

IN THE SUPREME COURT OF OHIO

City of Reynoldsburg, Ohio	:	Appeal from the Public Utilities
	:	Commission of Ohio
Appellant,	:	
	:	Public Utilities Commission of Ohio
v.	:	Case No. 08-846-EL-CSS
	:	
The Public Utilities Commission	:	Ohio Supreme Court
of Ohio,	:	Case No. 11-1274
	:	
Appellee.	:	

MERIT BRIEF OF APPELLANT CITY OF REYNOLDSBURG, OHIO

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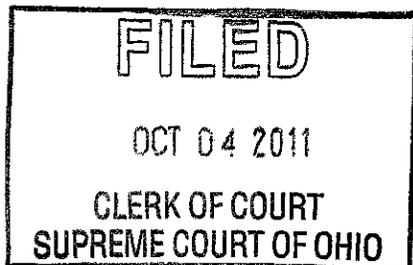


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STATEMENT OF THE CASE

At its core, this case concerns the fundamental respect for public property reflected in the laws of this state. The Ohio Constitution gives municipalities authority to regulate public property, including rights of way, within municipal boundaries. Section 3, Art. XVIII, Ohio Constitution (the “Home Rule” Amendment). The Ohio Revised Code gives municipalities express authority to manage their public rights of way on behalf of their citizens. R.C. 4939.01, et seq.; R.C. 4905.65; R.C. 723.01. The question presented in this case is whether a private profit-making utility company can usurp the constitutional and statutory authority of municipalities to regulate the use and occupancy of their public rights of way. According to longstanding Ohio law and sound public policy concepts, the answer is no.

Facts

Complainant, the City of Reynoldsburg, Ohio (hereinafter “Reynoldsburg” or “the City”) is a municipal corporation located primarily in Franklin County, Ohio, with portions of the City extending into Licking and Fairfield Counties. (Agreed Statement of Facts and Legal Issues 2) (hereinafter “Statement of Facts”). Pursuant to the constitution and laws of the State of Ohio, Reynoldsburg is a “Charter Municipality” governed by a duly adopted municipal charter, and the City is governed locally by a Mayor and a City Council. (Reynoldsburg Initial Brief to the Public Utilities Commission of Ohio 1) (hereinafter “Reynoldsburg Initial Brief”). Reynoldsburg, with a population of approximately 32,000, is part of the greater metropolitan area surrounding the city of Columbus, Ohio. (Statement of Facts 2.) The primary east-west traffic artery running through Reynoldsburg is Main Street. (Id.)

In the mid-1990s, Reynoldsburg experienced numerous problems along Main Street, including traffic congestion, parking problems, traffic speed, deteriorating or absent sidewalks,

and inadequate design standards. (Direct Testimony of Robert L. McPherson 2:17-19) (hereinafter “McPherson”¹; see also Reynoldsburg Franklin County Grant Application, Exhibit G to Agreed Statement of Facts and Legal Issues (enumerating problems and proposed solutions)).² Reynoldsburg officials perceived the problems as discouraging economic activity along Main Street and also viewed them as impairing public safety. (McPherson 2:17-20.)

In response to these problems, Reynoldsburg commissioned a study to produce a comprehensive plan for the revitalization of various commercial corridors in Reynoldsburg, including a stretch of Main Street in downtown Reynoldsburg. (McPherson 2:10-15.) As part of the plan to revitalize Main Street economically, and in order to better provide for the safety of vehicular and pedestrian traffic, the City determined that above-ground utility lines should be relocated to underground duct banks, if they were to remain in the public right of way. (McPherson 2:16 – 4:7.) The purposes of the project generally, and the relocation specifically, were to stimulate economic development and to promote public safety. (McPherson 2:19-23, 3:17-18.) The project to revitalize Main Street (“Main Street Project”) was to be accomplished through several discrete but related phases. (McPherson 2:23 - 3:1.)

