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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 APPLICATION FOR REHEARING

Pursuant to §4903.10, Ohio Rev. Code, and §4901-1-35, Ohio Admin. Code, Ohio Power Company (OPCO) files this Application for Rehearing of the Commission's July 25, 2007 Opinion and Order in this proceeding. Besides the incorrect legal analysis presented in the Commission's order, the Commission left unanswered important implications resulting from its decision. The controlling case law supports a ruling in favor of OPCO. However, to the extent that existing case law could support a ruling in favor of either party, the Commission should have considered important policy issues and determined the legal issue in a manner which preserves Commission jurisdiction and which reflects the Commission's own message of caution conveyed to municipalities at the conclusion of its Opinion and Order. Instead, the Commission unlawfully and unnecessarily ceded to municipalities its authority over certified service territories for *distribution* service and cautioned municipalities regarding these implications and policy issues.

The specific grounds on which the Opinion and Order is unreasonable and unlawful are the following:

1. Finding that the Village of Lexington's (Lexington) non-exclusive franchise which was accepted by Consolidated Electric Cooperative, Inc. (Consolidated) was a contract as contemplated under Section 4 of Article XVIII of the Ohio Constitution, and consequently that the franchise authorizes distribution service by Consolidated in OPCO's Commission-certified service territory within Lexington.

2. Failing to adhere to the applicable Ohio Supreme Court precedent provided by *Galion v. Galion* (1951), 154 Ohio St. 503, in which the question of whether a franchise like the Lexington franchise was a contract as contemplated under Section 4 of Article XVIII of the Ohio Constitution *was* before the court, and instead relying on *dicta* in other Ohio Supreme Court and Ohio Court of Appeals decisions in which the question of whether a franchise like the Lexington franchise was a contract as contemplated under Section 4 of Article XVIII of the Ohio Constitution *was not* before those courts. Further, as the Commission noted, the Galion case "does make a distinction between *franchises* that permit a utility to provide service in a municipality and a *contract* for utility service which spells out terms and conditions of service." (Opinion and Order, p. 13).

3. Finding at page 15 of the Opinion and Order that "Consolidated's service pursuant to Lexington's franchise is contractual in nature and authorized under Section 4." The contract for service is between Consolidated and the customers in OPCO's Commission-certified service territory that Consolidated is serving unlawfully. There is no contract for service between Lexington and Consolidated.

4. Relying on the decision in *Triad CATV v. The City of Hastings*, 1990 U.S. at Lexis 18212 (1990). That case is inapplicable because it was a Michigan case based on United States Constitutional due process precepts applicable to property rights. The language in the CTA concerning contracts under Section 4, Article XVIII of the Ohio Constitution was not analyzed in that case.

5. Failing to properly apply the Ohio Supreme Court's decision in *Local Telephone Company v. Cranberry Mutual Telephone Company* (1921), 102 Ohio St. 524. (Cranberry). The portion of that decision cited by the Commission at page 14 of its Opinion and Order concluded that the franchise in question in that case was a contract under Section 4 of Article XVIII of the Ohio Constitution because the village could *compel* the utility to furnish service to *all* inhabitants indiscriminately. No claim has been made in this proceeding that the franchise in question enables Lexington to compel Consolidated to serve *any* customers in Lexington, let alone all its inhabitants indiscriminately. Accordingly, the critical feature of the franchise in *Cranberry* which led the Court to conclude that the franchise was a contract under Section 4 is absent from the Lexington/Consolidated franchise, and the Commission erred when it ignored that difference.

6. Failing to apply the holding in the *Cranberry* case (that even though the franchise in that case was authorized under Section 4 of Article XVIII of the Ohio Constitution, Cranberry Mutual was not authorized to accept the franchise) to Consolidated's acceptance of Lexington's franchise, which acceptance was unlawful to the extent the ordinance would authorize Consolidated to provide electric distribution service in OPCO's Commission-certified service territory.

7. Finding that if the Lexington franchise were not a contract under Section 4, Article XVIII of the Ohio Constitution "Lexington could easily cure the problem by entering into a contract with Consolidated to serve a portion of the Woodburn subdivision." (Opinion and Order, p. 15). To come within the reach of Section 4 of Article XVIII of the Ohio Constitution, such a contract would need to obligate Consolidated to serve customers on behalf of Lexington for a period of time and at a rate specified in an ordinance. Even if Consolidated's violation of the CTA easily could be cured, that is not a basis for excusing this violation.

