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April 19, 2007

Via Hand Delivery

Ms. Reneé J. Jenkins
Director of Administration
Secretary of the Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

RE: In the Matter of the Complaint of Ohio Power Company v. Consolidated Electric Cooperative, Inc., Public Utilities Commission of Ohio, Case No. 06-890-EL-CSS

Dear Ms. Jenkins:

Enclosed are an original and ten (10) copies of a Post-Hearing Reply Brief, to be filed in connection with the above-referenced matter on behalf of Consolidated Electric Cooperative, Inc.

Thank you for your assistance. If you have any questions, please do not hesitate to call.

Very truly yours,

Carolyn S. Flahive

Enclosure

cc: Steven D. Lesser, Chief of Staff
All Parties of Record

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

RESPONDENT CONSOLIDATED ELECTRIC COOPERATIVE, INC.'S POST-HEARING REPLY BRIEF

I. SUMMARY

Ohio Power Company ("Ohio Power") argues in its initial Post-Hearing Brief that the Village of Lexington's exercise of its Article XVIII, Section 4 powers is limited by, and must be reconciled with, Ohio's "Certified Territory for Electric Suppliers" Act, Revised Code § 4933.81 *et seq.* (the "Act"). This is backwards, because pursuant to Article XVIII, Section 4 of the Ohio Constitution, the starting point for legal analysis is the Constitution itself. This point was cogently stated by the court in *Dibella v. Ontario*, 4 Ohio Misc. 120, 124 (1965) as follows:

> Perhaps the most important objective of the Home Rule was to give to each municipality the authority to carry out municipal functions without statutory authorization. The proper approach, therefore, to a municipal authority problem is not to determine whether such is authorized by statute, but rather to proceed on the basis that the function is authorized by the Home Rule Amendment and then determine whether such function can be restricted by the state legislature and, if so, whether the legislature has in fact restricted the manner in which such function can be carried out. *See Farrell-Ellis*, Ohio Municipal Code (11 Ed. pg. 3 *et seq.*); *also see* 1 McQuillin, Municipal Corporations (3 Ed.), Home Rule Sections.

Consolidated demonstrated in its initial Post-Hearing Brief that Lexington's grant of a franchise to Consolidated, coupled with Consolidated's acceptance of that franchise, constituted an exercise of Lexington's Article XVIII, Section 4 contracting powers. *Ohio Power v. Village of Attica*, 23 Ohio St.2d 37 (1970) ("*Attica*"); *Lucas v. Lucas Local School District*, 2 Ohio St.3d 13, 14 (1982) ("*Lucas*"). In its Brief, Ohio Power never addresses *Attica* or *Lucas*, and instead rests its constitutional argument entirely on a single sentence lifted out of context from the much older, and clearly distinguishable, case of *Galion v. Galion*, 154 Ohio St. 503 (1951) ("*Galion*"). The *Galion* case involved a municipal ordinance enacted to permit two specifically named customers of a municipal-owned electric utility whom the utility was no longer able to serve, to obtain electric service from another supplier. Even if *Galion's* holding had any relevance to this proceeding, which it does not, the broad proposition asserted by Ohio Power is plainly inconsistent with later Ohio Supreme Court decisions, and has been effectively overruled.

Aside from its misguided citation of *Galion*, Ohio Power ignores the plenary power of municipalities over public utilities pursuant to Article XVIII. Ohio Power, without support in the constitutional text itself or the case law, espouses a watered-down version of this municipal authority which would effectively strip much of Lexington's home rule power to contract with public utilities. Ohio Power shies away from directly criticizing Lexington and the explanation of its administrator, Charles Pscholka for Lexington's motives in enacting Ordinance No. 04-66. However, if Ohio Power is successful in this proceeding, the plenary power of Ohio municipalities over public utilities will be a thing of the past.

Most telling is Ohio Power's breathtaking assertion that Lexington's grant of a non-exclusive franchise to Ohio Power is magically transformed, against Lexington's will, into an exclusive grant. (Ohio Power Brief at 6-8.) The concept that a franchisee can claim additional

rights and privileges beyond those intended by the franchisor/municipality is a novel one that presents an unprecedented challenge to the constitutional power of municipalities to contract with public utilities.

Ohio Power seeks to further hamstring Ohio's municipalities and Lexington by claiming that if Lexington is going to act in regulating providers of public utility services, it must do so by creating a monopoly. (*See* Ohio Power Brief at 8.) The assertion that monopoly is a municipality's only constitutional choice is belied by the experience in Ohio with ongoing competition for new customers between (1) the City of Columbus Division of Electricity and Columbus Southern Power Company within the City of Columbus; and (2) Cleveland Public Power and Cleveland Electric Illuminating Company ("CEI") within the City of Cleveland. Moreover, in the *Attica* decision, the Supreme Court blessed similar competition between two different electric suppliers under competing franchises, allowing them both to serve the same subdivision. *Attica*, 23 Ohio St. 2d at 43-44.

Finally, Ohio Power's brief for the first time unveils the claim that service by Consolidated in Lexington is a "sham transaction" in Lexington. (Ohio Power Brief at 11.) Ohio Power has concocted this claim so it can rely upon *Cleveland Electric Illuminating Company v. Pub. Util. Comm'n.*, 76 Ohio St.3d 521 (1996). However, that case does not support Ohio Power's position; it involved a claimed retail sale of electricity disguised as a wholesale sale through a "straw man" designed for the sole purpose of circumventing the Act. Lexington is no "straw man." Lexington has acted pursuant to its constitutional powers and its own public policy concerns in granting a franchise to Consolidated. There is not the slightest hint in the evidence of any foul play or dishonesty which could form the basis for assertion of a "sham."

II. ARGUMENT

A. THE FRANCHISE GRANTED BY LEXINGTON TO CONSOLIDATED IS AUTHORIZED PURSUANT TO ARTICLE XVIII, SECTION 4 OF THE OHIO CONSTITUTION.

As Consolidated stated in its initial Post-Hearing Brief, if Lexington's grant of a franchise to Consolidated is authorized by Article XVIII, Section 4 of the Ohio Constitution, then the need for further analysis ends. The Ohio Supreme Court has held that "contracting for public utility services is exclusively a municipal function under Section 4, Article XVIII of the Ohio Constitution." *Lucas v. Lucas Local School District*, 2 Ohio St.3d 13 (1982). The Court in *Woodbran Realty Corp. v. Orange Village*, 67 Ohio App.3d 207 (appeal dismissed, 52 Ohio St.3d 712 (1990)) held as follows:

> This power to contract or decline to contract for public utility services is 'plenary.' *Dravo-Doyle v. Orrville*, 93 Ohio St. 236, syllabus. Thus the authority conferred by section 4, Article XVIII is beyond the pale of the general assembly to limit, restrict, or otherwise control. *Board of Delaware County Commissioners v. Columbus*, 26 Ohio St.3d 179, 184 (1986).

Woodbran Realty Corp., 67 Ohio App.3d at 211-212.

Citing *Galion v. Galion*, 154 Ohio St. 503 (1951), Ohio Power claims that Ordinance 04-66 does not trigger Lexington's authority under Article XVIII, Section 4 because (1) Lexington is not the party directly purchasing the power from Consolidated for resale to its residents; (2) the ordinance simply authorizes service by Consolidated and does not have words in it compelling Consolidated to provide service within the village; and (3) the ordinance does not specify the rates to be charged for service (see Ohio Power Brief at 10).

