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April 5, 2007

Via Hand Delivery

Ms. Reneé J. Jenkins
Director of Administration
Secretary of the Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

RE: In the Matter of the Complaint of Ohio Power Company v. Consolidated Electric Cooperative, Inc.; PUCO Case No. 06-890-EL-CSS

Dear Ms. Jenkins:

Enclosed are an original and ten (10) copies of a Post-Hearing Brief, to be filed in connection with the above-referenced matter on behalf of Consolidated Electric Cooperative, Inc.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Very truly yours,

Carolyn S. Flahive

Enclosure

cc: Steven Lesser, Attorney Examiner

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dhj 542498.1

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of:	:	
Ohio Power Company,	:	Case No. 06-890-EL-CSS
Complainant,	:	
v.	:	
Consolidated Electric Cooperative, Inc.,	:	
Respondent.	:	
Relative to Violation of the Certified Territory Act	:	

RESPONDENT CONSOLIDATED ELECTRIC COOPERATIVE, INC.'S POST-HEARING BRIEF

I. INTRODUCTION

By instituting this proceeding, Ohio Power Company ("Ohio Power") directly challenges the authority of Ohio municipalities to contract with public utilities for public utility service, which authority is conferred by Article XVIII, Section 4, of the Ohio Constitution. The Village of Lexington, Ohio ("Lexington") acted pursuant to this constitutional authority in enacting Ordinance No. 04-66, granting to Respondent Consolidated Electric Cooperative, Inc. ("Consolidated") the requisite authority to provide service to new electric distribution service consumers located in Lexington's Woodside subdivision.

While Ohio Power cites the "Certified Territories for Electric Suppliers Act" ("the Act"), Revised Code § 4933.81 *et. seq.*, as the basis for the complaint, the Act, by its express terms, states that it does not supersede Lexington's Article XVIII, Section 4 powers. The Act is unusual in that the text of the Act expressly acknowledges the constitutional authority of Ohio municipalities over public utility operations within their borders. Ohio Power seeks an interpretation of the Act that would ignore its plain language and thwart the constitutional power

of municipalities that is expressly recognized and deferred to in the Act. Therefore, the complaint should be dismissed.

II. STATEMENT OF FACTS

Lexington is a municipal corporation organized under the laws of the State of Ohio. (*See* Deposition of Charles Pscholka, Consolidated Exh. 3, at p. 11.)[1] Lexington operates as a charter municipality. (Pscholka Dep., p. 11 and Dep. Exh. 1.) On December 20, 2004, Lexington's village council unanimously passed Ordinance No. 04-66. (*See* Testimony of Brian Newton[2], Consolidated Exh. 1, and Exh. D attached thereto; Pscholka Dep., p. 15, and Dep. Exh. 2.) The terms of this ordinance grant a franchise to Consolidated "including the right to acquire, construct, maintain, and operate in the streets, thoroughfares, alleys, bridges, and public places of the Village of Lexington, State of Ohio, and its successors, lines for the transmission and distribution of electric energy to the Village of Lexington and the inhabitants thereof for light, heat, power and other purposes, and for the transmission and distribution of the same within, through, or across said Village of Lexington, State of Ohio." *Id.* Furthermore, under its charter, Lexington may exercise "all powers that may now or hereafter lawfully be possessed or exercised by municipal corporations under the constitution and laws of the State of Ohio." (Newton Testimony, Section 2.01 of Exhibit C attached thereto.)

Charles Pscholka, Lexington's village administrator, discussed Lexington's policy relative to the furnishing of public utility services to new developments within the municipal boundaries of Lexington — a policy which is reflected in Ordinance No. 04-66. Mr. Pscholka testified that Ordinance No. 04-66 was similar to Lexington's prior grant of a franchise to Ohio Power (Ordinance No. 69-21 identified at Pscholka Dep., p. 52, Exh. 7), in that both ordinances

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[1] Subsequent references to Mr. Pscholka's deposition will be in the format ("Pscholka Dep., p. __").
[2] Subsequence references to Brian Newton's testimony will be in the format ("Newton Testimony, p. ___").

grant the electric suppliers "non-exclusive franchises." The result and intention of these franchises is to give certain new customers "choice" of electric suppliers. (Pscholka Dep., pp. 21, 27.) Mr. Pscholka elaborated on the benefits of this legislation as follows:

> Personally, I think that any time that a developer or potential customers have some choice, they have more flexibility, they have more options, it's good for the developer, it's good for all the consumers.