Columbus Southern Power (“CSP”) is a provider of electricity, and one of the utilities serving Reynoldsburg that was permitted, by virtue of a franchise granted by the City of Reynoldsburg, to maintain utility lines in the public right of way at the time Reynoldsburg

¹ Citations to Direct Testimony of witnesses, and to the hearing Transcript, are cited in the following format: McPherson 2:23. The number before the colon represents the page number of the document cited, and the number or numbers following the colon represent the line numbers on the cited pages.

² The document originally attached as Exhibit G to the Agreed Statement of Facts and Legal Issues filed by the parties with the PUCO was the incorrect Exhibit G. The correct Exhibit G was filed on November 9, 2009 by the parties, and is included in the record. Citations in this Brief to Exhibit G are to the corrected Exhibit G.

decided that placing any such facilities underground was the best method to accomplish Reynoldsburg's goals. (Statement of Facts 2-4.) CSP is a "public utility" under Ohio Revised Code § 4905.02, and is a corporation organized under the laws of the State of Ohio. (Statement of Facts 2.) Prior to Reynoldsburg's decision to underground all overhead utility lines that would remain in that portion of the public right of way, Columbus Southern Power had inserted into its tariff a provision—Paragraph 17—purporting to force municipalities to pay for relocation of utility-owned infrastructure. A true and accurate copy of Paragraph 17 of CSP's tariff is attached to the Statement of Facts as Exhibit A; a copy of CSP's rate case is attached to the same document as Exhibit B. This provision purportedly applied to facilities located in private utility easements, and to facilities located within the public right of way. (Tr. 114:9.) The tariff, including Paragraph 17, was approved by the Public Utilities Commission of Ohio ("Commission" or "PUCO") in 1992.

In 2000, the Reynoldsburg City Council passed Reynoldsburg Ordinance 50-2000, granting a five (5) year non-exclusive franchise to CSP, allowing CSP to construct, maintain, and operate lines and appurtenances and appliances for conducting electricity in, over, under and through the streets, avenues, alleys, and public places of Reynoldsburg. A true and accurate copy of Ordinance 50-2000 is attached to the Agreed Statement of Facts and Legal Issues as Exhibit E.

Phase I of the Main Street Project began in 2003. (Tr. 21:11-12.) CSP's franchise expired on April 24, 2005. (Exhibit E to Statement of Facts; Direct Testimony of Sharon Reichard 4:17 (hereinafter "Reichard")). In May of 2005, the Reynoldsburg City Council enacted a Comprehensive Right of Way Management Policy Ordinance ("Right of Way

Ordinance” or “Ordinance”). (Compl., Ex. A.)³ The Right of Way Ordinance was passed by the Reynoldsburg City Council on May 9, 2005, and signed by the Mayor on May 11, 2005. At the time of its passage the Ordinance was classified as Emergency Legislation. (Compl., Ex. A., p. 33.) It therefore went into effect on May 11, 2005. (Tr. 99:11-14.)

Under the Right of Way Ordinance, no person shall use, occupy, construct, own or operate structures or facilities in, under, or over any City owned rights of way or any public property within the City unless such person first obtains a “Right of Way Permit” and conforms to the requirements of the Right of Way Ordinance. (Compl., Ex. A., p. 11 et seq.) The Right of Way Ordinance further provides that, at the direction of the safety/service director,

any Permittee shall, at its sole cost, * * * temporarily or permanently remove or rearrange its facilities * * * (ii) as part of the Director’s determination, to the extent permitted by Ohio law, that designated portions of its rights of way should accommodate only underground facilities * * * provided that such determination is reasonable and a part of an overall improvement or beautification plan or project * * * .

(Compl., Ex. A., p. 21-22.)