Ohio Power's citation of *Galion* is misplaced. *Galion* involved a scenario in which the City of Galion owned and operated a municipal electric plant by which had become "wholly inadequate and insufficient to meet the demands of its customers," including two manufacturing companies. *Galion,* 154 Ohio St. at 504. Therefore, Galion authorized another utility by

ordinance to furnish electric service only to those two companies (and not the public generally).[1] A question arose as to whether this ordinance was subject to referendum because of the provision contained in Article XVIII, Section 5 of the Ohio Constitution requiring that contracts entered into pursuant to Section 4 of the Article are subject to referendum. The Supreme Court held that the ordinance was not subject to referendum. *Galion*, 154 Ohio St. at 506-507.

Galion does not apply here. It simply facilitated special contracts between a utility and two companies which were customers of the city's municipally owned utility. Therefore, the ordinance involved in *Galion* was not really a "public utility" contract because that ordinance did not authorize the grantee to offer or render "public utility" service indiscriminately to all inhabitants.

The *Galion* court expressly acknowledged the limited effect of the ordinance in that case. Given the special circumstances of the *Galion* case, the court held that the effect of the grant was to "only provide for extension of the present service furnished by the existing municipally owned plant." *Galion* 154 Ohio St.507, quoting with approval *State ex rel. City of Fostoria v. King*, 154 Ohio St. 213 (1950). Both *Galion* and *Fostoria* hold that an ordinance providing for "the alteration, repairing, improvement, enlarging and extending" of a municipal utility is not an action subject to referendum under the provisions of Article XVIII, Sections 4 or 5. *Fostoria*, 154 Ohio St. at 217.

Thus, the circumstances of the *Galion* case are clearly distinguishable from the facts of the instant case. However, even if one indulges as correct Ohio Power's reading of *Galion* — that a municipal franchise given to a public utility to provide public utility service, and to use the city streets for said purpose, is not an action that is authorized by Article XVIII, Section 4 — such holding is inconsistent with later cases and has been tacitly overruled.

[1] A copy of the Ordinance is attached as Appendix A.

In *Attica*, Ohio Power (the same utility involved here) possessed a non-exclusive franchise to serve customers in the Village of Attica. Ohio Power attacked a second franchise granted by Attica to North Central Electric Cooperative, Inc. ("North Central") to serve areas Ohio Power was already authorized to serve by its own franchise from the Village of Attica. The ordinance granted North Central a franchise "to use the streets . . . and other public ways and places within the Village of Attica . . . for the purpose of supplying electricity for power and light . . .."[2] Like Ordinance 04-66 in which Lexington granted Consolidated a franchise, nothing in the Attica franchise ordinance specified rates or specific terms of service. Like Ordinance 04-66, there were no provisions in the Attica franchise ordinance for direct purchase of power by the Village of Attica from North Central.[3] Nevertheless, *Attica* held that North Central was a public utility and that its right to render public utility service pursuant to Attica's grant of the franchise was authorized pursuant to Article XVIII, Section 4 of the Ohio Constitution. *Attica*, 23 Ohio St.2d at 44.

The absence of direct municipal purchase, rate regulation, or specific verbiage "compelling" service in the *Attica* franchise ordinance posed no difficulty for the Supreme Court:

> . . . [w]hen North Central accepts the franchise for the municipality of Attica, it will subject itself to regulation by the municipality. For example, R.C. 743.26 provides that the legislative authority of the municipal corporation in which electric lighting companies establish facilities . . . may regulate the price which such companies may charge for electric light . . . and R.C. 4933.13 provides that an electric company may furnish electric power within a municipal corporation . . . with the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes. *Attica* 23 Ohio St.2d at 43-44.

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[2] Attica Ordinance 126-A, attached as Appendix B.

[3] Ordinance 04-66 is strikingly similar to the Attica grant to North Central in that it grants Consolidated a franchise to operate "along the streets, thoroughfares, alleys, bridges, and public places . . . of the Village of Lexington, State of Ohio, lines for the transmission and distribution of electric energy only . . . to render public utility service in said village and to the inhabitants thereof by supplying electric energy to said village and inhabitants thereof for light, heat, power, or any other purposes or purpose for which electric energy is now or may hereafter be used. . . ." See Testimony of Brian Newton, Consolidated Exh. 1 and Exhibit D attached thereto. ("Newton Testimony")

According to the teachings of *Attica*, acceptance of such a franchise does indeed obligate the franchisee in ways that were not raised or discussed in the *Galion* decision. Mere acceptance of such a franchise subjects the franchisee to municipal regulation and obligates it to provide public utility service to all.

It is important to note that Ordinance 04-66 specifically directs Consolidated to use authorized facilities to render "public utility service."[4] The acceptance by Consolidated of such a franchise commits it to "hold itself out to serve impartially the citizens generally of the territory occupied by it." *Attica*, 23 Ohio St.3d at 42 quoting with approval *Celina & Mercer County Tel. Co. v. Union Center Mutual Tel. Assn.*, 102 Ohio St. 487, 493 (1921). This commitment to render public utility service also means that Consolidated has devoted its facilities to "public use [which] must be of such character that the product and service is available to the public generally and indiscriminately," *Attica*, 23 Ohio St.2d at 42-43, quoting with approval *Southern Ohio Power Co. v. Pub. Util. Comm'n.*, 110 Ohio St. 246 (1924). Moreover, the court of appeals decision in *Attica* held that an acceptance of such a franchise by a franchisee "commits it to serving the public." *Ohio Power Co. v. Attica*, 19 Ohio App.2d 89, 99 (1969). In like manner, Ohio Power's acceptance of its Lexington franchise obligates it to provide public utility service.[5]

Accordingly, Ohio Power's unstinting efforts to limit Lexington's exercise of its constitutional authority under the guise of an attack on Consolidated should be rejected. Consolidated has been charged by Lexington with providing public utility service to the

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[4] It has always been the law that "a public utility franchise granted by a municipality is under authority of Sections 4 and 5 of Article XVIII of the Ohio Constitution and constitutes a contract. The contract is evidenced by the ordinance adopted by the municipality and its acceptance by the utility." *Parks, a taxpayer v. Cleveland Ry Co. et al.* 124 Ohio St. 79 (1931), syllabus.

[5] It is also noteworthy that the Supreme Court's decision in *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508 (1996), recognizes that a non-exclusive franchise granted by Clyde to Toledo Edison Company that is similar to Ordinance 04-66 was an exercise of power under Article XVIII, Section 4, and that the granting of such a franchise is in effect an exercise of the municipality's power under Article XVIII, Section 4 "to contract for public utility services." *Id.*

inhabitants of Lexington for the twenty year duration of the granted franchise. Acceptance of this franchise by Consolidated did not create a "loophole" (Ohio Power Brief at 5); it created a contract with the municipality under which Consolidated is obligated to provide Lexington's inhabitants "public utility service," and which subjected Consolidated to regulation by Lexington Accordingly, this franchise is a "contract" contemplated by Article XVIII, Section 4.

B. ARTICLE XVIII, SECTION 4 DOES NOT REQUIRE A MUNICIPALITY TO CREATE A MONOPOLY FOR SUCH SERVICE.

There is no constitutional basis for Ohio Power's argument that if Lexington chooses to exercise its authority under Article XVIII, Section 4, it must do so in a way to create a monopoly either for itself, or for some company with which it contracts.[6] (Ohio Power Brief at 8.) The constitutional grant of authority to municipalities to "contract with others," suggests a plural authority -- not a singular limitation. The operative word is the word "others," which is plural of "other." If it had been intended to authorize only a single municipal franchise, the operative word would have been the singular word "another." If a municipality's only choice under its plenary power is to create a monopoly, how can it possibly be that the City of Columbus and the Cleveland Public Power presently compete for new customers with Columbus Southern Power and CEI respectively?

