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**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

DUKE ENERGY OHIO, INC. :

Plaintiff : **CASE NO. 2019 CVH 01058**

vs. : **Judge McBride**

VILLAGE OF BATAVIA, OHIO :

Defendant : **DECISION/ENTRY GRANTING THE**
MOTION FOR SUMMARY JUDGMENT
FILED BY THE DEFENDANT VILLAGE OF
BATAVIA, OHIO. AND DENYING THE
MOTION FOR SUMMARY JUDGMENT FILED
BY THE PLAINTIFF DUKE ENERGY OHIO, INC.

Stephanie M. Chmiel and Kelsey Mincheff, 41 South High Street, Suite 1700, Columbus, Ohio 43215, Jamar T. King, 10050 Innovation Drive, Suite 400, Miamisburg, Ohio 45342, and James E. McLean, 139 East Fourth Street, MC 1212-Main, Cincinnati, Ohio 45202, counsel for the plaintiff Duke Energy Ohio, Inc.

Lawrence E. Barbieri and Christopher L. Moore, 5300 Socialville Foster Road, Suite 200, Mason, Ohio 45040.

This cause is before the court for consideration of cross-motions for summary judgment filed by the plaintiff Duke Energy Ohio, Inc. and the defendant Village of Batavia, Ohio on November 30, 2020. Following oral argument on February 25, 2021, the court took the motions under advisement,

Upon consideration of the motions, the written and oral arguments of counsel, the record of this case, the evidence submitted for the court's consideration, and the applicable law, the court renders this written decision.

UNDISPUTED FACTS

The case at bar stems from a dispute concerning the application of an ordinance the defendant Village of Batavia enacted, enabling it to provide electricity as a public utility. The plaintiff

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Duke Energy Ohio, Inc. is a public utility regulated by the Public Utilities Commission of Ohio.¹ The plaintiff provides electric service to over 700,000 customers in southwest Ohio, including service to residents and businesses in the Village of Batavia.²

In 2017, the defendant began considering that becoming a municipal public utility could improve its financial economy and the surrounding community.³ Dennis Nichols is the chief operating officer for the defendant.⁴ His responsibilities include, inter alia, the operation of the utilities department.⁵ In this capacity, he has led the defendant's efforts to establish a municipal electric utility.⁶

Following a presentation at an Ohio Municipal League meeting, Nichols thought that Batavia may financially benefit from owning an electric utility that would service large customers.⁷ The goals for such a project included encouraging industrial businesses in the Village of Batavia and generating a kilowatt hour tax as revenue for the defendant.⁸ Nichols' early research led him to resolve that the defendant could collect a kilowatt hour tax in excess of \$100,000 annually, based on an estimate of 28 million kWh and a large-user rate of 3.63 mills per kWh.⁹

Thereafter, the defendant commissioned a feasibility study to determine whether a municipally run electric system was fiscally feasible for the Village of Batavia.¹⁰ The feasibility study examined the feasibility of four commercial and industrial customers.¹¹ The survey did not explore providing electric service to other customers, such as Batavia residents.¹²

¹ Compl., ¶ 1.

² Compl., ¶ 2; Exs. G and H to S. Chmiel Aff.

³ D. Nichols Dep., pg. 34. (Nov. 3, 2020).

⁴ D. Nichols Dep., pg. 14.

⁵ D. Nichols Dep., pg. 14.

⁶ J. Thebout Dep., pgs. 12-13 (Nov. 4, 2020).

⁷ D. Nichols Dep., pgs. 27-28.

⁸ D. Nichols Dep., pg. 34.

⁹ Ex. D. to S. Chmiel Aff.

¹⁰ D. Nichols Dep., pgs. 50, 66.

¹¹ D. Nichols Dep., pgs. 67-68; Ex. 6 to Nichols Dep.

¹² D. Nichols Dep., pg. 74.

