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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO POWER COMPANY'S INITIAL POST-HEARING BRIEF

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I. INTRODUCTION

Since the enactment of Ohio's Certified Territory Act ("CTA" or "Act") (§§4933.81, *et seq.*, Ohio Rev. Code) in 1978, no electric supplier has claimed the right to serve customers in another electric supplier's certified territory based on the existence of a municipal franchise ordinance – until now. Wrapping itself in banners of "customer choice" and municipal "home rule" authority, Consolidated Electric Cooperative Inc. ("Consolidated") has invaded Ohio Power Company's ("OPCo") Commission-certified service territory and is openly providing service to customers which OPCo has the exclusive right to serve. Consolidated's disregard for the CTA is not limited to the violation presented in this proceeding. It also has breached the Commission-certified territory of OPCO's affiliate, Columbus Southern Power Company ("CSP").

In truth, Consolidated's violation of the CTA has nothing to do with customer choice or municipal home rule authority. Customer choice is statutorily confined to generation service. It neither contemplates nor permits customers choosing their distribution service provider. Moreover, even in the limited scope of customers choosing their generation service provider, Consolidated has not relinquished **its** hold as the only generation service provider in its Commission-certified service territory.[1]

Further, Consolidated's alleged interest in the extent of municipal home rule authority goes no further than its desire to rely on franchise ordinances as the basis for its invasions of other electric suppliers' Commission-certified service territories. It is OPCo's belief that Consolidated is the only electric supplier in Ohio who has taken the position that, in effect, it can override the Commission's careful regulation of certified electric service territories by obtaining

[1] Pursuant to §§ 4933.81(F) and 4928.03, Ohio Rev. Code, a not-for-profit electric supplier such as Consolidated can eliminate its certified territory for generation service. Despite its alleged support for customer choice, Consolidated has not done so.

a franchise from a municipality. Consolidated's position is contrary to law and strong public policy considerations. The "franchise" loophole on which Consolidated relies does not exist.

Consolidated's actions have created uncertainties for customers, developers and all other electric suppliers, where certainty has existed since 1978. The Commission should find that Consolidated's actions are unlawful, thereby restoring order to the disorder created by Consolidated.

II. APPLICABLE FACTS, LAW, AND POLICY

The facts of this case are simple. A portion of the Village of Lexington ("Village") is located within the certified territory of the Complainant, OPCo. *See* Testimony of Selwyn J. Dias (OPCo Ex. 1) at 3-4 and Exhibits A and B. Another portion of the Village is located within the certified territory of Respondent, Consolidated. *See id.* Both OPCo and Consolidated have non-exclusive franchises to distribute electric energy within the village. *See* Ordinance No. 69-21, attached to OPCo Ex. 1 as Exhibit C; *see also*, Ordinance 04-66, attached to Testimony of Brian Newton ("Newton Testimony") as Exhibit D. Consolidated is now furnishing retail electric service to seven customers within the portion of the Village that falls within **OPCo's** certified territory. *See* Newton Testimony at 3.

The law of this case is straightforward as well. The Certified Territory Act gives an electric supplier the exclusive right to furnish electric service to load centers within the supplier's certified territory. *See* § 4933.83, Ohio Rev. Code. The only exception to this rule occurs when the supplier's certified territory includes some or all of a municipality. The municipality may require the supplier to obtain a franchise in order to serve new customers there. *See* §

4933.83(A), Ohio Rev. Code.[2] Here, the Village of Lexington chose to grant a franchise to OPCo. The CTA makes that franchise exclusive for the portions of the Village that lie within OPCo's certified territory.

Consolidated, along with Intervenor, the City of Delaware ("Delaware"), would like to portray this case as a fight to support municipal home rule authority. But, this case has nothing to do with a municipality's ability to choose the electric utility that distributes electric service within municipal bounds. Under the Ohio Constitution and the CTA, a municipality has four choices concerning the provision of electric utility service within its boundaries. It can:

(1) Operate its own electric utility. *See* Ohio Constitution, Art. XVIII, § 4.

(2) Contract with others for the provision of electric utility service in the municipality. *See id.*

(3) Grant a franchise or franchises to the electric utility or utilities whose certified territory or territories include all or some of the municipality. *See* § 4933.83(A), Ohio Rev. Code.

(4) Refuse to grant a franchise to an electric utility whose certified territory includes all or some of the municipality, and instead grant a franchise for the portion of the territory within the municipality to a different utility. *See id.*

Thus, municipalities have certain choices over which utilities offer service within their bounds. But neither the Ohio Constitution nor the CTA authorizes what Consolidated and Delaware argue for here – competition for distribution service **within** a portion of an electric utility's certified territory.