8. Failing to differentiate between municipal *franchises*, as contemplated under §§4933.13 and 4933.16, Ohio Rev. Code, as the means of consenting to the construction and placement of electric facilities within the municipal corporation, and municipal *contracts* with others for a public utility product or service, as contemplated under Section 4 of Article XVIII of the Ohio Constitution.

9. Failing to consider the arguments raised by OPCO concerning the obligation to serve. The Commission's holding in this case makes ripe for resolution the question of whether OPCO retains an obligation to serve customers in its Commission-certified service territory in Lexington who are receiving service from Consolidated or would be eligible to receive service from Consolidated.

10. Finding that its decision only addresses the legal issues in the context of new customers, not customers or load centers where electric facilities currently exist. There is nothing in Lexington's franchise which imposes such a limit on Consolidated.

11. Finding that loss of existing customers due to a municipality's actions such as in this case, could not occur without Commission approval. Under the Commission's analysis

an existing customer of an electric supplier could terminate its distribution service relationship with that supplier and take distribution service from another electric supplier that has accepted a franchise from the municipality in which the existing customer resides. No Commission approval of such customer actions would be required. The decision in *State ex. Rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St. 3d 508, referred to by the Commission in regard to this finding, is inapplicable since Lexington has not acted to prohibit OPCO from providing service in Lexington.

MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING

1. The Lexington/Consolidated Franchise Is Not a Contract Under Section 4 Of Article XVIII Of The Ohio Constitution And Consolidated Cannot Lawfully Provide Distribution Service In Ohio Power Company's Commission-Certified Service Territory In Lexington: Allegation of Error Nos. 1, 2, 3

The Commission's order hinges on its interpretation of the phrase in Section 4 of Article XVIII of the Ohio Constitution providing that a municipality "may contract with others for any such product or services," *i.e.*, the product or services which the municipality may supply to itself or its inhabitants. The Commission agreed with OPCO that the Supreme Court of Ohio's decision in *Galion v. Galion* (1951), 154 Ohio St. 503 (*Galion*) "does support Ohio Power's argument that a granting of a franchise does not equate to contracting for utility service under Section 4." (Opinion and Order, p. 12). The Commission also noted that the *Galion* case "does make a distinction between *franchises* that permit a utility to provide service in a municipality and a *contract* for utility service which spells out terms and conditions of service."(Opinion and Order, p.13, emphasis added). Nonetheless, the Commission held that "Consolidated's service pursuant to Lexington's franchise is contractual in nature and authorized under Section 4." (*Id.* at 15).

Instead of following the Court's holding in *Galion*, the Commission cast it aside for two reasons. First, the Commission stated that the Court's decision "was made in the context of determining whether the franchise ordinance was subject to a voter referendum under Section 5 of Article XVIII of the Ohio Constitution." (*Id.* at 13). While that description of the context is correct, it is not a basis for rejecting the underlying rationale of the Court in *Galion.*

In *State ex rel. Mitchell v. Council of Milan* (1938), 133 Ohio St. 499 (*Milan*), the Supreme Court of Ohio considered the language in Sections 4 and 5 of Article XVIII of the Ohio Constitution. The Court's opinion superimposed the first sentence of Section 4 (which includes the phrase "may contract with others for any such product or services") over the forepart of the first sentence of Section 5 (which includes the phrase "proceeding ... to contract with any person or company therefore" Based on its analysis, the Court concluded:

> There is no doubt in our minds that these terms are and were intended to be used interchangeably and as referring to each other. The language, although different, is corresponding and expresses the same sense. (*Milan*, at 503).

Therefore, based on the Court's prior analysis in *Milan* of the language in Sections 4 and 5 of Article XVIII of the Ohio Constitution, its reasoning in the *Galion* case that the franchise was not a contract for voter referendum purposes under Section 5 of Article XVIII compels the conclusion that Lexington's franchise also was not a contract for purposes of Section 4 of Article XVIII of the Ohio Constitution. The Commission's conclusion to the contrary is unlawful and should be reversed on rehearing.