Moreover, in the *Attica* decision, both Ohio Power and North Central were granted franchises by the Village of Attica enabling both companies to serve the same subdivision. The courts in *Attica* were well aware that the dual franchises created a competitive situation, and yet sustained both the dual franchises as a proper use of Article XVIII, Section 4 authority. This is made abundantly clear in the Court of Appeals decision in *Attica*. The Court of Appeals

[6] As noted in Consolidated' initial Post Hearing Brief, a municipality's "contract with others" stands on the same constitutional footing as if the municipality was rendering the service itself by means of its own municipal electric system. (Consolidated Brief at 12.)

discussed this competitive situation as follows before siding with North Central in sustaining its second franchise:

> Although Ohio Power does not have nor does it claim a monopoly under its agreements, such contractual relationships are indirectly involved for they place Ohio Power in direct competition with North Central in furnishing the same services within the same area where North Central's continued competition will deprive Ohio Power of potential customers and thus cause it loss.

Attica, 19 Ohio App.2d at 94-95.

If Ohio's municipalities are truly to have authority over public utility franchising within their boundaries, they certainly have the right to make a policy decision that more than one supplier best serves the public needs. That is essentially what the court held in *Attica* over forty years ago. Nothing in the Act changes this because the Act, by its terms, is subordinate to municipal constitutional authority.

Furthermore, in *Lucas*, *supra*, the Supreme Court acknowledged that a municipality, if it so chose, could decide to create competition between itself and a franchised electric supplier. In *Lucas*, the Village of Lucas purchased electricity at wholesale from Ohio Edison, and in turn sold the electricity at retail to the residents of the Village of Lucas. The largest single purchaser from the Village was the Lucas Local School District. That school district decided to enter into a separate agreement with Firelands Electric Cooperative, Inc. to obtain electric service. *Lucas*, 2 Ohio St.3d at 13.

The Supreme Court enjoined the school district from contracting for public utility services, saying that this authority was granted to municipalities by Article XVIII, Section 4 of the Ohio Constitution. *Lucas*, 2 Ohio St.3d at 16. However, the Court made it clear that had Firelands sought and received permission from the Village to supply electric power to the school district by obtaining a franchise, the Village could have permitted Fireland's service to the school, notwithstanding the competing presence of the Village electric system. *Lucas*, 2 Ohio

St.3d at 16. Given this broad authority recognized in *Lucas*, Commission action against Consolidated would usurp the constitutional prerogative of Lexington to allow two suppliers within its boundaries.[7]

Finally, the decision by the Supreme Court in *State ex rel. Toledo Edison Company v. City of Clyde*, 76 Ohio St. 3d 508, 518 (1996) further underscores a municipality's power to create competition within its territorial limits by the granting of franchises. By implication, the Court there blessed the concept of a municipality operating a Article XVIII, Section 4 utility while at the same time granting a franchise to a competitor when it said:

> Therefore, unless a public utility has a franchise giving it the right to serve the municipal inhabitants, that public utility has no right to serve the customers within its service territory that are located within a municipality that is operating a Section 4, Article XVIII utility and declared an intention to serve such customers.

Clyde, 76 Ohio St.3d at 518.

In short, if a municipality in its wisdom determines that some limited customer choice for electric distribution service is advisable within its municipal boundaries, it is entitled to make that policy decision. If a municipality's sole power under Article XVIII, Section 4 were to create a monopoly, the provision would have said so. It does not.

C. OHIO POWER'S POSITION THAT THE NON-EXCLUSIVE FRANCHISE GRANTED BY LEXINGTON MUST BE INTERPRETED AS EXCLUSIVE IS INCONSISTENT WITH THE ACT ITSELF.

Next, Ohio Power unabashedly asserts that the Act effectively transforms Ohio Power's non-exclusive franchise into one that is exclusive. (Ohio Power Brief at 6-8.) Nonsense! The Act itself defers to the terms of franchise agreements entered into between municipalities and suppliers. Ohio Revised Code Section 4933.83(A) provides that "nothing in [the Act] shall

[7] Indeed, this Commission has recognized that one of the "statutory goals of the legislature" was "a clear exception in the Certified Territories for Electric Suppliers Act allowing vibrant municipal competition." *In the Matter of the Application of the City of Clyde Requesting Removal of Certain Electric Distribution Facilities of the Toledo Edison Company from within Clyde's Corporate Limits*, Case No. 95-02-EL-ABN (Opinion and Order, April 1, 1996) at 17.

impair the power of municipal corporations to require franchises or contracts for the provision of electric services within their boundaries." The clear message of the statute is that franchise agreements are to be honored – not just in part, but in their entirety.

It has always been the law that non-exclusive franchises to occupy and use public property in service to the public do not grant freedom from competition. *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 138 (1939). Similarly, in *Triad CATV v. The City of Hastings*, 1990 U.S. at. LEXIS 18212 (6th Cir. 1990) (attached as Appendix C), the court rejected an attempt by a cable company provider to enjoin a city's award of another cable franchise on the grounds that that award interfered with the plaintiff's own non-exclusive franchise agreement with the city. The Court held that the holder of a non-exclusive franchise has no authority to demand "immunity from competition" and, as a general matter "the distribution of cable franchises should be left to the discretion of local governmental bodies." *Id.*

In other words, Ohio Power cannot employ the Act to change its contract, and create exclusivity when none was granted. Ohio Power's assertions to the contrary must be rejected.

D. EVEN ASSUMING ARGUENDO THAT ARTICLE XVIII, SECTION 4 OF THE OHIO CONSTITUTION DOES NOT APPLY, THE GRANT OF A FRANCHISE BY LEXINGTON TO CONSOLIDATED IS AUTHORIZED BY ARTICLE XVIII, SECTION 3 OF THE OHIO CONSTITUTION.

As indicated above, Article XVIII, Section 4 provides the constitutional authority for Lexington's grant of a public utility franchise to Consolidated. But, assuming arguendo that it does not, Article XVIII, Section 3 would provide an alternative ground for doing so.

Article XVIII, Section 3 of the Ohio Constitution, commonly known as the Home Rule Amendment, provides:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

The Ohio Supreme Court has recognized two distinct powers of municipalities within the Section 3 Home Rule Amendment: (1) to exercise all powers of local self-government, and (2) to adopt and enforce police, sanitary, and other similar regulations as are not in conflict with general laws. *American Financial Services Assn. v. City of Cleveland*, 112 Ohio St.3d 170, 174 (2006). The words "as are not in conflict with general laws" modify only the words "local police, sanitary and other similar regulations," but do not modify the words "powers of local self-government." *Ohio Association of Private Detective Agencies v. City of North Olmsted*, 65 Ohio St.3d 242, 244 (1992). Therefore, a municipality's exercise of local self-government may be in conflict with general laws while its exercise of municipal police power may not.

Assuming that the Act can be properly characterized as a general law, and assuming that Lexington's franchise ordinance, and Consolidated's actions taken pursuant thereto, can be properly characterized as a police power, then they are valid unless the ordinance can be said to permit or license that which the Act forbids and prohibits. *American Financial Services*, 112 Ohio St.3d at 178, citing *Struthers v. Sokol*, 108 Ohio St. 263, 268 (1923), syllabus, para. 2. In *City of Cincinnati v. Baskin*, 112 Ohio St.3d 279, 283 (2006), the Supreme Court described the type of conflict which would doom a city ordinance as one in which the state statute "positively" prohibits that which the ordinance would permit. That is not the case here. Indeed, the very language of the Act positively permits any municipal exercise of power under "Article XVIII" — not just those actions taken pursuant to Section 4.

Therefore, Lexington's constitutional authority is authorized under Section 4, or alternatively, Section 3, of Article XVIII.