Ultimately, the defendant intends to provide electricity to one industrial customer.¹³ That customer is AAG Glass, and any other plans beyond serving AAG Glass would be hypothetical or imaginary.¹⁴ The defendant has no plans on providing any service to other residential or small business customers.¹⁵

On April 8, 2019, the defendant enacted Ordinance Number 1418-10 (the Ordinance), which provides, in relevant part:

"Establish, Acquire, and Operate a Municipal Electric System

Section 1. That the Village of Batavia shall acquire, construct, own, lease and operate, within or without its corporate limits, a public electric utility the product or service of which shall be supplied to the Village and its inhabitants and may contract with others for any such product or service.

Section 2. That there is hereby created an Electric Utility Department of the Village. The Village Administrator shall have supervision over the Electric Utility Department."¹⁶

The day the Ordinance was enacted, Nichols included in a monthly report to the Batavia Village Counsel that:

"With this ordinance, we propose to provide service only to AAG Glass, Inc., the new plant on Kent Road; the ordinance would authorize us to extend service to new development without needing to reimburse incumbent provider, Duke, or to accept existing Duke customers after paying Duke for 'stranded' investment and other costs."¹⁷

At the time the Ordinance was enacted, AAG Electric was not a customer of the plaintiff.¹⁸

¹³ D. Nichols Dep., pgs. 42-44, 54-55, 69-70.

¹⁴ D. Nichols Dep., pgs. 69-73, 175.

¹⁵ D. Nichols Dep., pgs. 70-71, 120-121.

¹⁶ Ex. 21 to D. Nichols Dep.; D. Nichols Dep., pgs. 159-160.

¹⁷ Ex. F. to S. Chmiel Aff.

¹⁸ D. Nichols Dep., pgs. 125-126.

The defendant has not added any information about its municipal electric utility to its website, as it has for water and sewer services, because it does not want its residents contacting it about service.¹⁹

The defendant has not purchased any equipment or supplies to furnish its electric utility.²⁰ It does not generate any power either.²¹ Instead, the defendant plans to place a meter on AAG Glass's transformers to accept and measure electricity from whomever AAG Glass contracts with for service.²² The defendant has not spent any money on establishing an electric utility yet.²³ Presently, the defendant has not begun servicing AAG Glass or any other customer.²⁴ The defendant has not begun service because it wants to see how the court resolves the instant case.²⁵ At the time of Nichols' deposition, the defendant was currently negotiating a lease or contract with AAG Glass for its transformers so that it can provide electricity to it.²⁶

PROCEDURAL BACKGROUND

On August 23, 2019, the plaintiff filed a verified complaint against the defendant, seeking declaratory and injunctive relief. The complaint alleges that the plaintiff has an exclusive right to provide electricity to its certified territory, which includes Batavia, Ohio. The plaintiff acknowledges that the defendant has home rule authority to own and operate a public utility under Article XVIII, Section 4 of the Ohio Constitution. However, it contends that the way in which the defendant would

¹⁹ D. Nichols Dep., pgs. 177-178.

²⁰ D. Nichols Dep., pg. 81.

²¹ D. Nichols Dep., pg. 46.

²² D. Nichols Dep., pgs. 136-138.

²³ D. Nichols Dep., pg. 79.

²⁴ D. Nichols Dep., pgs. 176-177.

²⁵ D. Nichols Dep., pgs. 126-127.

²⁶ D. Nichols Dep., pgs. 141-142 (Nov. 3, 2020) and D. Nichols Dep., pg. 7 (Nov. 4, 2020).

apply the Ordinance, by only supplying electricity to one industrial customer, would abridge the Ohio Constitution.

Specifically, the plaintiff prayed for the following, in pertinent part:

- "1. A declaratory judgment that the Ordinance, as Batavia intends to enforce it, does not fall within the scope of Batavia's home rule authority under Ohio Constitution, Article XVIII;
2. Preliminary and permanent injunctive relief ordering the Defendant to cease providing, or taking steps to provide, service to the Joint Venture and/or Property * * *."

The defendant filed a motion to dismiss on September 18, 2019. Following briefing and oral argument on the motion, the court overruled it on November 12, 2019. The defendant filed its answer on November 18, 2019.

