

July 8, 2021

The Honorable Michael C. O'Malley
Cuyahoga County Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, OH 44113

SYLLABUS:

2021-015

In cases where it has not received the consent of the municipalities, Cuyahoga County lacks the power to establish and operate an electric utility that would both: (1) provide electric services to customers located in municipalities within the county; and (2) compete for those customers with municipal utilities.



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OPINION NO. 2021-015

The Honorable Michael C. O'Malley
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Dear Prosecutor O'Malley:

You have requested an opinion asking several questions regarding the ability of Cuyahoga County, a county which has adopted its own charter, to operate an electric utility. Specifically, you ask three questions which I have framed as follows:

1. Does Cuyahoga County have the power to establish and operate an electric utility within the county when the municipalities within the county have not approved of the county's operating a utility?
2. Assuming Cuyahoga County can own and operate the utility, would the utility be subject to the requirements set forth in R.C. Chapter 743?
3. Assuming Cuyahoga County can own and operate the electric utility, would the utility be a "public utility" as that term is defined in R.C. 4905.02?

I conclude that the answer to Question 1 is "no," under Ohio law, Cuyahoga County cannot establish and

operate the utility when the municipalities where the utility would operate have not consented to the operation of the utility. Therefore, I do not need to answer Questions 2 and 3.

Before going any further, I must pause to address one important limitation on my ability to answer your questions. You have asked for an opinion interpreting portions of both state law and the Cuyahoga County charter. As a preliminary matter, I note that, pursuant to the long-standing practice of my office, the interpretation of county charter provisions is not within the opinion-rendering function of the Attorney General. 1995 Op. Att'y Gen. No. 95-035, at 2-186. Therefore, this opinion will be limited to opining on what state law allows or requires. A charter-county cannot exercise powers exceeding those conferred by the Ohio Constitution and the Revised Code. *State ex rel. O'Conner v. Davis*, 139 Ohio App.3d 701, 705, 745 N.E.2d 494 (9th Dist.2000); *see also* 2007 Op. Att'y Gen. No. 2007-035, at 2-360 to 2-363.

I

Cuyahoga County has adopted a “charter” form of government pursuant to Article X, Section 3 of the Ohio Constitution. That section allows a county to adopt a charter “which provides for the exercise by the county of power vested municipalities by the constitution or laws of Ohio[.]” The charter “shall become effective if approved by a majority of the electors voting thereon.” *Id.* In the “case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships... the exercise of power by the municipality or township shall prevail.” *Id.*

One municipal power is especially relevant here: A municipality in Ohio may “acquire, construct, own, lease and operate” a public utility. Ohio Constitution, Article XVIII, Section 4; *see also* R.C. Chapter 743.

You report that Cuyahoga County is considering establishing and operating a public electric utility. You also report that at least one municipality in Cuyahoga County currently operates its own electric utility. You state that simultaneous operation of a city-owned utility and a county-owned utility would create a situation “in which two utilities operate and may compete for customers and other resources within the same jurisdiction.” You ask whether Cuyahoga County may legally operate an electric utility under such circumstances.

Certain provisions of the Constitution and Revised Code could be interpreted to allow a charter-county to provide utility services to a municipality upon approval from the legislative authorities of municipalities in the county. *See, e.g.*, Ohio Constitution, Article X, Section 3; R.C. 743.18. Based upon your request letter’s description of the situation in Cuyahoga County, and based on communications with your office, I understand for purposes of this opinion that Cuyahoga has not obtained any such approval. Therefore, this opinion is limited to analyzing situations in which a county lacks explicit approval from a municipality to operate a county electric utility.

In addition, one clause of Article X, Section 3 of the Ohio Constitution allows certain charter-counties to exercise municipal powers *exclusively*. Such a charter must be approved by certain groups of voters, including a majority voting thereon in the county, in the largest municipality, and in the county outside of such municipality. My understanding is that Cuyahoga County’s charter was not adopted pursuant to this clause, so I do not analyze the clause.

