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September 4, 2007

By Messenger 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 Memorandum of Respondent Consolidated Electric Cooperative, Inc. and Intervenor City of Delaware, Ohio in Opposition to Complainant Ohio Power Company's Application for Rehearing, 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

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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	:	

MEMORANDUM OF RESPONDENT CONSOLIDATED ELECTRIC COOPERATIVE, INC. AND INTERVENOR CITY OF DELAWARE, OHIO IN OPPOSITION TO COMPLAINANT OHIO POWER COMPANY'S APPLICATION FOR REHEARING

INTRODUCTION

Ohio Power lists eleven grounds for rehearing, all of which say the same thing in different ways: that the Village of Lexington does not have the Home Rule power under Article XVIII of the Ohio Constitution to authorize a utility to provide electric distribution service to new customers within Lexington's boundaries, even through an ordinance that is substantially identical to ordinances used widely by Ohio municipalities to grant franchises to utilities, including Ohio Power itself. Ohio Power relies almost entirely on a decision, now more than half century old and since refuted several times over, which holds that such a form of ordinance is not a contract authorized by Article XVIII, Section 4 of the Ohio Constitution.

Nothing presented in Ohio Power's Application warrants rehearing. Almost all of the arguments made in the Application were presented, considered, and discredited in the Commission's Opinion and Order of July 25, 2007. The only new materials presented in the Application are fragments of language from cases that have little to do with the subject at hand. The only surprise in the Application is Ohio Power's concession at page 13 that Lexington "can provide for competition within its borders," and that admission moots many of Ohio Power's other arguments.

Below, Consolidated addresses the various matters presented by Ohio Power in the order in which Ohio Power presented them in its Application.

A. Ohio Power's Assertion That The Commission Misconstrued the *Galion* Case Is In Error. Moreover The *Britt*, *Milan*, and *Ohio River Power* Cases Do Not Support The Construction of *Galion* Advocated by Ohio Power.

While Ohio Power faults the Commission's treatment of *Galion v. Galion*, 154 Ohio St. 503 (1951), its Application actually fails to address the dispositive factual distinctions between the *Galion* ordinance and Lexington Ordinance No. 04-66. As the Commission's Opinion and Order states:

> 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 in 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 review of Ordinance No. 04-66 itself, Consolidated's service pursuant to the franchise is contractual in nature and authorized under Section 4.

(Opinion and Order at 15.)

Accordingly, *Galion* involved a situation where the ordinance simply facilitated special contracts between a utility and two companies that were customers of the city's municipally-owned utility. Thus, unlike Ordinance No. 04-66, the ordinance involved in *Galion* was not truly a "public utility" contract because that ordinance did not authorize the grantee to provide "public utility" service generally. Another distinguishing feature of the *Galion* ordinance was that it provided only 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.

While ignoring these factual differences cited by the Commission, Ohio Power attacks other reasons given by the Commission for distinguishing *Galion*. First, Ohio Power finds irrelevant the fact that the *Galion* 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," and Ohio Power chides the Commission for distinguishing *Galion* on that basis. (Ohio Power Application at 6, quoting Opinion and Order, at 13.) But the Commission was right to consider the context of the *Galion* decision — the decision did not turn on the metes and bounds of Section 4 authority.[1]

Furthermore, any claim that *Galion* supports Ohio Power's position was swept away by the Supreme Court of Ohio's decision in *Ohio Power v. Village of Attica*, 23 Ohio St.2d 37

[1] Ohio Power also cites *State, ex rel. Mitchell v. Council of Milan*, 133 Ohio St. 499 (1938), which is another referendum case. That case merely confirms that the requirements of Section 5 of Article XVIII relative to referendum apply to exercises of power by municipalities under Section 4 of Article XVIII. *Milan* does not advance Ohio Power's position that Ordinance No. 04-66 is not a contract contemplated by Article XVIII, Section 4.

(1970). While Ohio Power previously attempted to distinguish the facts of *Attica*, Ohio Power is now saying that those facts do not matter because "the ultimate decision of the court in the *Attica* case was that a municipality could contract with an electric cooperative, under Section 4 of Article XVIII of the Ohio Constitution, to supply electric power for the municipality and its inhabitants." (Ohio Power Application at 7, quoting *Attica*, 23 Ohio St.2d at 44.)