Consolidated's and Delaware's policy arguments are misguided, but more to the point, they are out of place here. Consolidated's position is contrary to the unambiguous language of the CTA and therefore must be rejected. OPCo is entitled to the relief it has requested.

[2] Of course, a municipality's right to exclude an electric supplier from continuing to provide service over its existing facilities after its franchise expires and the municipality declines to renew it is subject to the PUCO's review and approval under § 4905.21 and .22 (the Miller Act). *See Grafton, infra*; *Clyde, infra.*

A. UNDISPUTED FACTS

The facts of this matter are not in dispute. In its Answer, and in the testimony of its President, Brian Newton, Consolidated admits that:

- OPCo is an "electric light company" within the meaning of §4905.03(A)(4), Ohio Rev. Code, and therefore, is an "electric supplier" under §4933.81(A), Ohio Rev. Code. *See* Complaint ¶1, Answer ¶1.

- The boundaries of OPCo's "certified territory" as defined by §4933.81(G), Ohio Rev. Code, have been established in accordance with §§4933.81 to 4933.90, Ohio Rev. Code. *See* Complaint ¶2, Answer ¶2.

- Consolidated Electric Cooperative, Inc. is an "electric light company" within the meaning of §4905.03(A) (4) and, therefore, also is an "electric supplier" under §4933.81(A). *See* Complaint ¶3, Answer ¶3.

- The boundaries of Consolidated's "certified territory" also have been established in accordance with sections 4933.81 to 4933.90. *See* Complaint ¶4, Answer ¶4.

- By Ordinance No. 69-21, enacted on June 16, 1969, Lexington granted to OPCo, among other things, the non-exclusive right, privilege, franchise and authority to construct, operate and maintain facilities for the distribution of electric energy within the streets, thoroughfares, alleys, bridges and public places of the Village in order to provide public utility service in the Village and to its inhabitants, for a term of fifty years. *See* Complaint ¶11, Answer ¶11.

- Consolidated has constructed electric distribution facilities to, and is currently serving, seven electric load centers ("customers") within OPCo's certified territory in the Village of Lexington. *See* Complaint ¶9, Answer ¶9; *see also*, Newton Testimony at 2 and 3.

Thus, Respondent admits that (1) the Village of Lexington granted OPCo a franchise to distribute electric energy within the portion of OPCO's certified territory that is within the Village (see Answer ¶11), and (2) Consolidated has constructed electric distribution facilities to electric load centers within the portion of OPCo's certified territory that lies within the Village (*see id.* ¶¶9 and 14).

B. APPLICABLE LAW

Almost one hundred years have passed since Ohio's Constitution was amended to provide certain "home rule" powers to municipalities. *See Village of Lucas v. Lucas Local School Dist.* (1982), 2 Ohio St.3d 13, 14, 442 N.E.2d 449 (discussing the passage of the "Home Rule Amendments" to the Ohio Constitution in 1912). These powers include the power to operate their own utilities and to contract with a third party to provide electric service for the municipalities' or their inhabitants' use. *See* Ohio Constitution, Art. XVIII, § 4. Almost thirty years have passed since Ohio's legislature passed the Certified Territory Act.

Now, after all this time, Consolidated relies on a non-existent loophole in the CTA and a novel interpretation of the Ohio Constitution to argue that municipalities can override the Commission's authority to establish certified service territories by simply enacting a franchise ordinance. According to Consolidated, municipalities like the Village of Lexington have the Constitutional authority to grant non-exclusive franchises that authorize electric utilities to compete to offer electric **distribution** service within each others' certified territories. *See* Answer ¶17-26. This argument is not only unprecedented, it is contrary to the unambiguous language of both the Ohio Constitution and the CTA. The Village of Lexington's franchises do not, and cannot, undo the exclusivity provisions of the Certified Territory Act.

The Ohio Constitution and the CTA are clear. A municipality may choose to supply electric service to the municipality's residents itself or through a contract with a third party. Alternatively, it may authorize, by passage of a franchise ordinance, an electric supplier to supply service to the municipality's residents. The municipality need not grant a franchise to the electric supplier whose certified territory includes some or all of the municipality.[3] However, if

[3] Again, this is subject to the Miller Act, which requires Commission approval before a municipality may exclude a utility from continuing to provide electric distribution service to existing customers.

the municipality **does** grant a franchise to the electric supplier whose certified territory includes some or all of the municipality, then that electric supplier has the exclusive right and obligation to furnish electric service to all electric load centers within the portion of the municipality that lies within the utility's certified territory – no more and no less.