On November 30, 2020, the parties filed cross-motions for summary judgment. Both parties filed responses in opposition to the respective motions on January 4, 2021. On January 19th, both parties filed their replies in support of their summary judgment motions. The court heard oral argument on the motions on February 25th, after which it took the motions under advisement.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

- "(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 the party opposing the motion."²⁷

²⁷ *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). See *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

The court must view the evidence in a light most favorable to the nonmoving party.²⁸ Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.²⁹ A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."³⁰

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?³¹ This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."³²

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.³³ This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."³⁴ "To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment."³⁵ If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.³⁶

²⁸ *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

²⁹ *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

³⁰ *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

³¹ *Id.* at 251-52.

³² *Id.* at 250.

³³ *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

³⁴ *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.

³⁵ *Heard v. Dayton View Commons Homes*, 2d Dist. No. 27706, 2018-Ohio-606, 106 N.E.3d 327, ¶ 7, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

³⁶ *Id.* See *HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).

However, if the movant satisfies this burden, then the nonmoving party has a “reciprocal burden” to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a “triable issue of fact” remains.³⁷ The duty of the nonmoving party is more than that of resisting the motion’s allegations.³⁸ Instead, this burden requires the nonmoving party to “produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial.”³⁹ The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.⁴⁰ It may not rely on the pleadings or unsupported allegations.⁴¹

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is “pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action.”⁴² The trial court maintains the sound discretion to admit or exclude relevant evidence.⁴³ When a document falls outside the enumerated categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.⁴⁴

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.⁴⁵ “Personal knowledge” is defined as “[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information

³⁷ *Dresher*, 75 Ohio St.3d at 293.

³⁸ *Wells Fargo*, 2013-Ohio-855 at ¶ 25.

³⁹ (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).

⁴⁰ *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

⁴¹ *Id.*

⁴² *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 (“Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.”).

⁴³ *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

⁴⁴ *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).

⁴⁵ Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).

or hearsay.”⁴⁶ “Absent evidence to the contrary, an affiant’s statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E).”⁴⁷ Furthermore, if the affiant does not specifically state that he or she has personal knowledge, “personal knowledge may be inferred from the contents of the affidavit.”⁴⁸

By contrast, if certain statements in the affidavit “suggest that it is unlikely that the affiant had personal knowledge” of the facts, then “something more than a conclusory averment that the affiant has personal knowledge would be required.”⁴⁹ Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).⁵⁰

Civ.R. 56(E) provides that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Thus, documents referenced in the affidavit “must be attached to the affidavit.”⁵¹ If the affiant “relies” on documents in the affidavit but fails to attach those documents, “the portions of the affidavit that reference those document[s] must be stricken.”⁵²

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.⁵³ Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.⁵⁴

⁴⁶ *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

⁴⁷ *Id.*, citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.

⁴⁸ *Id.*

⁴⁹ *Id.*, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.

⁵⁰ *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist. 1989).

⁵¹ *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).

⁵² *Id.* at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).

⁵³ *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

⁵⁴ *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

LEGAL ANALYSIS

A. STANDING

“Before a court can consider the merits of a legal claim, a litigant must prove that it has standing to sue.”⁵⁵ “‘Standing’ is defined at its most basic as ‘[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.’”⁵⁶ It is question of whether “a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy * * *.”⁵⁷

Courts are “cautioned to remember, standing is not a technical rule intended to keep aggrieved parties out of court[.]”⁵⁸ This generosity has been tempered by the Ohio Supreme Court’s warnings that “[c]ourts have the duty to ensure that plaintiffs plead these elements for purposes of declaratory-judgment actions and that the complaint sufficiently avers injury, causation, and redressability.”⁵⁹

“Traditional standing ‘require[s] litigants to show, at minimum, that they have (1) suffered an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.’”⁶⁰ A party’s standing is not contingent upon the merits of its

⁵⁵ *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 35 (2018), citing *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7.

⁵⁶ *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15 (2012), quoting *Ohio Pyro Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27.

⁵⁷ *Federal Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 21, citing *Cleveland v. Sharker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987).

⁵⁸ (Internal quotations omitted.) *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 47, quoting *Fort Trumbull Conservancy, L.L.C. v. Alves*, 262 Conn. 480, 486, 815 A.2d 1188 (2003).

⁵⁹ *Moore*, 2012-Ohio-3897 at ¶ 49.