It is understandable why Ohio Power would prefer that the Commission ignore the facts of *Attica*, as well as what Ohio Power would no doubt describe as the "bare franchise" provided by *Attica* Ordinance No. 126-A in that case. First is the obvious fact that the *Attica* court would not have reached its decision unless it believed that the underlying ordinance was a valid exercise of Article XVIII, Section 4 authority. Equally important, the *Attica* franchise and other facts of the case are remarkably similar to the franchise and other circumstances presented to Commission here.[2] The *Attica* court's discussion of those facts, as applied here, are devastating to Ohio Power's position.

In *Attica*, Ordinance No. 126-A granted North Central Electric Cooperative, Inc. a "franchise to use the streets and public grounds in the village in providing electric service for public and private use in the Buckeye Village addition." That ordinance neither provided for rates nor for other terms of service.[3] Therefore, Ordinance No. 126-A (attached to Consolidated Reply Brief as Appx. B) was substantially identical to Lexington Ordinance No. 04-66: (1) both

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[2] Ohio Power's misguided attempt to sever the syllabus of the case from the underlying facts is unavailing. The Supreme Court rejected the exact same argument in *Wiss v. Cuyahoga County Board of Elections*, 61 Ohio St.2d 298 (1980) as follows:

> Appellee argues (correctly) that the law of a Supreme Court case is stated in the syllabus thereto and concludes (incorrectly) that since the quoted language is not in the syllabus, it is of no effect. The syllabus of a case must be read in light of facts in the case.

(*Wiss*, 61 Ohio St.2d at 300.)

[3] Ironically, Ohio Power was the complainant in *Attica* also. Consequently, Ohio Power's positions in this case constitute a collateral attack on the judgment rendered against it in *Attica*. Collateral estoppel precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action based upon a different cause of action. *New Winchester Gardens, Ltd. v. Franklin County Bd. of Revision*, 80 Ohio St.3d 36, 41 (1997).

granted rights and privileges for a term of years; (2) both granted rights to the cooperatives to use the streets for the purpose of furnishing electric power, heat, and light to the municipality's inhabitants; and (3) both placed conditions as to the manner in which the cooperatives were allowed to use the streets in erecting, maintaining, and using the necessary appliances to provide electricity.

Accordingly, when it decided the issue of whether a "municipal corporation may grant a franchise under Section 4, Article XVIII of the Ohio Constitution to an electric cooperative," the Supreme Court in *Attica* was not dealing with some abstract concept of "franchise," *Attica*, 23 Ohio St.2d at 39. It was dealing with a franchise ordinance virtually identical to Lexington Ordinance No. 04-66. Nonetheless, Ohio Power asserts at page 7 of its Application that the *Attica* decision ". . . does not answer the question in the present case — is the Lexington/Consolidated ordinance that type of contract [an Article XVIII, Section 4 contract]?" Ohio Power is wrong. To the contrary, given the virtual identity of *Attica* Ordinance No. 126-A and *Lexington* Ordinance No. 04-66, that question is resoundingly answered in the affirmative.

Moreover, Ohio Power's current argument is entirely inconsistent with the theory Ohio Power advanced in *Attica* itself. Then, Ohio Power argued that the village ordinance exceeded Home Rule authority because, Ohio Power claimed, a cooperative was not a "utility" under Article XVIII, Section 4 the Constitution. Now, Ohio Power argues that the *Attica* ordinance was not even enacted under Article XVIII, Section 4. This suggests that the *Attica* court was somehow misled in its belief that the village predicated its ordinance on Home Rule authority. Plainly, such an assertion is made far too late.

Ohio Power's plea that the Commission "pay no attention" to the facts and reasoning of *Attica* are reminiscent of similar entreaties of the Wizard of Oz. Even though the *Attica*

ordinance did not contain rates and terms of service, the Supreme Court found that acceptance of the ordinance subjected North Central to regulation and thereby fulfilled the prerequisites of an Article XVIII, Section 4 contract. The court stated:

> Furthermore, when North Central accepts the franchise from 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 . . . .'
>
> *From the foregoing*, we 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 power.