The second reason given by the Commission for rejecting the decision in the *Galion* case was that other decisions, preceeding and following *Galion*, supported a conclusion contrary to the *Galion* case. (Opinion and Order, pp. 13, 14). The first of these cases is *Ohio Power v Village of Attica*, (1970), 23 Ohio St. 2d 37 (*Attica*). As OPCO noted in its Reply Brief, at page

5, the ultimate decision of the Court in the *Attica* case was that a municipality could contract with an electric cooperative, under Section 4 of Article XVIII of the Ohio Constitution, to supply electric power for the municipality and its inhabitants. (*Attica* at 44).

The Commission, however, focused on the Court's conclusion that the cooperative "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 service (sic)."[1] (Opinion and Order, p. 14). That conclusion, however, does not answer the question in the present case – is the Lexington/Consolidated ordinance that type of contract? That question is answered in the negative based on the *Attica* case and cases preceding and following *Attica.*

Britt v. City of Columbus (1974), 38 Ohio St. 2d 1 (*Britt*), involved efforts by the City of Columbus to appropriate land outside the city in an effort to sell excess sewage services of the city to noninhabitants of the city. The affected property owners challenged the City of Columbus and when the dispute reached the Supreme Court of Ohio the city argued that Sections 3, 4 and 6 of Article XVIII of the Ohio Constitution provided authority for its actions. In considering Section 4, and relying on several of its prior decisions, including *Attica*, the Court stated:

> the power to "contract with others for any such product or service" confers authority to contract *solely* for the *purchase* by the municipality of utility products or services for its inhabitants. (*Britt* at 9, emphasis added to "solely"; emphasis to "purchases" in original)

The franchise issued by Lexington to Consolidated cannot in any way be characterized as obligating Lexington to *purchase* utility products or services for its inhabitants. Nor can that franchise be characterized as obligating any inhabitants of Lexington to purchase products or services from Consolidated. Since the Court in the *Britt* case relied on its decision in *Attica*, it stands to reason that the Commission's reliance on *Attica* as a basis for rejecting the reasoning of

[1] The Court's language refers to electric power, not service.

the *Galion* case was unlawful and should be reversed on rehearing.[2] The Lexington/Consolidated franchise is not a contract for supplying utility services.

Besides the reference to *Attica* in the *Britt* case, the Court also cited its earlier decision in the *Milan* case. In its opinion in that case, the Court, after having concluded that Sections 4 and 5 of Article XVIII of the Ohio Constitution express the same sense, turned its attention to Section 4. The Court concluded that Section 4 "authorizes municipal ownership and operation of public utilities (a point not relevant to the Lexington/Consolidated franchise) and the purchase of public utility products or services from others." (*Milan*, at 504). The Court in *Milan* went on to describe the features of such a contractual arrangement:

> "A contract entered into between a public utility and a municipality of this state, whereby the public utility agrees to supply its product or service to the municipality or its inhabitants for a period of ten years, at a rate, price, charge, toll or rental specified in such contract, is expressly authorized by Section 4, Article XVIII of the Constitution of Ohio, and is valid and binding upon the parties thereto . . . ." (*Id.* at 505).

That is the nature of the contract contemplated under Section 4 of Article XVIII of the Ohio Constitution. The public utility agrees to supply its product or service for a specified period of time and at a rate set forth in the contract. The Lexington/Consolidated franchise is not a contract of this nature. Instead, the service Consolidated is providing to selected residents of Lexington in OPCO's Commission-certified service territory results from contracts between Consolidated and those individual customers. The provision of service is not required to be provided in accordance with any terms or conditions specified by the Lexington/Consolidated franchise.

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[2] The Court in *Attica* interpreted the phrase "may contract with others for any such product or services" as contemplating "that municipal contracts for the supply of a utility service may be entered into with a public utility." *Attica* at 39).

A third case cited in the *Britt* opinion, *Ohio River Power Co. v. Steubenville* (1919), 99 Ohio St. 421 (*Steubenville*), confirms that a contract under Section 4 of Article XVIII of the Ohio Constitution must include the price to be charged for the product or service provided for in the contract. In the *Steubenville* case, the utility attempted to increase its rates during the term of its contracts for providing electric service to Steubenville.[3] After concluding that the applicable statutory provisions did not support the utility's contention that it was entitled to increase its rates for electric service, the Court turned its attention to Section 4, Article XVIII of the Ohio Constitution.