E. SINCE CONSOLIDATED'S SERVICE TO CUSTOMERS HAS BEEN PROPERLY AUTHORIZED PURSUANT TO THE CONSTITUTION BY LEXINGTON, ASSERTIONS OF "SHAM" TRANSACTION ARE INAPPROPRIATE.

The "sham" transaction argument advanced by Ohio Power should be stopped in its tracks because Lexington is empowered by the Constitution to grant a franchise to Consolidated. An allegation of "sham," without any supporting evidence, cannot be used to nullify this power.

Ohio Power's citation of *Cleveland Electric Illuminating Company v. Pub. Util. Comm'n.*, 76 Ohio St.3d 521 (1996) ("CEI") is off the mark. Ironically, that case involved a situation in which Ohio Power was claimed by CEI to have initiated a sham transaction to circumvent the Act. CEI filed a complaint with the Commission asserting that Ohio Power was selling electricity through Cleveland Public Power for resale to Medical Center Company ("MCC") in violation of the Act since the MCC's facilities were located in CEI's certified territory. The Court held that the Commission could consider the narrow issue of whether "a utility [Ohio Power] has used a straw man to effectuate a sale of electricity for the sole purpose of circumventing the Certified Territory Act." *CEI*, 76 Ohio St.3d at 426. On remand, the Commission found nothing improper about the arrangement and ultimately Ohio Power was permitted to provide power, which was ultimately used by MCC, pursuant to a wholesale arrangement with Cleveland Public Power (*In the Matter of the Complaint of Cleveland Electric Illuminating Company v. Medical Center Company*, Case No. 95-458-EL-UNC (Order on Remand, December 21, 2004)).

Lexington can hardly be considered to be a "straw man." It has made its own decision, clearly articulated by Charles Pscholka, that having two franchise electric suppliers is in the best interest of the village and its inhabitants. The policy issues expressed by Mr. Pscholka in his testimony that favored the granting of the second franchise to Consolidated remain unrefuted.

"Straw man" in law means "a 'front'; a third party who is put up in name only to take part in a transaction." *See* Black's Law Dictionary, Sixth Ed., p. 1421. The evidence is clear that Lexington is not such a "front" without a will of its own. It was Lexington that decided to give new customers "choice" of electric suppliers. (Deposition of Charles Pscholka, Consolidated Exh. 3, pp. 21, 27.) ("Pscholka Dep.") Moreover, it was ultimately Lexington that arranged for service from Consolidated to the Woodside subdivision. (Newton Testimony, p. 3, and Exhibit B attached thereto).

Accordingly, Ohio Power's attempt to find a "loophole" to Lexington's grant by the accusation of a "sham transaction" is without foundation in the record.

F. CONSOLIDATED'S DETERMINATION NOT TO OPT INTO COMPETITION FOR THE GENERATION COMPONENT OF SERVICE PURSUANT TO OHIO REVISED CODE SECTION 4928.01 ET SEQ. IS IRRELEVANT.

Ohio Power also makes much of the fact that Consolidated did not opt into competition for the generation portion of service within its certified territory pursuant to Senate Bill 3. Ohio Power is misguided, as Consolidated's election is entirely consistent with its position in this case. It is Lexington, not Consolidated, that made the decision that limited competition within the corporate limits was good for its residents.

Senate Bill 3, Ohio Revised Code 4928.01 *et seq.* does not alter, change or modify in any way municipal constitutional power over the furnishing of electric distribution service within municipal territorial limits. Additionally, Consolidated is offering electric distribution service to the residents of Lexington pursuant to Lexington's franchise. Reference to statutory provisions relating to offering of the generation component alone are irrelevant and have no application here.

Accordingly, Ohio Power's manipulation of Senate Bill 3 is nothing but a smokescreen to direct the Commission away from addressing the constitutional power of Lexington under Article XVIII, Section 4.

G. CONSOLIDATED'S RESPONSE TO OHIO POWER'S "POLICY" CONCERNS.

Finally, Ohio Power's Brief identifies a laundry list of policy concerns that Ohio Power contends are meaningful. While the policies cited are worthy of discussion, they support Consolidated's case here – not Ohio Power's.

1. Obligation to Serve.

Ohio Power argues that if Ohio Power does not have the exclusive right to provide electric distribution services to customers in its certified territory within Lexington, it would not have an obligation to serve customers. (Ohio Power Brief at 16.) Reality is otherwise. Does Ohio Power claim that its affiliate, Columbus Southern Power, has no obligation to serve customers within the City of Columbus just because the City is competing with it in that community? Ohio Power forgets its legal obligations under its own non-exclusive franchise with Lexington to provide public utility service. As was indicated in the Court of Appeals decision in *Attica*, when a franchisee, be it Consolidated or Ohio Power, accepts this type of franchise from a municipality "it will then be committed, if not theretofore committed, to serving the public within such municipality. At that time, if not before, . . . [the utility] will fulfill 'the principal determinative characteristic of a public utility' 'of service to, or readiness to serve, an indefinite public which has a legal right to demand and receive the utility's services or commodities.'" *Attica*, 19 Ohio App.2d at 99 (quoting with approval *Midwest Haulers, Inc. v. Glander Tax Commissioner*, 150 Ohio St. 402 (1948). (Compare the franchise in *Galion* where no such duty was created.)

2. Ohio Power's Criticism That Consolidated's "New Customer" Distinction is Unsupported in the Law.

Ohio Power posits that there is no legal support for Consolidated's distinction between service to new customers and existing Ohio Power customers. (Ohio Power Brief at 16, fn. 9) This gambit must be rejected out of hand. First, Mr. Newton's testimony explains the "practical economics" that dictate the need to avoid service to existing Ohio Power customers, including the economic disincentive to the customers and the legal disincentive against (duplication of facilities. (Newton Testimony, p. 4.) Second, Mr. Pscholka's testimony — never discussed by Ohio Power — makes it clear that the Consolidated policy is that the limited competition authorized by the dual ordinances will not be permitted to be used as a basis for taking away existing customers of Ohio Power. (Pscholka Dep., pp. 51-52) Finally, the distinction between service to new and future customers and service to existing customers was recognized and enforced by the *Clyde* court. In that case, "[The city of] Clyde . . . exercised its power to exclude [Toledo Edison] from serving new, future utility facilities within Clyde's city limits." *Clyde*, 76 Ohio St. at 517. As to those customers, *Clyde's* ordinance was sustained. *Id.* at 520. Accordingly, Consolidated's distinction must be sustained as well.

3. Temporary Service and Default Generation Service.

Ohio Power also contends that once Consolidated undertakes permanent service, Ohio Power should have no further obligation regarding default generation service. (Ohio Power Brief at 15-16.) Consolidated agrees. Once the customer is that of Consolidated, Consolidated has all public utility responsibilities and obligations to provide bundled service by the acceptance of a franchise. Consolidated subjects itself to municipal regulation of its retail electric distribution business within village limits.

With respect to the "temporary service" issue, Ohio Power is really making a mountain out of a mole hill. *Id.* Ohio Power is entitled pursuant to its tariff to make appropriate compensatory arrangements to cover all of its costs involved in the provision of temporary service to a construction site, especially if there is no assurance that Ohio Power will ultimately be providing permanent power to the same facility. Therefore, it is not subject to stranded costs. If two electric distribution utilities hold a franchise to serve, both are on notice that the ultimate owner may choose a different supplier.

