

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Complaint of Ohio Power Company,
Complainant,
v.
Consolidated Electric Cooperative, Inc.,
Respondent,
Relative to Violations of the Certified Territory Act.

PUCO

Case No. 06-890-EL-CSS

INITIAL BRIEF
OF
THE CITY OF DELAWARE

I. INTRODUCTION

This complaint by the Ohio Power Company ("OPC") is predicated upon the applicability of Ohio Revised Code ("R.C.") Section 4933.83(A) to the facts involved. However, R.C. 4933.83(A) contains a very explicit limitation to its applicability. The non-exclusive franchise agreement between OPC and the Village of Lexington is squarely within the scope of this explicit limitation, and, as a consequence, R.C. 4933.83(A) does not provide the territorial protection claimed by OPC. As explained below, OPC does not have recourse to the certified territory protections offered by R.C. 4933.83(A) because of the superior authority of its franchise agreement with the Village of Lexington. There is no ambiguity in either the language of R.C. 4933.83(A) or the franchise agreement between OPC and the Village of Lexington. If the

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Commission were to grant OPC its requested relief, it would be doing substantial violence to the agreement between OPC and Lexington; this is a step that R.C. 4933.83(A) and the Ohio Constitution prohibit. “[W]hat the sovereign people *do* by their *constitution*, their subordinate, the legislature, may not *undo* by *statute*, else the agent in government is more powerful than his principal.” *Village of Lucas v. Lucas Local School District, et al.*, (1982) 2 Ohio St. 3d 13, 14 [italics in original].

The outcome of OPC’s complaint may have a precedential effect on the operation of the City of Delaware’s franchise agreements with both the Columbus Southern Power Company (“CSPC”), an affiliate of OPC, and Consolidated within the municipal boundaries of the City of Delaware. It is for this reason that the City of Delaware has intervened in this case and is now urging the Commission to deny the complaint of OPC.

II. BACKGROUND

On July 10, 2006, Ohio Power Company’s (“OPC”) filed its complaint against Consolidated Electric Cooperative, Inc. (“Consolidated”), alleging that Consolidated violated Ohio Revised Code (“R.C.”) Section 4933.83(A) by providing electric service to customers within the certified territory of OPC. This complaint was brought despite the fact that OPC’s franchise with the Village of Lexington is unambiguously non-exclusive and that Consolidated holds a substantially identical franchise covering the same territory. By Entry dated August 21, 2006, the City of Delaware was granted intervention. The motions to intervene of the Industrial Energy Users-Ohio (“IEU”) and American Municipal Power-Ohio (“AMP-Ohio”) were granted by Attorney Examiner’s Entry dated January 24, 2007. A hearing was held in this matter on March 13, 2007, wherein the following testimony was entered into the record: OPC filed the testimony of Selwyn J. Dias and Robert J. Ivinskas, OPC Ex. 1 and 2, respectively; Consolidated

filed the testimony of Brian Newton, Richard McCleerey and the transcript from the deposition of Charles Pscholka, Consolidated Ex. 1,2 and 3, respectively; and the City of Delaware filed the initial and reply testimony of R. Thomas Homan, City of Delaware Ex. 1 and 2, respectively.

The salient facts are as follows. The Village of Lexington entered a franchise agreement with OPC through the adoption of its Ordinance No. 69-21, on June 16, 1969, for a term of 50 years. This franchise agreement is explicitly non-exclusive, containing the following language:

The rights, privileges, and franchise hereby granted shall not be construed to be exclusive and the Council of the Village of Lexington hereby reserves the power to grant similar rights, privileges, and franchises to any other person or persons, firm or firms, corporation or corporations.

On December 20, 2004, the Village of Lexington entered into a separate franchise agreement with Consolidated for a term of 20 years (Ordinance No. 04-66). This franchise agreement contains the identical provisions concerning non-exclusivity as that quoted above.

The rights, privilege, franchise and authority granted by these ordinances enable the franchisees, among other things, to supply electric energy to the Village and its inhabitants without any limitation as to a particular location within the boundaries of the Village.

Consolidated Ex 1, Attachments D and H.

This complaint stems from the provision of electric distribution service to four newly-build residential properties located within the "Woodside" subdivision within the Village of Lexington, Ohio, but outside the certified territory of Consolidated. Consolidated Ex. 1, pp. 3-4. At no time has OPC provided electric distribution service to these premises. Id.

