by virtue of a statute. Therefore municipalities of the state, especially the larger ones, were continually at the door of Ohio's General Assembly asking for additional political power for municipalities, or modifications in some form of previous delegations of such power. Such power, being legislative only, could be withdrawn from the municipalities, or amended, at any session of the Legislature.
>
> Municipalities were, therefore, largely a political football for each succeeding Legislature, and there was neither stability of law, touching municipal power, nor sufficient elasticity of law to meet changed and changing municipal conditions. To the sovereign people of Ohio the municipalities appealed in the constitutional convention of 1912, and the Eighteenth Amendment, then known as the 'Home Rule' Amendment, was for the first time adopted as a part of the Constitution of Ohio, wherein the sovereign people of the state expressly delegated to the sovereign people of the municipalities of the state full and complete political power in all matters of 'local self-government.'

Ridgway at 255.

Pursuant to the Home Rule Amendment, a "municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." *Article XVIII, Section 7, Ohio Constitution*; *see also Article XVIII, Section 3, Ohio Constitution* ("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."). In applying these provisions of the Home Rule Amendment, this Court has taken care to preserve local municipal control over matters

of "local self-government," and to permit municipal exercise of the State's "police power" in the absence of a conflicting "general law" relating to and regulating genuine state-wide concerns. *E.g., Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 16-18, 20.

II. THE TEXT OF THE CONSTITUTIONAL PROVISIONS IN QUESTION

Set against the background of this State's constitutional preference for local control over local matters, the Home Rule Amendment explicitly recognized that municipalities should be permitted to provide for the local, public supply of utility services:

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

Article XVIII, Section 4, Ohio Constitution. This Court has read this provision of the State's fundamental charter "to limit a municipality's authority to produce or acquire electricity primarily for the purpose of serving it or its inhabitants' needs." *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d at 295, 737 N.E.2d 529 (2000).

Nonetheless, a municipality is constitutionally permitted to provide for utility service needs other than its own or that of its residents:

> 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, Ohio Constitution. In *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959), this Court unanimously adopted the view of its own appointed

master commissioner as to the meaning of Article XVIII, Section 6 of the Ohio Constitution:

> The proper test to be applied in determining whether or not a municipality is conducting its electric utility business in accordance with Art. XVIII, Sec. 6 of the Ohio Constitution is by comparison of the number of kilowatt hours supplied outside the city within a given period of time, such as a month, with the number of kilowatt hours of electricity supplied within the municipality during the same period of time. If the number of kilowatt hours supplied to noninhabitants is in excess of 50 per cent of the number of kilowatt hours supplied within the municipality, the municipality is violating Art. XVIII, Sec. 6 of the Ohio Constitution.' (Emphasis added.)

Hance, 169 Ohio St. at 461-462, 159 N.E.2d 741. This method was adopted as "the proper method of measurement" for assessing whether a municipality is "selling more surplus electricity than is permitted under the provisions of Section 6, Article XVIII of the Constitution of Ohio." *Id.* at 462 and paragraph one of the syllabus.

Hance has never been overruled, and this Court expressly relied upon the decision while rendering *Toledo Edison*, 90 Ohio St.3d at 292-293, 737 N.E.2d 529. *Toledo Edison* simply read Article XVIII, Sections 4 and 6 of the Ohio Constitution "*in pari materia*" and held that these provisions "preclude a municipality from purchasing electricity solely for the purpose of reselling it to an entity that is not within the municipality's geographic limits." (Emphasis added.) *Toledo Edison* at 293. In no way did the decision in *Toledo Edison* alter the standard in *Hance* for determining whether there has been a surplus sale. *Toledo Edison* at 291-293. Read together, these authorities most clearly support the Proposition of Law urged by the Defendant-Appellees/Cross-Appellant municipalities, which preserves the rule in each of this Court's decisions.