On July 8, 2005, the Reynoldsburg Public Service Director notified CSP by certified mail that the City intended to begin construction of Phase II of the Main Street Project, which involved the revitalization of Main Street from Rose Hill Road to the bridge at Blacklick Creek. (McPherson 2:10-15.) Reynoldsburg notified CSP that the City had designated the right of way area within Phase II for underground utility facilities only, that the City anticipated construction of an underground duct bank would be completed in October of 2005, and that pursuant to Reynoldsburg’s Right of Way Ordinance, CSP was given notice that it would be required to

³ A copy of the Ordinance is also attached as Exhibit F to the Statement of Facts. For the reader’s ease, citations to the Ordinance are to the Complaint.

relocate any facilities *in the public right of way* into the underground duct bank at CSP's expense. (Statement of Facts, Ex. I) (emphasis added).⁴

In August of 2005, Reynoldsburg began Phase II of the Main Street Project ("Phase II"). As was the case with Phase I of the Project, the purposes of Phase II included promoting commercial and economic development along Main Street, and improving the safety of the traveling and pedestrian public on Main Street. As was also the case with Phase I of the Project, Phase II called for the relocation of above-ground utility lines to underground duct banks. At a cost well in excess of one million dollars, the City of Reynoldsburg, at its sole expense, constructed the underground duct bank available to utilities that elected to continue operating in the public right of way. (Exhibit G to Statement of Facts, § 2.3, p. 6.)

On or about September 1, 2005, CSP applied for a General Right of Way Permit from the City of Reynoldsburg.⁵ (Statement of Facts, Ex. L.) Unlike other entities that occupied the subject right of way, CSP refused to pay for any of the cost of relocating its facilities in the public right of way from overhead poles to underground duct banks. In order to keep the Phase II project on schedule, CSP and Reynoldsburg entered into a Letter Agreement on November 1, 2005. (Statement of Facts, Ex. M.) The Letter Agreement provided that Reynoldsburg would cover the up-front costs to relocate CSP's lines into the underground duct bank, and CSP in return agreed to settle the matter by way of litigation in the appropriate forum. (Id.)

⁴ Whether Reynoldsburg could require a utility to underground its facilities in a private, rather than public, right of way, is not at issue in this case. Only public rights of way are implicated by Reynoldsburg's actions.

⁵ Under the Right of Way Ordinance, there are two types of Right of Way permits. (Compl., Ex. A, p. 13.) The type germane to the present case is a General Right of Way Permit, which grants the permittee authority to use the rights of way generally for business purposes, including the provision of utility services to the City, its residents, and taxpayers.

Procedural History

This case is before the Court for a second time. *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St.3d 340, 2008-Ohio-849. Following the decision in *Fais*, Reynoldsburg filed a complaint with the PUCO, requesting, among other things, that the PUCO declare Paragraph 17 of CSP's tariff unjust, unreasonable, and unlawful because the tariff purports to usurp the municipality's constitutional and statutory authority over public ways. On April 5, 2011, the PUCO issued an Opinion and Order in Case No. 08-846-EL-CSS, finding that: 1) paragraph 17 of CSP's tariff applies to the facts of this case; 2) paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful; 3) the PUCO does not have jurisdiction to determine whether paragraph 17 of CSP's tariff violates the Ohio Constitution; 4) the PUCO does not have jurisdiction to determine whether Reynoldsburg's home rule powers or its ordinance supersede CSP's tariff; and 5) CSP properly applied its tariff by charging Reynoldsburg for the costs of relocation. (Apr. 5, 2011 Opinion and Order of the PUCO 28-30) (hereinafter "Op. & Order").

On May 4, 2011, Reynoldsburg timely filed an Application for Rehearing, asserting five assignments of error. The PUCO denied Reynoldsburg's Application for Rehearing by an Entry on Rehearing dated June 1, 2011 ("Entry on Reh'g."). On July 27, 2011, Reynoldsburg timely filed a Notice of Appeal with this Court.