III. APPLICABLE LAW

Ohio Revised Code Section 4933.83(A) provides in pertinent part:

Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have the

exclusive right to furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier; *provided that nothing in sections 4933.81 to 4933.90 of the Revised Code shall impair the power of a municipal corporation to require franchises or contracts for the provision of electric service within their boundaries...*

R.C. Section 4933.83(A) [italics added]. While R.C. 4933.81 defines an electric suppliers' certified territory, R.C. 4933.83(A) gives electric suppliers the exclusive right to serve load centers within that territory. But this section contains a limitation to its operation, and this twice-mentioned limitation operates directly on the exclusive right of an electric supplier to serve within its certified territory. Where the limitation applies, there is no exclusive right to serve under 4933.83(A).

The "otherwise provided" portion of Section 4, Article XVIII of the Ohio Constitution 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.*

[italics added].

IV. ARGUMENT

The franchise agreement between the Village of Lexington and OPC is an exercise of the Village of Lexington's constitutional authority to contract with OPC for the provision of public utility service within its corporate boundaries, just as the Village of Lexington's franchise agreement with Consolidated is an exercise of this same authority. By their terms, both of these franchise agreements are non-exclusive. The plain, unambiguous terms of these franchise

agreements override the operation of Section 4933.83(A) insofar as that section grants an exclusive right to serve a certified territory, both as a matter of constitutional authority as well as by the equally unambiguous terms of R.C. 4933.83(A). Revised Code Section 4933.83(A) creates an exclusive right to serve load within a certified territory only to the extent that such right does not impair the power of a municipality to require a franchise or a contract for the provision of electric service within its boundaries. The Village of Lexington, pursuant to its constitutional authority to contract with OPC for electric service, did require a franchise agreement, and the terms and conditions of that franchise agreement specify that “the rights, privileges, and franchise hereby granted shall not be construed to be exclusive and the Council of the Village of Lexington hereby reserves the power to grant similar rights, privileges, and franchises to any other person or persons, firm or firms, corporation or corporations.” OPC’s claim of right under R.C. 4933.83(A) cannot be reconciled with this condition of its franchise with the Village of Lexington. R.C. 4933.83(A) is self-limiting under these circumstances – the operation of the “right” bestowed by that section would necessarily “impair” the power of the Village of Lexington to require its franchise with OPC as it sees fit, hence the limitation contained in R.C. 4933.83(A) operates, and no right to serve is “provided.”

The laws of construction in Ohio state that if a contract is not reasonably susceptible to more than one meaning, then extrinsic evidence is not permitted and the contract is enforced as written. *E.g., City of Steubenville v. Jefferson County*, 2005 Ohio 6596, p 19, 2005 Ohio App. LEXIS 5927, p. 3 (2005). Further, words and phrases are given their plain and ordinary meaning absent specific contractual definitions. *Id.*, at p. 20. There exists no ambiguity in the terms and conditions of OPC’s franchise agreement with the Village of Lexington – no words that might

suggest that OPC's right to serve is directed to one part of the village or the other and no words that might suggest that the certified territory created by R.C. 4933.81 was intended to apply.

Neither is R.C. 4933.83(A) susceptible to differing interpretations under the circumstances of this case. If the Commission were to grant OPC's requested relief, it would be determining that the Village of Lexington does not have the authority to adopt a non-exclusive franchise agreement with OPC. Such a limitation is nowhere suggested in the language of R.C. 4933.83, rather it makes clear that *nothing* in sections 4933.81 to 4933.90 shall impair the power of a municipal corporation to require franchises or contracts for the provision of electric service. There is not the slightest hint in this language that it really means "nothing -- *except the right to exclusively furnish service granted hereinabove, ...*" But this is the interpretation that OPC's complaint would require the Commission apply.

In the past, OPC has agreed that a franchise ordinance is an exercise of a municipality's authority under Article VXIII of the Ohio Constitution. In *Ohio Power Co. v. Village of Attica, et al.*, a case involving a prior effort by OPC to protect its turf through litigation, OPC argued that Section 4, Article VXIII controls the powers of a municipal corporation respecting public utility services within the municipality and that a franchise agreement is the contract vehicle contemplated by that section of the Ohio Constitution. *Ohio Power Co. v. Village of Attica, et al.*, 19 Ohio App 2d 89, 93 (1969). It would be difficult for OPC to argue otherwise; the law in Ohio is well settled that municipal franchises operate as a contract between the franchising municipal authority and the franchisee public utility. *East Ohio Gas Co. v. City of Cleveland* (1922), 106 Ohio St. 489 at 502-503; 1922 Ohio LEXIS 237, p. 6; *City of Greenville, et al., v. Pub. Util. Comm.*, (1931), 124 Ohio St. 431, 1931 LEXIS 226; *City of Akron v. Pub. Util. Comm.* (1933) 126 Ohio St. 333 at 336-336, 1933 Ohio LEXIS 410, p. 2; *Village of Lucas v. Lucas*