(Pscholka Dep., p. 21.)

Mr. Pscholka commented that Ordinance No. 04-66 was not in derogation of any rights of Ohio Power under its own franchise granted by Ordinance No. 69-21 since the latter franchise provided that it was not to be "construed to be exclusive." (Pscholka Dep., p. 53.) The latter franchise ordinance reserved power to Lexington to grant similar rights and privileges and franchises to other companies. *Id.*

The portion of the totally residential Woodside subdivision that is in issue here is located within the municipal boundaries of Lexington and within the certified territory of Ohio Power as established under the Act. Block K (the area in question) of the Woodside subdivision is just across the territorial boundary line from the certified territory of Consolidated. Mr. Pscholka described Ordinance No. 04-66 as giving the developer of that subdivision the flexibility "to take whichever company along that boundary line could serve the development most effectively, [and] efficiently." (Pscholka Dep., pp. 31, 32.) Mr. Pscholka made it clear in his testimony that Lexington does not construe Ordinance No. 04-66 as granting Consolidated an unlimited right to serve all customers in the village. When asked about the "general policy" of Lexington relative to competition between electric suppliers, Mr. Pscholka stated:

> Having a non-exclusive franchise and reserving some flexibility which we apparently have, I guess we would leave the decision up to the developer and defer to the developer's wishes, but only if it's in an area that is unserved, not where we are taking other

> people's customers or existing customers. And there are economics, of course, which are going to come into this thing as to how feasible it is for this utility company to run a line way over here to serve this particular area.
>
> So, from that basis, I think we are really talking about those fringe areas like in Woodside Subdivision, and where it becomes more economically feasible, or just as economically feasible for Consolidated to serve the areas of AEP. I don't see the same scenario in this island over here in the middle of AEP's service territory. But that is not to say it couldn't happen.

(Pscholka Dep., pp. 51, 52.)

Mr. Pscholka, in his role as Village Administrator, was instrumental in the developer's decision to call upon Consolidated to serve the four lots in the Woodside subdivision that are the subject of this Complaint. Mr. Pscholka dealt with Richard McCleerey, a partner in Bailey Investments, Inc., the developer. (Pscholka Dep., p. 34.) Mr. McCleerey expressed dissatisfaction and frustrations in dealing with Ohio Power in obtaining commitments for electric service, and cost estimates for service to the Woodside subdivision. (Pscholka Dep., p. 34.) Mr. Pscholka also indicated that there were a number of complaints with respect to reliability issues with AEP that had been made to Lexington. (Pscholka Dep., p. 35.) The village council and the administration were concerned with these complaints and sympathized with the residents. *Id.*

Richard McCleerey's testimony (Consolidated, Exh. 2) further details these frustrations with Ohio Power's service to the Woodside subdivision. He states:

> The catalyst for Consolidated providing electric distribution service started with me because I was frustrated in attempting to have Ohio Power provide electric distribution service to the development. I encountered a number of frustrating things with respect to Ohio Power's service that led me to take steps to try to obtain another electric supplier. Among other things, Ohio Power failed to install street lights in the subdivision as required by the village. Secondly, there were instances where Ohio Power was unresponsive concerning the installation of permanent electric distribution service to new residences. Once temporary service was obtained, it was very difficult to get the permanent electric

> distribution service installed. I was frustrated in my efforts to have Paul Boeshart of Ohio Power respond to the need to complete installation of services in a timely manner. He was difficult to contact directly; and I felt I was effectively left with no remedy at Ohio Power to get the company to complete the required electric distribution facilities to provide service to the new residents. I reached the point where I became concerned that poor electric distribution service and my inability to obtain such service when needed was threatening the viability of the Woodside project, particularly the new phase of that development. I knew that residents in the area who were customers of Ohio Power were often out of service. I received many complaints from out-of-service residents who would look across the street and see lights of the customers of Consolidated burning.

(Testimony of Richard McCleerey, Consolidated Exh. 2, p. 1.)[3]

In response to the aforementioned pleas from Mr. McCleerey, Mr. Pscholka sent correspondence on March 29, 2005 informing Consolidated that in accordance with the recommendation of the developer of the Woodside subdivision "and in accordance with franchise Ordinance No. 04-66 dated December 20, 2004, . . . [Lexington] does desire and request Consolidated Electric Cooperative to provide electric service to the remaining undeveloped lots within the Woodside subdivision." (Newton Testimony, p. 3, and Dep. Exh. B attached thereto; Pscholka Dep., p. 39, Dep. Exh. 6.) At the time, Mr. Pscholka sent this correspondence to Brian Newton at Consolidated, "Block K," a new phase of the Woodside subdivision, was vacant land. (Pscholka Dep., p. 42.)