⁶⁰ *State ex rel. Ullmann v. Husted*, 148 Ohio St.3d 255, 2016-Ohio-5584, 70 N.E.3d 502, ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7. See *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, ¶ 8, citing *Cuyahoga Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22 (“Standing exists only when (1) the complaining party has suffered or has been threatened with direct and concrete injury in a manner or degree different from

claims.⁶¹ “Rather, standing depends upon whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case.”⁶² The Supreme Court of Ohio has indicated that, in addition to standing authorized by “common-law,” which requires injury-in-fact, causation, and redressability, “standing may also be conferred by statute.”⁶³

Standing “turns on the nature and source of the claim asserted.”⁶⁴ As mentioned above, in addition to common law standing, standing can be created by statute.⁶⁵ And when the legislature “has * * * provided by statute for judicial review * * * , the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.”⁶⁶

The declaratory judgment chapter of the Ohio Revised Code broadly authorizes plaintiffs to bring actions for a declaration of “rights, status, and other legal relations whether or not further relief is or could be claimed.”⁶⁷ Moreover, “[i]t is well settled that ‘[a]ctions for declaratory judgment may be predicated on constitutional or nonconstitutional grounds.’”⁶⁸ Further, under R.C. 2721.03:

“* * * any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument,

that suffered by the public in general, (2) the law in question caused the injury, and (3) the relief requested will redress the injury.”)

⁶¹ *State ex rel. Ullmann*, 2016-Ohio-5584 at ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7.

⁶² *State ex rel. Ullmann*, 2016-Ohio-5584 at ¶ 8, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382 at ¶ 7.

⁶³ *Smith v. Ohio State Univ.*, 10th Dist. Franklin No. 17AP-218, 2017-Ohio-8836, ¶ 13, citing *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 17.

⁶⁴ *Deutsche Bank Natl. Tr. Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 20 (2016), quoting *Moore*, 2012-Ohio-3897 at ¶ 23.

⁶⁵ *Moore*, 2012-Ohio-3897 at ¶ 48, citing *City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986).

⁶⁶ *Ferguson*, 25 Ohio St.3d at 75-76.

⁶⁷ *Moore*, 2012-Ohio-3897 at ¶ 45, citing R.C. 2721.02. See R.C. 2721.02(A): “* * * courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed.”

⁶⁸ *Moore*, 2012-Ohio-3897 at ¶ 45, quoting *State ex rel. Ohio Civ. Serv. Emps. Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 13.

constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.”⁶⁹

In addition, R.C. Chapter 2727 authorizes the common pleas court to grant injunctions and temporary restraining orders in the cases before it.⁷⁰

Thus, a declaratory judgment action contemplates a municipal ordinance. Moreover, R.C. 2721.03 is a legislatively created source of standing.⁷¹ “[S]tanding to challenge the validity of an ordinance through a declaratory judgment action is conferred upon those whose rights, status or other legal relations are affected by the municipal ordinance at issue.”⁷² To have standing under R.C. 2721.03, “[t]hose with simply a practical interest in the outcome of a declaratory judgment action are not proper parties to such an action.”⁷³ However, “a corporation allegedly affected by the passing of a city ordinance has standing to bring a declaratory judgment action pursuant to R.C. 2721.03.”⁷⁴

In the instant case, the plaintiff has prayed for a single declaratory judgment, declaring that “the Ordinance, as Batavia intends to enforce it, does not fall within the scope of Batavia’s home rule authority under Ohio Constitution, Article XVIII[.]” The defendant argues that the plaintiff does not have standing to have a declaratory judgment in this action under R.C. 2721.03 because it has not yet experienced a loss of customers or other economic injury.

The plaintiff, a utility regulated by the Public Utilities Commission of Ohio, is authorized to provide utility services to the Village of Batavia by virtue of the Certified Territories Act.⁷⁵ The

⁶⁹ R.C. 2721.03.

⁷⁰ *Corder v. Ohio Edison Co.*, 162 Ohio St.3d 639, 2020-Ohio-5220, 166 N.E.3d 1180, ¶ 16, citing R.C. 2727.02 and 2727.03.

⁷¹ *Moore*, 2012-Ohio-3897 at ¶ 48.