4. Facilities Built by Ohio Power for Future Customers Will be Underutilized or Idled.

Ohio Power also expresses concern for stranded investment. (Ohio Power Brief at 17-18.) By accepting a non-exclusive franchise from Lexington, Ohio Power accepted the risk that unrestricted future development could be curtailed at some point by Lexington. Even Ohio Power concedes that after its franchise expires, it could lose the right to compete for new customers in Lexington. The *Clyde* case demonstrates that Ohio Power has no vested right to obtain new customers and serve new facilities. In making its decision that the Miller Act did not provide such a right, the Supreme Court remarked:

> New facilities or load centers have no nexus to the public utility; their only relationship is with the municipality. First, these new facilities are hypothetical and may never be realized. Second, no nexus between the public utility and the new facilities preceded creation of the municipal utility, so there is nothing for the Miller Act to protect.

Clyde, 76 Ohio St.3d at 516.

5. The Possibility That Customers Might Switch.

Ohio Power's fears concerning fickle customers are unfounded. (Ohio Power Brief at 17-18.) Lexington has already stated that it is not going to permit switching of customers back and forth. As agreed at length above, the competition that Lexington is permitting is limited in scope

— only for new customers, mostly on the fringe or outlying areas of the municipality where development is taking place. Consolidated's position with respect to its rights under the franchise are consistent with Lexington's intent. Brian Newton's testimony also cites the practicalities which will not make it likely that a customer would ever want to change suppliers because of the "contribution in aid of construction or similar charges for duplicating facilities that normally would be required of the customer," and that it would not seek such customers. (Newton Testimony, p. 4.) Further, as argued above, the constitutional authority of a municipality to provide for competition can reasonably be limited to new and future customers.

6. Ohio Power's Concerns With Respect to Planning and Construction of Distribution Facilities Based on Anticipated Loads in an Area.

Ohio Power next voices "policy" concerns about planning issues, which are such the same as its "stranded investment" complaints. (Ohio Power Brief at 18-19.) Much of what Ohio Power says with respect to its policy concern suggests that Ohio's municipalities will not take them into account — that the actions of Ohio municipalities are not to be trusted. To the contrary, Mr. Pscholka's testimony demonstrates a balanced concern for the rights of the public and of electric suppliers. Mr. Pscholka was willing to provide a developer flexibility in choosing one of two electric suppliers, "but only if its in an area that is unserved, not where we are talking other people's customers, or existing customers." (Pscholka Dep., p. 51.)

Somehow, Columbus Southern Power has been able to deal with the ongoing competition that it has with City of Columbus, Division of Electricity in sizing and planning facilities in the City of Columbus. No testimony was placed in the record by its affiliate Ohio Power that it was impossible, or for that matter, difficult to make the necessary planning for such facilities because of this competition. There is no reason to believe the limited competition fostered here by Lexington would create any real difficulty for Ohio Power. Ohio Power offers nothing but

speculation to the contrary. Practical economics have always dictated that utilities not build distribution facilities that are unnecessary under the circumstances, and rational providers certainly do not extend such distribution facilities into areas where they have no customers.

7. Safety Concerns.

Finally, Ohio Power leans on the crutch of safety. (Ohio Power Brief at 19.) Ohio Power's speculation about safety issues are overblown. First, if there is a real concern about "interspersion" of facilities, we would have expected production of evidence of egregious safety situations created in the crowded competitive atmosphere in the City of Columbus, or perhaps anecdotally, bad experiences of other utilities in the cities of Cleveland and Clyde. No such testimony was forthcoming.

Moreover, hundreds if not thousands of overlap customers receive service throughout the state. Not one example of a safety mishap or a delay in service provision was cited by Ohio Power caused by these overlap situations. Presumably, appropriate lock-out tag-out procedures which would include inspecting the tags on each pole to which facilities are attached. These procedures exist, and will continue to exist, in preventing these situations.

These speculative (and we would submit, unsupported) concerns are not present in the Woodside subdivision. The customers in question are directly billed by Consolidated, so they know who their service supplier is. The electric load centers are not "interspersed;" they are across the street from one another. It is easy to identify whose facilities are whose. Consolidated serves from the back yard of one side of the street, and Ohio Power serves from the back yard of the other side of the street. "Safety" is no issue here.

IX. CONCLUSION

The court in *Lucas* held that if it was to allow the school district's contract with Firelands to override the Village of Lucas's constitutional power to withhold a franchise, "we would be allowing an agent of the state government to usurp a function within the exclusive domain of municipal governments." *Village of Lucas*, 2 Ohio St.3d at 16. Usurpation of municipal authority under the Ohio Constitution is what Ohio Power is seeking to have the Commission do here. For all the reasons set forth above, Ohio Power's complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons, via e-mail and regular U.S. mail, postage prepaid, this 19th day of April, 2007:

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APPENDIX A

Ordinance No. 2796.

An ordinance granting to The Ohio Public Service Company, its successors and assigns, the right to erect, construct, maintain and use the necessary poles, wires, conduits and such other structures, fixtures, and appliances, overhead and underground, as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys, highways and public places of the city of Galion, Ohio, for the purpose of furnishing and supplying electric service to The Galion Iron Works & Manufacturing Company and to the Central Ohio Steel Products Company, and declaring an emergency.

Whereas, the amount of electrical energy now being produced or that can in the immediate future be produced by the Galion Municipal Light Plant is wholly inadequate and insufficient to meet the demands of its

customers, including private consumers and manufacturing industries, and

Whereas, the inability of the Galion Municipal Light Plant to furnish sufficient power to manufacturing concerns in Galion has compelled them to repeatedly shut down during times repairs and improvements were being made in the local plant, resulting in a large loss of wages to employees of such industries and also in the loss of profits to the said manufacturers, and

Whereas, private consumers have suffered great hardship and inconvenience in being deprived of the necessary amount of electrical energy to operate heating stoves, electrical appliances, thermostats and heating controls and greater inconvenience will be suffered during the winter months in the inability to properly heat homes in the event of the failure of the thermostats and controls, and

Whereas, the local light plant is in such a state of disrepair that it will take years to rebuild and repair same so as to take care of the needs and demands of its customers, and

Whereas, the city has employed and had the advice of expert electrical engineers, all of whom without exception have recommended the use of outside power, and

Whereas, The Galion Iron Works & Manufacturing Company and the Central Ohio Steel Products Company have requested the city of Galion to permit them to purchase outside power and for that purpose to permit The Ohio Public Service Company to install the necessary poles, transmission wires and other appliances and appurtenances necessary and requisite to deliver electric

energy to their respective plants or factories to meet their urgent present and future demands, and

Whereas, such grant will be of great benefit and advantage to the city of Galion, in diverting the energy now being delivered to the aforesaid factories to other uses and to meet their present and future requirements.

Now, therefore, be it ordained by the council of the city of Galion, state of Ohio:

Section 1. That The Ohio Public Service Company, an Ohio corporation, organized and existing under and by virtue of the laws of the state of Ohio, its successors and assigns, be, and it or they are hereby granted, from and after the earliest date upon which this ordinance shall take effect, the right, privilege and franchise to erect, construct, maintain and use the necessary poles, wires, conduits, and such other structures, fixtures and appliances, overhead and underground, as may be deemed by it or them necessary or essential to enable it or them to transmit electricity through and along the streets, alleys, highways, and public places of the city of Galion, Ohio, for the purpose of furnishing and supplying electric service to The Galion Iron Works & Manufacturing Company and to the Central Ohio Steel Products Company, or to the successors or assigns of either of them. Said right so granted shall not be subject to revocation by the grantor prior to ten (10) years from the date upon which this ordinance becomes effective.

Section 2. The location of all poles, wires, supports, and type of construction shall conform to Administrative Order No. 72 of the Public Utilities Commission of Ohio,

as revised or amended, which governs situations where electric lines cross or more or less parallel the line of a railroad, interurban railway or other public utility. The location of all of such poles, wires, supports and type of construction shall further conform with all regulations and laws of the state of Ohio, and such location of such poles, wires and supports shall be such as not to interfere or impair the use of said streets and alleys for their intended uses and purposes.