Here, the Village of Lexington chose to grant a non-exclusive franchise to OPCo. Under the CTA, that franchise, coupled with the Commission's service territory certification, gives OPCo an **exclusive** right to serve the portion of the Village that is in OPCo's certified territory. The same is true for Consolidated. Under the CTA, the Village's non-exclusive franchise to Consolidated, coupled with the Commission's service territory certification, gives Consolidated an **exclusive** right to serve the portion of the Village that is in Consolidated's certified territory. While both OPCo and Consolidated have non-exclusive rights to serve customers within the Village of Lexington, the CTA restricts them both to serving the portions of the Village that fall within their respective territories. Consolidated's attempt to use the "non-exclusivity" provisions of the Village's franchises to allow competition for electric distribution service **within OPCo's *territory*** violates the plain language of the Act. Consequently, OPCo is entitled to the relief requested in its Complaint.

1. Once The Village of Lexington Granted OPCo A Franchise, The Certified Territory Act Prohibited Consolidated From Offering Electric Service In OPCo's Certified Service Territory Within The Village

"The purpose of The Certified Territory Act, which was signed into law in 1978, was to establish exclusive service territories for Ohio electric suppliers." *In the Matter of the Complaint of Union Rural Elec. Coop. v. Dayton Power and Light Co.*, 1988 Ohio PUC LEXIS 776, at ¶7. The Act gives an electric supplier the **exclusive** right to furnish electric distribution service to electric load centers within its certified territory:

> (A) 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 * * *.[4]
>
> (C) Except as provided in division (B) of this section[5] and Article XVIII of the Ohio Constitution,[6] each electric supplier has the obligation and **exclusive right** to furnish electric service to electric load centers, wherever located, which it was serving on January 1, 1977, * * * and **no other electric supplier shall furnish, make available, or extend electric service to any such electric load centers.**

§ 4933.83, Ohio Rev. Code (emphases added). In other words, "each electricity-producing public utility is assigned a territory under which it has the exclusive right to sell electricity to the inhabitants of that territory." *Toledo Edison Co. v. City of Bryan*, 90 Ohio St.3d 288, 291, 2000-Ohio-169, 737 N.E.2d 529 (internal citation omitted). Consolidated admits that, in violation of that right, it is providing electric service to customers within OPCo's certified territory. *See* Complaint ¶9, Answer ¶9; *see also*, Newton Testimony at 3.

The CTA makes limited exceptions for municipalities that lie within an electric supplier's certified territory. The Act "is expressly limited by [a municipality's] right to require a franchise contract to serve [the municipality's] inhabitants." *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 107, 1996-Ohio-336, 671 N.E.2d 241 (citations omitted). The Act permits a municipality to refuse the service of the electric supplier whose certified territory includes all or some of the municipality and, instead, grant a franchise to any other electric supplier. *See* § 4933.83(A), Ohio Rev. Code. Alternatively, the municipality can choose to create its own municipal utility, or contract with others for the provision of service, and thereby exclude other

[4] Respondent notes for some reason that the electric load centers it is currently serving within OPCo's certified territory are new, "not existing centers served by OPCo prior to the commencement of service by Consolidated." Answer ¶25. That is irrelevant. The CTA assigns an "exclusive right to furnish electric service to **all** electric load centers located presently **or in the future** within [the electric supplier's] certified territory." § 4933.83(A), Ohio Rev. Code (emphasis added).

[5] Section 4933.83(B), Ohio Rev. Code, pertains to the provision of physically adequate service by the existing electric supplier and is not relevant to this Complaint.

[6] Article XVIII of the Ohio Constitution is discussed in the next section of this brief.

electric suppliers entirely. *See, e.g., State ex rel. Toledo Edison Co. v. City of Clyde* (1996), 76 Ohio St.3d 508, 517, 1996-Ohio-376, 668 N.E.2d 498.

Thus, the Village of Lexington had a choice under the CTA. It could have created its own utility, or contracted for the provision of electric service, and thereby excluded both OPCo and Consolidated. Or, it could have refused to grant a franchise to OPCo and **only** granted a franchise to Consolidated. Had the Village done this, Consolidated would have had the right and the obligation to serve customers throughout the Village.[7] But, the Village of Lexington did not do this. Instead, it granted a franchise to OPCo, and then granted an essentially identical franchise to Consolidated.