Local School District, et al., (1982) 2 Ohio St. 3d 13, 14. Accordingly, there is no question that the terms and conditions of OPC's franchise with the Village of Lexington are an exercise of Lexington's authority under Section 4, Article XVIII of the Ohio Constitution.

When OPC accepted the ordinance of the Village of Lexington, it subjected itself to the regulation of the municipality – specifically, the terms and conditions of the ordinance. *Ohio Power Co. v. Village of Attica*, 23 Ohio St. 2d 37, 43 (1970). Whatever claims OPC might have had under the Certified Territories Act, it surrendered when it accepted the terms of the franchise to the contrary. The franchise controls. This is consistent with other portions of Title 49. For instance, R.C. 4933.13 provides that

A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. With the consent of the municipal corporation, *under such reasonable regulations as such municipal corporation prescribes*, such company may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires.

[Italics added..] Such “reasonable regulations” would encompass the terms and conditions contained within the franchise agreement between an electric supplier and a municipality.

Beyond the clear inapplicability of the exclusive right contained in R.C. 4933.83(A) to the circumstances of this case, there are other reasons why OPC's complaint must fail as a matter of public policy. The testimony of Richard McCleerey illustrates the importance of having multiple electric suppliers available to serve a community. See Consolidated Ex. 2. In addition, the testimony of R. Thomas Homan, City of Delaware Ex. 1, makes the substantially identical point, albeit with regard to OPC's sister company Columbus Southern Power Company. Similar to Mr. McCleerey, Mr. Homan testified that in the course of attempting to draw new industry to

the City of Delaware, significant problems were encountered with Columbus Southern Power, and the availability of Consolidated to serve the new load was instrumental in bringing new jobs and tax revenues to the city. City of Delaware Ex. 1, pp. 4-5.

The point of both Mr. McCleerey's and Mr. Homan's testimony is that municipalities have a vital interest in a healthy diversity of supply as a means to ensuring adequate electric service within their communities. Non-exclusive franchise agreements are a means of furthering this vital interest.

There is another highly practical reason why OPC's complaint should fail. Irrespective of the Certified Territories Act, an electric utility does not have the right to serve within the boundaries of a municipality without its consent. *Village of Lucas v. Lucas Local School District, et al.*, (1982) 2 Ohio St. 3d 13, 16; *Village of Grafton v. Ohio Edison Co.*, (1996) 77 Ohio St. 3d 102, 107; *State ex rel. Toledo Edison Company v. City of Clyde, et al.*, (1996) 76 Ohio St. 3d 508, 516. Without a valid franchise agreement, a public utility does not have the right to serve customers within the boundaries of that municipality at all, let alone exclusively, irrespective of the certified territorial boundaries created by R.C. 4933.81. If the Commission were to find in favor of OPC in this case, it would lead to further interference with the Village of Lexington's control over the provision of electric service within its boundaries. As an alternative, the village could cancel OPC's franchise with the village in order to prevent altogether OPC from serving new load within the village. Even without OPC in the picture, the Village of Lexington could have multiple electric utilities available to serve new load. This, however, was likely not the intent of the village in granting multiple non-exclusive franchise agreements, and it may be that the village does not want to be forced into this course of action due to an unwise, unwarranted and unnecessary decision by the Commission. This alternative

course of action also underscores the inherent absurdity of OPC's complaint: that a municipality has the power to exclude, but does not have the power to require non-exclusive franchise agreements. But rather than speculate on the intentions of the Village of Lexington, the Commission should simply take the Village at its word: Its franchises are non-exclusive.

IV. CONCLUSION

For all of the forgoing reasons, the City of Delaware urges the Commission to deny the complaint of the Ohio Power Company in this matter.

Respectfully submitted on behalf of
CITY OF DELAWARE




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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Initial Brief was served upon the parties of record listed below this 5th day of April 2007 *via* U.S. mail, postage prepaid and/or electronic service.



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