Section 3. The Ohio Public Service Company, its successors and assigns, shall protect and indemnify the city of Galion, Ohio, against any and all claims for damages which may in any way arise from the exercise of the rights and privileges herein granted. The said The Galion Iron Works & Manufacturing Company and the said Central Ohio Steel Products Company, for themselves or their successors and assigns, hereby expressly waive all claims, rights, demands, actions or cause of actions against the city of Galion, Ohio, arising or growing out of a situation, should it arise, where the city of Galion gives or grants to other customers or manufacturing industries a cheaper rate than the one obtained by The Galion Iron Works & Manufacturing Company and the Central Ohio Steel Products Company from an outside power company.

Section 4. Upon the termination of the right herein granted by the grantor if by reason of expiration of time, as provided herein, or for any other valid reason, or by reason of voluntary abandonment of the project herein contemplated, the grantees, their successors or

assigns, shall, within 180 days from said termination or abandonment, remove all poles, wires, conduits, and all other structures, fixtures and appliances, overhead and underground, so installed, as provided herein, in such manner as to leave the property of the grantor in its original condition as to future utility and safety, and that in default of such removal and restoration within the time herein limited said property so installed by the grantees, their successors or assigns, may be removed by the grantor at grantee's expense or shall become the property of the grantor at its option.

Section 5. The Ohio Public Service Company shall, within 60 days from the passage of this ordinance, file with the clerk of the city of Galion, its written acceptance thereof and it shall thereupon, subject to compliance with legal requirements, constitute a contract between the city of Galion, and the grantee.

Section 6. Grantee shall pay the cost of publication of this ordinance.

Section 7. This ordinance is hereby declared to be an emergency ordinance for the reasons hereinbefore set forth and necessary for the immediate preservation of the peace, health and safety of the city of Galion, such necessity being that extra electrical capacity is required to permit a portion of the municipal generating station to be shut down for maintenance or repair and at the same time provide electrical capacity sufficient for the needs of the city and its consumers. Any such interruption or deficiency in the supply of electrical service immediately jeopardizes the public peace, health and safety of the city.

Therefore, this ordinance shall take effect and be in force from and after the date of its adoption.

Passed this fifth day of October, 1948.

Signed: Otto Pfeifer,
President of Council of the City of Galion, Ohio.

Attest:
J. A. Nichols
Clerk of Council.

Approved:
....., 1948.

Received Oct. 8, 1948. Vetoed: Oct. 13, 1948
H. H. Hartman
Mayor of Galion

Passed over the veto. Nov. 4, 1948
J. A. Nichols,
Clerk of Council.

APPENDIX B

Ordinance No. 126-A.

GRANTING TO THE NORTH CENTRAL ELECTRIC COOPERATIVE, INCORPORATED OF ATTICA, OHIO, ITS SUCCESSORS AND ASSIGNS, THE RIGHT TO USE THE STREETS, LANES, ALLEYS, SIDEWALKS AND OTHER PUBLIC WAYS AND PLACES WITHIN THE VILLAGE OF ATTICA, SENECA COUNTY, OHIO, FOR THE CONSTRUCTION, MAINTENANCE AND OPERATION OF AN ELECTRICAL LIGHTING AND POWER DISTRIBUTING SYSTEM FOR THE PURPOSE OF SUPPLYING ELECTRICITY FOR POWER AND LIGHT PURPOSES AS HEREINAFTER PROVIDED.

BE IT ORDAINED by the Council of the Village of Attica, Seneca County, Ohio:

SECTION 1. That the North Central Electric Cooperative, Incorporated, an Ohio corporation, its successors and assigns, are hereby granted the right and invested with the privilege and authority to use the streets, avenues, alleys, lanes, sidewalks and all other public grounds and places of the Village of Attica, Seneca County, Ohio, to erect, maintain and use such poles, masts, towers, wires, cable, lines, lamps, transformers and other appliances as may be necessary for the transmission, transformation, utilization and sale of electrical energy, the operation and maintenance of electrical circuits and the furnishing of electric light, power and heat for the public and private use within the Buckeye Village Addition to the Village of Attica, except The North Central Electric Cooperative, Incorporated, shall not furnish electrical service, for any purpose, to those lots of said Buckeye Village Addition which have frontage on the south side of U. S. Highway Number 224.

SECTION 2. All poles shall be set, in so far as practicable, on or near the curb and property lines, all poles, wires, and guy anchors shall be so located and arranged

as not to interfere with traffic, and shall be erected in as sightly a manner as possible.

SECTION 3. The North Central Electric Cooperative, Incorporated, its successors and assigns, shall hold the Village of Attica, Seneca County, Ohio, harmless against damage for any and all injuries that may result from construction, operation or maintenance of said electrical distributing system, provided the North Central Electric Cooperative, Incorporated, its successors and assigns, shall forthwith, within ten days from the filing of any such claims, or institution of any such action, be notified in writing by said Village Council, or the Mayor, and the said North Central Electric Cooperative, Incorporated shall have the right and opportunity to conduct the defense or negotiation for settlement of any and all such claims, demands or actions.

SECTION 4. The rights, privileges and authority granted by this ordinance shall continue for a period of ten years from the date of the passage of this ordinance and its acceptance by the company.

SECTION 5. This ordinance is to take effect and be in force on and after its passage and legal posting or publication and the filing by the aforesaid North Central Electric Cooperative, Incorporated with the Clerk of said village of its acceptance in writing of each and all of the terms, provisions and requirements of this ordinance.

PASSED THIS 13th DAY

APRIL, 1961.

President of Council.

Mayor.

(Seal)

APPENDIX C

Source: Legal > States Legal - U.S. > Ohio > Cases > OH Federal & State Cases, Combined
Terms: nonexclusive franchise or non-exclusive franchise and municipality (Edit Search | Suggest Terms for My Search)

Select for FOCUS™ or Delivery

*1990 U.S. App. LEXIS 18212, **

TRIAD CATV, INC., Plaintiff-Appellant, v. THE CITY OF HASTINGS, Defendant-Appellee, and AMERICABLE INTERNATIONAL-MICHIGAN, INC., Intervenor Defendant-Appellee

No. 90-1082

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1990 U.S. App. LEXIS 18212

October 15, 1990, Filed

NOTICE: [*1]

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 916 F.2d 713, 1990 U.S. App. LEXIS 24521.

PRIOR HISTORY:

On Appeal from the United States District Court for the Western District of Michigan; No. 89-00090; Benjamin F. Gibson, Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff cable company appealed the judgment of the United States District Court for the Western District of Michigan, which granted defendant city's motion for summary judgment on the cable company's 42 U.S.C.S. § 1983 claim to redress an alleged diminution of a property interest without procedural due process. The cable company sought to enjoin the city from granting a competing cable franchise without analyzing the economic consequences.

OVERVIEW: After the cable company exercised its contractual right to renew its **non-exclusive franchise** agreement, the city entered into negotiations with intervenor operator to overbuild the cable company's system and offer competing service. The cable company obtained a preliminary injunction to block the award of a competing franchise without a hearing. The trial court granted the city's motion for summary judgment because it found that the cable company had not suffered a deprivation of property and because due process considerations did not compel the city to study economic feasibility before awarding a competing franchise. The court affirmed the district court's judgment. The court held that: (1) the city could freely award a competing franchise without unconstitutionally impairing or reducing the cable company's vested property interests because the cable company's vested property rights under its **non-exclusive franchise** agreement with the city did not include immunity from competition, and (2) the due process clause did not require the city to analyze the economic consequences of its decision prior to granting a competing franchise.

OUTCOME: The court affirmed the district court's judgment, which granted summary judgment in favor of the city on the cable company's procedural due process claim.

