Court finds that Brooklyn landfill solar project does not violate Ohio Constitution

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A recent ruling sheds additional light on Ohio municipal utilities' authority to sell surplus power to customers outside their boundaries. On May 10, 2019, Judge Robert C. Pollex, sitting as a visiting judge on the Cuyahoga County Common Pleas Court, found that FirstEnergy subsidiary Cleveland Electric Illuminating Company's (CEI) constitutional challenge to a renewable energy generation project in the City of Brooklyn was not well taken and dismissed CEI's case on cross-motions for summary judgment.

The project, a four-megawatt solar array consisting of 35,520 panels, was built by Columbus-based IGS Solar on approximately 17 acres of the closed 75-acre landfill on Memphis Avenue in Brooklyn. The City of Cleveland's Cleveland Public Power (CPP) built a transmission line carrying power from the array to a nearby electric substation for distribution. Cuyahoga County, represented by Bricker & Eckler as an intervening defendant in the litigation, contracted to buy the generated electricity from CPP to help power its commercial buildings within the City of Cleveland. It has been estimated that the project allows the county to save up to $3 million on utility bills over the next 25 years.

CEI sued Cleveland and CPP in May 2018 over the Brooklyn project, first arguing that CPP's work on a transmission line from the project to neighboring electric substation was done in an unsafe manner, later amending their complaint to argue that CPP violated the Ohio Constitution by trying to distribute electricity outside the city's borders. In July 2018, the county joined the lawsuit, seeking to defend the project and protect its energy investment.

One of the key provisions of Ohio law at issue was Article XVIII, Section 6 of the Ohio Constitution, which states:

> Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others … the surplus product of any … 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. (emphasis added)

This provision of the Ohio Constitution addresses the "50% limitation" on municipal utilities' ability to sell "surplus" utility services or products to customers outside their borders. The crux of CEI's argument was that the City of Cleveland was not selling "surplus" electricity – i.e, leftover electricity that CPP did not ultimately use to serve its own residents. Rather, CEI claimed that CPP was intentionally purchasing electricity for the sole purpose of brokering that electricity to entities outside of the City of Cleveland's boundaries.

In ruling on summary judgment, Judge Pollex found that CEI "failed to identify any relevant factual allegations that are in conflict, or to set forth any specific facts showing that there is a genuine issue for trial." Instead, the summary judgment determination was driven by the two remaining questions of law: (1) whether the City of Cleveland (via CPP) exceeded the 50 percent limitation set by Article XVIII, Section 6 of the Ohio Constitution, which provides that a municipality may sell electricity outside its borders up to 50 percent of the "total service or product supplied by the utility within the municipality" by selling or agreeing to sell service or products to the City of Brooklyn and/or other entities outside the municipal boundaries of the City of Cleveland, and (2) whether the City of Cleveland had purchased "electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits . . . in selling or agreeing to sell electric service to the city of Brooklyn and/or other entities."

The court found that the "purchase of the equipment and the construction contracts establishing [the Brooklyn project were] not for the sole purpose of providing electricity to the City of Brooklyn, or other outside customers," as the project will also service entities within Cleveland's municipal limits, namely those buildings owned by the county. Additionally, the court found that CPP can sell up to 50 percent of its approximately total 1,650,000 MWhs per year outside the City of Cleveland and that the undisputed documents and testimony established that the Brooklyn project would provide a mere 2 to 5 percent of this amount, well under the 50 percent limitation. From a public policy perspective, the court found that because the Brooklyn project expands the use of solar, wind and hydroelectric generation plants, it is a "plus from an environmental aspect." It also found that "when the City purchases the solar generated electricity for . . . County buildings[,] that electricity replaces some from another provider (presumably a less environmentally friendly one)." Moreover, the court found the fact that "the project is constructed on a former landfill, which has limited feasible uses" to be a favorable outcome for public policy.

The court ultimately concluded that the Brooklyn project does not violate either the Ohio Constitution or case law established by the Ohio Supreme Court, nor that a brokering situation or an abuse of the competitive process occurred through the establishment of the project, as alleged by CEI. Also, the contracts between the City of Brooklyn, Cuyahoga County and City of Cleveland are valid municipal uses of powers granted to municipalities under the Ohio Municipal code, Chapter 7 of the Ohio Revised Code.

The decision is now pending appeal before the Eighth District Court of Appeals.

Authors