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In the Matter of the Complaint :
Of Ohio Power Company, :

vs.

Case No. 06-890-EL-CSS

Respondent .

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PROCEEDINGS

before Steven D. Lesser, Hearing Examiner, at the Public Utilities Commission of Ohio, 180 East Broad Street, 11th Floor, Room C, Columbus, Ohio, called at 10:05 a.m. on Tuesday, March 13, 2007.

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7 On behalf of Ohio Power Company.

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12 On behalf of Ohio Power Company.

13 Thompson Hine, LLP
14 By William R. Case, Esq.
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19 On behalf of Consolidated Electric
20 Cooperative, Inc.

21 Bricker & Eckler, LLP
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On behalf of the Intervenor, the City of
Delaware.

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On behalf of Industrial Energy Users-Ohio.

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1 Tuesday Morning Session,
2 March 13, 2007.

3 - - -

4 THE EXAMINER: The Public Utility
5 Commission of Ohio has assigned for hearing at this
6 time and place In the Matter of the Complaint of Ohio
7 Power Company versus Consolidated Electric Cooperative,
8 Case No. 06-890-EL-CSS. My name is Steven D. Lesser,
9 and I'm the Attorney Examiner for the Commission. I've
10 been assigned to hear this case.

11 May I have the appearances on behalf of
12 the parties?

13 MR. RESNIK: Your Honor, on behalf of Ohio
14 Power Company, please let the record reflect an
15 appearance by Marvin I. Resnik with the American
16 Electric Power Service Corporation, 1 Riverside Plaza,
17 Columbus, Ohio 432165; Daniel R. Conway with the law
18 firm of Porter, Wright, Morris & Arthur, 41 South High
19 Street, Columbus, Ohio 43215.

20 THE EXAMINER: Go ahead, please.

21 MR. CASE: Yes. On behalf of Consolidated
22 Electric Cooperative, I'm Bill Case from Thompson Hine,
23 and with me are Bob Mone and Kurt Helfrich, also from
24 Thompson Hine.

1 THE EXAMINER: Other parties, please?

2 MR. O'BRIEN: On behalf of the Intervenor,
3 the City of Delaware, Bricker & Eckler, LLP, 100 South
4 Third Street, Columbus, Ohio 43215, by Thomas J.
5 O'Brien.

6 MS. McALISTER: On behalf of Industrial
7 Energy Users-Ohio, McNees, Wallace & Nurick, I'm Lisa
8 McAlister, 21 East State Street, Columbus, Ohio
9 43215.

10 THE EXAMINER: Thank you. Any preliminary
11 matters?

12 MR. RESNIK: Your Honor, just as a
13 preliminary matter to sort of set out what you might
14 expect this morning, it's going to be a short morning.
15 The parties have agreed to admit the pretrial testimony
16 into the record and will be waiving cross-examination
17 of that testimony. We have indicated that we do have a
18 few motions to strike concerning some of the testimony
19 that will be admitted, but, regardless, beyond that, we
20 will not have cross-examination.

21 THE EXAMINER: Let's proceed.

22 MR. RESNIK: Your Honor, if I could have
23 marked as OPCo Exhibit 1 the prepared direct testimony
24 of Selwyn J. Dias, and also if I can have marked as

1 OPCo Exhibit 2 the prefile direct testimony of Robert
2 Ivinskas.

3 THE EXAMINER: Do you have a copy of
4 that? Is this one and two?

5 MR. RESNIK: I have a copy for you.

6 THE EXAMINER: Thank you.

7 Any objection?

8 MR. CASE: No objection.

9 MR. O'BRIEN: No objections, Your Honor.

10 THE EXAMINER: OPCo Exhibits 1 and 2 are
11 admitted.

12 MR. RESNIK: Thank you.

13 THE EXAMINER: Do you have anything
14 further?

15 MR. RESNIK: No, we do not, Your Honor.

16 THE EXAMINER: Thank you.

17 Mr. Case.

18 MR. CASE: Yes, Your Honor. We, on behalf
19 of Consolidated, would be seeking to admit the prefile
20 testimony of Brian Newton, with the attachments. I
21 believe it's A through I. How do we want to mark
22 that? Would be it be successive, to go to three?

23 THE EXAMINER: No. It would be new. It
24 would be Consolidated No. 1.

1 MR. CASE: Okay. That will be
2 Consolidated No. 1.

3 THE EXAMINER: Do you have a copy?

4 MR. CASE: Yes.

5 THE EXAMINER: And that's with all the
6 schedules?

7 MR. CASE: Yes.

8 THE EXAMINER: Thank you. So marked.
9 Before we move on, do you have any other
10 exhibits?

11 MR. CASE: I have two other prefile
12 matters.

13 THE EXAMINER: Let's go through all
14 those.

15 MR. CASE: We would also move to admit the
16 testimony of Richard McCleerey as Consolidated Exhibit
17 2, and I'll provide a copy of that.

