

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of Ohio Power Company,
 Complainant,
 v.
 Consolidated Electric Cooperative, Inc.,
 Respondent.

Case No. 06-890-EL-CSS

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

Mr. Marvin I. Resnick, American Electric Power Service Corporation, 1 Riverside Plaza, 29th Floor, Columbus, Ohio 43215-2373, and Porter Wright Morris & Arthur LLP, by Daniel R. Conway and Eric B. Gallon, 41 South High Street, 30th Floor, Columbus, Ohio 43215-6194, on behalf of Ohio Power Company.

Thompson Hine LPP, by William R. Case, Kurt Powell Helfrich, and Robert P. Mone, 10 West Broad Street, Columbus, Ohio 43215-3435, on behalf of Consolidated Electric Cooperative, Inc.

Brickler & Eckler LLP, by Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215-4291 and Daniel B. Bennington, City of Delaware, One South Sandusky Street, Delaware, Ohio 43015, on behalf of the City of Delaware.

McNees, Wallace & Nurick LLC, by Samuel C. Randazzo, Lisa G. McAlister, Daniel J. Neilson, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

Chester, Wilcox & Saxbe LLP, by John W. Bentine and Bobby Singh, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, on behalf of American Municipal Power-Ohio, Inc.

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OPINION:I. History of the Proceedings

On July 10, 2006, Ohio Power Company (Ohio Power) filed the above-captioned complaint alleging that Consolidated Electric Cooperative, Inc. (Consolidated) violated Section 4933.83 of the Ohio Revised Code, the Certified Territory Act (the CTA), by providing electric service to customers within the certified territory of Ohio Power. On August 11, 2006, Consolidated filed an answer and affirmative defenses to the complaint.

On August 28, 2006, the City of Delaware (Delaware or City) filed a complaint against Columbus Southern Power Company (CSP) alleging that CSP was violating the CTA. Case No. 06-1070-EL-CSS, *In the Matter of the Complaint of the city of Delaware vs. Columbus Southern Power Company* (06-1070). Delaware contended that, through a course of discussions, CSP asserted an exclusive right to serve customers within Delaware and that the assertion was a violation of the CTA. On September 19, 2006, Delaware and Consolidated filed a motion to consolidate the above-captioned proceeding with 06-1070. On January 24, 2007, the Commission dismissed 06-1070, finding that Delaware had not stated a claim that was within the purview of the CTA and did not state a claim upon which relief could be granted. Based upon the Commission's ruling, the attorney examiner determined that the motion to consolidate was moot.

By Entry dated August 31, 2006, Delaware was granted intervention in this proceeding and a prehearing conference was set for September 20, 2006. On September 1, 2006, Industrial Energy Users-Ohio (IEU-Ohio) filed a motion to intervene for the limited purpose of briefing the legal issues raised by the complaint. On September 19, 2006, American Municipal Power-Ohio Inc. (AMP-Ohio) filed to intervene. By entry of January 24, 2007, both motions to intervene were granted. The entry also established the following procedural schedule: January 29, 2007, filing of testimony; February 12, 2007, filing of rebuttal testimony; and March 13, 2007, hearing.

At the hearing, the parties agreed to admit the prefiled testimony of Ohio Power, Consolidated and Delaware into the record as well as the deposition of Charles Pscholka, who is employed by the Village of Lexington, Ohio (Lexington or Village). Briefs and reply briefs were filed by all parties except AMP-Ohio which supported the brief of Delaware.

After the filing of reply briefs, Consolidated filed a motion for leave to file a surreply brief, along with the brief, to correct a misleading impression in Ohio Power's reply brief regarding the cited case of *Ohio Power v. Village of Attica* cited below. Ohio Power filed a memorandum contra to the motion and arguments to support its interpretation of the cited case. To clarify the parties' arguments, the Commission will allow both the surreply brief and Ohio Power's response as part of the record.

II. Testimony

Ohio Power presented the testimony of Selwyn Dias, responsible for regulatory affairs and economic development for American Electric Power's Ohio electric operating companies, Ohio Power and CSP, and Robert Ivinskas, Region Support Manager for Ohio Power and CSP.

Mr. Dias testified that Ohio Power discovered in 2006 that Consolidated had constructed distribution facilities to four residential customers located within a portion of Ohio Power's certified electric territory in Lexington and since then has provided service to a fifth customer. The witness provided a map showing the location of the certified territories of Ohio Power and Consolidated for the area in question, along with the location of the five residences (OPCO Exh. 1, Exhibit A). Mr. Dias also testified that Consolidated has extended its facilities into CSP's service territory to serve a Delaware industrial customer approximately two miles within CSP's certified territory. The witness stated that by Ordinance No. 69-21, enacted on June 16, 1969, Lexington granted to Ohio Power a non-exclusive franchise to construct, operate and maintain facilities for distribution of electric energy within the streets, thoroughfares, alleys, bridges, and public places of the Village in order to provide electric service in the Village and to its inhabitants for a term of 50 years (OPCO Exh. 1, Exhibit C).