Consolidated makes much of the fact that its franchise does not limit Consolidated to providing electric distribution service to areas within the corporate limits that are located in its certified territory. *See* Newton Testimony at 4. But, this is irrelevant. The **CTA** imposes that limitation. Under the unambiguous exclusivity provision of § 4933.83(A), Ohio Rev. Code, OPCo and Consolidated each has "the **exclusive** right to furnish electric service to all electric load centers located presently or in the future **within its certified territory**[.]" § 4933.83(A), Ohio Rev. Code (emphasis added). The non-exclusive franchise the Village of Lexington granted to Consolidated does not, and could not, authorize Consolidated to breach OPCo's certified territory. Therefore, when Consolidated did breach OPCo's certified territory, it violated the Certified Territory Act.

[7] As noted earlier, once OPCo had a franchise from the Village, expelling OPCo from serving customers within the Village would be subject to this Commission's jurisdiction under the Miller Act.

2. The Ohio Constitution Does Not Authorize The Village of Lexington To Grant Franchises That Violate The Certified Territory Act

> A municipal franchise ordinance authorizing a utility to provide service within the municipality, but not **requiring** the utility to provide service to anyone, and not fixing rates to be charged, does not constitute a contract under §4, Art. XVIII of the Ohio Constitution.
>
> *Galion v. Galion* (1951), 154 Ohio St. 503, 506-07, 43 Ohio Op. 435, 96 N.E.2d 881.

Consolidated asserts that the CTA is limited by the Ohio Constitution, which (Consolidated says) permits municipalities to grant competitive franchises like those at issue here. *See* Answer ¶17-26. The first part of this argument is correct; the CTA is limited by the Ohio Constitution. Respondent, however, misreads the relevant Constitutional text. Nothing in the Ohio Constitution gives municipalities the authority to grant franchises that would allow an electric supplier to furnish electric service in another, franchised, electric supplier's certified territory.

Section 4 of Article XVIII of the Ohio Constitution, the portion of the Constitution that Consolidated seeks to enlist in support of its argument, states in pertinent part:

> 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.**

(Emphasis added). The Supreme Court of Ohio has explained that "the primary purpose of that provision is to confer power upon municipalities to construct and operate their own utilities or secure by contract the product or service of other utilities." *Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 354, 37 Ohio Op. 39, 78 N.E.2d 890. In other words, §4 grants municipalities **the "power[ ] to buy or sell electricity."** *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*

(1996), 76 Ohio St. 3d 521, 526, 668 N.E.2d 889 (emphasis added); *see also, id.* at 527-28 (explaining that a municipality is excluded from the CTA "when it operates . . . its own utility[ ] for the purpose of generating power to service the municipality or its inhabitants" or "secure[s] by contract from another utility a product or service for the municipality's needs.") (Douglas, J., concurring); *see also, Toledo Edison Co. v. City of Bryan* (2000), 90 Ohio St.3d 288, 288 ("Section 4 authorizes a municipality to establish, maintain, and operate a power plant to produce electricity" or "contract to purchase electricity."); *State ex rel. Mitchell v. Council of Milan* (1938), 133 Ohio St. 499, 504, 11 Ohio Op. 187, 14 N.E.2d 772 ("Section 4 * * * authorizes municipal ownership and operation of public utilities and the purchase of public utility products or service from others.").

The Village of Lexington, however, chose neither of these two options. The Village did not construct and operate its own utility. Nor did the Village purchase power. It did not, in other words, "contract" with either OPCo or Consolidated, as the word "contract" is used in the Ohio Constitution. Instead, the Village issued ordinances granting both OPCo and Consolidated "the right, privilege, franchise, and authority" to construct, operate, and maintain facilities for the distribution of electric energy within the City of Lexington. *See* Complaint ¶ 11, Answer ¶¶ 11 and 17. The Supreme Court of Ohio has held that franchises such as these are not "contracts," as that term is used in Article XVIII of the Ohio Constitution. *See Galion v. Galion* (1951), 154 Ohio St. 503, 506-07, 43 Ohio Op. 435, 96 N.E.2d 881 (holding that a municipal ordinance granting a utility authority to supply "electric service" to industries within the municipality, but not **requiring** the utility "to supply, furnish or sell electric current to anyone" and not "fix[ing] the rates to be charged[,]" "does not constitute * * * a 'contract with any person or company'" under §4, Art. XVIII of the Ohio Constitution).