⁷² *Westgate Shopping Village v. Toledo*, 93 Ohio App.3d 507, 515, 639 N.E.2d 126 (6th Dist.1994).

⁷³ *Westgate Shopping Village*, 93 Ohio App.3d at 515, citing *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 273, 328 N.E.2d 395 (1975).

⁷⁴ *Toledo Edison Co. v. City of Bryan*, 6th Dist. Williams No. WM-98-017, 1999 WL 334495, *1 (May 28, 1999), *rev’d on other grounds*, *Toledo Edison Co. v. Bryan*, 90 Ohio St.3d 288, 737 N.E.2d 529 (2000), citing *Westgate Shopping Village*, 93 Ohio App.3d 507.

⁷⁵ See *Duke Energy Ohio, Inc. v. City of Hamilton*, 2018-Ohio-2821, 117 N.E.3d 1, ¶ 2 (12th Dist.) (“Duke Energy is a public-utility corporation that supplies natural gas and electric services throughout southwestern Ohio.”).

Ordinance authorizes the defendant to provide utility services to this same area. Since the plaintiff has a regulatory and economic interest in providing utility service to the Village of Batavia, its interest is affected by the Ordinance. Accordingly, the plaintiff has standing to bring this action for declaratory judgment under R.C. 2721.03.⁷⁶

B. MERITS OF MOTIONS FOR SUMMARY JUDGMENT

The Ohio Constitution grants municipalities the right to produce or purchase electricity for their inhabitants.⁷⁷ The Ohio Constitution provides in Article XVIII, Section 4:

“Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products 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 produce of any such utility.”

“This exclusive power necessarily presumes that while being able to grant public utility franchises, a municipality may likewise exclude a public utility from serving its inhabitants.”⁷⁸

“The purpose of our written Constitution is to define and limit the powers of government and secure the rights of the people.”⁷⁹ The Constitution “controls as written” unless it is amended.⁸⁰ Moreover, the “Ohio Constitution is the paramount law of this state, and we recognize that the

⁷⁶ See *Duke Energy Ohio, Inc. v. City of Hamilton*, C.P. Butler No. CV 2017 01 0163, pg. 11 (Dec. 11, 2019).

⁷⁷ (Internal citation omitted.) *Cleveland Elec. Illum. Co. v. City of Cleveland*, 2020-Ohio-33, 139 N.E.3d 996, ¶ 3 (8th Dist.).

⁷⁸ *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 516, 668 N.E.2d 498 (1996), quoting *Lucas v. Lucas Local School Dist.*, 2 Ohio St.3d 13, 16, 442 N.E.2d 449 (1982).

⁷⁹ *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 16.

⁸⁰ *Id.*

framers chose its language carefully and deliberately, employed words in their natural sense, and intended what they said[.]”⁸¹ As such:

“[a court’s] duty is to determine and give effect to the intent of the framers as expressed in its plain language, *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St.3d 322, 2009-Ohio-4900, 916 N.E.2d 462, ¶ 50, so that ‘[w]here the meaning of a provision is clear on its face, we will not look beyond the provision in an attempt to divine what the drafters intended it to mean[.]’”⁸²

Because the General Assembly is vested with the legislative power in Ohio, “* * * it may enact any law that is not in conflict with the Ohio or United States Constitutions.”⁸³ The Ohio legislature did just that in enacting R.C. 4933.83(A), which is part of the Certified Territory Act. R.C. 4933.83(A) provides, in pertinent part:

“Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have the exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier; provided that nothing in sections 4933.81 to 4933.90 of the Revised Code shall impair the power of municipal corporations to require franchises or contracts for the provision of electric service within their boundaries * * *.”

Thus, as a regulated public utility, the plaintiff has the exclusive right to provide electric service to customers within its assigned territory, subject to municipalities’ “home rule authority” under Sections 4 of Article XVIII of the Ohio Constitution.⁸⁴

And R.C. 4933.87 goes on to provide, in pertinent part:

“Nothing contained in sections 4933.81 to 4933.90 of the Revised Code shall be construed to affect the right of municipal corporations to generate, transmit, distribute, or sell electric energy. The rights and powers of municipal corporations as they exist on or after the

⁸¹ *Id.*, citing *Gibbons v. Ogden*, 22 U.S. 1, 188, 9 Wheat 1, 6 L.Ed. 23 (1824) and *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So.2d 503, 510 (Fla.2008).