Attica, 23 Ohio St.2d at 43-44 (emphasis added).[4]

In a further effort to undercut *Attica*, Ohio Power also cites *Britt v. City of Columbus*, 38 Ohio St.2d 1 (1974) and *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421 (1919). *Britt* is totally off base. That case involved a suit against the City of Columbus seeking to enjoin the proposed construction of a city sewer project. The purpose of the sewer extension was to sell excess sewage services of the City of Columbus to non-inhabitants of the City, with no intent that the project extension would serve inhabitants of the City of Columbus. The question presented by the *Britt* complaint was whether the grant of power to municipalities in Article XVIII, Section 4 – to acquire or construct public utility facilities "for service which is or is to be supplied to the municipality or its inhabitants" – could be construed to also include facilities

[4] In another illogical attempt to combat the *Attica* decision, Ohio Power makes a further reference to the *Milan* decision. First, *Milan* was decided in 1938 — 32 years before *Attica*. Second, *Milan* involved a challenge to the Village of Milan's purchase of electric current from the City of Norwalk, Ohio, which the relator in that case asserted was in the purview of Article XVIII, Section 4, and therefore subject to referendum under Section 5. Of course it is! In holding that a municipal ordinance authorizing the municipal purchase of public utility products or services is subject to Sections 4 and 5 of Article XVIII of the Ohio Constitution, the Supreme Court was simply writing a syllabus to fit the facts of that particular case. Nothing in *Milan* suggests, infers, or determines that the type of franchise arrangements blessed by the Supreme Court in *Attica* and by the Commission here are not contracts within the purview of Article XVIII, Section 4 of the Ohio Constitution.

solely constructed for the sale of those products outside the municipality. In the context of this "sale-purchase" dichotomy, the Court held that eminent-domain authority extends to facilities used by the municipality for the purchase of utility products or services for its inhabitants, but not to facilities used in sales to others. In a weird twist of logic, Ohio Power asserts that *Britt*'s reliance on *Attica* somehow changes or undermines what the *Attica* court said. Ohio Power Application at 7-8. This contention is both illogical and inscrutable.

Ohio Power's construction of the *Britt's* reference to "purchasing" would eviscerate most municipal home-rule powers over utilities. Even rate ordinances promulgated by a municipality would not be an exercise of Article XVIII, Section 4 power because the municipality would not be directly involved in purchasing power for its resale to its inhabitants. No doubt realizing that this position is absurd, Ohio Power retreats slightly and urges instead that Lexington Ordinance 04-66 cannot be characterized as an exercise of Article XVIII, Section 4 power because it does not obligate "any inhabitants of Lexington to purchase products and services from Consolidated." (Ohio Power Application at 7). If Ohio Power were correct, *Attica* ordinance 126-A also could not have been held to be an exercise of Article XVIII, Section 4 powers because *Attica*'s residents also were not obligated by the ordinance to take service from North Central.[5] In fact, as the Court of Appeals pointed out in *Ohio Power Co. v. Attica*, 19 Ohio App. 2d 89, (1969):

> The ordinance placed "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." *Ohio Power Co.*, Ohio App. 2d at 95.

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[5] And of course, it is also the case that residents of Cleveland and Columbus are not obligated to buy power from their respective municipal electric systems. Yet it is clear that this fact does not eviscerate the constitutional power of Columbus and Cleveland to conduct their own electric business. As we show *infra* Ohio Power later concedes in its application that a municipality can authorize such competition.

Ohio Power's reliance on *Ohio River Power Co. v. Steubenville*, 99 Ohio St. 421 (1919) is similarly misplaced. In *Ohio River Power Co.*, the court dealt with a 1915 contract between the City of Steubenville and an electric supplier. Pursuant to this contract, the electric supplier agreed to furnish the city with light and power at a specified rate for a period of ten years, or until 1925. The electric supplier sold its rights under the contract to the Ohio River Power Co. Notwithstanding the agreement as to rates (which had been adopted by the city ordinance), Ohio River Power Co. in 1917 filed new rate schedules increasing the rates for electric power, and Steubenville sought and obtained an injunction against implementation of the new rates. The Court sustained the injunction, holding that the assumed contract was "expressly authorized by Section 4, Article XVIII of the Constitution of Ohio, and is valid and binding upon the parties thereto." *Ohio River Power Co.*, 99 Ohio St. at syllabus 4.