> Even if it were conceded that the statutes of this state do not confer power upon the council of a municipality to fix arbitrarily, or by contract, the rate an electric light company might charge for electric current for power purposes; nevertheless, Section 4, Article XVIII of the Constitution, as amended 1912, expressly authorizes a municipality to contract with any public utility, the product or service of which is to be supplied to the municipality or its inhabitants. While this section does not authorize the municipality to fix an arbitrary rate to be charged by a public utility for the commodity it furnishes to the municipality or its inhabitants, it does clearly authorize a contract between the municipality and the utility, and *that contract would necessarily include the price to be paid for service or commodity to be furnished by the utility.* Therefore, *when the utility names the rate* at which it is willing to furnish its product, *and the city accepts that rate on its own behalf and on behalf of its inhabitants, and enters into a contract, the terms of which include the rate so agreed upon, such contract, including the agreement as to rate, clearly comes within the authority conferred upon municipalities by Section 4, Article XVIII of the Constitution of Ohio;* (*Steubenville*, at 427, 428, emphasis added).

[3] The original contracts were between Steubenville and the Steubenville & East Liverpool Railway & Light Company. One contract was for service to the city for ten years at the rate specified therein. The other contract resulted from an ordinance fixing the price for electric service to private consumers for ten years, which the company formally accepted. Subsequently, Ohio River Power Company purchased these contracts from the Railway & Light Company.

This is yet another instance in which the Court made clear that a municipality's contract for the product or service "would necessarily include the price to be paid for the service or commodity to be furnished by the utility." The Lexington/Consolidated franchise is not a contract which spells out terms and conditions of service. It merely is a franchise that permits a utility to provide service. The Commission failed in this case to recognize this distinction which the Commission recognized was drawn by the Supreme Court of Ohio in the *Galion* case. (Opinion and Order, p. 13).

The Commission's reliance on *Lucas v Lucas Local School District* (1982), 2 Ohio St. 3d 13 (*Lucas*), *Woodbran Realty Corp. v Orange Village* (1990), 67 Ohio App. 3d 207 (*Woodbran*), *Village of Grafton v. Ohio Edison Company* (1996), 77 Ohio St. 3d 102 (*Grafton*) and *State ex rel. Toledo Edison Company v. City of Clyde* (1996), 76 Ohio St. 3d 508 (*Clyde*) also is misplaced.

The *Lucas* case confirms that under Section 4 of Article XVIII of the Ohio Constitution, municipalities have the exclusive authority to enter into contracts with public utilities for the product or service of the utility to be provided to the inhabitants of the city. That case did not, however, consider the nature of that contract, for instance whether it must obligate the utility to provide service and must set forth the rates for that product or service.

The *Grafton* case also does not address the issue which is before the Commission in this case, *i.e.*, whether a franchise, such as the Lexington/Consolidated franchise, is a contract between a public utility and a municipality under Section 4 of Article XVIII of the Ohio Constitution. Instead, *Grafton* addressed the issue of whether a municipality that has not renewed the franchise previously given to a public utility could preclude the utility from initiating new service within the municipality after the expiration of the franchise. The Court in

Grafton held that the utility's service to current and new customers inside its Commission-certified service territory is expressly limited in §§ 4933.83 (A) and 4933.87,[4] Ohio Rev. Code, by the municipality's right to require a franchise contract to serve its inhabitants. (*Grafton*, at p. 107). The Court had no need to consider, and did not consider the nature of the contract contemplated under Section 4 of Article XVIII of the Ohio Constitution. Indeed, the *Grafton* case revolved around the fact that the franchise had expired. Thus, there was no franchise to consider in the context of whether it was a contract for the product or service of the public utility which obligated the public utility to provide service at specified rates.

