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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.	)	

INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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April 5, 2007

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I. BACKGROUND

On July 10, 2006, the Ohio Power Company ("OPCo") filed a Complaint alleging that Consolidated Electric Cooperative, Inc. ("CEC") violated Section 4933.83, Revised Code, part of Ohio's Certified Territory Act, inasmuch as CEC is currently serving at least four customers in OPCo's service territory in the Village of Lexington.[1] Industrial Energy Users-Ohio ("IEU-Ohio") moved to intervene on September 1, 2006 for the limited purpose of briefing the issues. The Public Utilities Commission of Ohio ("Commission") granted IEU-Ohio's intervention on January 24, 2007. The evidentiary record in this proceeding was completed on March 13, 2007. Pursuant to the procedural schedule established by the Attorney Examiner in this proceeding, IEU-Ohio hereby submits its Initial Brief for the Commission's consideration.

The irony of OPCo's Complaint is not lost on IEU-Ohio and it should not be ignored by the Commission as it works its way to a lawful disposition of the issues.

[1] As a result of Ohio's electric restructuring legislation, OPCo no longer possesses a certified service area with regard to generation service.

OPCo is asking the Commission to block a supplier (selected based on the supplier's responsiveness and performance) from serving four residential customers. OPCo made its move to block customer access to their supplier of choice despite the fact that in Case No. 03-2570-EL-UNC[2] the Commission found that OPCo violated a stipulation requiring OPCo to make service quality improvements for customers in the rural portions of OPCo's service territory. OPCo, along with Columbus Southern Power Company ("CSP", collectively referred to as "AEP") has also filed a self-complaint to obtain an increase in distribution rates and charges of approximately $640[3] million, which AEP says is necessary to maintain increased spending on distribution service reliability. AEP's application for a distribution rate increase was filed by AEP despite the fact that it sought and obtained a freeze on distribution rates and charges as part of its rate stabilization plan.[4] In the case of Ormet, a customer that wanted to return to OPCo after transferring to a cooperative, OPCo refused to serve Ormet under standard tariff service offerings. Ormet was ultimately permitted to change suppliers after agreeing to pay a price acceptable to AEP.[5] More generally, the current customers of OPCo and CSP are seeing their annual electric bills increase through a combination of automatic annual increases, self-implementing increases subject to possible refund and riders to

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[2] *In the Matter of a Settlement Agreement Between the Staff of the Public Utilities Commission of Ohio and Columbus Southern Power Company and Ohio Power Company*, Case No. 03-2570-EL-UNC, Finding and Order at 1 (January 21, 2004).

[3] *In the Matter of the Self-Complaint of Columbus Southern Power Company and Ohio Power Company Concerning the Implementation of Programs to Enhance Their Currently Reasonable Level of Distribution Service Reliability*, Case No. 06-222-EL-SLF, Self Complaint of Columbus Southern Power Company and Ohio Power Company at 2-3 (January 31, 2006) (hereinafter, "Self-Complaint").

[4] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 22 (January 26, 2005) (hereinafter "RSP Opinion and Order").

[5] *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company,* PUCO Case No. 05-1057-EL-CSS, Supplemental Opinion and Order (November 8, 2006).

permit AEP to further increase rates and charges so that its customers can underwrite investment in new generating technologies[6] or selectively deal with the costs incurred to, for example, respond to storms.[7] And, if a new residential customer located in OPCo's service area wanted OPCo to extend service, the customer would likely be looking at extra charges as a result of OPCo's line extension tariff.[8]

The Commission should not lose sight of the fact that regulation was initially introduced as a result of legislative determinations that competition, duplication of systems and unmanaged redundancy had to be managed **for the benefit of customers**.[9] Section 4928.02, Revised Code, also makes it clear that the Commission's mission must be driven by outcomes that are useful to ultimate customers. In this case specifically, the developer of the properties now occupied by the customers targeted by OPCo's Complaint testified that he resorted to seeking assistance from CEC after OPCo was unresponsive, failed to comply with Village of Lexington's requirements, caused delays and was known by customers in the area more for frequent service outages than for customer-driven service. All of these very

[6] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Opinion and Order (April 10, 2006) and Entry on Rehearing (June 28, 2006); appeal pending in *Industrial Energy Users-Ohio v. The Public Utilities Commission of Ohio*, Ohio Supreme Court Case No. 2006-1594.