In its Application, Ohio Power selectively quotes the *Ohio River Power Co.* opinion, asserting that an Article XVIII, Section 4 contract must necessarily include rates. *Ohio River Power Co.* means nothing of the sort. The quotation relied upon by Ohio Power is not only dicta; it was made in the context of determining whether rate provisions of such a contract are supported by that constitutional authority. Thus, Ohio Power's logic is backward. Under *Ohio River Power Co*, rates included in an Article XVIII, Section 4 contract are <u>enforceable</u> as part of the contract. That does not mean the contract <u>must</u> have rates to qualify as a contract authorized by Article XVIII, Section 4.

Ohio Power also tries to distinguish certain other post-*Attica* decisions which conclude that the "contract" between a municipality and an electric supplier need not include rates in order to be authorized by Article XVIII, Section 4. For example, Ohio Power claims that *Lucas v. Lucas Local School District*, 2 Ohio St.3d 13 (1982), did not "consider the nature of that

contract, for instance, whether it must obligate the utility to provide service and must set forth the rates for that product or service." (Ohio Power Application at 10.) Actually, *Lucas* does indicate that had Firelands Electric Cooperative obtained permission to operate (*i.e.*, a "bare franchise") from the Village of Lucas, Firelands would have prevailed. As the court noted:

> Further, Firelands has not received or sought permission from the Village to supply electric power to the school system and seeks to circumvent obtaining a franchise from the municipality.

Lucas, 2 Ohio St.3d at 16.

Furthermore, both *Lucas* and *State, ex rel. Toledo Edison Co. v. City of Clyde*, 76 Ohio St.3d 508 (1996), provide that the ability to grant public utility franchises is within the exclusive power provided by Article XVIII, Section 4. *Lucas*, 2 Ohio St.3d at 16; *Clyde*, 76 Ohio St.3d at 516-17. In *Clyde*, Toledo Edison had been providing service within the municipality pursuant to a non-exclusive 25 year franchise that included no rate requirements. The court discussed the exclusive power in municipalities to grant public utility franchises in the context of the Toledo Edison franchise to occupy the streets. The *Clyde* court quoted *Lucas* in linking a municipal grant of permission (and withholding of permission) to a utility as an exercise of exclusive municipal power under the constitution. *Clyde*, 76 Ohio St.3d at 516, quoting with approval *Lucas*, 2 Ohio St.3d at 16. Therefore, the suggestion by Ohio Power that *Lucas* and *Clyde* are inapplicable is erroneous.

Similarly, Ohio Power's attempt to distinguish *Woodbran Realty Corp. v. Orange Village*, 67 Ohio App.3d 207 (1990) fails. *Woodbran* involved the issue of whether a private utility was obligated to obtain village permission to extend its sewer lines. The court specifically held that the municipal determination of whether the public utility would be allowed to use village streets to locate its facilities involved application of Article XVIII, Section 4 powers. The *Woodbran* court held that a municipality's right to give such consent (or to refuse it)

involved home-rule power because "any other holding would violate appellee's home-rule power to contract or decline to contract for public utility services." *Woodbran*, 67 Ohio App.3d at 212. Thus, Ohio Power is dead wrong to suggest that *Woodbran* "sheds no light on whether the Lexington/Consolidated franchise is a contract for public utility products or services under Section 4." (Ohio Power Application at 11-12.) The *Woodbran* court could not have been clearer in stating that municipal permission to occupy the city streets was an exercise of municipal power contemplated by Article XVIII, Section 4.

Ohio Power also tries to distinguish *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102 (1996). What is significant about the *Grafton* decision is the court's broad interpretation of Grafton's constitutional power over utilities, which includes all matters pertaining to the provision of electric service within municipal limits:

> Thus Ohio Edison poses the question of whether forcing the abandonment of two electric lines erected in violation of *Grafton's constitutional right to control the provision of electric services to its inhabitants* requires commission approval. . . . Nor should a public utility be allowed to knowingly violate a municipality's right to exclusive control of utility services within the municipality. . . .