The decision in *Clyde* (1996), 76 Ohio St. 3d 508 on which the Commission also relied, is comparable to *Grafton*, except it addressed the municipality's authority regarding the utility's service not only to new customers acquired after the termination of the franchise but also to existing customers who were receiving services at the time the franchise was terminated. Like *Grafton* there was no existing franchise to consider in the context of Section 4 of Article XVIII of the Ohio Constitution.

Finally, although the Commission does not discuss the decision in *Woodbran*, it does include that case among those cases cited by Consolidated and the intervenors. (Opinion and Order, p. 13). The *Woodbran* case stands for the simple proposition that just as surely as a municipality can choose to enter into a contract under Section 4 of Article XVIII of the Ohio Constitution for public utility products or services, it can choose to not enter into such a contract. *Woodbran,* however, sheds no light on whether the Lexington/Consolidated franchise is a

[4] Note that § 4933.87, Ohio Rev. Code, refers to a municipality operating a public utility or supplying the service or product by means of a *rate* ordinance under § 743.26, Ohio Rev. Code, or Section 4 of Article XVIII of the Ohio Constitution. This further demonstrates that the contract under Section 4 is intended to contain rates for the service to which the utility obligates itself.

contract for public utility products or services under Section 4.[5] Therefore, to the extent the Commission relied on this case in reaching its conclusion that Consolidated has not violated the CTA it should reverse that finding on rehearing.

2. The Commission Erred By Applying The Decision In *Triad CATV v. The City of Hastings*, 1990 U.S. Lexis 182 12 (1990) To Base Its Interpretation Of Whether The Lexington/Consolidated Franchise Was A Contract Under Section 4 Of Article XVIII Of The Ohio Constitution: Allegation of Error No. 4

The Commission's reliance on *Triad CATV v. The City of Hastings*, 1990 U.S. at Lexis 18212 (1990) (*Triad*) was misplaced. That case involved an allegation by Triad that if the City of Hastings were to enter into a non-exclusive franchise with another cable television system, Triad's property interest in the non-exclusive franchise it had with the city would be diminished without the procedural due process protection provided by the United States Constitution.

A review of the Court's decision reflects that its analysis was based on consideration of the extent of *Triad's* property rights under its franchise. The Court's decision that the city could issue a second non-exclusive franchise has no bearing on the case before the Commission. *Triad* has nothing to do with certified service territories or any provision of the Ohio Constitution. In fact, this case originated in Michigan. The Commission's conclusion that when the logic of the *Triad* case is applied to this case "we find that the granting of non-exclusive franchises does not impair Ohio Power's rights under the CTA" improperly applies a decision based on United States Constitutional due process rights precepts to a case involving Ohio's CTA and provisions of its state constitution having nothing to do with due process rights. The conclusion that the

[5] *Woodbran* does shed light on a point raised by OPCO at pages 7-8 of its Reply Brief concerning Consolidated's ability to enter into a contract with Lexington for the provision of electric service in OPCO's Commission-certified service territory. Citing *Local Telephone Company v. Cranberry Mutual Telephone Company* (1921), 102 Ohio St. 524 (a case discussed in greater detail elsewhere in this Memorandum in Support), the Court pointed out that since Woodbran Realty had a Commission-granted certificate it had the legal capacity to contract with the village, if the village had chosen to enter into a contract. (*Woodbran*, at 214). The converse of that observation is that if the public utility was not authorized to enter into such a contract, the municipality could not execute a valid contract with that public utility.

U.S. Constitution does not establish, or protect, non-exclusive franchise rights of a cable television service provider in Michigan provides no instruction regarding the extent to which Ohio's CTA establishes, and preserves, the right (and obligation) of an electric supplier to provide electric distribution service in its Commission-certified service territory.

Further, in its discussion of the *Triad* case the Commission states there is "no basis for a determination that Lexington cannot grant non-exclusive franchises to provide competition within its municipal boarders (sic)." (Opinion and Order, p.15). OPCO agrees that Lexington can provide for competition within its borders by either establishing its own electric utility system or by entering into a contract under Section 4 of Article XVIII of the Ohio Constitution with the necessary terms and conditions obligating the contracting party to provide the product or service set out in the contract. The Lexington/Consolidated franchise is not such a contract. The Commission's conclusion was unlawful and should be reversed on rehearing.