In *Galion,* the Court also noted that, under the franchise ordinance, the city "would have no interest in any dispute which might arise between the [utility] and [its customers] with respect to furnishing or supplying of such service." *Id.* at 507. Likewise, the franchise ordinances at issue in this proceeding do not create an interest for the Village in service-related disputes that might arise between OPCo and its customers residing in Lexington or between Consolidated and its customers residing in Lexington. Thus, nothing in § 4, Art. XVIII of the Ohio Constitution authorizes a municipality to grant utilities competitive franchises for providing electric distribution service within the utilities' certified territories, as Consolidated claims the Village has done.

Moreover, the Supreme Court of Ohio already has affirmed that an electric supplier cannot use a municipality's home-rule powers under §4, Article XVIII of the Ohio Constitution as a means to furnish electric service in another, franchised electric supplier's certified territory. In *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St. 3d 521, 668 N.E.2d 889, the Court held that a municipality may not purchase electricity from an electric supplier and sell it to a municipal resident located outside the electric supplier's certified territory "for the sole purpose of circumventing the Certified Territory Act." *Id.* at 526. In other words, a municipality may not act as a "straw man" and engage in a sham transaction to help a load center within the municipality or an electric supplier avoid the territorial restrictions of the CTA. For the same reason, a municipality may not issue multiple, non-exclusive franchises that ostensibly create competition for electric distribution services within the municipality. Consolidated's franchise from the Village of Lexington should not be construed to grant a right to compete in OPCo's certified service territory that the Village has no power to provide.

C. PUBLIC POLICY

1. Consolidated and Delaware's Policy Arguments Are Improper and Misguided

Finally, Consolidated and Delaware each make policy arguments to support their new interpretations of the Ohio Constitution and CTA. These arguments are simply out of place. The people of Ohio decided the breadth of powers to grant municipalities when they adopted the "Home-Rule Amendments" of 1912. The Ohio Legislature set further policy in this arena, consistent with the Ohio Constitution, when it passed the Certified Territory Act in 1978. If Consolidated and Delaware believe the law needs to be changed, they can seek redress with the Ohio Legislature or the people of Ohio. They should not, however, be seeking approval from this Commission for blatantly violating the exclusivity restrictions of the Act.

Consolidated claims to be defending the Act, arguing that preventing municipalities from granting competing, non-exclusive franchises would conflict with what Consolidated asserts is one of the purposes of the CTA, "to assure that municipalities * * * retain the right to determine * * * whether to permit * * * multiple providers of electric service within their municipal boundaries." Answer ¶28. But, there is no evidence that this **was** one of the purposes underlying the CTA. In fact, the language of the Act plainly contradicts this assertion.

As this Commission has held, "the Commission's statutory responsibility * * * is to apply the provisions of [the CTA]. Unambiguous statutes are to be applied, not interpreted." *In the Matter of the Complaint of Union Rural Elec. Coop. v. Dayton Power & Light Co.*, PUCO No. 88-947-EL-CSS, 1989 Ohio PUC LEXIS 204, at ¶5. Here, the CTA states unambiguously that an "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[.]" § 4933.83(A), Ohio

Rev. Code. Given this unambiguous statement of principle, the Commission should be loathe to read into the CTA an endorsement of intra-territorial competition within municipalities.

Delaware, in turn, argues that municipalities need the right to offer a choice of electric suppliers for economic reasons. According to Delaware, communities might lose prospective new employers (and taxpayers) if the existing, franchised utilities do not offer the "cost and reliability" that those businesses desire. *See* Testimony of R. Thomas Homan at 3-4. Whether this is true or not, a number of this Commission's decisions confirm that the CTA does not allow customers to change electric suppliers simply because they object to the cost of their electric service.

For instance, in *In the Matter of the Complaint of R. Dwight McKee, Complainant, v. Holmes-Wayne Electric Co-operative, Inc. and Ohio Power Company, Respondents*, PUCO No. 86-631-EL-CSS, 1986 Ohio PUC LEXIS 777, the Commission held that a farm owner in OPCo's certified territory could not choose instead to receive electric service from an electric co-operative simply because the co-operative would charge less for extending power lines to new homes being built on his property. The Commission noted that the CTA authorizes the Commission to switch customers from one electric supplier to another in only two cases:

- "[I]f this Commission finds that the electric supplier is not providing and does not propose to provide physically adequate service we may issue an order requiring the electric supplier to provide adequate service. If the electric supplier fails to comply with such an order, we may authorize another electric supplier to serve that electric load center." *Id.* at ¶6, citing (§ 4933.83(A) [should be (B)], Ohio Rev. Code.