ARGUMENT

The Commission's Order should be reversed for several reasons. First, the Commission's Order violates Section 3, Article XVIII of the Ohio Constitution, because Reynoldsburg has the power under the Home Rule Amendment to regulate its public ways. Second, the Ohio Revised Code bolsters, rather than undermines, Reynoldsburg's authority over its public ways. Third, Ohio adheres to the well-established common law rule requiring utilities to bear the cost of relocating from a public right of way at the request of a municipality. Fourth, Columbus Southern Power did not present sufficient evidence to pre-empt Reynoldsburg's Right of Way Ordinance. Fifth, intervention in a ratemaking proceeding is not a necessary condition to filing a complaint case against a private utility. Finally, the Commission erred in finding that CSP's tariff applies in the present situation, and in construing and applying the language of the tariff itself.

I. The Commission's Opinion and Order Upholding Paragraph 17 of Columbus Southern Power's Tariff Violates Section 3, Article XVIII of the Ohio Constitution.

The Commission found that CSP's tariff pre-empted Reynoldsburg's Right of Way Ordinance. (Op. & Order 30.) To the extent that Reynoldsburg's Right of Way Ordinance conflicts with the terms of CSP's tariff, however, Ohio law makes clear that the Ordinance controls. Reynoldsburg's Ordinance is valid and controlling because it was enacted pursuant to the City's powers of local self-government, granted by the Home Rule Amendment to the Ohio Constitution. However, even if the ordinance were enacted pursuant to the City's police powers, ~~there is no conflict with the "general laws" that would serve to invalidate the Ordinance.~~ Moreover, even if the ordinance were enacted under the City's police powers, the Ordinance is a

reasonable exercise of such power, and under the well-established common-law rule concerning utility relocation in public rights of way, CSP must bear the cost of undergrounding its lines.

A. Reynoldsburg’s Authority to Control Its Public Rights of Way is a Power of Local Self-Government Under the Ohio Constitution.

Reynoldsburg is a municipal corporation governed by a duly adopted municipal charter. (Statement of Facts 2.) Consequently, Reynoldsburg has power and authority to govern its local affairs pursuant to Section 3, Article XVIII of the Ohio Constitution. The Home Rule Amendment provides in its entirety:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such police, sanitary, and other similar regulations, as are not in conflict with general laws.

Section 3, Article XVIII, Ohio Constitution.

The Home Rule Amendment by its terms establishes two separate but related sources of municipal power: “powers of local self-government” and “police, sanitary, and other similar regulations.” Section 3, Article XVIII, Ohio Constitution. Ohio courts have drawn a distinction between these two sources of municipal authority—the “powers of local self-government” on the one hand, and “police, sanitary, and other similar regulations” on the other. Powers of local self-government are “such [powers] as involve exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality.” *Billings v. Cleveland Ry. Co.* (1915), 92 Ohio St. 478, 484; see also *Schultz v. Upper Arlington*, 88 Ohio App. 281, 282 (Franklin Cty. App. 1950) (powers of local self-government are “such powers as are local in the sense that they relate to the municipal affairs of the particular municipality”). Police powers, on the other hand, are those that involve “peace, health, morals, and safety.” *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 386.

The statement in Section 3, Article XVIII that a municipal ordinance may not “conflict with general laws” is a limit on a municipality’s police powers only, not a limit on a municipality’s power of local self-government. *Ohio Association of Private Detective Agencies v. N. Olmsted* (1992), 65 Ohio St. 3d 242, 244, 602 N.E.2d 1147; see also *Dublin v. State* (2002), 118 Ohio Misc.2d 18, 2002-Ohio-2431, ¶ 121 (“It is now well settled that the requirement that municipal regulations not conflict with the general laws is limited to local police, sanitary and other similar regulations, and is not intended as a restriction on the powers of local self-government.”). Municipalities derive their powers of local self-government directly from the Ohio Constitution. *City of Mansfield v. Endly*, 38 Ohio App. 528, 535 (5th Dist. 1931). Within the sphere of “powers of local self-government,” a municipality’s powers are inviolable. *Dublin* at ¶ 75.