Grafton, 77 Ohio St.3d at 109 (emphasis added).

In its Opinion and Order here, the Commission concluded that the "point 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," (Opinion and Order at 14). That conclusion remains unshaken. Therefore, Ohio Power's discussion of the cases relied upon by the Commission, as well as its additional arguments related to *Galion*, add nothing warranting rehearing.

B. Ohio Power's Discussion of the *Triad CATV* Decision Adds Nothing Warranting Rehearing, Particularly in Light of its New Concession That a Municipality is Constitutionally Empowered to Authorize Competition Between Electric Suppliers.

After having argued to the contrary in its earlier briefing, Ohio Power now "agrees that Lexington can provide for competition within its borders by either establishing its own electric utility system or by entering into a contract under Section 4 of Article XVIII of the Ohio Constitution. . . ." (Ohio Power Application at 13.) This new concession goes a long way toward admitting that Ohio Power's Complaint is unfounded. Any argument that competition between two electric suppliers within a municipality is unlawful per se is now waived. Given that the Constitution clearly authorizes a municipality in its plenary power to authorize competition if it wants to, and given that Ohio's Certified Territory Act defers to that municipal constitutional power in all respects, Ohio Power's concession is long overdue.

Because Ohio Power now concedes that the Certified Territory Act does not prohibit a municipality from granting competing franchises, Ohio Power's discussion of *Triad CATV v. The City of Hastings*, 1990 U.S. LEXIS 18212 (1990) is quite beside the point. The Certified Territory Act does not preclude a municipality from establishing competition between two utilities, so how can it help Ohio Power to suggest that *Triad* might have been decided differently had a statute similar to the Certified Territory Act been in place?

Simply, the *Triad* decision shows: (1) there is nothing inherently wrong in a municipality granting multiple franchises for the same service to public utilities, (2) a municipality may "freely award competing franchises," and (3) non-exclusive franchise holders like Ohio Power in Lexington cannot complain when a municipality authorizes a second provider to operate. Ohio Power's Application does not assert otherwise.

C. By Its Own Terms, The Certified Territory Act Permits Consolidated's Service.

The Certified Territory Act receives very limited mention in Ohio Power's Application. Significantly, Ohio Power ducked the Commission's finding that Ohio Revised Code §4933.83(A), in providing deference to Ohio's municipalities, "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.'" (Opinion and Order at 13.) As the Commission cogently pointed out, "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." (Opinion and Order, p. 13.)

In unmistakable language that was unrebutted by Ohio Power, the Commission's Opinion and Order states:

> 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.

(Opinion and Order at 15-16.)

D. Ohio Power's Reliance on *Cranberry* is Mystifying Because, as the Commission Pointed Out, it Supports Consolidated's Position in Every Respect.

The Commission's Opinion and Order refuted Ohio Power's attempt to rely on *Local Telephone Co. v. Cranberry Mutual Telephone Co.*, 102 Ohio St. 524 (1921). (Opinion and Order at 14.) As the Commission pointed out, the Supreme Court in *Cranberry* acknowledged that a franchise to a telephone company allowing it to construct a telephone exchange and to

occupy the streets and highways of the municipality to provide telephone service to the inhabitants, if accepted in writing by the telephone company, would constitute a contract for public utility product or service contemplated by Article XVIII, Section 4. The court so ruled even though the franchise had "no definite period of time fixed, and no schedule of rates." *Cranberry*, 102 Ohio St. at 531. Therefore, the *Cranberry* opinion is in keeping with *Attica*'s holding that a franchise granted to a utility, even absent rates or other terms of service, is a contract for utility products or service pursuant to Article XVIII, Section 4.

Cranberry Mutual Telephone Co. lost its case because it did not have capacity to contract; it had failed to secure a certificate of public necessity from the Public Utilities Commission. Therefore, the company "by its failure to possess a certificate is under a legal infirmity, without which it is incapable of contracting for the furnishing of telephone service. . . . This want of a certificate on the part of the public utility desiring to contract for the furnishing of telephone is the same as lacking the certificate or badge of authority to enter into a contract to furnish the service." *Cranberry*, 102 Ohio St. at 532.