- "Section 4933.83(E), Revised Code, permits this Commission to reallocate service territories if we are petitioned to do so by both the electric supplier in whose territory the electric load center is located and the electric supplier who wishes to serve that electric load center." *Id.* at ¶8.

Because OPCo was willing and able to provide service to the farm owner, the Commission concluded it could not authorize the electric co-operative to provide that service instead. "An

allegation that the cost of service is too high," the Commission held, "is not an allegation that the company does not propose to provide adequate service pursuant to Section 4933.83[(B)], Revised Code." *Id.* at ¶ 7. The Commission reached similar conclusions in *In the Matter of the Complaint of J.B. Spencer, Complainant, v. Ohio Edison Company, Respondent*, PUCO No. 85-1837-EL-CSS, 1986 Ohio PUC LEXIS 1525, at ¶8, and *In the Matter of the Complaint of Roxanna and Alden Hildebrandt Complainants, v. The Toledo Edison Company, Respondent*, PUCO No. 87-1741-EL-CSS, 1987 Ohio PUC LEXIS 1097, at ¶6.[8]

As these cases show, the Ohio Legislature provided customers with a remedy if their electric supplier is not providing physically adequate service. But, the Ohio Legislature did not provide customers with the authority to switch electric service providers simply to save money; nor did it provide one electric supplier with the authority to breach the certified service territory of another supplier even if it might enable some customers to save money. And, there is nothing in the CTA that suggests that municipalities have the power to authorize this kind of competition for electricity distribution service, regardless of the arguments Delaware might raise for the creation of such a rule.

2. Compelling Policy Considerations Support OPCo's Position

In any event, if the resolution of this Complaint depended on policy considerations (and it should not, because the law plainly supports OPCo's position), they also support OPCo's position. As a starting point, the Commission should agree that the existing procedure that the CTA provides for assigning the obligation and complementary right to provide electric service (*see* § 4933.83(B) and (E), discussed above) has worked well. If the Commission approves a

[8] OPCo is unaware of any prior case in which the electric supplier intentionally breached the certified service territory of another electric supplier. The reasoning resulting in the Commission decisions cited in this paragraph also supports OPCo's argument that Delaware's policy argument is without foundation.

change in a certified service territory boundary pursuant to either of those statutory provisions, the affected electric suppliers also modify their boundary maps and file the revised maps with the Commission. All parties are aware of any changes in the rights and responsibilities for serving customers. Consolidated would relegate this tried-and-true process for assigning and transferring service rights and obligations to the junk heap, along with the knowledge electric suppliers have regarding the location of their customers and associated facilities.

A more recent legislative policy consideration is found in the enactment of Ohio's electric industry restructuring legislation – Am. Sub. S.B.3. That legislation enacted Chapter 4928, Ohio Rev. Code, and made complementary amendments to the CTA. As relevant to this proceeding, Chapter 4928 made **generation** service a competitive service, but did not make **distribution** service competitive. Clearly, the General Assembly recognized the advantages of electric suppliers retaining their obligation and exclusive right to provide distribution service in service territories certified by the Commission and assigned to individual electric suppliers.

The continued regulation of distribution certified service territories also avoids the variety of significant adverse impacts which would result if Consolidated's view were to prevail. **First**, as Mr. Dias explained, OPCo operates its electric distribution service business under the assumption that it has both the exclusive right, in comparison to other electric suppliers, and the obligation to provide electric distribution service to customers in its certified territory, including those portions of its territory that are within municipalities for which it has franchise authority. OPCo Ex. 1 at 7. He noted that if one or more other electric suppliers, such as Consolidated, also has a right to provide electric distribution service to customers within the portion of OPCo's certified territory that lies within the Village, there will be several adverse consequences. For example, one impact will be on OPCo's obligation to provide electric distribution service to any

customers in its certified territory within the Village. Logically, the obligation is tied to the exclusive right to serve because the costs of being in a position to fulfill an obligation to serve customers must be recovered from those customers. The way that OPCo recovers costs from customers is by selling them services. Consequently, the rational conclusion is that if OPCo does not have the exclusive right to provide electric distribution services to customers in its certified territory within the Village, it would not have an obligation to serve them either. *Id.* at 7-8. Mr. Dias noted that there is no obvious choice regarding which, if any, electric supplier would have an obligation to serve customers in OPCo's certified territory within the Village if Consolidated's view prevails. *Id.* at 8.[9]