II

Pursuant to Article X, Section 3 of the Ohio Constitution in the event of a conflict between the exercise of municipal powers by a charter-county and

the exercise of powers by a municipality, “the exercise of powers by the municipality... shall prevail.”

No court has yet interpreted this provision or decided what standard should be used to determine if a conflict exists. I do not need to determine the broader limits of what creates a conflict between a county and a municipality’s joint exercise of a power, however, to conclude that a conflict exists in this instance.

A long line of Ohio Supreme Court decisions has held that municipalities have the right to determine which public utilities serve their municipality, *and the right to exclude other public utilities from serving the municipality*. In *State ex rel. Toledo Edison Co. v. City of Clyde*, the Ohio Supreme Court found that a public utility was prohibited from expanding its service in a municipality after the expiration of its contract (or “franchise”) with the municipality. 76 Ohio St.3d 508, 668 N.E.2d 498 (1996). The Court stated:

The [municipality’s] right to require a contract necessarily also means the ability to exclude competitors of a municipal utility. Permitting competition inside the municipal utility boundaries would be inconsistent with a municipality’s right to require a contract to serve the municipal inhabitants. Therefore, absent a franchise or contract with a municipality giving a public utility the right to serve the municipal inhabitants, that public utility has no right to serve those customers within its service territory that are located within a municipality with a Section 4, Article XVIII utility. Accordingly, a municipality may exclude another energy provider, including the local public utility, from attempting to provide utility service inside the municipal boundaries. *Id.* at 517.

In a follow-up case, the Court described the municipality's right as "the right to create a municipal utility *monopoly*." *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 107, 671 N.E.2d 241 (1996) (emphasis added). Other decisions have held similarly. *See, e.g., Bd. of Cty. Commr. v. Village of Marblehead*, 86 Ohio St.3d 43, 45, 711 N.E.2d 663 (1999) ("The Ohio Constitution authorizes a municipality to provide water service to its residents to the exclusion of other providers."); *Lucas v. Lucas Local School Dist.*, 2 Ohio St.3d 13, 16, 442 N.E.2d 449 (1982) (municipality could prohibit a school district located within the municipality from operating or contracting with an electric utility) ("contracting for public utility services is exclusively a municipal function under Section 4, Article XVIII of the Ohio Constitution.")

The Ohio General Assembly also recognizes that municipalities have the right to determine which public utilities operate in their territory. *See* R.C. 4933.83(A) ("[E]ach electric supplier shall have the exclusive right to furnish electric service... within its certified territory... 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[.]")

Because a municipality has the right to determine which utilities may operate in its territory, along with the right to exclude other utilities from operating in that territory, an attempt by a county to operate a utility within a non-consenting municipality would necessarily create a conflict with the municipality. A county's exercise of a utility within a non-consenting municipality necessarily conflicts with the municipality's power to determine which utilities operate within its territory.

Pursuant to Article X, Section 3 of the Ohio Constitution, in the event of a conflict between the

exercise of powers by the charter-county and a municipality, the municipality shall prevail. Therefore, the municipality's power to operate, contract with, and exclude utilities within its territory would prevail over any power a charter-county may have to do the same. As such, Cuyahoga County may not operate a public utility under the circumstances described in your letter.

III

Questions Two and Three in your letter ask about whether various statutes are applicable to a charter-county operated utility. Question Two asks whether the utility would be subject to the requirements in R.C. Chapter 743 that are generally applicable to municipal utilities. Question Three asks whether a charter-county operated utility would be a "public utility" as that term is defined in R.C. 4905.02. Because I conclude that the answer to your first question is "no," I do not need to answer your second or third questions.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

In cases where it has not received the consent of the municipalities, Cuyahoga County lacks the power to establish and operate an electric utility that would both: (1) provide electric services to customers located in municipalities within the county; and (2) compete for those customers with municipal utilities.

Respectfully,



DAVE YOST
Ohio Attorney General