Following and pursuant to Mr. McCleerey's and Mr. Pscholka's requests, Consolidated extended service to new homes being built on Lots 1735, 1736, 1728, and 1729 of Block K of the Woodside subdivision. (Newton Testimony, p. 1.) Ohio Power serves homes in Block K located across the street from the new homes now served by Consolidated. (Newton Testimony, p. 3.) Ohio Power's underground facilities are, like Consolidated's, located in the back of the

[3] Subsequent references to Richard McCleerey's testimony will be in the format ("McCleerey Testimony, p. ___)".

lots they serve. The lots served by Consolidated are depicted in Exhibit B attached to Newton's testimony. A list of the affected member-customers is set forth in Exhibit C attached to Mr. Newton's testimony. Since Consolidated also serves customers in the area immediately adjacent to the lots it now serves in Block K, it was relatively simple for Consolidated to provide power by extending underground facilities to access the rear portions of Lots 1735, 1736, 1728, and 1729. (Pscholka Dep., p. 46.)

Mr. Pscholka confirmed that Ordinance No. 04-66 affords a developer like Bailey Investments some flexibility so that advantageous and responsive utility service can be obtained. (Pscholka Dep., p. 37.) He agreed that providing this flexibility to Mr. McCleerey resulted in a "good thing" from Lexington's standpoint. (Pscholka Dep., p. 37.)

Consolidated was responsive to the service needs of Bailey Investments and Mr. McCleerey, who testified that "Consolidated did everything it said it would do." Mr. McCleerey further testified that he is "extremely pleased with Consolidated's responsiveness, and its involvement has assisted my efforts in marketing these properties." (McCleerey Testimony, p. 2.)

Much of Brian Newton's testimony on behalf of Consolidated echoes policy considerations advanced by Mr. Pscholka on behalf of Lexington. Consolidated does not maintain that its franchise rights include the right to extend service to a load center already receiving adequate electric distribution service from Ohio Power. (Newton Testimony, p. 5.)

Testimony submitted by R. Thomas Homan on behalf of the City of Delaware provides additional insight as to why this case is important to Ohio's municipalities. Choice in utility services is important in attracting new businesses to the community. Mr. Homan testified as follows:

> Economic development practices have changed over time and competition among communities, particularly in the Midwest and Ohio, to attract new and diverse businesses and industry, with their attendant jobs, has become very intense. Cities like Delaware can no longer afford to be passive about the creation or retention of commercial activities within their territories. This is particularly true with respect to the provision of basic infrastructure; it must be a better value than the infrastructure of the 'competition.' Utility services – electric, gas, communications, water and sewer – are essential tools of economic development . . . as it pertains to electric service, a diversity of supply, both in terms of the source of generation and the path of delivery is a major benefit in terms of both reliability and costs.

See Testimony of R. Thomas Homan (City of Delaware Exh. 1, pp. 3 and 4).

III. LEGAL ARGUMENT

Consolidated's Electric Distribution Service To New Customers In The Woodside Subdivision Was Authorized By Lexington Pursuant To Section 4, Article XVIII Of The Ohio Constitution. The Certified Territories For Electric Suppliers Act Does Not Afford A Basis For Prohibiting Consolidated From Providing Service That Is So Authorized.

Ohio Power's complaint alleging violations of the Act is built on a foundation of sand that washes away when subjected to scrutiny. This is not a case in which an act of the legislature arguably is in conflict with a constitutional provision. To the contrary, the Act repeatedly defers to the municipal authority over public utilities granted by Article XVIII of the Ohio Constitution. The Act clearly confirms — several times over — that those rights trump any provision of the Act that might otherwise be construed as creating a conflict with municipal constitutional rights under Article XVIII. The Act's deference is exhibited in seven different places.

First, Revised Code § 4933.82(B) provides in pertinent part:

> Certification of territory pursuant to Sections 4933.81 – 4933.90 of the Revised Code shall not in any manner prohibit or restrict the rights of municipalities under Article XVIII or any other article of the Ohio Constitution . . .