Mr. Dias stated that Ohio Power's operating assumption is not simply that it has an exclusive right, but also an obligation, to provide electric distribution service in its certified territory, including within municipalities from which it has franchises. He further stated that if one or more other electric suppliers have a right to serve within a municipality within Ohio Power's certified territory, then a question arises as to whether Ohio Power has any obligation to provide electric distribution service to any customer within that municipality. The witness also contends that if it does not have the right to provide exclusive service within a municipality, it should not be required to provide service on a temporary basis during construction of a project or default generation service to customers who become customers of Consolidated. Lastly, Mr. Dias also stated his concern that the lack of an exclusive right to serve within municipalities could lead to idle or underutilized distribution facilities. (OPCO Exh. 1 at 7-10)

Mr. Ivinskas testified that, in his 26 years of focusing on the operation of distribution systems, to his knowledge electric suppliers subject to the CTA have in the past restricted extension of the distribution lines to customers within their assigned certified territory (OPCO Exh. 2 at 2). Mr. Ivinskas stated that he has three concerns with Consolidated's recent actions. His first concern is that Consolidated's actions will likely lead to the construction of duplicative, and thus underutilized, distribution facilities, leading to higher operating costs. Secondly, he believes that if another electric supplier is able to construct facilities in Ohio Power's territory within municipalities, it will

adversely affect the efficiency and timeliness of Ohio Power's maintenance and service restoration activities, because confusion of identifying utility ownership of facilities, which currently exists with existing municipal systems, will increase. Mr. Ivinskas stated that Ohio Power has a good understanding of where its electric territory boundary lines are currently, but that could change if two or more electric suppliers receive non-exclusive franchises from the same municipality. Lastly, Mr. Ivinskas stated his concern regarding safety. According to Mr. Ivinskas, if repairs are required to facilities, with more than one supplier in an area, it may become increasingly difficult to determine which electric supplier circuit is affected and which wires to de-energize to make repairs. (OPCO Exh. 2 at 4-7)

Consolidated presented the testimony of Brian Newton, President of Consolidated, and Richard McCleery, a realtor involved with the development of the Woodside housing subdivision in Lexington. Mr. Newton stated that Consolidated received a request from Charles Pscholka, at the time Administrative Director for Lexington, to provide electric service to certain lots being developed in the Woodside subdivision. At the time of the request, Ohio Power had no existing electric distribution facilities in place on any of the properties subject to the request. However, Ohio Power provides service to lots across the street from the lots served by Consolidated. The witness testified that Consolidated currently serves seven lots within the subdivision and anticipates providing service to the remaining five lots. (Consolidated Exh. 1 at 3)

Mr. Newton testified that in 2004, Lexington passed Ordinance No. 04-66 which authorized Consolidated to render electric service to the Village and its inhabitants. By letter dated December 22, 2004, Consolidated accepted the ordinance. Prior to 2004, Lexington had an ordinance dating back to 1973 with Consolidated's predecessor, Morrow Electric Cooperative, Inc. (Morrow), which provided Morrow with permission to serve portions of Lexington on a non-exclusive basis. Mr. Newton stated that Morrow was limited to providing electric distribution service only to areas within the corporate limits that were located in Morrow's certified territory. However, Ordinance No. 04-66 contains no such limitation. The witness believes that Consolidated has been given the same franchise authority to serve within the Village limits as Ohio Power. However, he believes that it would be both highly impractical and contrary to the public interest to unnecessarily duplicate electric lines throughout a municipality even if it would be in the narrow economic interest of certain customers to do so. Consequently, it is the position of Consolidated that its franchise rights in Lexington do not include the right to unnecessarily duplicate electric distribution facilities by extending service to a load center already receiving adequate electric distribution service from Ohio Power. It is Mr. Newton's belief that there is always the inherent risk for electric utilities to serve within a municipality because of the constitutional right of municipalities to establish their own municipal system on contract with others for that service. (Id. at 4-6 and Exhibits D, E, and F)

Mr. McCleery testified that he has served as the real estate agent for the owners of the Woodside subdivision and been involved with the development of the property. Mr. McCleery initiated Lexington's request for Consolidated service because of his frustration with Ohio Power unresponsiveness in installing permanent electric service to new residences and street lighting, and because of the number of outages to existing Ohio Power customers in the area. Mr. McCleery stated he has been pleased with the service Consolidated has provided the development. (Consolidated Exh. 2 at 1 and 2)

