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THE PUBLIC UTILITIES COMMISSION OF OHIO

RESPONDENT CONSOLIDATED ELECTRIC COOPERATIVE, INC.'S
MOTION FOR LEAVE TO FILE A SURREPLY BRIEF AND
REQUEST FOR EXPEDITED RULING

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In accordance with Ohio Admin. Code §4901-1-12(C), undersigned counsel has contacted counsel for Ohio Power. Counsel for Ohio Power has retained Ohio Power's right to file a Reply Memorandum.

Respectfully submitted,

William R. Case (TEL)

William R. Case (0031832)
Robert P. Mone (0018901)
Thomas E. Lodge (0015741)
Kurt P. Helfrich (0068017)
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*Attorneys for Respondent Consolidated Electric
Cooperative, Inc.*

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	:	

**MEMORANDUM IN SUPPORT OF RESPONDENT CONSOLIDATED
ELECTRIC COOPERATIVE, INC.'S MOTION FOR LEAVE TO FILE
A SURREPLY BRIEF AND REQUEST FOR EXPEDITED RULING**

Ohio Power has characterized the Village of Lexington's grant to Consolidated as a "pure franchise" which is not a "contract with others" for "public utility . . . service" as contemplated by Article XVIII, Section 4 of the Ohio Constitution. Consolidated showed in its Reply Brief that Ohio Power is legally in error because a nearly identical franchise granted to the electric distribution cooperative in the *Attica* case was found to be authorized by that constitutional provision.

However, in its Reply Brief, Ohio Power claims that the *Attica* case, as a matter of fact, did not involve a "pure franchise" for North Central,¹ contending instead that the *Attica* facts also encompassed a "contract that established an obligation to provide service and rates."² As its foundation for this position, Ohio Power refers to a second ordinance enacted by the Village of Attica – Ordinance 125-A – which purportedly authorized the mayor to enter into a "contract with North Central for such service."³

¹ North Central Electric Cooperative, the competing supplier in *Attica*.

² Ohio Power Reply Brief at 6.

³ *Id.*, quoting (but not citing) *Attica*, 23 Ohio St.2d at 37.

Based on the language of Ohio Power's Reply Brief, a reader would almost certainly conclude that Ordinance 125-A involved a separate written contract in which North Central was required to serve the inhabitants of Attica at a specified rate. Such an inference misstates the facts of *Attica*, and necessarily its import to this case. As addressed in Consolidated's proffered Surreply Brief: (a) *Attica's* Ordinance 125-A had nothing to do with service to Attica's inhabitants – it was a separate street lighting contract that did not deal with public utility service to inhabitants whatsoever; and (b) this critical misstatement is of moment to the Commission's interpretation of *Attica* and its deliberations herein.

According, Consolidated is obliged to correct this misstatement.⁴ Consolidated respectfully requests that Consolidated's Motion for Leave to File a Surreply Brief be granted *instantly* and on an expedited basis.

Respectfully submitted,



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Cooperative, Inc.*

⁴ Consolidated attempted to resolve the misstatements of the Ohio Power Reply Brief by other means. Attached is a copy of the e-mail sent to Mr. Conway, counsel for Ohio Power, offering the opportunity to make such a clarification. On Tuesday, April 24, 2007, Mr. Conway, on behalf of himself and Mr. Resnick, declined the opportunity to make any clarification. Thus, it has become necessary for Consolidated to bring this matter to the Commission's attention.

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 30th day of April, 2007:

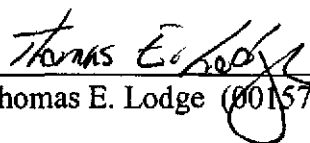
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Thomas E. Lodge (0015741)

From: Case, William
Sent: Friday, April 20, 2007 11:11 AM
To: 'dconway@porterwright.com'; 'miresnik@aep.com'
Subject: FW: Emailing: Attica Ordinance No. 125-A

Gentlemen:

I am attaching for your attention a copy of Attica ordinance 125-A which we obtained from the record of the Attica case at the Supreme Court. As you can see, it is purely a street lighting ordinance. It does nothing to establish "an obligation to provide service and rates" to the residents of the community, as stated in page 6 of your brief. The misleading reference to ordinance 125A is further compounded when you seek to distinguish Attica from Galion by saying in page 6 of your brief that, "Unlike in Galion, whether a pure franchise, i.e., one that does not include either a commitment to provide service to anyone or establish rates for such service, constitutes a contract under Article XVIII, section 4, was not an issue in Attica." Obviously with respect to any obligation to serve the residents on North Central's part, that obligation can only be ascertained from Ordinance 126.