Second, Revised Code § 4933.83(A) specifically provides that an electric supplier's exclusive right to furnish electric service to all electric load centers within its certified territory is conditional in that such right is subject to "Article XVIII of the Ohio Constitution." Third, this section also provides that nothing in the Act "shall impair the power of municipal corporations to require franchises or contracts for the provision of electric service within their boundaries . . . ." Fourth, said Section (A) further provides that in the event "that a municipal corporation refuses to grant a franchise or contract for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality, any other electric supplier may serve the municipal corporation under a franchise or contract with the municipal corporation."

Fifth, Revised Code § 4933.83(C), pertaining to "grandfathering" of service commitments made prior to January 1, 1977 between an electric supplier and customer, makes those commitments subject to municipal power under Article XVIII of the Ohio Constitution. Sixth, Revised Code § 4933.84 provides that annexation or incorporation by a municipal corporation does not affect the right of an electric supplier to continue or extend electric service within a certified territory "except insofar as that right is affected or modified by Article XVIII or any other article of the Ohio Constitution." Seventh, and finally, Revised Code § 4933.87 provides:

> The rights and powers of municipal corporations as they exist on or after the 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.

Given that the Act was not designed by the legislature to in any way impede or restrict an Ohio municipality's power over public utilities under the Ohio Constitution, the question before the Commission is simply whether Lexington is authorized pursuant to its Article XVIII powers

to authorize (and indeed help bring about) Consolidated's electric distribution service to new customers in the Woodside subdivision. If the answer is "yes," then Consolidated submits that the case is over and the Ohio complaint must be dismissed.[4]

Article XVIII, Section 4, of the Ohio Constitution provides:

> *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). The municipal utility power granted by Section 4, Article XVIII is "not generally subject to statutory restriction." *Board of County Commissioners of Ottawa County v. Marblehead*, 86 Ohio St.3d 43, 45 (1999).[5] The Supreme Court of Ohio has characterized this provision as "clearly a grant of power and not a limitation of authority," stating that the "obvious

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[4] Given the Act's stated deference to a municipality's constitutional power, this is not a situation (such as with cases construing the Miller Act, Revised Code § 4905.20 and .21) in which a statute conflicts with the attempted exercise of municipal power. *See State ex rel. Toledo Edison Company v. City of Clyde*, 76 Ohio St.3d 508 (1996); *Village of Grafton v. Ohio Edison Company*, 77 Ohio St.3d 102 (1996).

In previous dockets, including complaint proceedings under the Act, the Commission has recognized its authority and responsibility to interpret Article XVIII, Section 4 of the Ohio Constitution. *In the Matter of the Complaint of Cleveland Electric Illuminating Company v. Medical Center Company*, Case No. 95-458-EL-UNC, 1995 Ohio PUC LEXIS 622 (August 10, 1995) at p. 11 (*reversed on other grounds in Cleveland Electric Illuminating Company v. PUCO*, 76 Ohio St.3d 521 (1996); *In the Matter of the Application of City of Clyde Requesting Removal of Central Electric Distribution Facilities of the Toledo Edison Company from Within Clyde's Corporate Limits*, Case No. 95-02-EL-ABN, 1996 Ohio PUC LEXIS 176 (April 11, 1996).

[5] Given the language of the Act, there is no conflict between the Act and Article XVIII, Section 4. But even if there was, the *Marblehead* case instructs that the statute would prevail only "where the state enacts a statute promoting a valid and substantial interest in the public health, safety, morals, or welfare; where the statute's impact upon the municipal utilities is incidental and limited; and where the statute is not an attempt to restrict municipal power to operate utilities. . . . Conversely, where the purpose of a statute is to control or restrict municipal utilities, the statute must yield." *Marblehead*, 86 Ohio St.3d at 46. Here, any result in favor of Ohio Power would have to be based on an interpretation of the Act which would unlawfully restrict municipal power to operate utilities.

purpose of this section is to provide the municipalities with the comprehensive authority to deal with public utilities." *Lucas v. Lucas Local School District*, 2 Ohio St.3d 13, 14 (1982).

This Commission has explicitly recognized that the Act contains a "carve out," which precludes a party from asserting that the Act trumps municipal power over utilities conferred by Article XVIII, Section 4. The Commission held in *In the Matter of the Complaint of Cleveland Electric Illuminating Company, The Medical Center Company, supra*, as follows:

> Pursuant to Article XVIII, Section 4, of the Ohio Constitution, municipalities in Ohio may own and operate public utilities and may "contract with others for any product or service." Moreover, the certified territory statutes (Sections 4933.81-84, Revised Code) specifically carve out an exception for municipal utilities regarding application of certified territories. Thus, even construing CEI's allegations in this case as true, the existing constitutional and statutory constraints preclude granting the relief sought by CEI.