In addition to the prefiled testimony of Mr. Newton and Mr. McCleery, Consolidated submitted into the record the deposition of Charles Pscholka. Mr. Pscholka is a consultant for day to day operation of the Village and formerly its Administrative Director. The witness stated that Ohio Power serves the majority of the Village, with Consolidated serving the far western edge of the Village. Both utilities have served the Village since at least 1975 (Consolidated Exh. 2 at 10-11). Through ordinances approved by the Village, both Ohio Power and Consolidated have been granted franchises to serve the Village. Both are non-exclusive and do not place limits on where the utilities can serve within the Village (Id. at 20). Mr. Pscholka believes that such non-exclusive franchises provide flexibility to developers and encourages economic development within the Village. He stated that, upon request from Mr. McCleery, he requested Consolidated serve portions of the Woodside subdivision that were adjacent to its existing service territory, not realizing that the lots in question were actually in Ohio Power's service territory (Id. at 45-47). Mr. Pscholka's basic belief is that dual non-exclusive franchises work best in the fringe areas, like the Woodside subdivision, where Ohio Power's and Consolidated's territories meet and where both utilities could serve the fringe area economically. Mr. Pscholka stated his belief that the ability to choose between electric utilities affects only areas not currently served by an electric supplier and was not intended to take customers away from their existing electric supplier (Id. at 48-52). He stated that the Village has had no objection to the service provided by Consolidated in the Woodside subdivision (Id. at 30).

The last witness to present testimony was R. Thomas Homan, the City Manager for the City of Delaware, who testified to the relevance of this case to Delaware's economic development. Mr. Homan testified that the City has passed Ordinance No. 04-22 granting a franchise to CSP to provide electric service within the City and passed Ordinance No. 04-179 granting Consolidated the same franchise rights. Both franchises are non-exclusive. Mr. Homan stated that the purpose of the non-exclusive feature is to enable the City and its inhabitants to obtain electric service from multiple providers and that no territorial boundaries within the City are contemplated by the ordinances. Mr. Homan believes that having multiple providers of electric from which new businesses can choose enhances economic development for the City and provides major benefits in terms of both reliability and cost. The witness testified that one of the reasons Associated Hygienic Products (AHP) wanted to expand its Ohio operations into the City was the ability of AHP to reach acceptable terms for electric service with Consolidated

that were not available through CSP. Mr. Homan stated that the City's effort to have AHP relocate to Delaware, bringing 200 new jobs and \$7 million payroll, was threatened by CSP's assertion that Consolidated was violating the CTA. (Delaware Exh. 1 at 2-5)

III. Discussion of the Parties' Positions

Ohio Power argues that the CTA gives an electric supplier the exclusive right to furnish electric service to load centers within the supplier's certified territory pursuant to Section 4933.83, Revised Code. The only exception to this right occurs when the supplier's certified territory includes some or all of a municipality. Ohio Power asserts that under the Ohio Constitution and the CTA, a municipality has four choices concerning the provision of electric utility service within its boundaries. It can:

- (1) Operate its own electric utility pursuant to Ohio Constitution, Art. XVIII, § 4.
- (2) Contract with others for the provision of electric utility service in the municipality pursuant to Ohio Constitution, Art. XVIII, § 4.
- (3) Grant a franchise or franchises to the electric utility or utilities whose certified territory or territories include all or some of the municipality pursuant to Section 4933.83(A), Revised Code.
- (4) Refuse to grant a franchise to an electric utility whose certified territory includes all or some of the municipality, and instead grant a franchise for the portion of the territory within the municipality to a different utility pursuant to Section 4933.83(A), Revised Code.

However, Ohio Power contends that neither the Ohio Constitution nor the CTA authorizes competition for distribution service within a portion of an electric utility's certified territory. It is Ohio Power's position that a municipality need not grant a franchise to the electric supplier whose certified territory includes some or all of the municipality. However, if the municipality does grant a franchise to the electric supplier whose certified territory includes some or all of the municipality, then that electric supplier has the exclusive right and obligation to furnish electric service to all electric load centers within the portion of the municipality that lies within the utility's certified territory. While Lexington and Delaware have granted non-exclusive rights to Ohio Power and Consolidated to serve customers within their municipalities, the CTA restricts the utilities to serving the portion of the municipalities that falls within their respective territories, according to Ohio Power.

Another argument raised by Ohio Power is that a municipal franchise ordinance authorizing a utility to provide service within the municipality, but not requiring the utility to provide service to anyone and not fixing rates to be charged, does not constitute a

contract under Section 4 of Article XVIII of the Ohio Constitution [Citing *Galion v. Galion* (1951), 154 Ohio St. 503, 506-507, 43 Ohio Op. 435 (*Galion case*) and *Local Telephone Company v. Cranberry Mutual Telephone Company* (1921), 102 Ohio St. 524 (*Cranberry case*)]. Consequently, Ohio Power does not believe that providing service pursuant to a franchise falls within constitutional municipal activity exempt from the CTA. Ohio Power argues that:

the Village did not construct and operate its own utility. Nor did the Village purchase power. It did not, in other words, 'contract' with either OPCo [Ohio Power] or Consolidated, as the word 'contract' is used in the Ohio Constitution. Instead, the Village issued ordinances granting both OPCo and Consolidated 'the right, privilege, franchise, and authority' to construct, operate, and maintain facilities for the distribution of electric energy within the Village of Lexington.