3. The Commission Failed To Properly Apply The Ohio Supreme Court's Decision In *Local Telephone Company v. Cranberry Mutual Telephone Company* (1921), 102 Ohio St. 524. (Cranberry): Allegation of Error Nos. 5, 6. 7

The Commission improperly applied the Court's decision in *Local Telephone Company v. Cranberry Mutual Telephone Company* (1921), 102 Ohio St. 524 (*Cranberry*). That case involved two distinct issues, both of which are applicable to the case presently before the Commission, but only one of which was considered by the Commission.

The issue addressed by the Commission was whether the franchise passed by the Village of New Washington and accepted by Cranberry Mutual Telephone Company (Cranberry) was the type of contract contemplated by Section 4 of Article XVIII of the Ohio Constitution. From the Court's opinion it is clear that the passage of the franchise was "no more or no less than a permission to use the streets for the benefit of the public and the acceptance of the franchise is no

more or less than the expressed intention of doing that for which the grant was intended." (*Cranberry*, at 530).

The franchise and its acceptance was not a Section 4 contract, however, until service was initiated by Cranberry. As the Court phrased it, "The putting into operation of the service supplied what theretofore was wanting, namely, the subject-matter of the contract, -- that part of the consideration moving to the village on behalf of its inhabitants, -- the rights granted to the utility company being the consideration moving to it." The Court went on to state that even though the franchise had "no definite period of time fixed, and no schedule of rates" the service being provided was one of "the two particular things which is subject to contract under Section 4 of Article XVIII of the Ohio Constitution . . . ." (*Id.* at 531).

The Commission's reliance on that conclusion is improper because it fails to address the remainder of the Court's analysis regarding this issue. The Court further stated that it had no doubt that the village, "while [Cranberry] is furnishing service, may enforce the contract in respect to the compelling of the furnishing of the service to all inhabitants indiscriminately." (*Id.*). Despite this characterization of the nature of the service being provided, the Commission found that the Court's rationale "is equally applicable in the present case." (Opinion and Order, p. 14). Further, the Commission also concluded that even if the Lexington/Consolidated franchise were not a contract under Section 4 of Article XVIII of the Ohio Constitution, "Lexington could easily cure the problem by entering into a contract with Consolidated to serve a portion of the Woodburn subdivision." (Opinion and Order, p.15).

These findings are wrong. There is no evidence in the record, either in the Lexington/Consolidated franchise itself or in any testimony, that suggests that Lexington or Consolidated intended to enact, or believe that Lexington has enacted, a franchise under which

Lexington could compel Consolidated to provide any service anywhere in Lexington, let alone in the portion of Lexington that is within OPCO's Commission-certified territory. Nor is there any basis to conclude that the Lexington/Consolidated franchise requires Consolidated to serve all of Lexington's inhabitants indiscriminately. In fact, the Commission's holding that its decision in this case applies only to new customers directly conflicts with the nature of the service cited by the Court in *Cranberry* as being necessary for the franchise in that case to be considered a contract under Section 4 of Article XVIII of the Ohio Constitution. As for the easy cure the Commission envisions, there is no evidence that Consolidated would want to be compelled to provide service or have its rates for service regulated by Lexington. Moreover, even if Consolidated's violation of the CTA easily could be cured, that is not a basis for excusing this violation. Either the municipality has exercised its constitutional powers or not (OPCO submits it has not done so here). The mere ability to do so does not alter OPCO's exclusive right to serve customers in its certified territory.

A further distinction which undermines the Commission's finding that the Court's rationale in *Cranberry* "is equally applicable in the present case" is the presence of the CTA. The Court did not need to consider the implications of a territorial service area law. The significance of this distinction is that the Commission's adoption of the Court's rationale produces the illogical result that if service is not provided pursuant to the Lexington/Consolidated franchise, the franchise would not be a contract under Section 4 of Article XVIII of the Ohio Constitution. Consequently, Consolidated would be confined to the portion of Lexington that is within its Commission-certified service territory. However, if Consolidated started to provide service across the Consolidated/OPCO boundary in Lexington, the very activity that would otherwise be prohibited would become permissible. Such an unusual

result strongly suggests that the Court's reasoning in the *Cranberry* case is not applicable, equally or otherwise, to the Lexington/Consolidated franchise. The Commission's finding to the contrary is unlawful and should be reversed on rehearing.