[7] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Implement Storm Related Service Restoration Cost Recovery Riders*, Case No. 06-412-EL-UNC, Finding and Order (August 9, 2006).

[8] OPCo Tariff No. 18, Original Sheet No. 3-9.

[9] Statement of D. Bruce Mansfield on RCNLD (reproduction cost new less depreciation) before the Joint Select Committee on Energy, June 24, 1975 at page 4. Mr. Mansfield was retained to speak on behalf of the investor-owned electric, gas and telephone utilities following his retirement as President of Ohio Edison Company.

real considerations threatened the viability of the development. Proposed Testimony of Richard McCleery at 1.

Even if OPCo's Complaint had legal merit – and it does not – there is nothing in the relief sought by OPCo that might be regarded as being useful to the four residential customers which are the current object of OPCo's affection, developers who depend on the timely assistance of utilities or units of local government that strive to meet the needs of the citizens through the exercise of their Constitutional authority. OPCo's requested relief is built on an obnoxious foundation of bad policy and bad law.

II. THE COMMISSION SHOULD DENY OPCO'S COMPLAINT INASMUCH AS OPCO HAS FAILED TO STATE REASONABLE GROUNDS FOR ITS COMPLAINT

As the complainant seeking to preempt CEC from serving customers within a municipality with which CEC and OPCo have nonexclusive franchise agreements, OPCo has the burden of proving that CEC has violated the Certified Territory Act.[10] As demonstrated below, OPCo has not met its burden of proof. Moreover, the issues raised by OPCo's Complaint are without merit and OPCo's proposed remedy is overly broad and unnecessary. For these and the other reasons set forth below, IEU-Ohio urges the Commission to deny OPCo's Complaint.

A. OPCo's Complaint must be dismissed because the Commission is bound by precedent.

This is not a case of first impression. The Commission is bound by *Ohio Power Co. v. Attica*, 23 Ohio St.2d 37 (1970). In that case, OPCo sought a declaratory judgment and injunctive relief against the village of Attica and North Central Electric Cooperative, Inc. ("North Central") when Attica granted North Central a nonexclusive

[10] The Certified Territory Act refers to Sections 4933.81 through 4933.99, Revised Code.

franchise agreement to serve a new development in OPCo's service territory not previously served by any provider. The Appellate Court found that:

> Either because North Central was a public utility prior to the time the ordinances in question were adopted... or because the record is silent, and Ohio Power has failed to prove the controlling point of time when public utility status must exist, there is no showing of any illegality either in the adoption of the ordinances in question or in the franchise and street lighting contract contemplated by such ordinances. So far as the record is concerned the ordinances and such franchise and street lighting contract are authorized by the Constitution and by statute.

Ohio Power Co. v. Attica, 19 Ohio App.2d 89, 99 (1969). The Appellate Court concluded that OPCo was entitled to neither the declarative judgment nor injunctive relief. OPCo appealed the decision to the Ohio Supreme Court, which upheld the Appellate Court and determined that a "nonprofit corporation organized to manufacture, distribute and sell electric power to the public, either on a membership or a nonmembership basis, is a public utility, and that a municipality may contract with such a corporation to supply electric power for the use of the municipality **and its inhabitants**." *Id.* at 44 (emphasis added).

The holding in *Attica* is applicable to this case. This case deals only with new customers not previously served by any utility provider located within both a certified service territory of a public utility and a municipality that has granted multiple, nonexclusive franchises to provide electric distribution service within the municipality. Thus, the Commission must follow the law, find that the facts presented by OPCo result in no violation of the Certified Territory Act and dismiss OPCo's Complaint on the merits.