Ohio Power also contends that there are good public policy reasons for the Commission to adopt its position. It contends that to adopt Consolidated's view would lead to added confusion as to where a utility's service territory lies and in determining which utility's facilities may be involved if outages occur and repairs or maintenance are required. Along with this concern is the safety factor of ensuring that the correct lines have been deactivated so that repairs or maintenance can be performed safely. Ohio Power also points out that dual providers may result in increased costs to provide service within a municipality if a utility installs or expands distribution facilities to serve additional customers who may end-up choosing an alternative distribution utility. This may lead to electric facilities that will be idled or underutilized, increasing costs to all customers on the system. In addition, Ohio Power believes that dual providers will lead to uncertainty with respect to the planning and construction of distribution facilities, because such actions are based on anticipated load which would be more difficult to estimate. Further, there is the question of whether any utility would have the obligation to serve within a municipality that has granted various non-exclusive franchises. Ohio Power believes that its obligation to serve within its certified territory is concurrent with its exclusive right to provide service under the CTA. It argues that if it does not have the exclusive right to serve, then it has no obligation to serve.

Ohio Power requests that the Commission find that Consolidated is in violation of the CTA and, pursuant to the CTA, Section 4933.86, Revised Code, is subject to remedies and penalties under Sections 4905.54, 4905.56, 4905.57, 4905.59, 4905.60, 4905.61, and 4905.99(B), Revised Code. Further, Ohio Power requests that the Commission order Consolidated to transfer the seven customers it serves in Ohio Power's territory to Ohio Power and that Consolidated cease and desist from furnishing customers in Ohio Power's certified territory.

Consolidated's position is that its distribution service to new customers in the Woodside subdivision was authorized by the Village pursuant to Section 4 of Article XVIII of the Ohio Constitution and that the CTA does not afford a basis for prohibiting Consolidated from providing such service. It argues that there are seven different places in the CTA that defer to municipal authority over public utilities granted by Article XVIII of the Ohio Constitution. Consolidated asserts that the CTA was not designed by the legislature to impede or restrict in any way Ohio municipalities' authority over public utility service within their borders.

Consolidated points to the language in Section 4 of Article XVIII of the Ohio Constitution, which allows municipalities to operate their own public utility or contract with others for any such product or service, to support its position that it is not in violation of the CTA. Consolidated states that it is clear the Village's grant of a franchise to Consolidated to operate electric distribution facilities and to use the public streets for that purpose, coupled with Consolidated's acceptance of that franchise, constitutes an exercise of the Village's Section 4 of Article XVIII of the Ohio Constitution powers, citing *Ohio Power v. Village of Attica*, 23 Ohio St.2d 37 (1970) (*Attica*) and *In the Matter of the Complaint of Cleveland Electric Illuminating Company v. Medical Center Company*, Case No. 95-458-EL-UNC, Entry of August 10, 1995. It further contends that *Attica* also stands for the proposition that the grant of a municipality-wide public utility franchise to an electric supplier does not create an exclusive right for that supplier and that Section 4 of Article XVIII of the Ohio Constitution confers the right of a municipality to grant more than one franchise for public utility service to new customers within the geographic area of the municipality.

Consolidated also contends that Section 3 of Article XVIII of the Ohio Constitution provides additional authority to municipalities to grant franchises to electric suppliers. Section 3, commonly referred to as the Home Rule Amendment, provides that municipalities shall have the 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. Consolidated argues that even if the granting of franchises to utilities is not a "contract" under Section 4, the municipality still has authority to grant non-exclusive franchises under its Home Rule authority of Article XVIII of the Constitution, and, therefore, its actions still fall within its constitutional power reserved in the CTA.

With regard to the issue of the obligation to serve within a municipality where the municipality grants more than one non-exclusive franchises, Consolidated argues that *Attica* holds that the utilities have the obligation to serve all the public within their authorized franchised area. Consolidated points out that public utilities currently compete with municipal electric systems and that does not diminish the utilities' obligations to serve customers with those municipalities. It further notes that Lexington has stated that its intent is not to permit existing utility customers to switch between franchised utilities

and that its constitutional authority to provide for competition can reasonably be limited to new and future customers.

The City of Delaware supports the arguments of Consolidated. It argues that an electric supplier has no exclusive right to serve under the CTA, where a municipality is contracting with others to supply service pursuant to its constitutional powers. Delaware asserts that the unambiguous terms of Lexington's non-exclusive franchises to both Ohio Power and Consolidated override the operation of the CTA insofar as the CTA grants exclusive rights to serve a certified territory, both as a matter of constitutional law as well as the specific exceptions set forth in the CTA. Delaware argues that Section 4933.83(A), Revised Code, creates an exclusive right to serve load within a certified territory only to the extent that such right does not impair the power of a municipality to require a franchise or a contract for the provision of electric service within its boundaries. Delaware contends that if the Commission were to grant Ohio Power's requested relief, it would be determining that the Village does not have the authority to adopt non-exclusive franchises. It contends that such a limitation is nowhere suggested in the language of Section 4933.83(A), Revised Code. Delaware believes that its ability to grant non-exclusive franchises assists economic development and helps ensure adequate electric service within its community. With regard to the public policy arguments raised by Ohio Power, Delaware contends those arguments should be directed towards the Village of Lexington, as the franchising authority, not the Commission.