The other issued raised in the *Cranberry* case was addressed in OPCO's Reply Brief at pages 8 and 9, but not addressed by the Commission. That issue presented the question of whether Cranberry had the ability to accept the franchise from New Washington, despite its failure to obtain from the Commission a statutorily-required certificate for furnishing telephone service. The Court held that Cranberry lacked the capacity to render service under the franchise and, therefore, the contract was rendered unenforceable. (*Cranberry* at 533). The Court further held that prohibiting Cranberry from entering into a contract for service with the village, based on the absence of a Commission-approved certificate, was not an unconstitutional interference with the village's authority under Section 4 of Article XVIII of the Ohio Constitution. (*Id.*).

The Court's rationale for finding that Cranberry lacked capacity to engage in a service contract with the village is equally applicable to the present case. As the Court in *Cranberry* stated:

> Suppose an electric light company, chartered to furnish electric current, should ask, obtain, and accept a franchise to furnish telephone service, clearly outside its charter power. Could it be claimed, because the municipality was the other party and had the constitutional power to contract, to enter into it by constitutional grant, that the corporation organization laws of the state would thereby of necessity give way and become unconstitutional?
>
> The contractual incapacity in no way affects or limits the municipal power, but renders a contract made with another, who is under disability, ineffectual and unenforceable. The contract falls because of the infirmity of the other party, and this section, regulatory in nature, cannot be said to abridge the constitutional grant comprised in the Home Rule Amendment. (*Id.* at 532, 533). [6]

[6] The Supreme Court of Ohio's decision in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 521, discussed at page 11 of OPCO's Initial Brief supports this conclusion.

To whatever extent a municipality has the authority to enter into a contract with others for service pursuant to Section 4 of Article XVIII of the Ohio Constitution, the other parties must be capable of contracting with the municipality. Under the CTA, Consolidated has no capacity to contract for service in another electric supplier's Commission-certified service territory. Therefore, the Lexington/Consolidated franchise is not an enforceable contract under Section 4 of Article XVIII of the Ohio Constitution. The Commission's finding to the contrary is unlawful and should be reversed on rehearing.

4. The CTA And Ohio Case Law Distinguish Between Municipal Franchises And Municipal Contracts In The Context Of Section 4 Of Article XVIII Of The Ohio Constitution: Allegation of Error No. 8

The Commission's Opinion and Order appears to adopt the view of Consolidated and the intervenors "that generally the Ohio Courts have not differentiated between municipal franchises and municipal contracts when referring to the municipality's rights under Section 4 ...." (Opinion and Order, p.13). Their assertion is contrary to not only the applicable case law, but to the CTA itself and to other provisions of Chapter 4933, Ohio Rev. Code.

Section 4933.83(A), Ohio Rev. Code, makes clear that under the CTA municipalities retain their right to grant a franchise or a contract for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality. By referring to a franchise OR contract, the CTA provides a distinction between the two terms.

Further, the cases cited previously by OPCO demonstrate that while a franchise, such as the Lexington/Consolidated franchise, may be a contract, it is not a contract under Section 4 of Article XVIII of the Ohio Constitution. That is the holding in the *Galion* case, which is supported by the decisions in the *Britt*, *Milan* and *Steubenville* cases. Instead, the

Lexington/Consolidated franchise is no more than Lexington's consent for Consolidated to construct facilities within the municipality for power, light and heating purposes (See §§ 4933.13 and 4933.16, Ohio Rev. Code, and to render service. It is not a contract compelling service pursuant to a set of terms and conditions.

5. The Commission Should Have Resolved Policy And Other Legal Issues Resulting From Its Decision: Allegation of Error Nos. 9, 10, 11

At page 16 of its Opinion and Order the Commission declined to address several policy concerns raised by OPCO as well as other legal issues which arise because of the Commission's decision. One such legal issue concerns the impact on OPCO's obligation under the CTA to provide service and to be the Provider of Last Resort under §4928.14, Ohio Rev. Code. The Commission's decision not to resolve that issue was based on there being "no case or controversy on this issue at this time." (Opinion and Order, p.16).