B. OPCo's Complaint must be dismissed because "Home Rule" trumps the Certified Territory Act and, thus, CEC did not violate any Ohio law.

In its Complaint, OPCo argues that the service territories of OPCo and CEC were established pursuant to and in accordance with the Commission's service territory authority in Sections 4933.81 through 4933.90, Revised Code. OPCo Complaint at 2.[11] Section 4933.83(A), Revised Code, grants electric suppliers the exclusive right to furnish electric service to all electric load centers located within their respective certified territories, and prohibits electric suppliers from furnishing service to electric load centers outside of the certified territory. However, the Certified Territory Act is limited and applies only to the extent allowed in Article XVIII of the Ohio Constitution. Of course, Article XVIII of the Ohio Constitution is the source of the Village of Lexington's home rule authority.

Article XVIII § 4 of the Ohio Constitution states that any municipality may acquire the use and franchise of any company supplying a utility service or product and that the municipality may contract for utility service with any public utility. OHIO CONST. art. XVIII, §4. Thus, the rights established by the Certified Territory Act are limited and apply within municipalities only to the extent not otherwise modified by the municipality through a franchise or other agreement.[12]

There is additional support in the law that demonstrates that public utilities' rights are not superior to the authority of municipalities' to arrange for the pricing and supply of electric power for the use of the municipality and its inhabitants.

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[11] The July 10, 2006 Complaint also specifically states that Sections 4933.83 and 4933.86, Revised Code, provide the legal predicate for the relief requested.

[12] *See also*, Section 4905.65, Revised Code, permits municipalities to reasonably restrict the construction, location, or use of a public utility facility through any legislative or administrative action having the effect of restricting or prohibiting the use of an existing public utility facility, unless the public utility facility: 1) is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; 2) is to be constructed in accordance with generally accepted safety standards; and 3) reasonably affects the welfare of the general public.

Ohio's ratemaking law acknowledges that municipalities may, by ordinance, fix the rates and terms of service that a public utility may charge within the municipality. Section 4909.34, Revised Code. The utility's acceptance of the ordinance divests the Commission of jurisdiction. Only when a utility provides notice to the Commission that it does not accept such an ordinance does the Commission have jurisdiction to examine whether the municipality's rates are just and reasonable. Section 4909.38, Revised Code.

Section 4933.83, Revised Code, contains another significant exception to certified service territory authority. It states that in the event that a municipality "refuses to grant a franchise... for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality, any other electric supplier may serve the municipal corporation under a franchise... with the municipal corporation." Section 4933.83(A), Revised Code.

As acknowledged in *Attica* and as indicated by the clear language in Sections 4933.83 and 4909.34, among others, the Certified Territory Act does not establish service area rights in any electric supplier that are superior to a municipality's "Home Rule" authority. Municipalities have the right and authority, as stated in the Ohio Constitution, Ohio case law and the Certified Territory Act itself, to alter a distribution company's certified service territory within the municipality by granting multiple nonexclusive franchise agreements or refusing to grant franchises.

There is no dispute that the Village of Lexington granted both OPCo and CEC nonexclusive franchise agreements. Thus, while the past practice of utilities may have been to maintain the service territories within the municipal boundaries despite nonexclusive franchise agreements, there is no violation of the Certified Territory Act to

do otherwise, particularly when, as in this case, the customers request service from a utility authorized to provide it within a municipality. Proposed Testimony of Richard McCleerey at 1.

Because the Village of Lexington granted both OPCo and CEC nonexclusive franchise agreements pursuant to the powers granted to municipalities in Article XVIII of the Ohio Constitution, CEC is not an electric supplier that has violated the Certified Territory Act. Consequently, OPCo's Complaint is without merit and must be dismissed on the merits.

