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FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO POWER COMPANY'S MEMORANDUM CONTRA RESPONDENT'S MOTION FOR LEAVE TO FILE A SURREPLY BRIEF

Ohio Power Company (OPCo) opposes Consolidated Electric Cooperative, Inc.'s (Consolidated) Motion for Leave to File a Surreply Brief. First, it is an attempt by Consolidated to add another brief to the two that it has already filed, thereby unfairly gaining for itself the "last word." It violates the briefing schedule that the Attorney Examiner established and to which all parties agreed. Briefing is over, and Consolidated's attempt to re-open and extend this phase of the process should be rejected. Second, Consolidated's criticisms of OPCo's discussion in its Reply Brief of the Ohio Supreme Court's decision in Attica, which are the purported basis for its motion, are baseless. Third, if any party has engaged in misconstruction and misapplication of the facts and law in its briefs, it is Consolidated.

A. Consolidated's Motion Should Be Denied Because It Violates the Briefing Schedule Previously Established and Seeks to Gain An Unfair Advantage.

The Commission's Attorney Examiner established a briefing schedule for this case at the end of the evidentiary hearing on March 13, 2007. The parties were given the opportunity to file initial briefs, simultaneously, on April 5, 2007, and reply briefs, also simultaneously, on April 19, 2007.

Consolidated, the Respondent, agreed to this briefing schedule. So did OPCo, even though, as the Complainant, OPCo arguably should have had the right to file the last brief. Not satisfied with the schedule to which it had previously agreed, Consolidated seeks to have the "last word" through its Motion for Leave to File a Surreply Brief.

The Commission should deny Consolidated's Motion. Briefing has been completed, according to the schedule to which Consolidated agreed and the Attorney Examiner ordered. Consolidated should not be permitted to add another layer of post-hearing briefs, let alone create for itself the unfair advantage that would result from allowing it to have the last word.

B. Attica Does Not Help Consolidated, And Consolidated's Criticism of OPCo's Reply Brief, Which Demonstrated That Consolidated's Reliance Upon Attica Is Misguided, Is Baseless.

Consolidated believes that the Ohio Supreme Court's decision in Ohio Power Co. v. Village of Attica (1970), 23 Ohio St.2d, 37, 261 N.E.2d 123, authorizes Consolidated to violate the Certified Territory Act. OPCo explained in its Reply Brief, at pages 5 – 7, that Attica does not help Consolidated. First, the issue that was before the Ohio Supreme Court was whether the rural electric cooperative involved in the case was a public utility. The Court in Attica was not presented with the issue of whether a pure franchise, one that is not accompanied by a commitment to provide service to anyone or establish rates for such service, is a contract within

§ 4, Article XVIII, of the Ohio Constitution. Accordingly, Attica's holding is not that a pure franchise, of the type Lexington issued to Consolidated, is a § 4 contract. Rather, Attica's holding is that a rural electric cooperative is a public utility with whom municipalities may contract under § 4. As OPCo also pointed out in its Reply Brief, in Galion v. Galion (1951), 154 Ohio St. 503, 96 N.E.2d 881, the Court did address the precise question of whether a pure franchise is a contract under § 4, and held that it is not.

Second, the Court's dicta in Attica regarding the status of "franchises" as contracts under § 4 of Article XVIII must be read in the context in which the Court spoke. That context, as OPCo explained in its Reply Brief, at page 6, was both a "franchise" ordinance that allowed the rural electric cooperative to use Attica's public ways to provide electric service and a "contract" ordinance that authorized the village's mayor to contract with the cooperative "for such service." The Court's description made clear that the two ordinances were a package deal and that the contract ordinance was a critical component of the context in which its discussion occurred:

> In 1961, the village enacted ordinance No. 126-A, granting North Central a franchise to use the streets and public grounds in the village in providing electric service for public and private use in the Buckeye Village Addition, and also ordinance No. 125-A, authorizing the mayor to enter into a contract with North Central for such service.

Id. at 37.

Consequently, Consolidated's argument that the Ohio Supreme Court held in Attica that a pure franchise is a contract under § 4 of Article XVIII is simply incorrect. In addition, it is not accurate even to contend that the Court's dicta in Attica addressed the pure franchise situation, because what the Court had before it, in its own words, was a combination of ordinances, one granting a franchise *authorizing* the provision of electric service and another resulting in a contract that would *obligate* the cooperative to provide "such service."