Ohio Power opines that the Commission's reliance on *Cranberry* is inappropriate because there is "no evidence in the record, either in the Lexington/Consolidated franchise itself or in any testimony, that suggests that Lexington or Consolidated intended to enact, or believe that Lexington has enacted, a franchise under which Lexington could compel Consolidated to provide any service anywhere in Lexington, let alone in the portion of Lexington that is within OPCo's Commission-certified territory. Nor is there any basis to conclude that the Lexington/ Consolidated franchise requires Consolidated to serve all of Lexington's inhabitants indiscriminately." (Ohio Power Application, at 14-15.)

First, both *Cranberry* and *Attica* stand for the proposition that the acceptance by a utility of a duly-enacted franchise carries with it certain obligations owing by that utility to the municipality and its inhabitants, and those obligations are implied by operation of law whether or not they are specifically mentioned in the franchise ordinance.[6] Whether or not Consolidated would welcome regulation or rate-setting by Lexington, or whether Lexington intends it is irrelevant; the fact is that Consolidated's acceptance of the franchise subjects it to municipal regulation.

Furthermore, Consolidated did present evidence recognizing its duty to serve. The testimony of Brian Newton states that since Lexington has authorized Consolidated to serve within its corporate limits, "it is my belief that we have every right, and indeed the obligation to serve these new customers, if we are asked to do so." (*See* Testimony of Brian Newton, Consolidated Ex. 1, p. 3.)

Mr. Newton goes on to say that:

> Consolidated stands ready to provide service to any new electric load centers in Lexington pursuant to its non-exclusive franchise.

Id. at p. 6.

Ohio Power also claims that Consolidated's contract is really not a contract for public utility service because both parties are construing it to apply only to new services and not to existing customers. Ohio Power Application at 15. Ohio Power overstates by a wide margin. It goes without saying that discrimination in the rendition of services may be based upon a reasonable classification. *Myers v. Public Utilities Commission*, 64 Ohio St.3d 299, 301-302

[6] To reiterate, in *Attica*, it was held the acceptance of the franchise by an electric cooperative subjects it to regulation by the municipality pursuant to Ohio Revised Code § 743.23 relative to rates and Ohio Revised Code §4933.13 relative to the provision of reasonable regulations by the municipal corporation. *Attica*, 23 Ohio St.2d at 43-44. As the Commission observed, however, *Cranberry* says the village may enforce the contract with respect to compelling the furnishing of service. (Opinion and Order at 14.)

(1992). The reasons for differentiating between existing customers and new ones are set forth at length in the testimony of Messrs. Pscholka and Newton and need not be repeated here.

Finally, Ohio Power uses *Cranberry* as a basis for asserting that Consolidated lacks capacity to enter into a service contract with Lexington. (Ohio Power Application at 16.) Such an assertion goes nowhere. The syllabus of *Attica* states:

> A non-profit corporation organized to manufacture, distribute and sell electric power to the public, either on a membership or non-membership basis, is a public utility, and a municipality may contract with such a corporation to supply electric power for the use of the municipality and its inhabitants.

Attica, 23 Ohio St.2d 37 (syllabus) (emphasis added).

Still, Ohio Power gamely asserts that "under the CTA, Consolidated has no capacity to contract for service in another electric supplier's commission-certified service territory." (Ohio Power Application at 17.) Nonsense. The Certified Territory Act explicitly defers to the Article XVIII plenary power of municipalities over utilities – power that *Attica* recognizes as an explicit constitutional right to contract with a rural electric cooperative. Suffice it to say that nothing presented with respect to *Cranberry* warrants rehearing.

E. Ohio Revised Code Section 4933.83(A) Does Not Support the Proposition That The Franchise Created by Ordinance No. 04-66 Is Not Authorized by Article XVIII, Section 4 of the Ohio Constitution.

Consolidated has demonstrated that Lexington Ordinance No. 04-66 is an exercise of Article XVIII, Section 4 power, supported by decisions of the courts construing franchises in *Attica, Lucas, Clyde, Grafton, Woodbran,* and *Cranberry*. At page 17 and 18 of the Ohio Power Application, Ohio Power apparently asserts that the legislature can somehow change the way that the Constitution is to be interpreted by its adoption of subsequent legislation.