18 THE EXAMINER: Thank you.

19 MR. CASE: Then, Your Honor, we also had
20 filed -- as part of the record in this case, we had
21 first filed just a copy of the deposition of Charles
22 Pscholka, who is employed by the Village of Lexington,
23 and last week we filed the original with the exhibits,
24 which is now on file with the Commission, and I don't

1 know how you want to do that, just consider that or --
2 I have an extra copy of that as well. Without
3 objection, we can mark that.

4 THE EXAMINER: Well, we'll mark that. The
5 entire deposition is going to be --

6 MR. CASE: Yes.

7 THE EXAMINER: Okay. We'll mark the
8 deposition as Consolidated No. 3.

9 MR. CASE: All right. I just have one
10 copy of that. I know that would be our presentation.
11 I do believe that Mr. Conway may have --

12 THE EXAMINER: You would move for
13 admission of the documents?

14 MR. CASE: We move for the admission of
15 all that testimony at this time.

16 THE EXAMINER: Any objections?

17 MR. CONWAY: No objection.

18 MR. O'BRIEN: No objections, Your Honor.

19 MS. McALISTER: No, Your Honor.

20 MR. CONWAY: Well, Your Honor, before --
21 we don't object to the admission of the exhibits;
22 however, subject to the rulings on our motions to
23 strike portions of the exhibits that are, we believe,
24 are objectionable.

1 THE EXAMINER: I'd like to deal with the
2 motions to strike, because I would like to hear what
3 those are and make a determination before we admit
4 them.

5 MR. CONWAY: If I may, Your Honor, with
6 regard to Mr. Newton's testimony, which is Consolidated
7 Exhibit No. 1, I have four fragments of it that I'd
8 like to address. The first one -- would you like me to
9 tell you what they all are at the outset or just go
10 through them one by one?

11 THE EXAMINER: Are they connected?

12 MR. CONWAY: No. The bases of the motion
13 are similar, but they're not -- they're on separate
14 pages. Two of them --

15 THE EXAMINER: No. I meant are they all
16 under the same theory?

17 MR. CONWAY: They're basically under the
18 same theory, yes.

19 THE EXAMINER: Then let's hear them all.

20 MR. CONWAY: Okay. The first piece is at
21 Page 3, Lines 33 through 39, starting with the --
22 after, "I am not a lawyer," the rest of that sentence
23 and the rest of that answer is subject to the motion to
24 strike.

1 THE EXAMINER: Through Line 39?

2 MR. CONWAY: Yes, through the rest of that
3 answer. That's the first fragment.

4 Second, the second fragment is on Page 4,
5 Lines 23 through 26, sentence that starts with the
6 words, "That ordinance did not confine," and ending
7 with the end of that -- through the end of that answer
8 on Line 26 to -- there's actually two sentences that
9 are involved, the last two sentences of that answer.

10 The third piece of the testimony that
11 we're moving to strike is the portion of the second
12 sentence of the answer that starts on Line 31, after
13 the introductory comment that the witness is not a
14 lawyer, starting with the words, "From what I
15 understand," through the end of that sentence on Line
16 34.

17 And then, finally, on Page 6, the answer
18 that starts on Line 1, starting with the second
19 sentence which begins, "Because of the non-exclusivity
20 of its franchise," through the end of that answer on
21 Line 12.

22 THE EXAMINER: Okay. Now, the basis for
23 the motion to strike?

24 MR. CONWAY: The basis for the motion to

1 strike is that it's material that is all legal opinion,
2 and he is not a lawyer. None of this material is he
3 qualified to speak to, and it's all argument that can
4 be included in the brief, but it's not appropriate
5 testimony by the witness. And I can go through the
6 different pieces and explain the bases for each one.

7 THE EXAMINER: No. That's okay. I'd like
8 to take a minute to look at it.

9 Do you have a response?

10 MR. CASE: Yes, I have a response, but
11 before I make that response, I want to ask Mr. Conway
12 one thing on the last one, because he and I talked
13 about what his objections were going to be.

14 And the last one, Dan, I had marked that
15 you were objecting to the second sentence of the answer
16 on Page 6, ending with "assumption." Was I in error on
17 that? Because now you're saying the whole answer.