Mr. Dias observed that there would be a similar impact on OPCo's obligation to provide temporary service and default generation service. He explained that OPCo often extends distribution facilities and furnishes power on a temporary basis to developers and contractors, which they use to build improvements and structures that owners and tenants then occupy on a permanent basis. If OPCo is not going to be the supplier of electric service to the consumer once construction at the premises is complete, the logical conclusion is that it should not be required to provide service on a temporary basis during the construction phase. Nor, should it have an obligation to provide default generation service to customers within the Village, at least not to those who become customers of Consolidated. Similarly, it is not obvious that there would be any electric supplier that would have an obligation to provide temporary service or default generation service in these circumstances. *Id.* at 8-9.

[9] Consolidated contends that the first electric supplier to provide service to a customer would retain the obligation to serve. *See* Newton Testimony at 5. However, there is no support for this conclusion since, as the Supreme Court of Ohio has held, a franchise ordinance does not compel the electric supplier to provide service. *See Galion, supra*, 154 Ohio St. at 506-07. Moreover, Mr. Newton's testimony still leaves unanswered the question of which electric supplier, if either, is obligated to provide service initially.

Second, Mr. Dias also described the impact of Consolidated's position on OPCo's existing investment in distribution plant and the adverse impact on customers. His concern is that distribution facilities already constructed to provide service to existing and future customers within OPCo's certified territory in the Village will be idled or underutilized. He explained that, as a result, the costs of those idled or underutilized distribution facilities that OPCo would have recovered through electric distribution services provided to customers who, instead of remaining or becoming OPCo customers, take service from Consolidated, will not be recovered from those customers. *Id.* at 9-10. Instead, such costs would have to be recovered from other OPCo customers. *Id.* at 10.

Third, Mr. Ivinskas testified regarding the uncertainty that Consolidated's position will create with respect to the planning and construction of OPCo's distribution facilities. Mr. Ivinskas explained that OPCo plans, designs, and constructs distribution facilities, including their size and location, based on anticipated loads in an area. To the extent that OPCo's ability to project load growth in a particular locale becomes more uncertain, for example due to a new uncertainty regarding whether it will be serving new distribution service customers (or continuing to serve existing customers), the likelihood that it will either oversize or undersize the distribution facilities in that area will increase. OPCo Ex. 2 at 3.

Mr. Ivinskas explained that oversizing will lead to construction of duplicate, and thus underutilized, distribution facilities. In that event, more costs will be incurred than would have been the case if OPCo had been able to more accurately size the new facilities prior to construction. He noted that a variation of this problem will occur when existing customers switch their distribution service to another electric supplier, idling or reducing the utilization of

existing distribution facilities.[10] He pointed out that undersizing distribution facilities will lead to a different type of problem. It increases the risk to the reliable operation of OPCo's distribution system. *Id.* at 3-4.

Fourth, another problem that Mr. Ivinskas testified Consolidated's position creates is that it would adversely affect the efficiency and timeliness of OPCo's maintenance and service restoration activities. He testified that if another electric supplier (or suppliers) may construct facilities and extend electric service to customers interspersed with OPCo's customers in the portion of its certified territory that is within a municipality such as Lexington, it will adversely affect the efficiency and timeliness of maintenance and service restoration activities. He allowed that some confusion already occurs with the current system of certified territories, as the result of the difficulty in some instances of confirming which electric supplier is responsible for customers whose properties abut the electric suppliers' boundary. However, if the certified boundaries are eliminated, as Consolidated apparently advocates should happen within municipalities like Lexington, he stated that the confusion would increase significantly. *Id.* at 4.

Mr. Ivinskas provided as an example of the adverse impact on service restoration activities an apartment tenant, unaware of who his electric supplier is, who contacts OPCo to report a service outage. He explained that in that instance an OPCo service truck might be dispatched only to find upon arrival that the party is served by Consolidated. Consolidated would then have to be notified that its customer is out of service. It would, in turn, dispatch a service truck and restore service. This would delay service restoration to the tenant. He also noted that the converse situation also could happen. Another example that Mr. Invinkas

[10] Consolidated contends that it has no interest in extending its service to customers already served by OPCo. *See* Newton Testimony at 4-5. However, if Consolidated's legal analysis is correct, there is nothing that would preclude Consolidated, or some other electric supplier, from extending service to customers already served by another electric supplier.

provided involved damage and hazard assessment after a major ice storm or summer storm. Assessors unfamiliar with the area and facilities would have an extremely difficult time determining which facilities need to be assessed, delaying both the assessment and, ultimately, restoration efforts. *Id.* at 4-5.