IEU-Ohio asserts that the Commission should dismiss Ohio Power's complaint. It expresses similar opinions as Consolidated and Delaware that the provisions of the CTA are limited and only apply to the extent that the Village does not act pursuant Section 4 of Article XVIII of the Ohio Constitution. It believes that because the Village granted non-exclusive franchises to both Ohio Power and Consolidated under its constitutional powers, Consolidated has not violated the CTA by providing service in an area of the Village determined to be in the certified territory of Ohio Power.

IEU-Ohio also addresses the issue of who has the obligation to serve when multiple electric suppliers can provide service in the same areas of a municipality. IEU-Ohio states that this case is about new customers that have not yet been served by any electric distribution provider and, therefore, the Commission does not have to address issues of default customers. However, IEU-Ohio believes that whether a customer was a returning customer or a new customer, Ohio Power would have an obligation to provide distribution service at its Commission-approved rates within its certified territory.

IV. Commission Conclusion

There is little dispute over the factual matters of this complaint. Ohio Power and Consolidated are "Electric Suppliers" as defined by Section 4933.81(A), Revised Code, and their certified territories have been established in accordance with the CTA. Ohio Power and Consolidated serve customers within the Village of Lexington and have been granted,

by ordinances, non-exclusive franchises from the Village to construct and operate lines for the transmission and distribution of electricity in the Village and to supply electricity to the Village and its inhabitants. The ordinance granting a franchise to Consolidated provides that:

Consolidated Electric Cooperative, its successors, and assigns (hereinafter called "Grantee") are hereby granted the right, privilege, franchise, and authority to acquire, construct, maintain, and operate in, above, under, across, and along the streets, thoroughfares, alleys, bridges, and public places (as the same now exist or may hereafter be laid out) of the Village of Lexington, State of Ohio, lines for the transmission and distribution of electric energy only, either by means of overhead or underground conductors, with all the necessary or desirable appurtenances and appliances, including electric substations, to render public utility service in said Village and to the inhabitants thereof by supplying electric energy to said Village and the inhabitants thereof, and persons or corporations beyond the limits thereof for light, heat, power, or any other purposes or purpose for which electric energy is now or may hereafter be used, and the transmission and distribution of the same within, through, or across said Village of Lexington, State of Ohio.

Both ordinances contain the following language:

The rights, privileges, and franchises hereby granted shall not be construed to be exclusive and the Council of the Village of Lexington hereby reserves the power to grant similar rights, privileges, and franchises to any other person or persons, firm or firms, corporation or corporations.

(Consolidated Exh. 1, Attachments D and H)

At the request of the Village, Consolidated has been providing electric service to customers in a portion of a new residential subdivision that is within the certified territory of Ohio Power but near the certified territory boundary line between Ohio Power and Consolidated. At no time has Ohio Power provided distribution service to these new premises.

The question for the Commission to decide, as put forth by the parties to this complaint, is whether Consolidated has violated the provisions of the CTA by providing electric distribution service to customers in Ohio Power's certified territory within Lexington pursuant to a non-exclusive franchise. Divisions (A) and (C) of Section 4933.83, Revised Code, provide in pertinent parts as follows:

(A) Except as otherwise provided in this section and Article XVIII of the Ohio Constitution, each electric supplier shall have the exclusive right to

furnish electric service to all electric load centers located presently or in the future within its certified territory, and shall not furnish, make available, render, or extend its electric service for use in electric load centers located within the certified territory of another electric supplier; provided that nothing in sections 4933.81 to 4933.90 of the Revised Code shall impair the power of municipal corporations to require franchises or contracts for the provision of electric service within their boundaries, In the event that a municipal corporation refuses to grant a franchise or contract for electric service within its boundaries to an electric supplier whose certified territory is included within the municipality, any other electric supplier may serve the municipal corporation under a franchise or contract with the municipal corporation.

(C) Except as provided in division (B) of this section and Article XVIII of the Ohio Constitution, each electric supplier has the obligation and exclusive right to furnish electric service to electric load centers, wherever located, which it was serving on January 1, 1977, or which it had agreed to serve under lawful contracts in effect on or resulting from written bids submitted under bond prior to January 1, 1977, and no other electric supplier shall furnish, make available, or extend electric service to any such electric load centers.

In addition, Section 4933.87, Revised Code, states as follows:

Nothing contained in sections 4933.81 to 4933.90 of the Revised Code shall be construed to affect the right of municipal corporations to generate, transmit, distribute, or sell electric energy. The rights and powers of municipal corporations as they exist on or after the effective date of this section to acquire, construct, own, lease, or operate in any manner a public utility or to supply the service or product by means of a rate ordinance adopted under section 743.26 of the Revised Code or under Section 4, Article XVIII, Ohio Constitution in any portion of the state is not affected by sections 4933.81 to 4933.90 of the Revised Code... .

Clearly, the intent of the provisions of the CTA is not to abridge the rights of Home Rule municipalities from exercising their power under Article XVIII of the Ohio Constitution or their power to pass ordinances granting franchises. Section 4 of Article XVIII of the Ohio Constitution (hereafter Section 4) states:

Any municipality may acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or services.

