

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

ENTRY ON REHEARING

The Commission finds:

- (1) On July 10, 2006, Ohio Power Company (Ohio Power) filed a complaint alleging violations of the Certified Territory Act (Act) by Consolidated Electric Cooperative, Inc. (Consolidated).
- (2) On July 25, 2007, the Commission issued its Opinion and Order (Order) finding that Consolidated had not violated the Act and dismissed the complaint.
- (3) On August 23, 2007, Ohio Power filed an application for rehearing alleging that the Order is unreasonable and unlawful. Ohio Power argues that the Commission erred in finding that the non-exclusive franchise accepted by Consolidated was a contract as contemplated under Section 4 of Article XVIII of the Ohio Constitution (hereafter Section 4) and misapplied Supreme Court of Ohio (Court) precedent. Also, Ohio Power asserts that issues raised concerning the obligation to serve and the ability of existing customers to switch to another electric service supplier, not addressed by the Commission, were ripe for Commission consideration. Further, Ohio Power contends that the Commission's statement, that if the franchise was not considered a contract Lexington could have cured the problem by entering into a contract with Consolidated to serve a portion of the Woodburn subdivision, does not provide a basis for the Commission's decision.

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- (4) On September 4, 2007, Consolidated and the City of Delaware (respondents) filed a joint memorandum contra to Ohio Power's application. Respondents argue that the Commission correctly applied the law and Court precedent. Further, the respondents state that Ohio Power has not raised any issues that warrant rehearing and that the arguments raised have been adequately addressed by the Commission in its Order.
- (5) On September 19, 2007, the Commission granted Ohio Power's application to further consider the matters specified in the application for rehearing.
- (6) With regard to Ohio Power's arguments that the Commission misapplied Court precedent and relied on Court dicta, we do not agree. The Commission considered the totality of the cases presented to us on brief to determine whether a municipal grant of a franchise and the actions taken by an electric supplier based on that franchise could be considered contractual in nature and entered into pursuant to Section 4. Although the Commission considered the Court's decision in *Galion v. Galion*, 154 Ohio St. 503, the weight of the cases cited in our Order supported a finding that the franchise granted in this case and the actions taken by Consolidated amounted to a contractual relationship under Section 4. The franchise created an agreement between the parties whereby Lexington has given permission to Consolidated to serve customers within the municipality and Consolidated has taken on the obligation to serve customers and installed facilities in accordance with the terms of the franchise. We are also not persuaded by Ohio Power's argument that *Local Telephone Company v. Cranberry Mutual Telephone Company*, 102 Ohio St. 524, (*Cranberry*) does not apply to the current circumstance because there is no claim that Consolidated's franchise compels Consolidated to serve any customers in Lexington. We believe that the portion of the Court's decision in *Cranberry*, cited in our Order at page 14, taken as a whole supports our decision in this case. Further, the Court in *Ohio Power v. Village of Attica*, 23 Ohio St.2d 37, discussed in our Order, acknowledged that electric suppliers serving pursuant to a franchise are subject to the legislative authority of a municipal corporation (*Attica* at page 43). We also disagree that our findings were based on dicta from various Court cases. In the cases cited in our Order, the Court's decisions were premised on

municipalities' authority to grant franchises under Section 4. This was not dicta.

In its application for rehearing, Ohio Power cites *State ex rel. Mitchell v. Council of Milan* (1938), 133 Ohio St. 499; *Britt v. City of Columbus* (1974), 38 Ohio St. 2d 1 (*Britt*); and *Ohio River Power Co. v. Steubenville* (1919), 99 Ohio St. 421 (*Steubenville*), to support its argument that the franchise in this case was not contractual in nature. After reviewing those cases, the Commission does not find the Court's pronouncements in those cases warrant rehearing or persuade us that our decision was in error. The fact that the Court in *Steubenville* found that a contract for electric service necessarily included an agreed-upon rate and time period for the purchase of electricity by the municipality does not support a finding that the franchise in the current case is not contractual in nature inasmuch as Section 4 refers to "the product or service which is to be supplied to the municipality or its inhabitants." We find Lexington's entering into a franchise agreement with Consolidated involved the supplying of electricity to its inhabitants pursuant to Section 4, even though it was not actually purchasing electric service. Further, the Court's holding in *Britt*, addressing a municipality's right to use eminent domain and the distinction between purchasing and selling utility services under Section 4, is not applicable to the current proceeding.


- (7) With regard to Ohio Power's argument that the Commission failed to address electric suppliers' obligation to serve and the effect of the ruling on existing customers, the Commission did not err. Not only was there no case or controversy but there was not sufficient record or arguments presented for the Commission to consider adequately this matter. As for the Commission's recognition that, even if the franchise did not amount to a contract, Lexington could have cured the problem by entering into a contract with Consolidated to serve a portion of the Woodburn subdivision, this recognition was not the basis for the Commission's decision.
- (8) Based upon our discussion above, Ohio Power's application for rehearing should be denied.

It is, therefore,

ORDERED, That Ohio Power's application for rehearing is denied. It is, further,
ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

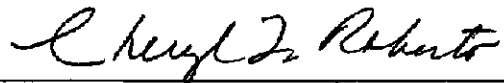
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus



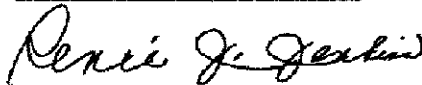
Cheryl L. Roberto

Valerie A. Lemmie

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Renee J. Jenkins
Secretary