Before taking action to bring your mischaracterization of ordinance 125-A to the commission's attention, we decided to afford you the opportunity to do so first. We assume upon a more careful reading of the ordinance you will agree that your brief has mischaracterized its effect, and you will so advise the commission. Accordingly, could you let us know by the end of business today whether you will file something next week with the commission correcting this mischaracterization? Please call if you have any questions.

-----Original Message-----

From: Zallocco, Ann
Sent: Friday, April 20, 2007 10:38 AM
To: Case, William
Cc: Lodge, Thomas
Subject: Emailing: Attica Ordinance No. 125-A

Attached:

Attica Ordinance No. 125-A

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 SURREPLY BRIEF**

In its Reply Brief, Ohio Power seeks to distinguish the franchise granted by the Village of Attica, which was unsuccessfully challenged by Ohio Power in the *Attica* case, from the franchise at issue here. Ohio Power wishes to do so because *Attica* validated such a franchise under Article XVIII, Section 4 of the Ohio Constitution. Regrettably, to make that distinction, Ohio Power molds the facts of *Attica* to an inaccurate and misleading form. Ohio Power asserts that the *Attica* franchise was not a "pure franchise," but instead involved "both a franchise and a contract that established an obligation to provide service and rates. . . ."¹

With that statement, Ohio Power's Reply Brief leaves a grossly misleading impression of the two separate and distinct *Attica* ordinances. The undeniable impression left by reading the Ohio Power Reply Brief is that Attica Ordinance 125-A furnished the specific contract which Ohio Power says is required to validate the franchise under Article XVIII of the Ohio Constitution, and which Ohio Power says is allegedly missing in this case. Ordinance 125-A did no such thing.

¹ Ohio Power Reply Brief at 6.

Ohio Power's Reply Brief did not attach Attica Ordinance 125-A. It is attached here as Surreply Appendix A. Contrary to the misimpression left by Ohio Power, Attica Ordinance No. 125-A is a street lighting ordinance and nothing more.² Nothing in Attica Ordinance No. 125-A suggests that North Central had any obligation to serve the residents of the subdivision or any other inhabitants of the Village of Attica; nowhere in Attica Ordinance 125-A are any rates established for any service other than street lighting. Attica Ordinance No. 125-A is purely a street lighting contract under which North Central charged Attica rates in exchange for lighting streets in the subdivision.

Thus, in the *Attica* case, the only basis for service by North Central to the inhabitants of Attica was Attica Ordinance No. 126, granting North Central a franchise.³ Whether one characterizes that franchise as "pure" or otherwise,⁴ the Supreme Court necessarily determined in *Attica* that it was a "contract with others" for "public utility . . . service," contemplated by Article XVIII, Section 4 of the Ohio Constitution and within Attica's municipal authority. Accordingly, neither of the two ordinances involved the magic words that Ohio Power now asserts to be essential in franchise authorized by Article XVIII of the Ohio Constitution.⁵ Moreover, the Supreme Court noted in *Attica* that North Central's acceptance of the franchise created the requisite obligations contemplated by the Constitution, as the municipality could then regulate

² Admittedly, in its Reply Brief, Ohio Power never specifically states that Attica Ordinance No. 125-A was a contract to serve the inhabitants of Attica. Nonetheless, Consolidates leaves to the Commission's good judgment whether readers of Ohio Power's Reply Brief would be likely to draw any other conclusion.

³ Attached to Consolidated's Reply Brief as Appendix B.

⁴ Ohio Power's current argument that a "pure franchise" is not an exercise of Article XVIII, Section 4 municipal powers presents some irony. In the *Attica* proceedings, Ohio Power never raised that assertion, contending instead that North Central was not a utility that Attica was constitutionally authorized to franchise. See *Ohio Power Co. v. Village of Attica*, 19 Ohio App. 2d 89, 93-94 (1969). Thirty-five years later, the "pure franchise" argument is evidently Ohio Power's fall-back position.