CORE TERMS: franchise, cable, franchise agreement, renewal, non-exclusive, property interest, cable television, municipality, extension agreement, default, deprivation of property, fourteenth amendment, summary judgment, deprivation, overbuild, awarding, correspondence, first amendment, property rights, cable system, due process, subscribers, vested, holder, preliminary injunction, fifteen-year, formally, customers', users', Cable Communications Policy Act

LexisNexis(R) Headnotes • Hide Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 The federal circuit court's review of conclusions supporting the district court's entry of summary judgment is de novo. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Substantive Due Process > Citizenship

Constitutional Law > Substantive Due Process > Scope of Protection

HN2 Section 1 of the Fourteenth Amendment forbids states and local governmental units to deprive any person of property, without due process of law. U.S. Const. amend. XIV, § 1. As the limiting reference to "property" suggests, the Fourteenth Amendment places procedural constraints only on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the Due Process Clause. In addition, the Supreme Court has explained that the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised decisions. Rather, the due process clause simply ensures that deprivation of a protected property interest must be preceded by notice and opportunity for hearing appropriate to the nature of the case. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

HN3 Property interests are not created by the Constitution; they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. More Like This Headnote

Business & Corporate Law > Distributorships & Franchises > General Overview

Communications Law > Cable Systems > Franchises > General Overview

HN4 Franchises can give rise to property interests. More Like This Headnote

Business & Corporate Law > Distributorships & Franchises > General Overview

Communications Law > Cable Systems > Franchises > General Overview

HN5 A franchisee's vested property rights can be no broader than its contractual rights. More Like This Headnote

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Covenants Not to Compete

Communications Law > Cable Systems > Franchises > General Overview

Contracts Law > Types of Contracts > General Overview

HN6 The grant of a franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted to the franchise holder. In this respect, a holder of a **non-exclusive franchise** has no authority to demand "immunity from competition." More Like This Headnote

Communications Law > Cable Systems > Franchises > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > General Overview

HN7 A **municipality** may freely award competing franchises without unconstitutionally impairing or reducing a **non-exclusive franchise** holders vested property interests. More Like This Headnote

Communications Law > Cable Systems > Franchises > General Overview

HN8 As a general matter, the distribution of cable franchises should be left to the discretion of local governmental bodies. More Like This Headnote

Communications Law > Cable Systems > Franchises > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

HN9 The due process clause does not require the **municipality** to analyze the economic consequences of its decision prior to granting a competing franchise. More Like This Headnote

JUDGES: Keith and Guy, Circuit Judges; and Lively, Senior Circuit Judge.

OPINION BY: PER CURIAM

OPINION: Plaintiff, Triad CATV, Inc. (Triad), appeals from the entry of summary judgment on its 42 U.S.C. § 1983 claim to redress an alleged diminution of a property interest without procedural due process. n1 Because we reject Triad's contention that due process required the City of Hastings, Michigan (City), to determine the local market's capacity to support two cable television operators before granting a competing franchise to overbuild Triad's cable system, n2 we **[*2]** affirm.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 The district court also granted summary judgment on the plaintiff's claim under the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-613, and dismissed the plaintiff's state law contract claims without prejudice, but the plaintiff chose not appeal those aspects of the district courts ruling.

n2 "'Overbuild" refers to a situation in which a second cable television operator wires the same streets and competes head-to-head for subscribers with the operator which first served the area." *Nishimura v. Dolan,* 599 F. Supp. 484, 489 n.4 (E.D.N.Y. 1984).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

I.

On May 12, 1975, the City entered into an agreement with Barry Cable Corporation (Barry) for the construction and operation of a cable television system. The **non-exclusive franchise** specified maximum installation and service charges, and conditioned rate increases upon approval by the city council. By its terms, the contract ran for fifteen years, but granted Barry "the option to extend all terms and **[*3]** conditions of the agreement for one additional fifteen (15) year period by giving written notice of its desire for such extension at least sixty (60) days prior to the termination date of the original term. . . ." After Triad merged with Barry, Triad became the acknowledged successor to the franchise agreement. An August 27, 1979, amendment passed by the city council formally recognized Triad as the cable television operator under the franchise agreement. Thus, Triad obtained Barry's contractual right to extend the franchise for an additional fifteen-year term.

Triad sent a certified letter to the City on November 24, 1987, noting that the original franchise term was due to expire on May 12, 1990, and expressing the company's desire to exercise its contractual right to a fifteen-year extension. The letter further indicated that Triad planned to "submit a draft of the new Franchise that would be updated to include the changes brought about by the Cable Act of 1984." Triad subsequently furnished the City with a proposed agreement, prompting a November 3, 1988, response from the City scheduling a "special meeting . . . for the purpose of discussing the proposed Franchise Agreement." **[*4]**

In January of 1989, the City conducted a public hearing concerning the quality of Triad's cable service. n3 Discussions at the hearing included various complaints from cable subscribers about the Triad system. n4 The City subsequently addressed Triad's proposed extension agreement in a letter dated March 8, 1989. The City's correspondence offered the following rationale for rejecting the proposal:

Regarding any changes that may have occurred in the Cable Act of 1984, the proposed Agreement that you submitted to the City of Hastings did not contain any changes. Additionally, the proposed Agreement provides for an automatic renewal under Paragraph 6 on Page 4.

Please be advised that the City of Hastings formally rejects this proposed Agreement for the reason that it does not intend to grant Triad an option to extend all of the terms and conditions in that Agreement for an additional 15 year period beyond this proposed 15 year extension.

As you know, should you resubmit a new Franchise Agreement to the City that does not contain a renewal clause, it would appear the City would have no choice but to approve it. Should you dispute the City of Hastings' right to not grant an option for **[*5]** [an] additional 15 year renewal period, please direct any correspondence in that regard to [the city attorney]. (Emphasis added).

The City followed up this correspondence with a March 13, 1989, letter to Triad characterizing the company as "in default" on the existing franchise agreement due to deficiencies in the cable system identified at the January 1989 public hearing. The City cited a provision in the agreement allowing 90 days for Triad to remedy any default, and demanded that the company take action to address the cable customers' complaints.

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n3 The mayor of Hastings sent Triad a letter on January 13, 1989, apprising the company of the scheduled hearing and inviting company representatives to attend the public meeting.

n4 The City received (and included in the record) a significant number of letters from cable subscribers complaining about poor picture quality, temporary loss of stations, and a lack of selection on the Triad system. Many writers encouraged the City to switch cable operators to improve service.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*6]**

Triad responded in a March 21, 1989, letter discussing both the rejection of its proposed extension agreement and the declaration of a default attributable to poor service. On the first issue, the company raised no objection to the City's position, promising that a "new renewal agreement will be submitted to you shortly . . . containing no renewal clause, which should comply with your request. . . ." On the issue of service quality, however, the company "requested that the default alleged be specifically stated so that Triad CATV can properly respond to said notice of default."

The City formally answered Triad's letter on April 17, 1989. Specifically, the City acknowledged receipt of the revised franchise extension agreement submitted by Triad and promised to present the proposal to the city council on April 24, 1989. With respect to the alleged flaws in the cable system, however, the City expressed its belief that Triad was well aware of the users' complaints and had exclusive access to the technical and financial information necessary to remedy the problems identified by the cable customers. Accordingly, the City could not provide any further guidance with respect to the users' **[*7]** complaints unless Triad furnished the City with "the technical information concerning the construction and operation" of the system "as well as all of [the company's] financial books and records."