⁸² (Internal quotations omitted.) *City of Cleveland*, 2019-Ohio-3820 at ¶ 17, quoting *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 146 Ohio St.3d 356, 2016-Ohio-2806, 56 N.E.3d 950, ¶ 16.

⁸³ *City of Cleveland*, 2019-Ohio-3820 at ¶ 18, citing *Toledo*, 154 Ohio St.3d 41, 2018-Ohio-2358 at ¶ 17.

⁸⁴ *Cleveland Elec. Illum. Co.*, 2020-Ohio-33 at ¶ 3, citing R.C. 4933.83.

effective date of this section to acquire, construct, own, lease, or operate in any manner a public utility or to supply the service or product by means of a rate ordinance adopted under section 743.26 of the Revised Code or under Section 4, Article XVIII, Ohio Constitution in any portion of the state is not affected by sections 4933.81 to 4933.90 of the Revised Code. * * *

Hence, while the plaintiff has the “exclusive right” to furnish electricity to the current and future customers inside its service territory, this right is expressly limited by R.C. 4933.83(A) and 4933.87.⁸⁵

And as R.C. 4933.87 states, R.C. 4933.83 does not limit the defendant’s rights under Section 4 of Article XVIII of the Ohio Constitution. Yet, “[a] municipality’s authority to produce or purchase electricity is limited primarily to the furnishing of services to their own inhabitants.”⁸⁶ As Section 4 prescribes, a municipality may construct, own, and operate “any public utility.” In this case, the plaintiff contends that the defendant’s intended actions are inconsistent with the meaning of a “public utility.”

The Ohio Constitution does not define “public utility” for purposes of Section 4, Article XVIII.⁸⁷ Although “public utility” is defined in certain titles of the Ohio Revised Code, the Ohio Supreme Court has held that those definitions are relevant solely to the statutory chapters in which they are located and thus are irrelevant in defining “public utility” in other contexts.⁸⁸ Where the statute or constitutional provision does not provide a definition, courts should look to case law.⁸⁹

The determination of whether a particular entity is a public utility is a mixed question of law and fact.⁹⁰

⁸⁵ *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 107, 671 N.E.2d 241, 246 (1996), citing R.C. 4933.83(A) and 4933.87.

⁸⁶ (Internal quotations omitted.) *Cleveland Elec. Illum. Co.*, 2020-Ohio-33 at ¶ 26, quoting *Toledo Edison*, 90 Ohio St.3d at 291-292.

⁸⁷ *Englewood v. Miami Valley Lighting, L.L.C.*, 2d Dist. No. 22965, 182 Ohio App.3d 58, 2009-Ohio-1631, 911 N.E.2d 913, ¶ 18.

⁸⁸ *Englewood*, 2009-Ohio-1631 at ¶ 18, citing *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 53.

⁸⁹ *St. Marys*, 2007-Ohio-5026 at ¶ 53.

⁹⁰ *Id.* at ¶ 54, citing *Marano v. Gibbs*, 45 Ohio St.3d 310, 311, 544 N.E.2d 635 (1989).

"The resolution of the question of whether an enterprise is operating as a public utility is decided by an examination of the nature of the business in which it is engaged. Although case law provides a list of characteristics common to public utilities, it is generally recognized that none of these characteristics is controlling. That is, each case must be decided on the facts and circumstances peculiar to it."⁹¹

The Ohio Supreme Court has considered numerous factors in determining whether a good or service qualifies as a public utility.⁹² "One of the most important attributes of a public utility is that it provides 'an essential good or service to the general public which has a legal right to demand or receive this good or service.'"⁹³ Electricity is an essential service.⁹⁴

The second factor is whether the good or service must be provided to the public "generally and indiscriminately."⁹⁵ The provider must have an obligation to provide the good or service that cannot be arbitrarily or unreasonably withdrawn.⁹⁶ These first two factors are referred to as the "public service" requirement.⁹⁷