By pointing out in its Motion that the "franchise" ordinance provided a general authority to the rural electric cooperative to use the public ways to erect its facilities and provide electric service in the village, Consolidated neither avoids these consequences nor undercuts OPCo's explanation why Attica does not help Consolidated. The fact that the narrow scope of electric services that the "contract" ordinance *obligated* the cooperative to provide in the village is but a subset of those that the franchise ordinance *authorized* it to provide does not detract from OPCo's arguments in its Reply Brief (recapped above) regarding Attica's import. The franchise ordinance was necessary, but not sufficient, to obligate the cooperative to provide *any* service.

It is Consolidated's effort to treat the contract ordinance in Attica as a separate fact, unrelated to the franchise ordinance, that is misleading. Clearly, the Court in Attica regarded them as a package. Consolidated's criticisms of OPCo's discussion of Attica are baseless and, in OPCo's view, misleading.

C. Consolidated Has Made Numerous Misstatements Concerning The Law, The Facts, and OPCO's Arguments.

If any party has made misstatements in its post-hearing Reply Brief that merit correction, it is Consolidated. For example, at page 3 of its Reply Brief, Consolidated contends that OPCo's position that the Certified Territory Act does not permit electric suppliers to compete for distribution service customers within municipal boundaries is an "assertion that monopoly is a municipality's only constitutional choice." OPCo did not state that monopoly is a municipality's only constitutional choice. OPCo said that only one *electric supplier* may provide distribution service within any geographical area, including within municipalities. Obviously, if a municipality wants to establish a municipal electric utility it may do so, and it may authorize an electric supplier to compete with the municipal system, as occurs in Columbus and Cleveland. A municipal electric utility is not an "electric supplier" under the CTA (a point that Consolidated

ignores). *See* §4933.81(A), Ohio Rev. Code (defining "electric supplier" to exclude "municipal corporations or other units of local government that provide electric service"). The CTA's restriction against one electric supplier providing competing distribution service in another electric supplier's certified territory does not apply to a municipal electric utility. Consolidated's mischaracterization of OPCo's position on this point is startling.

Another example of Consolidated's misstatements is its contention, also at page 3 of its Reply Brief, that

> in the Attica decision, the Supreme Court blessed *similar competition between* two different electric suppliers under competing franchises, allowing them to serve the same subdivision.

This is an astonishing mischaracterization, in one breath, of both Attica and the CTA. Attica was decided in 1970. The CTA was not enacted until 1978. There were no "electric suppliers" before the Court in Attica because there was not yet a CTA. Accordingly, the Court in Attica did not approve of one electric supplier competing in a portion of another electric supplier's certified territory that is within a municipality. Nor did the Court rule that the CTA's prohibition against electric suppliers entering each other's certified territory did not apply within municipalities.

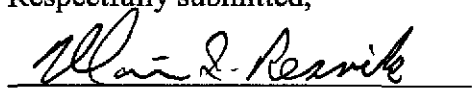
Consolidated's Reply Brief, at page 3, also mischaracterized OPCo's reliance on Cleveland Electric Illuminating Co. v. Pub. Util. Comm. (1996), 76 Ohio St.3d 521. Consolidated contends that "Ohio Power's brief for the first time unveils the claim that service by Consolidated in Lexington is a 'sham transaction' in Lexington." This is inaccurate. OPCo pointed out in its Initial Brief, at page 11, that the underlying basis for the Court's decision in CEI was that municipalities cannot use their home-rule authority under § 4, Article XVIII, to override the certified territory boundaries that the Commission establishes pursuant to the CTA. That is the point for which OPCo cited CEI in its brief: that municipalities do *not* have any

constitutional authority to authorize an electric supplier to offer service within another, franchised electric supplier's territory. OPCo has never alleged that Consolidated used a "sham transaction" to violate the CTA. Rather, OPCo believes, and has stated consistently, that Consolidated has directly and openly violated the CTA.

Perhaps the most notable mischaracterization of OPCo's position is Consolidated's repeated argument that "[OPCo] unabashedly asserts that the Act effectively transforms [OPCo's] non-exclusive franchise into one that is exclusive." Consolidated's Reply Brief, at page 10-11. See also page 2 of its Reply Brief (where Consolidated refers to "[OPCo's] breathtaking assertion that Lexington's grant of a non-exclusive franchise to [OPCo] is magically transformed, against Lexington's will, into an exclusive grant.") OPCo has recognized all along that Consolidated is entitled to provide service in the portion of Lexington that is within its certified territory. Consolidated's rights under the CTA are not diminished by OPCo's franchise from Lexington. Likewise, Consolidated's rights under the CTA are not expanded by its Lexington franchise.

Consolidated's Motion should be denied, and the Commission should proceed to rule favorably upon OPCo's Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra of Ohio Power Company to Respondent's Motion for Leave to File a Surreply Brief was served by First-Class United States Mail, postage prepaid, and electronic mail upon the following counsel of record this 7th day of May, 2007:

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