In addition, several provisions of the Ohio Revised Code set forth the municipality's authority over electric service provided within the municipality. Sections 4933.13 and 4933.16, Revised Code, require the electric utility to obtain the consent of the municipality before constructing electric facilities within the municipality. This is done through the passage of an ordinance granting a franchise to the utility. In addition, Section 743.26, Revised Code, provides for the establishment of rates for electric service by a municipality.

Ohio Power argues that Lexington's granting of a non-exclusive franchise to Consolidated is not a contractual arrangement covered by the municipality's constitutional power to "contract with others for any such product or service." It contends that the granting of such a franchise does not rise to the level of contracting for electric service protected by Section 4. Therefore, Ohio Power believes that Consolidated's service to customers in Ohio Power's certified territory violates Divisions (A) and (C) of Section 4933.83, Revised Code. In support of its argument it cites the Ohio Supreme Court's decision in *Galion*. The City of Galion ordinance granted the Ohio Public Service Company the following franchise:

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 supply 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.

(*Galion* at 504)

Galion does support Ohio Power's argument that a granting of a franchise does not equate to contracting for utility service under Section 4. *Galion* held the following:

It is the opinion of this court that the ordinance in question does not constitute or authorize a contract to acquire, construct, own, lease or operate a public utility or a "contract with any person or company therefore." It does not require The Ohio Public Service Company to supply, furnish or sell electric current to anyone. It fixes no rates to be charged by that company in the event it should supply current to any inhabitant of Galion. It merely authorizes The Ohio Public Service Company to make certain use of the streets, alleys and public ways of Galion to enable that company to furnish and supply "electric service" to two industries if and when those industries contract with The Ohio Public Service Company for such service. The ordinance gives the city of Galion no power to require The Ohio Public Service Company to supply current to those two industries and the city

would have no interest in any dispute which might arise between The Ohio Public Service Company and those industries with respect to the furnishing or supplying of such service.

(*Galion* at 506-507)

Having made such a finding, the Ohio Supreme Court found that the ordinance granting a franchise to Ohio Public Service Company was not subject to a voter referendum pursuant to the provisions of Section 5 of Article XVIII of the Constitution of Ohio. (*Galion* at 507)

Consolidated, Delaware, and IEU-Ohio do not agree with Ohio Power's arguments. They cite to *Attica; Lucas v. Lucas Local School District*, 2 Ohio St.3d 13 (1982) (*Lucas*); *Woodbran Realty Corp. v. Orange Village*, 67 Ohio App.3d 207 (1990); *Village of Grafton v. Ohio Edison Co. (Grafton)*, 77 Ohio St.3d 102 (1996); and several other cases. These parties argue that these cases support the position that generally the Ohio courts have not differentiated between municipal franchises and municipal contracts when referring to the municipality's rights under Section 4 and that the Ohio Supreme Court's holding in *Galion* is inconsistent with the cases cited above.

After considering the applicable provisions of the Ohio Constitution, the CTA, and the case law presented by the parties, the Commission concludes that Consolidated has not violated the provisions of the CTA. Various sections within the CTA cited above make it clear that the CTA is not meant to interfere with the rights of municipalities to establish their own utilities or issue franchises and contracts for utility services. Section 4933.83(A), Revised Code, not only refers to Article XVIII of the Ohio Constitution but also states that the CTA shall not "impair the power of municipal corporations to require franchises or contracts for the provision of electric service within its boundaries." Ohio Power's argument, that a municipality should not be able to grant non-exclusive franchises, is contrary not only to the language of Section 4933.83(A), Revised Code, but to the Ohio Supreme Court's decision in *Attica* where the Court upheld the Village of Attica's authority to issue a franchise to North Central Electric Cooperative in an area served by Ohio Power.

We recognize that the *Galion* case cited by Ohio Power does make a distinction between franchises that permit a utility to provide service in a municipality and a contract for utility service which spells out terms and conditions of service. However, that decision was made in the context of determining whether the franchise ordinance was subject to a voter referendum under Section 5 of Article XVIII of the Ohio Constitution. The Ohio Supreme Court, in many other decisions, has considered the issue of municipal rights involving utility services, preceding and following *Galion*, and discussed franchises and contracts in the context of Section 4. In *Attica*, the Court discussed North Central Electric Cooperative's ability to serve customers pursuant to a franchise passed by the Village of Attica. The Court noted that North Central's acceptance of the franchise will subject it to regulation of the municipality for rates and facility installation under Sections 743.26 and

4933.13, Revised Code, and went on to conclude that "North Central is a public utility with which the village of Attica may, under Section 4, Article XVIII of the Ohio Constitution, contract for the furnishing of electric service (Attica supra, at 44). In *Lucas*, the Court held that Firelands Electric Cooperative's failure to obtain a franchise from the Village of Lucas to serve the Lucas Local School District interfered with the village's constitutional rights under Section 4. In addition, in *Grafton*, the Court held that Ohio Edison Company's service to new customers in the Village of Grafton after its franchise had expired was contrary to the village's rights under Section 4. Further, in *State ex rel. Toledo Edison Co. v. Clyde* (1996), 76 Ohio St. 3d 508, (*Clyde*) the Court found the municipality's right to provide electric service to all new customers after a utility franchise expired was within the authority of the municipality under Section 4. The point to be made from all these cases is that the Court looked at the municipality's authority to issue franchises in the context of contractual matters under Section 4.

