

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint and)
Appeal of The Dayton Power and)
Light Company from Ordinance No.)
432 Passed by the Council of the)
Village of St. Paris On January 17,)
1983 to Amend the Price which The)
Dayton Power and Light Company, its)
Successors and Assigns, may Charge)
for Electric Light Furnished to the)
Public Grounds, Streets, Lanes,)
Alleys and Avenues in the Village)
of St. Paris, State of Ohio, Com-)
mencing on the 1st Day of January)
1983, and Ending on the 31st Day)
of December 1985, and Determining)
the Manner in which said Lighting)
may be Furnished, Provided and Paid)
for.)

Case No. 83-193-EL-CMR

In the Matter of the Complaint and)
Appeal of The Dayton Power and)
Light Company from Ordinance CM-654)
Passed by the Council of the Vil-)
lage of West Milton on February 8,)
1983 Fixing the Price which The)
Dayton Power and Light Company, its)
Successors and Assigns, may Charge)
for Electric Light Furnished to the)
Public Grounds, Streets, Lanes,)
Alleys and Avenues in the Village)
of West Milton, State of Ohio, for)
a Period of Twelve (12) months Com-)
mencing on the 1st Day of January)
1983, and Ending on the 31st Day of)
December 1983, and Determining the)
Manner in which said Lighting may)
be Furnished, Provided and Paid)
for.)

Case No. 83-381-EL-CMR

In the Matter of the Complaint and)
Appeal of The Dayton Power and)
Light Company from Ordinance No.)
0-83-3 Passed by the Council of the)
Village of Bradford on March 10,)
1983 Fixing the Price which the)
Dayton Power and Light Company, its)
Successors and Assigns, may Charge)
for Electric Light Furnished to the)
Public Grounds, Streets, Lanes,)
Alleys and Avenues in the Village)
of Bradford, State of Ohio, for a)
Period of Two (2) Years and Con-)
tinuing not more than Ten (10))
Years Commencing on the 1st Day of)
January 1983 and Determining the)
Manner in which said Lighting may)
be Furnished, Provided and Paid)
for.)

Case No. 83-532-EL-CMR

ENTRY

The Commission, coming now to consider the above-entitled matters, and specifically the May 3, 1983 memorandum of the Villages of Bradford and St. Paris, the May 23, 1983 memorandum of the Village of West Milton, and the June 2, 1983 memorandum of The Dayton Power and Light Company, finds:

- 1) On February 2, 1983, the Dayton Power and Light Company (hereinafter referred to as the complainant, the company or DP&L) filed a complaint and appeal from Ordinance No. 432 passed by the Village Council of St. Paris on January 17, 1983. This complaint and appeal was docketed as Case No. 83-193-EL-CMR and was later amended on March 10, 1983. DP&L also filed on March 10, 1983 a complaint and appeal from Ordinance CM-654 passed by the Village Council of West Milton on February 8, 1983. This complaint and appeal was docketed as Case No. 83-381-EL-CMR. In Case No. 83-532-EL-CMR, the company filed a complaint and appeal from Ordinance O-83-3 passed by the Village of Bradford on March 10, 1983. DP&L's complaint and appeal was filed on April 6, 1983 in Case No. 83-532-EL-CMR.
- 2) In all three of these cases, DP&L has asserted that its service responsibility is limited to supplying electricity and access to its poles for lighting purposes. The challenged ordinances in each of these three cases requires DP&L to perform what it contends to be nonjurisdictional services including but not limited to maintaining, repairing, replacing and inscailing fixtures, luminaires, and other appurtenances ("lighting appliances") as distinguished from providing electricity and access to its poles. The complainant requested that the Commission make an initial determination as to its jurisdiction over the subject matters of these complaint and appeals.
- 3) In its April 20, 1983 Entry in Case Nos. 82-193-EL-CMR and 83-381-EL-CMR, and its May 4, 1983 Entry in Case No. 83-532-EL-CMR the Commission indicated its initial impression that it did not have subject matter jurisdiction over the ordinances to the extent the ordinances attempt to require DP&L to provide lighting appliances in addition to electricity. However, the Commission extended the opportunity to the Villages of St. Paris, West Milton, and Bradford to file memoranda on this issue.
- 4) On May 23, 1983, the Village of West Milton (West Milton) filed a memorandum on the jurisdictional issue in which the Villages of St. Paris and Bradford joined. The Village of Bradford had earlier filed a memorandum on May 3, 1983 in which the Village of St. Paris joined.
- 5) In its memorandum, West Milton alleges that the Commission has broad and plenary powers over public utilities pursuant to Sections 4905.04 4905.06, and 4905.07, Revised Code. It also argues that because the provision to supply electricity is inextricably woven with the duty to provide the instrumentalities (lighting appliances) associated with such supply, DP&L must maintain, repair, replace and stall lighting appliances pursuant to Section 4905.22, Revised Code. West Milton cites three cases for the propositions that