In the Matter of the Complaint of Cleveland Electric Illuminating Company, 1995 Ohio PUC LEXIS 622 at p. 11-12.[6]

It is clear that Lexington's grant of a franchise to Consolidated to operate electric distribution facilities and to use the public streets for that purpose, coupled with Consolidated's acceptance of that franchise, constitutes an exercise of Lexington's Article XVIII, Section 4 powers. This was made abundantly clear by the Supreme Court of Ohio in *Ohio Power v. Village of Attica*, 23 Ohio St.2d 37 (1970) (the "*Attica* case"). As is the case here, Ohio Power, which also had a franchise conferred by the Village of Attica ("Attica"), was trying to stop an electric distribution cooperative (North Central Electric Cooperative, Inc.) from serving incorporated and newly annexed areas of Attica pursuant to a second franchise granted by Attica

[6] On appeal of that order, the Supreme Court of Ohio in *Cleveland Electric Illuminating Company v. Public Utilities Commission*, 76 Ohio St.3d 521 (1996) remanded the case for the limited purpose of determining whether an alleged wholesale sale of power from AEP to Cleveland Public Power for ultimate consumption by Medical Center Company was a "sham transaction" entered into for the sole purpose of circumventing the Act. On remand, the Commission found that there was no such alleged sham transaction and the sale went forward. *In The Matter of the Complaint of Cleveland Electric Illuminating Company v. Medical Center Company*, 95-458-EL-UNC (December 21, 2004).

to North Central. In the *Attica* case, the Supreme Court of Ohio held that a village franchise granted to an electric distribution cooperative "to use the streets and public grounds in a village in providing electric service for public and private use" pursuant to municipal power was within the ambit of Article XVIII, Section 4 of the Ohio Constitution in that the franchise was a "contract with others for any such product or service." In rejecting Ohio Power's position, the court held:

> Furthermore, when North Central accepts the franchise for the municipality of Attica, it will subject itself to regulation by the municipality. For example, R.C. 743.26 provides that the legislative authority of the municipal corporation in which electric lighting companies establish facilities . . . may regulate the price which such companies may charge for electric light . . . and R.C. 4933.13 provides that an electric company may furnish electric power within a municipal corporation . . . with the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes . . . .[7]
>
> From the foregoing, we conclude that North Central is a public utility with which the Village of Attica may, under Section 4, Article XVIII of the Ohio Constitution, contract for the furnishing of electric power.

Ohio Power v. Village of Attica, 23 Ohio St.2d at 43-44.

While the *Attica* case predates the passage of the Act, its premise that the exercise of the franchising power by a municipality is a constitutional one remains unchallenged. Indeed, the Supreme Court's subsequent decision in *Lucas v. Lucas Local School District*, 2 Ohio St.3d 13, 16 (1982) removed any possible doubt. In *Lucas*, the Supreme Court held that the constitutional municipal utility power is "an exclusive power," that "necessarily presumes . . . being able to grant public utility franchises." Moreover, it has been held that "the acceptance of an electric light franchise from a municipality carries with it an obligation to furnish electric light and

[7] One example of such a reasonable regulation contained in Ordinance No. 04-66, granting Consolidated's franchise, is the requirement that Consolidated's facilities be placed underground.

power agreeably to the provisions of the ordinance." *VanWert v. Public Service Co.*, 21 Ohio Dec. 526 (1910). *See also* lower court decision in *Lucas v. Lucas Local School District*, Ohio App. LEXIS 4947 (1981) (attached as Appendix A).

The *Attica* case also stands for the proposition that the grant of a municipality-wide public utility franchise to an electric supplier does not create an exclusive right to that utility, and that Section 4 of Article XVIII confers the right of a municipal corporation to grant more than one franchise for public utility service to new customers within the geographic area of the municipality.

Lexington's franchise contract with Consolidated stands on the same footing constitutionally as if Lexington itself was providing the service through its own municipally-owned electric plant. Article XVIII, Section 4 does not draw any distinction between a wholly owned municipal operation and a municipal "contract with others" for such electric service. Moreover, as is well known to the Commission, competition between electric utilities and municipally-owned electric light operations is ongoing in both Cleveland and Columbus.[8]

Ohio Power's claim to an exclusive right to serve all customers within the territorial limits of Lexington goes far beyond its franchise right. The rights granted by Ordinance No. 69-21 were "non-exclusive." The Supreme Court held in *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102 (1996):

> Yet, a public utility should not be permitted knowingly to overreach the express terms of its franchise agreements to expand its service territory.

