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April 30, 2007

*By Messenger Delivery*

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

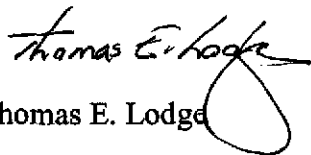
Re: In the Matter of the Complaint of Ohio Power Company v. Consolidated Electric Cooperative, Inc., Public Utilities Commission of Ohio, Case No. 06-890-EL-CSS

Dear Ms. Jenkins:

Enclosed are an original and ten (10) copies of Respondent Consolidated Electric Cooperative, Inc.'s Motion for Leave to File a Surreply Brief and Request for Expedited Ruling, to be filed in connection with the above-referenced matters.

Thank you for your assistance. If you have any question, please feel free to call.

Very truly yours,



Thomas E. Lodge

cc: Russell Gooden, Attorney Examiner  
All Counsel of Record  
Robert P. Mone, Esq.  
Kurt P. Helfrich, Esq.  
Ann Zallocco, Esq.  
Carolyn S. Flahive, Esq.

Enclosures

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business  
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Tom.Lodge@ThompsonHine.com Phone: 614.469.3246 FAX: 614.469.3361

TEL/th 543422 1

THOMPSON HINE LLP  
ATTORNEYS AT LAW

10 West Broad Street  
Suite 700  
Columbus, Ohio 43215-3435

www.ThompsonHine.com  
Phone 614.469.3200  
Fax 614.469.3361

Now comes Respondent Consolidated Electric Cooperative, Inc. (“Consolidated”), and pursuant to Ohio Admin. Code §4901-1-12 moves the Commission for an order permitting it to file the attached Surreply Brief *instante*. This motion is made on the grounds that Ohio Power Company’s discussion of the key case of *Ohio Power v. Village at Attica*, 23 Ohio St. 2d 37 (1970) (“*Attica*”) leaves a misleading impression, which if not corrected will lead the Commission astray in its determination of the issues in this proceeding. As consideration of this Surreply Brief should occur forthwith, along with the rest of the briefing that has been submitted herein, Consolidated requests that the Commission make an expedited ruling on this motion.

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 (TBL)

William R. Case (0031832)  
Robert P. Mone (0018901)  
Thomas E. Lodge (0015741)  
Kurt P. Helfrich (0068017)  
Ann Zallocco (0081435)  
Carolyn S. Flahive (0072404)  
THOMPSON HINE LLP  
10 West Broad Street, Suite 700  
Columbus, Ohio 43215-3435  
(614) 469-3200  
(614) 469-3361 (fax)

*Attorneys for Respondent Consolidated Electric  
Cooperative, Inc.*

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	:	

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.<sup>4</sup> Consolidated respectfully requests that Consolidated's Motion for Leave to File a Surreply Brief be granted *instanter* and on an expedited basis.

Respectfully submitted,



---

William R. Case (0031832)  
Robert P. Mone (0018901)  
Thomas E. Lodge (0015741)  
Kurt P. Helfrich (0068017)  
Ann Zallocco (0081435)  
Carolyn S. Flahive (0072404)  
THOMPSON HINE LLP  
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Columbus, Ohio 43215-3435  
(614) 469-3200  
(614) 469-3361 (fax)

*Attorneys for Respondent Consolidated Electric  
Cooperative, Inc.*

---

<sup>4</sup> 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:

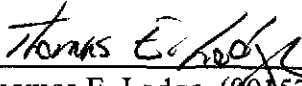
Marvin I. Resnik  
Trial Counsel  
American Electric Power Service Corp.  
1 Riverside Plaza, 29th Floor  
Columbus, Ohio 43215  
miresnik@aep.com

Daniel R. Conway  
Porter Wright Morris & Arthur LLP  
41 South High Street  
Columbus, Ohio 43215  
dconway@porterwright.com

John W. Bentine  
Bobbie Singh  
Chester Willcox & Saxbe LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
jbentine@cwslaw.com  
bsingh@cwslaw.com

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
tobrien@bricker.com

Samuel C. Randazzo  
McNees Wallace and Nurick LLC  
21 East State Street, 17th Floor  
Columbus, Ohio 43215  
sam@mwncnh.com

  
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. . . ."<sup>1</sup>

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.

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> Whether one characterizes that franchise as "pure" or otherwise,<sup>4</sup> 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.<sup>5</sup> 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

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<sup>2</sup> 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.

<sup>3</sup> Attached to Consolidated's Reply Brief as Appendix B.

<sup>4</sup> 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.

<sup>5</sup> *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,



William R. Case (0031832)

Robert P. Mone (0018901)

Thomas E. Lodge (0015741)

Kurt P. Helfrich (0068017)

Ann Zallocco (0081435)

Carolyn S. Flahive (0072404)

THOMPSON HINE LLP

10 West Broad Street, Suite 700

Columbus, Ohio 43215-3435

(614) 469-3200

(614) 469-3361 (fax)

*Attorneys for Respondent Consolidated Electric  
Cooperative, Inc.*

**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 30<sup>th</sup> day of April, 2007:

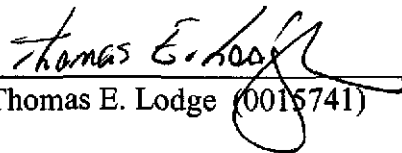
Marvin I. Resnik  
Trial Counsel  
American Electric Power Service Corp.  
1 Riverside Plaza, 29th Floor  
Columbus, Ohio 43215  
miresnik@aep.com

Daniel R. Conway  
Porter Wright Morris & Arthur LLP  
41 South High Street  
Columbus, Ohio 43215  
dconway@porterwright.com

John W. Bentine  
Bobbie Singh  
Chester Willcox & Saxbe LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
jbentine@cwslaw.com  
bsingh@cwslaw.com

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
tobrien@bricker.com

Samuel C. Randazzo  
McNees Wallace and Nurick LLC  
21 East State Street, 17th Floor  
Columbus, Ohio 43215  
sam@mwnclnh.com

  
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)