18 MR. CONWAY: Well, I had -- the answer is
19 I thought that I was addressing -- in our conversation,
20 frankly, I wasn't -- I didn't -- when we had the
21 conversations, I wasn't prepared specifically when we
22 had them to discuss it, but my recollection is that my
23 objection went to the portions of this last answer on
24 Page 6 that dealt with legal issues. I can't recall

1 exactly what I told you, but --

2 MR. CASE: Well, that's why I asked. I
3 can respond.

4 THE EXAMINER: Before you respond, I'd
5 like to just read them.

6 MR. CASE: Sure.

7 THE EXAMINER: Okay.

8 Mr. Case.

9 MR. CASE: My response is basically the
10 same for all of the sections that Mr. Conway has
11 pointed out. I think we have to first understand Mr.
12 Newton is the CEO of Consolidated Electric
13 Cooperative. All these answers that have been
14 discussed are basically he's giving you his explanation
15 of why and how Consolidated has done what it has done
16 in this case, kind of giving some context to the
17 actions taken by Consolidated and why they've done what
18 they've done, and this is clearly admissible under
19 Evidence Rule 701, which says that testimony, even if
20 it's nonexpert testimony, in the form of opinions or
21 inferences, is admissible where it is helpful to a
22 clear understanding of the witness' testimony. That's
23 all this is. It gives a clear understanding of how we
24 got where we are, and I believe it's responsive to a

1 number of the questions that you posed at the
2 prehearing conference, and that's one reason we put
3 those answers in, to kind of give some context to this;
4 so for all those reasons, we would respectfully submit
5 that it is appropriate under Evidence Rule 701 to
6 admit.

7 THE EXAMINER: Mr. Conway, anything?

8 MR. CONWAY: Your Honor, it may be that
9 opinion testimony is appropriate in a proper case, but
10 a nonlawyer or layperson giving legal opinions is not
11 appropriate, and I don't think the evidence rule Mr.
12 Case referred to addresses that point. I don't think
13 it confirms a right to have a lay witness essentially
14 recite without being in a brief or a lawyer's
15 posthearing argument as testimony. It's not evidence.
16 It's argument.

17 THE EXAMINER: Thank you. The motions to
18 strike are denied. We will have plenty of legal
19 arguments on all these issues, but I do not read any of
20 these answers to the questions, based on what the
21 questions were, as being legal conclusions, but just
22 being understandings or assumptions of the witness in
23 regard to how and why the company operated, as opposed
24 to what the legal foundation was for that decision.

1 MR. CONWAY: Thank you, Your Honor.

2 THE EXAMINER: Anything further?

3 MR. O'BRIEN: Your Honor, I have some
4 testimony I'd like to admit.

5 THE EXAMINER: Did you have anything?

6 MR. CASE: Nothing further, Your Honor,
7 other than I'm not sure that our motion was granted.

8 THE EXAMINER: There were no other
9 objections to Consolidated 1, 2, and 3?

10 MR. CONWAY: No, Your Honor.

11 THE EXAMINER: They're admitted, then.

12 MR. CASE: Thank you.

13 THE EXAMINER: Mr. O'Brien.

14 MR. O'BRIEN: Your Honor, on behalf of the
15 City of Delaware, I would ask the court reporter to
16 mark as Delaware Exhibit 1 the direct prefile testimony
17 of R. Thomas Homan and as Delaware Exhibit 2 the
18 rebuttal testimony of R. Thomas Homan.

19 THE EXAMINER: Thank you.

20 MR. O'BRIEN: And I would move the
21 admission of those exhibits into the record at this
22 time.

23 THE EXAMINER: Any objections?

24 MR. RESNIK: Yes, Your Honor. We have an

1 objection concerning two portions of the City of
2 Delaware's exhibits, and I can address both of them at
3 this time. The first I'd like to address is at Page --
4 it's marked Page 4 of 4 and begins at Line 3 --

5 THE EXAMINER: This is the direct?

6 MR. RESNIK: I'm sorry?

7 THE EXAMINER: This is his direct
8 testimony or the rebuttal?

9 MR. RESNIK: There's just direct.

10 MR. O'BRIEN: No. There's rebuttal.

11 MR. RESNIK: There's rebuttal?

12 MR. O'BRIEN: Yes.

13 (Discussion off the record.)

14 MR. RESNIK: In any event, this is the
15 testimony filed January 29. It was just the January 29
16 testimony, Your Honor. I'm sorry.

17 THE EXAMINER: Page 4 of 4?

18 MR. RESNIK: Yes. We do have the rebuttal
19 testimony. The testimony at Lines 3 through 13, this
20 witness is attempting to speak on behalf of Associated
21 Hygienic Products, a facility located in -- actually in
22 Columbus, Southern Power Company's Certified Service
23 Territory that is being served by the Respondent in
24 this case, but when you look at that portion of the

1 testimony, this witness is talking about what, and I'll
2 just use the initials, AHP would have done and why it
3 located where it did, why it shows the supplier that it
4 did, and our view is that it's just hearsay. There's
5 no basis for this witness being able to testify as to
6 what AHP was thinking about, and particularly then it
7 gets into speculation as to what AHP would have done
8 under some different set of circumstances.