One month later, on May 17, 1989, Triad replied that the company "had not yet heard from [the City] regarding the revised franchise renewal following the meeting of April 24, 1989," nor had the company "received any indication as to the '90 day problem.'" Triad then detailed its understanding of the cable users' complaints and the steps the company had taken to resolve these concerns. Triad concluded the letter by demanding "approval of the franchise and a notice that the 90 day provision has been satisfied.'" Discussions between the City and Triad regarding the renewal and service quality issues apparently ensued, and Triad eventually wrote to the City on July 17, 1989, to clarify the positions of both sides.

The City ultimately set forth its positions concerning the disputes with Triad in a letter dated September 8, 1989. The City confirmed Triad's right to renewal, but raised continuing concerns about service in the following language:

It is our position that Triad's franchise **[*8]** was automatically renewed by their notification to the City to so renew sent November 24, 1987, so we do not believe a new agreement is necessary. The franchise simply continues on the same terms as contained in the existing franchise agreement.

We still believe Triad is in default, with reference to the quality of its services, as previously outlined in our correspondence. We cannot supply the technical shortcomings of the system and/or its maintenance which are causing the problems, but we are still trying to find a consultant to analyze the system for us.

Besides expressing concerns about the quality of the Triad system, the letter concluded on what Triad perceived as an ominous note by indicating that the City had received a franchise proposal from another cable company which the City intended to consider "in the next few weeks."

Although the City ultimately formalized the extension of its franchise agreement with Triad for an additional

fifteen-year term, n5 the City also opened negotiations with Americable International-Michigan, Inc. (Americable), to provide an alternative to the Triad system. Triad feared that the city council would grant Americable a competing franchise **[*9]** at a meeting on October 10, 1989, so the company filed this action against the City prior to the meeting and sought a temporary restraining order to block the award of a competing franchise. The district court reviewed Triad's claims that the City violated the Cable Communications Policy Act of 1984 and breached the 1975 franchise agreement, then issued a temporary restraining order, and eventually converted the TRO into a preliminary injunction.

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n5 A formal extension agreement between the City and Triad was executed on November 13, 1989. The extension agreement explicitly provides that "there shall be no further automatic extensions of [Triad's] franchise in [the] City beyond May 12, 2005."

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

After Triad submitted an amended complaint followed by a second amended complaint including a 42 U.S.C. § 1983 procedural due process claim, Americable filed a motion for limited intervention and the City moved for summary judgment. The district court conducted a hearing on December 5, 1989, to **[*10]** address the various motions. The court granted Americable's motion to intervene, took the pending motion for summary judgment under advisement, and extended the preliminary injunction until December 22, 1989, to allow the court time to prepare a written resolution of the City's request for summary judgment. On December 21, 1989, the district court issued a memorandum opinion and order granting summary judgment for the City on Triad's federal claims, dismissing the pendent state claims without prejudice, and dissolving the preliminary injunction. n6 This appeal followed.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n6 The City subsequently awarded a competing franchise to Americable.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Triad argues on appeal, as it did in the district court, that the City's award of a competing franchise without a hearing to determine the impact of an overbuild on Triad's franchise constituted a violation of due process guaranteed by the fourteenth amendment. In granting summary judgment for the City, the district court reasoned that: (1) Triad had not suffered a deprivation **[*11]** of property; and (2) due process considerations did not compel the city to study economic feasibility before awarding a competing cable franchise. HN1 Our review of these conclusions supporting the district courts entry of summary judgment is *de novo*. *See, e.g.*, *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1084 (6th Cir. 1989).

II.

HN2 Section 1 of the fourteenth amendment forbids states and local governmental units to "deprive any person of . . . property, without due process of law." See U.S. CONST. amend. XIV, § 1. As the limiting reference to "property" suggests, "the Fourteenth Amendment places procedural constraints [only] on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978). In addition, the Supreme Court has explained that "the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised . . . decisions." *Bishop v. Wood*, 426 U.S. 341, 350 (1976). Rather, the due process clause simply ensures that deprivation of a protected **[*12]** property interest must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Thus, we must initially examine the contours of Triad's property interest to ascertain whether a deprivation of property has, in fact, occurred. We then must focus on the type of "'hearing appropriate to the nature of [a] case'" involving the award of a competing cable franchise. *See id.*

A. Deprivation of Property

The Supreme Court has indicated that HN3"property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .'" *Loudermill*, 470 U.S. at 538 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Here, the district court correctly reasoned that, because HN4franchises can give rise to property interests, *see New York Elec. Lines Co. v. Empire City Subway Co.*, 235 U.S. 179, 193 (1914), the **[*13] non-exclusive franchise** in this case "gave [Triad] some vested property rights." *See Carlson v. Village of Union City, Michigan*, 601 F. Supp. 801, 813 (W.D. Mich. 1985) (emphasis omitted). Since the franchise agreement serves as the sole basis for the property rights asserted in this case, however, HN5Triad's "vested property rights can be no broader than [its] contractual rights." *Id.* Consequently, Triad cannot claim a deprivation of any property interest unless the City's decision to grant a competing franchise to Americable impinged upon Triad's rights under its **non-exclusive franchise.**

In *Helena Water Works Co. v. Helena*, 195 U.S. 383 (1904), the Supreme Court emphatically stated that HN6"the grant of [a] franchise does not of itself raise an implied contract that the grantor will not do any act to interfere with the rights granted" to the franchise holder. *Id.* at 388. In this respect, a holder of a **non-exclusive franchise** has no authority to demand "immunity from competition." *See, e.g., Durham v. North Carolina*, 395 F.2d 58, 61 (4th Cir. 1968). Based upon this principle, we conclude that HN7a **municipality [*14]** may freely award competing franchises without unconstitutionally impairing or reducing a **non-exclusive franchise** holders vested property interests. Despite Triad's speculative concerns about the detrimental impact competition will have on its business and the local cable television market, the company has failed to identify any enumerated right under its **non-exclusive franchise** that has been revoked or any privilege that has been dishonored due to the award of a competing franchise. Triad's contention that it has been deprived of a property right, therefore, is meritless.

B. The Process Required in Awarding Cable Franchises

We not only reject Triad's deprivation of property theory, which is an essential predicate to the company's due process claim, but also repudiate the company's view of the process due in the context of awarding competing cable franchises. The Supreme Court has commented that, when an impending deprivation of a property interest necessitates "due process," the "formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved. . . ." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). Triad argues **[*15]** that the deleterious effect of overbuilds on existing cable operators and local markets suggests that **municipalities** must consider the economic impact of allowing two operators to compete in a single market before awarding competing franchises. We disagree.

We have indicated that, HN8as a general matter, the distribution of cable franchises should be left to the discretion of local governmental bodies. *Cf. City Communications*, 888 F.2d at 1090 ("federal courts are not . . . cable television franchise distributors"). For this reason, our deference in *Communications Systems, Inc. v. City of Danville, Kentucky*, 880 F.2d 887 (6th Cir. 1989), to the **municipality's** conclusion that the local market could support only one cable operator does not even suggest that the City of Hastings was constitutionally compelled to reach a contrary conclusion before awarding a competing franchise. *Cf. id.* at 892. Indeed, first amendment considerations identified by the Supreme Court in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-96 (1986), call into question any refusal to award a competing franchise, even **[*16]** in a small market that clearly amounts to a "natural monopoly." *See, e.g., Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 717 (8th Cir. 1986) (addressing first amendment challenge to award of *de facto* exclusive franchise in "natural monopoly" market), *cert. denied*, 480 U.S. 910 (1987). If a **municipality** chooses to permit competition to avoid potential liability for first amendment violations, to offer another option to disgruntled customers of an existing operator, or simply to reap the perceived benefits of enhanced competition, HN9the due process clause does not require the **municipality** to analyze the economic consequences of its decision prior to granting a competing franchise.

AFFIRMED.

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