Also telling is the Ohio Supreme Court's decision in *Cranberry*. Although the case is cited by Ohio Power, our reading of the decision supports the arguments raised by the opposing parties. In that case, the Court was determining whether a village ordinance granting a franchise to a telephone company to provide service constituted a contract for service and was, therefore, permissible under Section 4. The Court stated as follows:

The grant of the franchise is no more or no less than a permission to use the streets for the benefit of the public, and the acceptance of the franchise is no more or less than the expressed intention of doing that for which the grant was intended. But in this case more was done. The telephone plant was constructed, the streets used, and the telephone service installed. The putting into operation of the service supplied what theretofore was wanting, namely, the subject-matter of the contract, - that part of the consideration moving to the village on behalf of its inhabitants, - the rights granted to the utility company being the consideration moving to it.

Service is not only a proper and sufficient consideration to sustain a contract generally, but it is the one of the two particular things which is the subject of contract under Section 4, Article XVIII of the Constitution, and although there is no definite period of time fixed, and no schedule of rates, yet we doubt not that the village, while the defendant is furnishing service, may enforce the contract in respect to the compelling of the furnishing of the service to all the inhabitants indiscriminately.

The Court's rationale for finding that franchise arrangement between the telephone company and the village was a contractual matter falling under Section 4 is equally applicable in the present case. Ordinance No. 04-66 was passed by Lexington authorizing Consolidated to provide service; Consolidated accepted that authority in writing; and

Consolidated has acted upon that authority in installing facilities to serve new customers in the Woodside development.

In addition to the case law discussed above, a review of the Ordinance No. 04-66 shows that once the ordinance is accepted by Consolidated, it becomes contractual in nature, remains in force and effect for a twenty-year period, and states that "all rights privileges, franchises and obligations herein contained by or on behalf of said Village, or by or on behalf of said Grantee [Consolidated], shall be binding upon, and inure to the benefit of the respective successors or assigns of said Village, or of said Grantee, whether so expressed or not." (Consolidated Ex 1, Exhibit D) We find the Galion ordinance discussed above different, in that it was a franchise authorizing the utility to serve two industrial customers upon entering into agreements with those customers. Accordingly, we find that, from the weight of the case law and a review of Ordinance No. 04-66 itself, Consolidated's service pursuant to the franchise is contractual in nature and authorized under Section 4.

Aside from our legal determination above, there appears to be little practical basis for finding that contractual utility service under Section 4 does not include the granting of municipal franchises. Even Ohio Power recognizes in its brief that Lexington has the ability to "contract with others for the provision of electric utility service in the municipality pursuant to Ohio Constitution, Art. XVIII, Section 4." If it were to be found that its franchise did not fall under Section 4, Lexington could easily cure the problem by entering into a contract with Consolidated to serve a portion of the Woodburn subdivision.

We also find no basis for a determination that Lexington cannot grant non-exclusive franchises to provide competition within its municipal borders. Consolidated cites to the Federal Sixth Circuit Court opinion *Triad CATV v. The City of Hastings*, 1990 U.S. at Lexis 18212 (1990) (*Triad*), which it has attached to its brief, to support its argument that municipalities may grant non-exclusive franchises. In *Triad*, involving cable service, the Court concluded that "a municipality may freely award competing franchises without unconstitutionally impairing or reducing a non-exclusive franchise holder vested property interests." Ohio Power's position is that Lexington can grant more than one franchise, but is limited to granting a franchise to Consolidated to serve its certified territory within the Village and granting a franchise to Ohio Power to serve its certified territory within the Village. We find that the CTA does not prohibit a municipality from granting competing franchises nor do we believe that such a limitation on a municipality's ability was intended, considering the length the CTA goes to maintain municipal authority over utility services within its borders. We believe that the utility's exclusive right to serve does not apply in a municipality where the municipality has acted otherwise, such as in this case, by granting non-exclusive franchises. Further, to argue that Lexington's non-exclusive franchise ordinances were meant only to allow utilities to serve only within their certified territories would make the non-exclusive franchise language in the ordinances

superfluous. Applying the *Triad* logic to this case, we find that the granting of non-exclusive franchises does not impair Ohio Power's rights under the CTA because the CTA specifically carved out any such right to serve within municipal borders to the extent that the municipality has acted otherwise.