9 THE EXAMINER: That's 3 to Line 13?

10 MR. RESNIK: Yes, sir.

11 THE EXAMINER: Mr. O'Brien.

12 MR. O'BRIEN: Your Honor, this testimony
13 is being offered from the perspective of the City of
14 Delaware's understanding of what AHP's position was.
15 What AHP's actual position was is irrelevant. And Mr.
16 Homan is testifying to defense that he was directly
17 involved with and in his direct knowledge. He's
18 testifying his understanding, and that's what is
19 relevant. If AHP created a misconception, again it
20 doesn't have anything to do with what the City of
21 Delaware's perspective on the issue is.

22 THE EXAMINER: Well, I'm going to grant
23 the motion to strike through Line -- I would --
24 starting on Line 4, "When Associated Hygienic

1 Products," through Line 11 -- or through Line 10, where
2 it says, "AHP." What that leaves in is just what
3 you've described. It leaves in, "The economic benefits
4 of multiple providers is borne out by an actual example
5 that is directly analogous to this case." "But due to
6 the availability of an alternative electric supplier,
7 Consolidated, the City of Delaware was able to
8 secure" -- the intervening sentences are opinions of
9 AHP, not the City of Delaware, and I will grant the
10 motion to strike.

11 MR. RESNIK: Thank you, Your Honor. Then
12 just one other, going backward, actually. At Page 3 of
13 4, first two questions and answers, Lines 1 through 9.

14 THE EXAMINER: Page 3?

15 MR. RESNIK: Three, yes. This witness is
16 a city manager. He's not a member of council. He's
17 not secretary of council. His testimony is sort of a
18 mix of offering a legal opinion as to what -- in the
19 first question, what the ordinance means, and the
20 second question is what the Delaware City Council
21 intended to do by certain language in the ordinance,
22 and, again, I don't believe that he can testify
23 regarding the intent of the Delaware City Council.
24 He's not a member. He's not a secretary. There's no

1 minutes of the meeting or the discussion of the
2 council, and I would move to strike both those
3 questions and answers.

4 THE EXAMINER: His testimony is that he
5 holds the position of City Manager. He's testifying on
6 behalf of the City of Delaware. The motion to strike
7 is denied.

8 Anything further?

9 MR. RESNIK: That's it.

10 THE EXAMINER: We're all straight on the
11 direct and the rebuttal?

12 MR. RESNIK: Yes.

13 THE EXAMINER: Any objection to the direct
14 and the rebuttal, Delaware 1 and 2?

15 MR. RESNIK: No, Your Honor.

16 THE EXAMINER: Admitted.

17 Miss McAlister, anything to offer?

18 MS. McALISTER: No, Your Honor. We've
19 only intervened to brief the issues.

20 MR. CASE: Your Honor, I only had one full
21 copy of the deposition with the exhibits, so I can
22 provide that to you this afternoon, have it delivered.

23 THE EXAMINER: I have a copy, if you can
24 provide it to the reporter.

1 Anything further?

2 MR. CASE: Briefings, I guess.

3 THE EXAMINER: Do you have a proposal?

4 MR. RESNIK: I think we were talking about
5 initial brief on April 5th, with reply brief two weeks
6 later, the 19th.

7 THE EXAMINER: Any objection?

8 MR. CASE: That's good.

9 THE EXAMINER: Sounds good to me. The
10 briefing schedule of initial briefs due April 5th,
11 reply briefs April 19th is adopted.

12 Any requests for e-mails of briefs or
13 exchanges?

14 MR. RESNIK: E-mail would be wonderful.

15 THE EXAMINER: I like e-mail. I also like
16 Word documents as opposed to PDF's. And if there is
17 nothing further, this matter is submitted on the
18 record. Thank you.

19 MR. CASE: Thank you.

20 MR. RESNIK: Thank you.


21 (Thereupon, the hearing was concluded at
22 10:29 a.m.)

23

24

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, March 13, 2007, and carefully compared with my original stenographic notes.


Valerie J. Stobas, Registered
Professional Reporter and Notary
Public in and for the State of
Ohio.

My commission expires June 8, 2011.

(VJS-149)

EXHIBIT

Case Number 06-890-EL-CSS

The following exhibit(s) were prefiled and can be located with the pleadings:

[illegible]