Mr. Ivinskas testified that the magnitude of the problem that OPCo and CSP face today of timely and efficiently maintaining and restoring service to customers near their service area boundaries is fairly stable. He noted that under the current system of certified territories, each boundary is fixed. "We know where it is." *Id.* at 5-6. In addition, the boundary only changes upon the agreement of the two suppliers and the Commission's approval. So, again, each supplier knows where the boundary is located even when it does change. The same is true for OPCo's and CSP's boundaries with municipal systems. OPCo and CSP know where they are and, almost without exception, their facilities are outside of the municipal borders and the municipal system's facilities are inside of the city. He noted that that even in the case of Columbus, the one exception, the location of CSP's facilities and the City's facilities have remained fairly static over time. *Id.* at 6.

If Consolidated's position prevails, Mr. Ivinskas predicted that facilities of each supplier will end up interspersed with the other's, potentially throughout the municipality.[11] He testified that the level of difficulty that such a system would create for timely and efficiently restoring and maintaining distribution facilities would be much greater than what is currently encountered in Ohio. *Id.*

[11] Consolidated contends that its interest in extending its service within OPCo's certified service territory is limited to areas in close proximity to the existing certified territory boundaries. *See* Newton Testimony at 6. Consolidated's presence about two miles into CSP's service territory more accurately reflects Consolidated's intention. Moreover, if Consolidated's legal analysis is correct, there is nothing that would preclude Consolidated, or some other electric supplier, from extending service deep into the certified service territories of other electric suppliers.

Finally, Mr. Ivinskas's greatest concern with regard to Consolidated's position is the impact it would have on safety during maintenance and service restoration activities. He explained that during maintenance and service restoration activities the safety of the line crews, damage assessors, and others depends on OPCo's and CSP's personnel having information regarding which electric supplier is responsible for which distribution facilities. This is particularly true, he emphasized, in instances of downed lines that might still be energized. Mr. Ivinskas explained that if electric suppliers' distribution service customers and, thus, distribution facilities are interspersed, determining which electric supplier is responsible for specific equipment and customers will become more problematic. He testified that the magnitude of the challenges OPCo and CSP will face with regard to safety issues will increase as the difficulty of determining which electric supplier is responsible for which distribution facilities increases. *Id.* at 6-7.

Mr. Ivinskas provided an example of the type of problem that could be encountered involving a downed wire reported to OPCo by a Lexington municipal authority during a severe storm. The OPCo first responder could possibly mistake a Consolidated circuit for an OPCo circuit and remotely open what the responder believes is the isolating device for the downed wire. The OPCo responder would return to the downed wire after opening the isolating device and possibly end up working with an energized circuit that the responder mistakenly believes is de-energized. That, Mr. Ivinskas warned, could be a fatal mistake. *Id.* at 7.

III. CONCLUSION

The law is clear and the policies are compelling. Therefore, for the reasons stated above, Complainant Ohio Power Company respectfully requests that this Commission:

- find that OPCo has stated reasonable grounds for its Complaint;
- find that, by furnishing retail electric service to seven customers in Lexington, Ohio, whose load centers are within OPCo's certified territory, Consolidated is in violation of § 4933.83(A), Ohio Rev. Code;
- find that, upon furnishing, making available, rendering, or extending its electric service to other customers whose load centers are within OPCo's certified territory, or even offering to furnish, make available, render, or extend its electric service to other such customers, Consolidated will be in violation of § 4933.83(A), Ohio Rev. Code;
- find that, by violating § 4933.83(A), Ohio Rev. Code, Consolidated is subject to the remedies and penalties provided by §§ 4905.54, 4905.56, 4905.57, 4905.59, 4905.60, 4905.61, and 4905.99(B), Ohio Rev. Code;
- order Consolidated to cease and desist from furnishing electric service to the seven customers in Lexington, Ohio, whose load centers are within OPCo's certified territory;
- order Consolidated to transfer service that it is currently providing to the seven customers in Lexington, Ohio whose load centers are within OPCo's certified territory to OPCo; and
- order Consolidated to cease and desist from furnishing, making available, rendering, or extending its electric service to other customers whose electric load centers are within the certified territory of OPCo, or even offering to furnish, make available, render, or extend its electric service to such customers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Initial Post-Hearing Brief of Ohio Power Company was served by First-Class United States Mail, postage prepaid and electronic mail, upon the following counsel of record this 5th day of April, 2007:

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