Lastly, "a public utility must conduct 'its operations in such a manner as to be a matter of public concern.'"⁹⁸ "In determining whether an entity conducts itself in such a way as to become a matter of public concern, courts look to the good or service provided, competition in the local marketplace, and regulation by a governmental authority."⁹⁹ Ultimately, the term "public utility" can

⁹¹ *Englewood*, 2009-Ohio-1631 at ¶ 19, quoting *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 387, 596 N.E.2d 423 (1992). See *Maumee v. Pub. Util. Comm.*, 101 Ohio St.3d 54, 2004-Ohio-7, 800 N.E.2d 1154, ¶ 10, quoting *A & B Refuse Disposers, Inc.*, 64 Ohio St.3d at 387 (providing the same definition).

⁹² *Englewood*, 2009-Ohio-1631 at ¶ 20.

⁹³ *St. Marys*, 2007-Ohio-5026 at ¶ 56, quoting *A & B Refuse Disposers, Inc.*, 64 Ohio St.3d at 387.

⁹⁴ *Washington Twp. Trustees v. Davis*, 95 Ohio St.3d 274, 2002-Ohio-2123, 767 N.E.2d 261, ¶ 22.

⁹⁵ *St. Marys*, 2007-Ohio-5026 at ¶ 57, quoting *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700, paragraph two of the syllabus (1924).

⁹⁶ *Englewood*, 2009-Ohio-1631 at ¶ 20, citing *A & B Refuse Disposers, Inc.*, 64 Ohio St.3d at 387.

⁹⁷ *Englewood*, 2009-Ohio-1631 at ¶ 20.

⁹⁸ *St. Marys*, 2007-Ohio-5026 at ¶ 58, quoting *A & B Refuse Disposers*, 64 Ohio St.3d at 388.

⁹⁹ *St. Marys*, 2007-Ohio-5026 at ¶ 58, citing *A & B Refuse Disposers*, 64 Ohio St.3d at 388.

contemplate both “a privately owned utility, many of which operate under a franchise, and a publicly owned operation, such as a municipal water or sewage disposal system.”¹⁰⁰

In turning to the present case, the plaintiff maintains that this case turns on whether the defendant is a public utility. The defendant, among other arguments, posits that this question is premature because it has no current customers yet.

Whether the time is ripe to determine if the defendant is a public utility goes to the core requirements for issuing a declaratory judgment. A declaratory judgment is used to decide an “actual controversy, the resolution of which will confer certain rights or status upon the litigants.”¹⁰¹ Hence, the plaintiff must show that the following elements are satisfied: “(1) a real controversy between adverse parties; (2) a controversy which is justiciable in character; and (3) a situation where speedy relief is necessary to preserve the rights of the parties.”¹⁰²

These elements are not satisfied if the opinion is advisory or answers a moot question.¹⁰³ “Ohio’s declaratory judgment statutes, while broad in scope, are not limitless.”¹⁰⁴

“Not every conceivable controversy is an actual one. * * * [I]n order for a justiciable question to exist, [t]he danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events * * * and the threat to his position must be actual and genuine and not merely possible or remote.”¹⁰⁵

¹⁰⁰ *City of Columbus ex rel. Willits v. Cremean*, 27 Ohio App.2d 137, 143, 273 N.E.2d 324 (10th Dist.1971).

¹⁰¹ *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 10 quoting *Mid-American*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9.

¹⁰² *Athens Metropolitan Housing Authority v. Pierson*, 4th Dist. Athens Nos. 01CA28, 01CA29, 2002 WL 851767, *4 (Mar. 12, 2002).

¹⁰³ *Pierson*, 2002 WL 851767, *4.

¹⁰⁴ *Graceworks Lutheran Servs. v. City of Hamilton*, 12th Dist. Butler No. CA2007-01-015, 2007-Ohio-6167, ¶ 15.

¹⁰⁵ (Internal quotations omitted.) *Graceworks Lutheran Servs.*, 2007-Ohio-6167 at ¶ 16, quoting *Mid-American Fire & Cas. Co.*, 2007-Ohio-1248 at ¶ 9.