Nothing in the text of Article XVIII, Section 6 of the Ohio Constitution permits a finding of an unconstitutional surplus sale of any amount less than "fifty per cent of the total service or product supplied by such utility within the municipality." That the provision supplies a simple and straightforward test by which to measure whether there

has been an unconstitutional extra-territorial sale of a utility-service surplus by a municipality, *Hance*, 169 Ohio St. at 461-462, 159 N.E.2d 741, should preclude the judicial branch of government from adopting some additional burdens, particularly a narrower or more stringent one. After all, the well-known canon of legislative and constitutional construction, *expressio unius est exclusio alterius*, " 'tells us that the express inclusion of one thing implies the exclusion of the other.' " *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 39, quoting *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, 906 N.E.2d 409, ¶ 42.

III. MUNICIPALITIES ARE ENTITLED TO WORK TOGETHER

Alternatively, this Court could avoid overruling or modifying any of its prior decisions by recognizing that R.C. 715.02(A) permits municipal corporations and political subdivisions to enter into the sort of agreement that was made between Cleveland, CPP, and Brooklyn. The provision states in pertinent part:

> Two or more municipal corporations, one or more municipal corporations and one or more other political subdivisions, or two or more political subdivisions other than municipal corporations may enter into an agreement for the joint construction or management, or construction and management, of any public work, utility, or improvement, benefiting each municipal corporation or other political subdivision or for the joint exercise of any power conferred on municipal corporations or other political subdivisions by the constitution or laws of this state, in which each of the municipal corporations or other political subdivisions is interested.

R.C. 715.02(A). Defendant-Appellee/Cross-Appellants Cleveland, CPP, and Brooklyn were thus permitted by R.C. 715.02(A) to make an agreement that would accomplish the exercise of their powers under Article XVIII, Section 4 of the Ohio Constitution. It is apparent that both the Ohio Constitution and the Revised Code contemplate extra-territorial delivery of services by one municipality at the discretion and desire of an extra-

territorial municipality so long as the two political subdivisions can come to an agreement on the matter.

The majority in *Toledo Edison* did not rely upon R.C. 715.02(A) in reaching its decision, presumably because the facts of that case were distinguishable in a vital way. *But see Toledo Edison*, 90 Ohio St.3d at 295, 737 N.E.2d 529 (Hadley, J., dissenting) ("In conjunction with the constitutional power regarding utilities, the General Assembly has enacted R.C. 715.02, which provides that two or more municipal corporations may enter into agreements for the joint construction or management of a utility[.] * * * Thus a municipality has full and complete power to enter into whatever arrangement it deems necessary for the ownership, operation, and control of public utilities by itself or in conjunction with other municipalities, subject to the fifty-percent limitation."). In that case a consortium of municipalities had worked together to sell power directly to "Chase Brass & Copper Company," a "corporation engaged in smelting * * * located in Williams County, but outside of all the municipalities' geographic limits." (Emphasis added.) *Toledo Edison* at 288-289. The municipalities constructed "an electric power transmission line" that ran from one of the "municipal electrical substations directly to Chase Brass." *Id.* at 289. Although there is no doubt they were working together in *Toledo Edison* as contemplated by R.C. 715.02(A), each and every one of those municipalities was still limited by Article XVIII, Sections 4 and 6 of the Ohio Constitution in the manner that it could sell to those outside of the municipality.

Unlike in *Toledo Edison*, the agreement that this Court must now examine requires that CPP would "provide electricity service to customers in Brooklyn" and "seven of [Brooklyn's] municipal buildings located in Brooklyn." (Emphasis added.) *Cleveland Elec. Illum. Co.*, 2020-Ohio-33, 139 N.E.3d 996, at ¶ 6. The entire sale of service that Plaintiff CEI objects to within these proceedings has been provided within the municipal territory of Brooklyn. *Id.* Properly understood, R.C. 715.02(A) authorizes Cleveland, CPP, and

Brooklyn to work together to exercise the "power conferred" on Brooklyn "by the constitution or laws of this state." Brooklyn is entitled under Article XVIII, Section 4 of the Ohio Constitution to provide all of the "service of which is or is to be supplied to the municipality or its inhabitants." In this way, this Court should rule that municipalities and other political subdivisions may exercise their Home Rule authority jointly with regard to the provision of utility services without running afoul of the surplus-sales rule in Article XVIII, Section 6 of the Ohio Constitution.

CONCLUSION

For the foregoing reasons, this Court should accept and adopt Cross-Proposition of Law 1 and reject Propositions of Law I through III.

Respectfully Submitted,

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