Village of Grafton, 77 Ohio St.3d at 109.

[8] It is ironic that Ohio Power speculates as to potential safety concerns with respect to the proposed "fringe" service to a few customers in the relatively rural area of Lexington when its affiliate Columbus Southern Power (also part of AEP Ohio) has experience with intense house-to-house competition and accompanying interspersed electric operations between the City of Columbus and AEP Ohio within the urbanized areas of Columbus. Furthermore, the testimony of Messrs. Newton and Pscholka makes clear that the intense interspersion of facilities that is present in Columbus is not going to happen in Lexington. (Newton Testimony, pp. 3-5; Pscholka Dep., p. 51.)

While not critical to the outcome of this case, it is important to note that neither Lexington nor Consolidated views Lexington's enabling legislation as creating "no-holds barred" competition. The testimony of Messrs. Newton and Pscholka makes clear that Ordinance No. 04-66 is intended to permit Consolidated to compete with Ohio Power for service *only* to new customers at new load centers. Mr. Pscholka's testimony indicates that competition foreseen by Lexington would be confined to the "fringe" areas of Lexington. Moreover, Mr. Newton advocates that a duty to serve not be imposed on Ohio Power in Lexington once a new customer has chosen Consolidated as its supplier, and that absent a showing of inadequate service, the customer not be permitted to switch suppliers once it has chosen Consolidated as its supplier. (Newton Testimony, p. 5.) Accordingly, Ohio Power's complaint should be dismissed because Consolidated has been empowered by Lexington to provide the service to the customers in question pursuant to Article XVIII, Section 4.[9]

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[9] In addition, Lexington's grant of a franchise, and Consolidated's exercise thereof is authorized by Article XVIII, Section 3 of the Ohio Constitution, which provides:

> 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.

Unlike the power regarding "public utilities" granted by Ohio Constitution, Article XVIII, Section 4, the power granted under Section 3 to municipalities to enact local police, sanitary, and similar regulations is subordinate to conflicting general laws. *City of Columbus v. PUCO*, 58 Ohio St.2d 427 (1979). In determining whether an ordinance is in "conflict" with general laws under Article XVIII, Section 3, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa. *American Financial Services v. City of Cleveland*, 112 Ohio St.3d 170, 177 (2006). In other words, "no real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa." *Struthers v. Sokol*, 108 Ohio St. 263, 268 (1923).

While we believe that Article XVIII, Section 4 is the applicable constitutional provision in this case given the fact that Lexington is exercising its authority over public utilities, it is also true that under a Section 3 analysis, Lexington's franchise Ordinance No. 04-66 cannot be said to be in "conflict" with the general law of the state. Once again, the Act's complete deference to municipal constitutional power precludes an argument that Ordinance No. 04-66 is in conflict with the Act.

IV. CONCLUSION

Ohio Power's complaint seeks to restrict municipal authority in ways neither permitted by the Constitution of Ohio nor intended by the Act. Accordingly, the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons, via e-mail and regular U.S. mail, postage prepaid, this 5th day of April, 2007:

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*1981 Ohio App. LEXIS 4947, **

VILLAGE OF **LUCAS,** A MUNICIPAL CORPORATION LOCATED IN RICHLAND COUNTY, OHIO, Plaintiff-Appellee, -vs- **LUCAS LOCAL SCHOOL** DISTRICT, **LUCAS LOCAL SCHOOL** DISTRICT BOARD OF EDUCATION, RANDY J. HARDY, SUPERINTENDENT, **LUCAS LOCAL SCHOOL** DISTRICT, FIRELANDS ELECTRIC COOPERATIVE, Defendant-Appellant

NO. CA-2001

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, RICHLAND COUNTY

1981 Ohio App. LEXIS 4947

1981

CASE SUMMARY

PROCEDURAL POSTURE: Appellant cooperative challenged the decision of the Common Pleas Court of Richland County (Ohio), which permanently enjoined it from selling electric power inside the municipal corporate limits of appellee village.

OVERVIEW: The trial court found that the board of education had no legal right to enter into a contract with the cooperative for providing electrical service to school board facilities located within the corporate limits of the village. The village was under contract with an electric supplier granting the supplier the right to provide the village with wholesale electrical power. The village never enacted any ordinance contracting with the cooperative to supply electrical energy to the school property. On review, the court affirmed. The court held that a municipal corporation in Ohio had the exclusive right to franchise the providing of public utility services to customers located within its municipal boundaries. The court held that, in the absence of a franchise granted by the village to provide public utility service within the municipal boundaries, the cooperative was prohibited by law from providing such service within those municipal boundaries.