A "controversy" exists when the parties have a genuine dispute and adverse legal interests.¹⁰⁶ An issue is justiciable if it is ripe for review.¹⁰⁷ "A court will not indulge in advisory opinions."¹⁰⁸

In the instant case, the plaintiff seeks a declaration on a hypothetical future event. The plaintiff does not seek a declaration as to whether the Ordinance as written is constitutional. The issue is not with the Ordinance itself, but rather with the defendant's intended application of it. The Ordinance states that the defendant will do what the plaintiff submits it must do to be in compliance with Section 4 of Article XVIII of the Ohio Constitution as a public utility: "That the Village of Batavia shall acquire, construct, own, lease and operate, within or without its corporate limits, a public electric utility the product or service of which shall be supplied to the Village and its inhabitants and may contract with others for any such product or service."¹⁰⁹

The plaintiff seeks a declaration regarding how the defendant *intends* to enforce the Ordinance. Stated differently, the plaintiff seeks a declaration that the defendant will not act as a public utility to supply electricity to the Village of Batavia and its inhabitants – contrary to the language of the Ordinance – therefore violating the constitution. However, this action has not occurred yet. And as of the time of Nichols' deposition, the defendant was still negotiating with AAG Glass. As a result, there is not even a lease or contract between the defendant and AAG Glass for the court to review demonstrating that an injury to the plaintiff is imminent. The defendant currently has no customers for its municipal public utility. Thus, there is no actual controversy, and the issue presented to the court is nonjusticiable.¹¹⁰ A decision by the trial court on future, hypothetical events would therefore be an impermissible advisory opinion.

¹⁰⁶ Id. at *5.

¹⁰⁷ Id.

¹⁰⁸ *Armatas v. Aultman Health Found*, 5th Dist. Stark No. 2016CA00130, 2016-Ohio-7316, ¶ 18, citing *Egan v. National Distillers & Chem. Corp.*, 25 Ohio St.3d 176, 495 N.E.2d 904, syllabus (1986).

¹⁰⁹ (Emphasis added.)

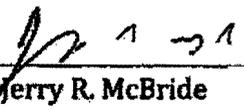
¹¹⁰ See *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 26 (Emphasis original) (finding that to the extent that the plaintiffs seek a declaratory judgment regarding negotiation of "any future agreement," there was no claim for which relief can be granted; the issue was not justiciable because the collective bargaining agreement at issue did not exist yet); *Fulton RR*.

CONCLUSION

For the foregoing reasons, the court finds that the defendant Village of Batavia's motion for summary judgment is well-taken and is hereby granted. The court concludes that the plaintiff Duke Energy Ohio, Inc.'s motion for summary judgment is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: 6-27-21



Judge Jerry R. McBride

Co. v. City of Cincinnati, 1st Dist. Hamilton No. C-150373, 2016-Ohio-3520, ¶¶ 10-11 (affirming dismissal of complaint seeking a judgment declaring city noise regulations unconstitutional; since their complaint had not alleged that they had been subject to any adverse conduct by the city, or that their own conduct exceeded the permissible sound levels, any "danger or dilemma" to the plaintiffs was contingent on the city's hypothetical future action of issuing a noise-ordinance citation).

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision were e-mailed to Jamar T. King, at jamar.king@thompsonhine.com, James E. McLean, Jr., at james.McLean@duke-energy.com, Stephanie M. Chmiel, at Stephanie.Chmiel@ThompsonHine.com, and Kelsey Mincheff, at Kelsey.Mincheff@thompsonHine.com, Attorneys for the Plaintiff Duke Energy Ohio Inc., and to Lawrence E. Barbieri, at lbarbieri@sbmplaw.com, and Christopher L. Moore, at cmoore@sbmplaw.com, Attorneys for the Defendant Village of Batavia Ohio. Printed copies were mailed to Thompson Hine LLP, 10050 Innovation Drive, Suite 400, Miamisburg, Ohio 45342, to Duke Energy Office of the General Counsel, 139 E. Fourth Street MC 1212 Main, Cincinnati, Ohio 45202, and to Schroeder, Maundrell, Barbieri & Powers, 5300 Socialville Foster Rd., Mason, Ohio 45040.



Judicial Assistant to Judge McBride