Neither customers nor electric suppliers are well served by a non-decision on this issue. Once the Commission determined that the right to serve the same customer could be asserted by one electric supplier under the CTA and by another electric supplier under a municipal franchise, the obligation-to-serve issue became ripe for resolution. The Commission's decision to await an actual situation where an electric supplier refuses to extend service to a load center requesting such service because that load center previously was served by another electric supplier will leave the customer in a state of limbo while a complaint is filed and processed at the Commission. Further, if this case is appealed to the Supreme Court of Ohio the Court should have the benefit of the Commission's thinking on this obviously related issue.

Electric suppliers and customers also should know whether the Commission believes its decision applies equally to existing service to load centers and, in particular, whether the provision of temporary service for construction or other purposes should be considered as

existing service. The Commission's order states that its decision does not address "customers or load centers where electric facilities currently exist." (Opinion and Order, p.16). Nonetheless, the Commission goes on to indicate that "a municipality cannot require a utility to stop serving existing customers it is serving lawfully, without first obtaining approval from the Commission pursuant to the Miller Act.... So, loss of existing customers due to a municipality's actions, such as in the case above, could not occur without Commission approval." (*Id.*)

It is not clear whether the Commission's thinking on this point is intended to resolve the question of the applicability of the Commission's order to existing load, since the Commission explicitly says it would not address that question. Moreover, it is not clear if a request from an existing customer to have the current electric supplier end its service to the load center so another electric supplier could assume the role of service provider to the load center would be subject to Miller Act requirements. Does the Commission believe that such a request is comparable to a municipality requiring the electric supplier to stop serving existing customers within its Commission-certified service territory? These issues now are ripe for resolution and affected parties should not be left to dispute among themselves in the future while they wait for a new complaint to be filed and be resolved by the Commission.

Finally, the Commission seems to acknowledge several valid policy issues which OPCO argued should be considered in reaching a decision in this case. Chief among those issues is safety concerns for employees engaged in service restoration/maintenance activities. Less critical, but nonetheless important, are the diseconomies associated with over-building or under-building facilities associated with the increased uncertainty of how much load in the electric supplier's certified service territory will be served by the electric supplier and how much will be served by another electric supplier with a franchise that, under the Commission's decision, can

serve beyond its certified service territory. Further, the related uncertainty regarding the electric supplier's recovery of investment in distribution facilities, which the Commission's decision also creates, runs counter to the very important policy objective of facilitating distribution reliability.

In response to these policy issues the Commission cautioned municipalities "to think through all the ramifications and unintended consequences, as well as the policy concerns raised by Ohio Power in this case, before granting unlimited non-exclusive franchises within their borders." (*Id.* at 16). This cautionary statement seems to suggest that the Commission recognized, and was troubled by, the consequences that flow from the legal conclusions it reached. OPCO believes that the legal arguments it has presented in this case require the Commission reversing its legal conclusions on rehearing. At a minimum, however, OPCO's legal arguments are sufficient to at least support such a reversal on rehearing, even if it also could be concluded that Consolidated and the intervenors presented legal arguments that could support a decision in their favor. In a situation where the case law can support a conclusion favoring either party, the difficult policy questions and issues concerning obligation to serve and service to existing load centers more than tip the scale in favor of upholding the Commission's jurisdiction over certified service territories. There is no state policy favoring customer choice among *distribution* service providers. In fact, the enactment of Chapter 4928, Ohio Rev. Code, which provides for customer choice among generation service providers, to the exclusion of distribution service, and the CTA confirm that, as a matter of state policy, customer choice among distribution service providers is disfavored. The Commission's decision improperly promotes this disfavored policy at the expense of compelling policy concerns OPCO has raised. The Commission should reverse its decision on rehearing.

CONCLUSION

Based upon the record in this case and the legal and policy issues discussed in OPCO's briefs and in this Application for Rehearing the Commission should reverse its July 25, 2007 Opinion and Order in this case and conclude that Consolidated's service to customers in OPCO's service territory in Lexington, Ohio is unlawful and must cease.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing and Memorandum in Support of Application for Rehearing of Ohio Power Company was served by First-Class United States Mail, postage prepaid and electronic mail, upon the following counsel of record this 23rd day of August, 2007:

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