With regard to the public policy issues raised by Ohio Power, we recognize that the provisions of the CTA that exempt municipalities' jurisdiction from the provisions of the CTA may have some less than desirable effects on public utility operations. However, to a large extent, those effects were created with the amendment of the Ohio Constitution to allow municipal control of utility service and the enactment of the CTA and Sections 4933.13 and 16, and 743.26, Revised Code. As to the question of the obligation to serve, the CTA places an obligation on electric suppliers, whether they are public utilities or electric cooperatives, to provide service within their certified territory. However, the Commission need not pass upon the question of whether that obligation is somehow removed when a municipality grants more than one franchise to serve customers within the municipality inasmuch, as there is no case or controversy on this issue at this time. We also note that our decision addresses the issue of electric service to new customers, not customers or load centers where electric facilities currently exist. The Ohio Supreme Court, in *Clyde*, has already stated that a municipality cannot require a utility to stop serving existing customers it is serving lawfully, without first obtaining approval from the Commission pursuant to the Miller Act, Sections 4905.20 and 4905.21, Revised Code. So, loss of existing customers due to a municipality's actions, such as in the case above, could not occur without Commission approval.

Although we find that the CTA does not prohibit a municipality from granting non-exclusive franchises, we caution municipalities about unrestricted use of non-exclusive franchise practices. Witnesses for Lexington stated at hearing that the granting of more than one non-exclusive franchise is "intended" for limited circumstances, or is only practical, where a new customer is near a certified territory boundary line. However, it appears that Lexington has not placed any geographical boundaries in its franchises that would limit a franchisee from duplicating facilities throughout the municipality to serve particular customers at a customer's request. We encourage municipalities to think through all the ramifications and unintended consequences, as well as the policy concerns raised by Ohio Power in this case, before granting unlimited non-exclusive franchises within their borders.

Based upon our findings above, Consolidated is not in violation of the CTA and the complaint against it should be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- 1) On July 10, 2006, Ohio Power filed the above-captioned complaint alleging that Consolidated violated Section 4933.83 of the Ohio Revised Code by providing electric service to customers within the certified territory of Ohio Power.
- 2) Ohio Power and Consolidated are "Electric Suppliers" as defined by Section 4933.81(A), Revised Code, and their certified territories have been established in accordance with the CTA.
- 3) By Ordinance No. 69-21, enacted on June 16, 1969, Lexington granted to Ohio Power a non-exclusive franchise to construct, operate and maintain facilities for distribution of electric energy within the streets, thoroughfares, alleys, bridges, and public places of the Village in order to provide electric service in the Village and to its inhabitants, for a term of 50 years.
- 4) In 2004, Lexington passed Ordinance No. 04-66 which authorized Consolidated to render electric service to the Village and its inhabitants on a non-exclusive basis.
- 5) At the request of the Village, Consolidated has been providing electric service to customers in a portion of a new residential subdivision that is within the certified territory of Ohio Power but near the certified territory boundary line between Ohio Power and Consolidated. At no time has Ohio Power provided distribution service to these new premises.
- 6) The intent of the provisions of the CTA is not to abridge the rights of Home Rule municipalities from exercising their power under Article XVIII of the Ohio Constitution or their power to pass ordinances granting franchises.
- 7) From the weight of the case law and a review of Ordinance No.04-66 itself, Consolidated's service pursuant to the Lexington franchise is contractual in nature and authorized under Section 4.
- 8) The CTA does not prohibit a municipality from granting competing franchises nor does the Commission find that such a limitation on a municipality's ability was intended, considering the length the CTA goes to maintain municipal authority over utility services within its boarders. A utility's exclusive right to serve does not apply in a municipality where the municipality has acted otherwise, in this case by granting non-exclusive franchises.

- 9) After considering the applicable provisions of the Ohio Constitution, the CTA, and the case law presented by the parties, the Commission concludes that Consolidated has not violated the provisions of the CTA.

ORDER:

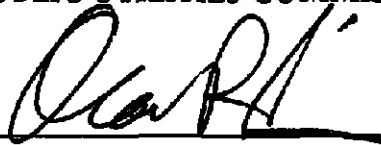
It is, therefore,

ORDERED, That, to clarify the parties' arguments, both the surreply brief of Consolidated and Ohio Power's response be included as part of the record. It is, further,

ORDERED, That, based on the findings above, the complaint against Consolidated be dismissed. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

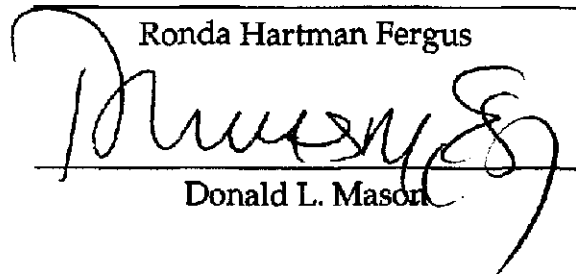
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



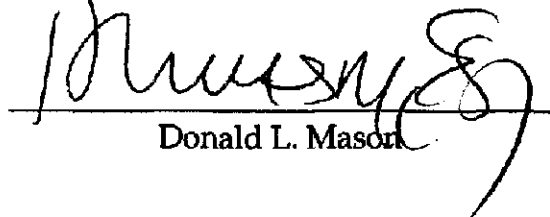
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Donald L. Mason

RRG:ct

Entered in the Journal

JUN 25 2017



Renee J. Jenkins
Secretary