OUTCOME: The judgment permanently enjoining the cooperative from selling electric power inside the municipal corporate limits of the village was affirmed.

CORE TERMS: municipal, public utility, village, municipality, electrical, franchise, customers, energy, inside, electricity, constitutional provision, contrary to law, electric, acquire, dissenting opinion, irrespective, municipal power, exclusive power, school board, legal right, manufacture, inhabitants, territory, construct, wholesale, selling, street, lease, heat

LexisNexis(R) Headnotes • Hide Headnotes

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Energy & Utilities Law > Transportation & Pipelines > Eminent Domain Proceedings

Governments > Public Improvements > General Overview

HN1 Ohio Const. art. XVIII, § 4 provides that 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. More Like This Headnote

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Governments > Local Governments > General Overview

Transportation Law > Commercial Vehicles > Bridges & Roads

HN2 Ohio Rev. Code § 4933.02 states that every corporation organized to manufacture and supply electricity for light, heat, or power purposes, subject to statutory provisions relating to the granting of franchises by municipal corporations may manufacture and supply electricity for light, heat, and power purposes. Likewise, Ohio Rev. Code § 4933.03 requires consent of the municipality before a public utility may operate within the municipal corporation, irrespective of whether or not use of the public ways is involved. Ohio Rev. Code § 4933.02 does not confer a right to engage in the business referred to in such section, or to erect or maintain structures in a street, alley, or public place, without the consent of the municipal corporation in which such structures are to be constructed. In like manner, Ohio Rev. Code § 4909.34 and § 743.26 relating to the rate fixing power also recognize the exclusive power of the municipal corporation to control who may sell utility service within the municipal boundaries irrespective of whether use of the public ways is involved. More Like This Headnote

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Transportation & Pipelines > Electricity Transmission

HN3 Ohio Rev. Code § 4533.87 provides that nothing contained in Ohio Rev. Code § 4933.81 to § 4933.90 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 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 Ohio Rev. Code § 743.26 or Ohio Const. art. XVIII, § 4 in any portion of the state is not affected by Ohio Rev. Code § 4933.81 to § 4933.90. More Like This Headnote

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JUDGES: Henderson, P. J., and Milligan, J., concur

OPINION BY: PUTMAN, J.

OPINION: JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, both Assignments of Error are overruled, and the judgment of the Common Pleas Court of Richland County, Ohio is affirmed.

OPINION

As reflected by the judgment entry appealed from, this case was tried to the court alone upon stipulations of fact.

No facts are in dispute. The trial court found that the Firelands Electric Cooperative, Inc., has no legal right to serve customers within the corporate limits of **Lucas** under the facts and circumstances of this case; and that the defendant, **[*2]** **Lucas** Local Board of Education, has no legal right to enter into a contract with the co-defendant for providing electrical service to school board facilities located within the corporate limits of the Village of **Lucas;** and permanently enjoined the Firelands Electric Cooperative from selling electric power inside the municipal corporate limits of the Village of **Lucas.** This injunction, of course, included the **Lucas Local School** District located inside the **Lucas** municipal corporate limits.

There are two separate Assignments of Error in form, but they constitute a single complaint that the judgment is contrary to law.

Actually, the Assignments of Error are separate arguments why the judgment is contrary to law.

The first Assignment of Error claims the trial court erred in finding that there was a legal basis for the village to maintain a monopoly and prohibit competition for electric service to customers within its boundries.

The second Assignment of Error claims the permanent injunction is contrary to law because the power of the village to regulate utilities was exercised unreasonably by its prohibition of the performance of the Firelands school board contract for service.

We **[*3]** overrule both Assignments of Error and affirm the judgment of the trial court. Our reasons follow.

For several years prior to the genesis of the controversy at bar, the village of **Lucas,** pursuant to Article XVIII, Section 4 of the Ohio Constitution, had been effectively operating its own public utility electrical service by purchasing electrical power at wholesale rates from the Ohio Edison Company, and, in turn, distributing it to its 306 customers within the corporate limits of the village of **Lucas** at a retail rate.

Firelands Electric Cooperative, Inc., is a non-profit corporation, organized and existing under the laws of Ohio, and operates as a public utility.