⁵ *Attica* is critical to a correct legal analysis here, because Ohio Power asserts that *Galion* holds that Article XVIII of the Ohio Constitution does not authorize a franchise for utility service unless the franchise contains certain magic words relating to the obligation to provide service and rates. However, a correct reading of the facts of *Galion* shows that it involved an ordinance for the *extension* of electric service to only two existing customers of the municipal utility system, and not a franchise to serve all the inhabitants of an area of the municipality. Moreover, assuming *arguendo* that Ohio Power's reading of *Galion* were correct, no court decision either before or after *Galion* has recognized any such requirements. Thus, Ohio Power's reading of *Galion* has been rejected by a Supreme Court in *Attica* and all cases following *Attica*.

the price that could be charged for electric light and promulgate other reasonable regulations.

Attica, 23 Ohio St. 2d at 43-44.

In short, with a correct understanding of *Attica*'s facts, one cannot distinguish *Attica* from this case. As the Court concluded in *Attica*, the franchise given Ohio Power's competitor is authorized under the Ohio Constitution.

Respectfully submitted,



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*Attorneys for Respondent Consolidated Electric
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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 30th day of April, 2007:

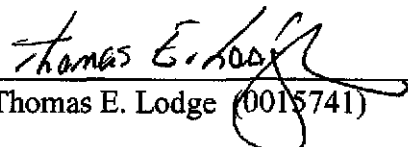
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Thomas E. Lodge (0015741)

SURREPLY
APPENDIX A

Ordinance No. 125-A.

AN ORDINANCE AUTHORIZING AND DIRECTING THE MAYOR AND CLERK OF THE VILLAGE OF ATTICA, SENECA COUNTY, OHIO, TO CONTRACT WITH THE NORTH CENTRAL ELECTRIC COOPERATIVE, INCORPORATED, FOR THE LIGHTING OF THE STREETS, AVENUES, ALLEYS AND PUBLIC PLACES IN THE BUCKEYE VILLAGE ADDITION TO THE VILLAGE OF ATTICA, SENECA COUNTY, OHIO.

Be it ordained by the Council of the Village of Attica, Seneca County, Ohio.

SECTION 1. That the Mayor and Clerk of the Village of Attica be and they hereby are authorized and directed to enter into a written contract with the North Central Electric Cooperative, Incorporated, for the lighting of the streets, avenues, alleys and public places in the Buckeye Village Addition to the Village of Attica, Seneca County, Ohio, Upon the following terms and conditions to-wit:

1. The North Central Electric Cooperative, Incorporated, is authorized and directed to light the streets, avenues, alleys and public places in the Buckeye Village Addition to the Village of Attica, Seneca County, Ohio, and to maintain all necessary lighting units in good operating condition, and to charge and collect, and the Village shall pay therefore monthly as follows:

(a) For no less than two 2500 lumen lamps at \$2.55 per month, per lamp.

Said lights to be lighted each and every night for the period between one-half ($\frac{1}{2}$) hour after sunset and one-half ($\frac{1}{2}$) hour before sunrise for approximately 4000 hours per year.

The location of the lamps shall be in accordance with the instructions of the Village Council, and shall be permanent.

Additional lamps may be added at any time at the request of the Village Council.

2. All payments for the fore-going service shall be made in accordance with rules, regulations and collection procedure now established or there may be established applying to all members of the North Central Electric Cooperative, Incorporated.

3. The Village shall assume the responsibility for location of poles upon the Village streets and alleys and shall grant and does hereby grant an unrestricted easement for the location of poles that carry the overhead conductors and lamps, together with all necessary fixtures.

4. All expense involved in providing the initial lighting, labor and material and any additional lighting, labor and material herein provided for shall be at the cost the North Central Electric Cooperative, Incorporated.

SECTION 2. Said contract shall be effective for a term of ten years, beginning at the earliest time allowed by law, and upon the due execution thereof, and shall take effect and be in force thirty-one (31) days from and after its passage.

PASSED THIS 13th Day

APRIL, 1961.

President of Council.

Mayor.

(Seal)