- a) another jurisdiction has held that the cost of renewal, replacement, and maintenance of lighting appliances and instrumentalities is essential to the determination of a proper and equitable streetlighting rate [In re Willow River Power Company, P.U.R. 1933A, at 309 (1932)], b) another regulatory body has approved a "servicing and maintenance of equipment charge" as part of a streetlighting tariff [In re Potomac Electric Power Company, 85 P.U.R. 3d 119, at 124 (1970)], and c) another jurisdiction has ordered an electric utility to obtain a suitable supply of streetlighting appliances and to file an appropriate tariff [In re Narragansett Electric Company, 40 P.U.R. 4th 498, at 530 (1980)]. It alleges that historically DP&L has provided these services by ordinance and that the Commission's own files reveals electric tariffs which provide for both the supply of electricity and the replacement, installation, repair, and maintenance of company-owned instrumentalities. Finally, the Village of West Milton alleges that because these are rate-fixing ordinances, the Commission has jurisdiction in these cases.
- 6) The Village of Bradford (Bradford) also relies on a broad interpretation of Sections 4905.04, 4905.05, and 4905.06, Revised Code in its May 3, 1983 memorandum of law. Bradford also suggests that by virtue of Section 4905.04, Revised Code, the Commission may require public utilities to render services exacted by it or by law. It also maintains that since streetlighting is inherently a matter of public safety, the Commission has broad jurisdiction over the services associated with streetlighting pursuant to Section 4905.06, Revised Code. Finally, Bradford alleges that since DP&L is abandoning services, it must comply with Sections 4905.20 and 4905.21, Revised Code.
- 8) DP&L, in its June 2, 1983 memorandum, argues that by simply applying the provisions of Sections 4905.02 and 4905.03, Revised Code, one must conclude the Commission's subject matter jurisdiction does not extend to the service of maintaining, repairing, replacing, and installing lighting appliances. The company asserts that Section 4905.02, Revised Code defines a public utility as "every corporation...defined in Section 4905.03, Revised Code." Section 4905.03(A)(4) provides in part:

"as used in Section 4905.01 to 4905.64 of the Ohio Revised Code:

- (A) Any...corporation, wherever organized or incorporated is:
- (4) an electric light company when engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state;"

Therefore, the company argues that while the Commission may have broad and plenary power over public utilities, DP&L is a public utility only when engaged in the business of supplying electricity for light, heat or power purposes to consumers within the state. To the extent DP&L would be involved in other activities (such as installing, maintaining, repairing, or replacing lighting appliances), the complainant believes that it would not fall within the definition of a public utility under Sections 4905.02 and 4905.03, Revised Code.

The company also believes that Section 4905.22, Revised Code applies only to the business activities of a public utility and the term "instrumentalities" used in that statute is limited to those facilities such as generating plants, transmission and distribution lines used to supply electricity and does not include "lighting appliances". The complainant maintains that the three cases cited by West Milton, namely Willow River, supra, Potomac Electric, and Narragansett Electric, supra are not applicable to the instant issue because the jurisdictional issue was not raised or adjudicated in those cases nor was OHio law interjected.

The company disagrees with West Milton's assertion that the Commission has jurisdiction over all of the rate ordinances since they are municipal rate-fixing ordinances. The complainant points out Chapter 4909 of the Revised Code incorporates the definition of a public utility contained in Section 4905.02, Revised Code and that the complaint and appeal statute, Section 4909.34, Revised Code, is limited to an ordinance "with respect to the rate... charged... for... service by such public utility". The company argues that since it is not a public utility with respect to the repair, maintenance, and replacement of lighting appliances, the Commission's complaint and appeal jurisdiction is limited to establishing rates for the supply of electricity and access to poles for streetlighting purposes only.

- 9) The complainant argues that merely because it had contracted with a village in the past to provide services regarding lighting appliances is not determinative of the jurisdictional question. The company maintains that it is free to contract for services which exceed its jurisdictional public utility service and that it has never invoked the jurisdiction of the Commission with respect to streetlighting.

DP&L also asserts that contrary to Bradford's contention, Sections 4905.20 and 4905.21, Revised Code are not applicable in this case. The company alleges that the Sections 4905.20 and 4905.21, Revised Code apply to a "public utility" as defined by Section 4905.02, Revised Code and since DP&L is not a public utility with respect to maintaining, replacing, repairing, or installing lighting appliances,

Sections 4905.20 and 4905.21, Revised Code do not apply to it. To the extent DP&L is a public utility with regard to the provision of electricity and access to its poles, the argument is made that DP&L is not abandoning a generating plant, power station, or an electric light line and it will continue to supply electricity and access to its poles for streetlighting purposes.