C. OPCo's Complaint must be dismissed because OPCo cannot demonstrate any harm and did not seek a declaratory judgment.

The relief OPCo requests is broader than might apply to four residential customers that OPCo initially targeted in its Complaint. OPCo seeks relief that, if granted, would operate to generally bar CEC from meeting the service needs of ultimate customers. More specifically, OPCo asks the Commission to preclude CEC from serving or soliciting the residential customers it identifies in its Complaint as well as all other customers within OPCo's territory. OPCo alleges that as a result of CEC's actions it will suffer at least potential harm in several ways: 1) the efficiency and timeliness of OPCo's maintenance and service restoration may be affected; 2) safety during maintenance and service restoration may be impacted; 3) OPCo may have increased uncertainty regarding its planning and construction of its distribution facilities; and, 4) OPCo may be obligated to provide temporary and/or permanent service without a corresponding exclusive right to provide permanent service. None of these concerns demonstrates either actual harm or even potential harm that OPCo is not already addressing and for which OPCo is not already being compensated. Even if these

potential policy considerations had merit, there is no legal basis for the Commission to violate the law on policy grounds.

OPCo's first two potential concerns regarding safety, efficiency and timeliness of processes after service outages or required maintenance would only be ripe if there is no coordination or communication between OPCo and any other service provider with customers adjacent to OPCo's customers. As the Commission knows, OPCo and other electric suppliers have sent crews to other states to assist in service restoration efforts. It is hard to imagine that some simple communication between OPCo and CEC would not leave both utilities with some service restoration options that are useful to both the suppliers and their customers.

As discussed above, a municipality has a right to operate its own distribution system or contract for distribution service irrespective of any electric utility's certified service territory. Section 4933.83(A), Revised Code. In fact, there are municipalities within the boundaries of OPCo's service territory that own and operate their own distribution systems. Ivinskas Testimony at 5. Furthermore, there are service providers serving customers adjacent to OPCo's customers along the entire length of OPCo's service territory boundary. Thus, it is clear that OPCo must currently address issues regarding coordination among other providers to safely, efficiently and effectively restore and maintain service. OPCo has not suffered any actual harm and could avoid any potential harm to itself or its customers by putting into place what should already be basic protocol for situations that OPCo admits it already deals with on a regular basis. Ivinskas Testimony at 5.

Similar to OPCo's first two potential concerns, OPCo's third potential concern that it will over or under size facilities due to the uncertainty created by CEC's position is

meritless. Budgeting for new distribution facilities ahead of time is an art, not a science due to the inherently unpredictable nature of forecasting growth. OPCo's planning and sizing of distribution lines, or any utility's for that matter, always involves some uncertainty about the number of customers and size of the customers that may ultimately require service. OPCo's rates provide it with both a return on and of capital and OPCo has made no showing that any opportunity for just and reasonable compensation has been impaired by CEC's or the Village of Lexington's actions.[13]

The bigger issues involved in this case surround OPCo's concern that it has an obligation to provide temporary and/or permanent service without an exclusive right to serve new customers within its certified service territory and the inference that if OPCo does not have a right, it does not have the obligation to serve any customers within its certified service territory. Notwithstanding the fact that the Ohio Supreme Court has already resolved this issue, the assumption that OPCo must not have an obligation to provide service if it does not have an exclusive right to serve new customers is flawed.

Since the inception of regulation of utility service, utilities have had an obligation to provide service to the general public. The obligation to provide service applies to all public utilities, regardless of whether they are incumbent distribution companies regulated by the Commission or not-for-profit cooperatives. *See Industrial Gas Co. v. Pub. Util. Comm.*, 135 Ohio St. 408, 413 (1939), in which the Court states, "A public

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[13] It is also worth noting that OPCo's tariff addresses the problems associated with designing and sizing facilities:

> Before the Company shall be required to furnish service, the Company may request that a customer submit written specifications of electrical apparatus to be operated by service, and to furnish the Company a detailed sketch giving the location of the customer's facilities. Such requests will be limited to specific instances where such information significantly assists the Company in designing and sizing its local facilities.