Ohio Revised Code §4933.83(A) signals no such intention on the part of the General Assembly. Nonetheless, even if the statute were so construed, it would fall of its own weight. A

statute enacted subsequent to a constitutional provision cannot lawfully establish the intent of the citizens of Ohio when they adopted the constitutional provision. No legislative body, be it Congress or the General Assembly, has the power "to decree the substance" of what a constitutional provision means. (*See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).) It is a judicial function to determine what a constitutional provision means — not a legislative function. *City of Boerne, supra*, 521 U.S. at 535-36. "When the political branches of the government act against the background of a judicial interpretation of the Constitution already issued . . .," they act "beyond their authority and the principle of separation of powers is violated." *Id.*[7]

In any case, the use of the words "franchise or contract" in Ohio Revised Code §4933.83(A) supports Consolidated's position, not Ohio Power's. The final sentence of Ohio Revised Code §4933.83(A) states that if a municipal corporation refuses to grant a franchise or contract to the certified territory electric supplier, "any other electric supplier may <u>serve the municipal corporation</u> under a franchise or contract with the municipal corporation." (Emphasis added.) This language indicates clearly that a franchise is not a mere license; it carries with it the contractual obligation to "serve the municipal corporation." Moreover, not all contracts for electric service that a municipal corporation might enter into are franchises; for example, a municipal corporation could purchase its inhabitants' requirements from another supplier and then resell the power. Accordingly, recital of both terms – "franchises or contracts" – is entirely consistent with Consolidated's position in this proceeding. Accordingly, nothing in Section 4933.83(A) warrants rehearing.

[7] <u>See also</u> *Marbury v. Madison*, 1 Cranch 37 (1803).

F. Ohio Power's "Policy" Arguments Do Not Warrant Rehearing and the Commission Properly Exercised its Discretion and "Judicial Restraint" in Declining to Consider The Various Scenarios Advanced by Ohio Power.

The Commission is sitting in this case as a quasi-judicial body, (*see generally* 2 Ohio Jur. 3d Administrative Law § 69), and in effect, the Commission has exercised judicial restraint in exercising its discretion not to consider other hypothetical controversies. *Tschantz v. Ferguson*, 57 Ohio St.3d 131 (1991).

Ohio Power, by contrast, would apparently have this Commission open a generic proceeding to consider all of the possible scenarios in which retail electric competition might take place inside a municipality. (Ohio Power Application at 18-20.) The Commission should not render advisory opinions concerning other possible scenarios without an actual case or controversy to present those fact situations.[8]

It should also be remembered that Ohio Power drafted and filed this Complaint, defining both its scope of its limitations. The Complaint was strategically narrow, alleging that a small number of customers at specific addresses in the Village of Lexington were illegally receiving service from Consolidated. In fact, Ohio Power resisted consolidation of this case with a similar complaint in case number 06-1070-EL-CSS. The Commission has undoubtedly rendered a full and complete Opinion and Order dismissing Ohio Power's complaint that service to these specific customers was illegal. Ohio Power cannot now be heard to complain that the Commission kept within the boundaries Ohio Power established, and declined to reach other issues that were not essential to its decision.

[8] See *In the Matter of the Complaint of the Office of the Consumers' Counsel*, Case Nos. 92-1525-TP-CSS and 93-230-TP-ALT, Entry on Rehearing (May 18, 1994).

CONCLUSION

For the reasons above stated, Respondent Consolidated Electric Cooperative, Inc. and Intervenor City of Delaware, Ohio respectfully requests that the Application for Rehearing be overruled.

Respectfully submitted,

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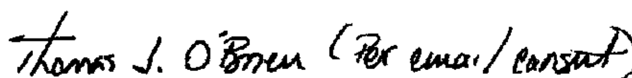

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CERTIFICATE OF SERVICE

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 4th day of September, 2007:

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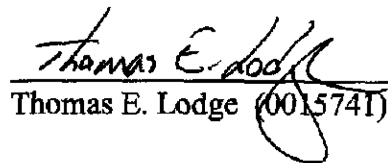

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