About December 1, 1980, the **Lucas Local School** District Board of Education adopted a resolution to terminate service for electrical energy from the village of **Lucas,** and to purchase electrical energy instead from the Firelands Electric Cooperative, Inc.

The village of **Lucas** has been under contract with Ohio Edison Company since March 2, 1977, granting Ohio Edison the right to supply the village with wholesale electrical power until March of 1982.

The village has never enacted any ordinance contracting with Firelands **[*4]** to supply electrical energy to the school property.

Firelands has never applied to any authority of the Village of **Lucas** for a franchise or any other right to sell power inside the municipal corporate limits.

We hold that the municipal corporation in Ohio has the exclusive right to franchise the providing of public utility services to customers located within its municipal boundaries.

We hold that in the absence of a franchise granted by the municipality to provide public utility service within the municipal boundaries, such public utility is prohibited by law from providing such service within those municipal boundaries. HN1 Article XVIII, Section 4 of the Ohio Constitution provides as follows:

"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 **[*5]** to the municipality or its inhabitants the service or product of any such utility."

In our opinion, the foregoing constitutional provision carries with it as a matter of necessary implication the grant of exclusive power to the municipal corporation to determine who may sell public utility service inside its corporate limits.

Any legislation which might be construed to diminish that grant of power is, necessarily, unconstitutional.

In striking down conflicting legislation, the Supreme Court of Ohio in 1915 referred to the constitutional grant of authority to municipal corporations as "plenary." See Drano-Doyle Co., v. Orrville (1915), 93 Ohio St. 236. See also Swank v. Village of Shiloh (1957), 166 Ohio St. 415, holding that municipal electric systems cannot be prohibited from furnishing free electricity for public purposes.

See also Pfau v. Cincinnati (1943), 142 Ohio St. 101; Link v. Public Utilities Commission (1921), 102 Ohio St. 301; Euclid v. Camp Wise Assoc. (1921), 102 Ohio St. 207; Board of Education v. City of Columbus (1928), Ohio St. 295, referring to the dissenting opinion of Chief Justice Marshall in City of East Cleveland v. Board **[*6]** of Education (1925), 112 Ohio St. 607, which said dissenting opinion stated that the constitutional provision in question had the effect of placing "certain utilities within the state of Ohio . . . within the entire control of the municipalities within whose boundaries their operations have been carried on." See page 618 of 112 Ohio St. 607.

The appellants argue that the long line of Ohio cases, some of which precede the enactment

of the home-rule provisions of the Ohio Constitution in 1912, should be read to limit the exclusive franchising power of the municipal corporation to control over its streets.

We disagree.

In our view, such a limitation is contrary to common sense.

From the nature of the subject matter and the text of the constitutional provision, it is apparent to us that a constitutional grant of exclusive control within its boundaries is made in favor of municipal corporations.

This power of a municipal corporation exclusively to control the selling of utility services within its boundary is recognized by the legislature.

HN2 R.C. 4933.02 states in pertinent part as follows:

"[E]very corporation organized . . . to manufacture and supply electricity for light, **[*7]** heat, or power purposes, subject to statutory provisions relating to the granting of franchises by municipal corporations . . . may manufacture and supply electricity . . . for light, heat, and power purposes." (Emphasis added)

Likewise, R.C. 4933.03 requires consent of the municipality before a public utility may operate within the municipal corporation, irrespective of whether or not use of the public ways is involved:

" Section 4933.02 of the Revised Code does not confer a right to engage in the business referred to in such section, or to erect or maintain structures in a street, alley, or public place, without the consent of the municipal corporation in which such structures are to be constructed." (Emphasis added)

In like manner, R.C. 4909.34 and R.C. 743.26 relating to the rate fixing power also recognize the exclusive power of the municipal corporation to control who may sell utility service within the municipal boundaries irrespective of whether use of the public ways is involved.

In like manner, legislative deference to the municipal power granted by the Ohio Constitution is reflected in legislative enactments popularly referred to as the "certified **[*8]** territory" statute (R.C. 4533.81 et. seq.).

There the legislature says in substance that certification of territory pursuant to Sections 4933.81 to 4933.90 of the Revised Code

" . . . shall not in any manner prohibit or restrict the rights of municipalities under Article XVIII or any other Article of the Ohio Constitution."

Another clear legislative recognition of the municipal power conferred by the Constitution is contained in HN3 R.C. 4533.87 which provides:

"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 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." (Emphasis added)

For the foregoing reasons, both assigned **[*9]** errors are overruled and the judgment of the Court of Common Pleas of Richland County is affirmed.