- 10) It is clear that barring restrictions or limitations in its corporate charter or its franchise, an electric light company may contract with a municipality to furnish light at specified rates which may be interpreted as requiring the furnishing of current as well as the lamps. See, Newark v. Licking Light & Power Co., 10 Ohio Dec. 669, (Licking County C.P., 1906). However, this does not answer the instant question. The jurisdictional question presented is whether absent any contract, the duty of a public utility which is an electric light company extends to the installation, maintenance, repair and replacement of lighting appliances for a municipality's street lights. There appears to be no case precedent on this question.
- 11) This Commission is a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute. See Penn Central Transportation Co. v. Public Util. Comm., (1973) 35 Ohio St. 2d 97, 298 N.E. 2d 587. This Commission's general powers are set forth in Chapter 4905 of the Revised Code. The Commission does have jurisdiction over public utilities which are defined by Sections 4905.02 and 4905.03, Revised Code. As referenced above, a public utility includes an "electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes". See Sections 4905.03(A)(4) and 4905.02, Revised Code. We believe that the term "when" in Section 4905.03(A)(4), Revised Code is significant. The statute does not vest the Commission with jurisdiction over DP&L when the company is engaged in activities other than the business of supplying electricity for light, heat, or power purposes. For the same reasons, we believe that Section 4905.22, Revised Code does not require an electric light company to furnish and provide lighting appliances. The installation, maintenance, repair, and replacement of lighting appliances are functions separate and apart from the business of supplying electricity and giving access to its poles.
- 12) We do not believe that the language contained in Section 4905.04, Revised Code vesting the Commission with the power and jurisdiction "to require all public utilities to furnish their products and render all services exacted by the Commission or by law" empowers the Commission to exact new services from utilities above and beyond what is required by law, but rather authorizes the Commission

to compel services consistent with what is required by law.

- 13) The mere fact that the ordinances are rate-setting ordinances does not guarantee that the Commission has jurisdiction over the entire ordinance. Section 4909.34, Revised Code, the "complaint and appeal" statute, is applicable to ordinances setting rates for public utilities. To the extent the ordinances attempt to set rates for activities other than the supplying of electricity and providing access to poles, Section 4909.35, Revised Code would not be applicable to these ordinances because there would be no attempt to set rates for public utilities.
- 14) The Commission does agree with Bradford's contention that streetlighting is a matter of public safety. But that alone does not mean that the installation, maintenance, repair and replacement of lighting appliances is within the jurisdiction of this Commission. We do not believe that every matter that concerns itself with the public safety is necessarily within the jurisdiction of the Commission. Rather, we would interpret the pertinent provisions of Section 4905.06, Revised Code, referenced by Bradford, as meaning that the Commission has power to examine public utilities and keep informed as to how DP&L, in its business of supplying electricity for light, heat and power purposes to consumers and providing access to its poles, leases, operates, manages, and conducts its property with respect to the safety and security of the public. The Commission does not believe that Section 4905.06, Revised Code vests the Commission with jurisdiction over the installation, maintenance, repair, and replacement of lighting appliances.
- 15) After having reviewed the cases cited by West Milton of Willow River, supra, Potomac Electric, supra, and Narragansett Electric, supra, the Commission agrees with DP&L that these cases are not applicable to the instant issue because none of the three interpret Ohio law and the jurisdictional issue was not litigated in any of the three cases.
- 16) The Commission acknowledges that it has on file streetlighting tariffs from other electric light companies which provide for the installation, maintenance, repair, or maintenance of lighting appliances. However, this is not dispositive of the jurisdictional issue. Another regulatory commission has ordered the cancellation of an outdoor lighting tariff, which had been on file in one form or another since 1939, after it determined that such outdoor lighting service was not devoted to the use and accommodation of the public. See Virginia Electric and Power Co. v. State Corporation Commission, 252 S.E. 2d 333 (1979).

- 17) The Commission also is of the opinion that the fact these services were historically provided pursuant to contract between the villages and DP&L is of no significance or impact in determining the jurisdictional issue. The Commission's jurisdiction is defined by statutes which may be interpreted by the Commission.
- 18) We do not agree with the Village of Bradford that the company must comply with Sections 4905.20 and 4905.21, Revised Code in this case. DP&L is not abandoning any tariffed service. The cited sections apply to a public utility abandoning certain facilities or service and to the extent Bradford is referring to the installation, maintenance, repair or replacement of lighting appliances, DP&L is not a public utility.
- 19) Absent any specific condition contained in the franchises of DP&L to the contrary, the Commission finds that it does not have subject matter jurisdiction over those portions of the ordinances which attempt to require and establish rates for the installation, maintenance, repair, and replacement of lighting appliances.
- 20) The company should file the information required by the Standard Filing Requirements consistent with this Entry within thirty days after the journalization date of this Entry. See the June 15, 1983 Entry in these matters.

It is, therefore,

ORDERED, That the foregoing findings be observed. It is, further,

ORDERED, That a copy of this Entry be served upon counsel for all parties parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

<i>Michael B. Bane</i>	
Chairman	
<i>William J. Brooks</i>	<i>Adley P. Brown</i>
Commissioners	Commissioners
<i>Gloria L. Gaylord</i>	<i>Alan R. Elch</i>
Commissioners	Commissioners

SMH;vlc

Entered in the Journal

OCT 5 1983

A True Copy

Mary Ann Orlinski
 Mary Ann Orlinski
 Secretary