OPCo Tariff No. 18, Original Sheet No. 3-1.

utility to the extent of its capacity is bound to serve those of the public who need the service and are within the field of its operations, at reasonable rates and without discrimination." *Id.* (internal citations omitted). Although Amended Substitute Senate Bill 3 ("SB 3") changed the pricing mechanism by which incumbent electric distribution utilities are compensated for providing the generation supply, nothing in SB 3 modified the common law obligation of any public utility to serve customers. Thus, regardless of whether a distribution service provider is a regulated incumbent electric distribution utility or a municipally owned utility, it has an obligation to provide service.

The details of OPCo's obligation to provide service (including temporary service[14]) are specified in the provisions of its Commission-approved tariff that specify the availability of various service offerings as well as prices. *See* OPCo Tariff No. 18, Original Sheet No. 3-1, which states, in pertinent part:

> These Terms and Conditions of Service apply to service under the Company's schedules which provide for generation, transmission and distribution service. Customers requesting only distribution service from the Company, irrespective of the voltage level at which service is taken, as provided for in Section 4928.40(E), Ohio Revised Code, shall be served under the Company's open access distribution schedules and the Terms and Conditions of Open Access Distribution Service shall apply.

While utilities have an obligation to provide service to the general public, as discussed above, incumbent distribution providers operating within municipal corporations do not necessarily have any right to provide service to new customers. It is also true that customers located within a municipality may have supplier choices that

[14] The fact that OPCo may have provided temporary service is irrelevant in this case since OPCo charges a tariffed rate for temporary service and is fairly compensated for the temporary service in accordance with the tariff details. *See* OPCo Tariff No. 18, Original Sheet No. 3-10, paragraph 14. Also, OPCo elected to provide temporary service knowing that it had a non-exclusive service opportunity within the Village of Lexington. As a result of OPCo's inattentiveness to the service opportunity it was provided, the service turned out to be more temporary than OPCo may have assumed.

are enabled by the exercise of the municipality's Home Rule authority irrespective of statutory or Commission-approved tariff provisions.

OPCo has not demonstrated any harm resulting from CEC's actions and the potential policy considerations raised by OPCo have no merit. Accordingly, there is no legal or other basis for the Commission to violate the law to grant OPCo's Complaint.

D. Currently existing measures already address a default by CEC.

The Attorney Examiner's request that parties address the issue of what should happen if the Commission denies OPCo's Complaint and customers being served by CEC want to come back to OPCo or are forced to OPCo if CEC defaults demonstrates that there is confusion about what is at issue in this case.

This case is about the distribution function of providing electric service – not generation. OPCo has no certified service area obligations with regard to generation supply. Also, it is about new customers that have not yet been served by any distribution provider. Thus, this complaint case does not present facts that require the Commission to resolve issues that may be raised by customers that may desire to return to OPCo if CEC "defaults." It is unclear from a practical standpoint how CEC could even default on providing distribution service without physically cutting lines. Nonetheless, if CEC defaults, the municipality has legal remedies associated with its franchise agreement, contract for service, and common law. Also, if CEC defaults and is determined to be providing inadequate service, the Commission has the power to change CEC's certified service area and to direct other actions to remedy the problem.[15] Furthermore, whether a customer was a returning customer or a new customer, OPCo would have an obligation to provide distribution service at its Commission-approved

[15] *See* Section 4933.83(B), Revised Code.

tariffed distribution rates. OPCo would also be fairly compensated for any physical facilities it may be required to provide through its line extension tariff.[16]

III. CONCLUSION

For the reasons discussed herein, IEU-Ohio respectfully requests that the Commission deny OPCo's Complaint.

Respectfully submitted,

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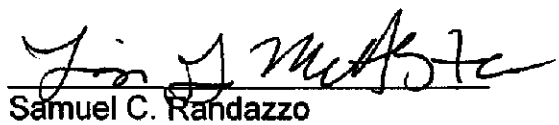
[16] Similarly, if CEC also defaults on its obligation to provide generation, OPCo would have an obligation to serve the customers as new customers (not returning customers because they have never before taken service from OPCo) pursuant to the existing plan, whether a rate stabilization plan, a market based standard service offer or something else in place at the time.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 5th day of April 2007, via electronic transmission.



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