Thus, only regulations enacted under a municipality’s police power can be scrutinized for conflict with the “general laws.” *City of Twinsburg v. State Emp. Rel. Bd.* (1988), 39 Ohio St.3d 226, 228, 530 N.E.2d 26 (overruled on other grounds by *Rock River v. State Emp. Rel. Bd.* (1989), 43 Ohio St.3d 1, 20, 539 N.E.2d 103). If the ordinance relates solely to matters of local self-government, “the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.” *Ohioans for Concealed Carry, Inc. v. Clyde* (2008), 120 Ohio St.3d 96, 2008-Ohio-4605, ¶24.

Reynoldsburg’s Ordinance relates solely to matters of local self-government. Nearly one hundred years of Ohio case law holds that municipal regulation of public ways is a power of local self-government. Consider the following statements by this Court:

A consideration of the course of legislation in Ohio under the old Constitution seems to clearly disclose that control of the streets has been regarded as a matter chiefly of municipal concern.

Billings v. Cleveland Ry. Co. (1915), 92 Ohio St. 478, 486.

[T]he location, vacation, extension, widening, curbing, guttering, paving, maintenance, and control of streets are attributes of local self-government, which belong to the municipal government under the home rule amendment.

Froelich v. City of Cleveland (1919), 99 Ohio St. 376, 384.

It would be a bold assertion to say that ‘all powers of local self-government,’ as used in the Ohio Constitution of 1912, did not include the power of complete regulation and control of the streets.

Village of Perrysburg v. Ridgway (1923), 108 Ohio St. 245, 255-56.

The foregoing precedents leave no doubt that the regulation of the use of publicly owned or controlled property is an inherent exercise of a municipality’s powers of local self-government.

Vernon v. Warner Amex Cable Communications (1986), 25 Ohio St.3d 117, 120.⁶

Reynoldsburg’s Ordinance regulates “the use or occupancy of all Rights of Way in the City.” (Compl. Ex. A., p. 7.) “Right of Way” means:

The surface of and the space above and below the paved or unpaved portion of any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive and any other land dedicated or otherwise designated for the same * * *.

⁶ See also *City of Dublin v. Ohio*, 2002-Ohio-2431, ¶ 157. In a thorough opinion summarizing Ohio case law construing the home rule power, and analyzing the right of way statutes in the Ohio Revised Code, the Franklin County Court of Common Pleas stated:

[A] municipality can rely upon its powers of local self-government (narrowly construed) when it is regulating other uses of municipal public ways such as, per *Billings [v. Cleveland Ry. Co.]*, 92 Ohio St. 478], the use of public ways by utility companies who would install and operate their equipment and facilities in and along the public ways.

City of Dublin v. State, 2002-Ohio-2431, ¶ 157.

(Compl. Ex. A., p. 6) (emphasis added).

By its terms, the Ordinance regulates the use and occupancy of public ways. Such regulation is within the City's powers of local self-government, according to the overwhelming authority quoted above.

Further, the clause at issue in this matter regulates only those changes to occupancy or use of the public right of way that arise in conjunction with an "overall improvement or beautification plan or project" undertaken by the City. (Compl. Ex. A, p.21-22.) "[M]atters relating to all local *improvements*, such as roads, streets, ditches and the like, have been peculiarly matters of local concern and control." *Perrysburg* at 257 (emphasis added). Phase II of the Main Street redevelopment in Reynoldsburg is a local improvement. Thus, the Main Street Project involved an exercise of the City's police powers rather than powers of local self-government.

The Commission agreed with CSP that the Ordinance has extraterritorial effects, because CSP would choose to recover the cost of complying with the Ordinance from all CSP ratepayers across the state. (Op. & Order 14; Entry on Reh'g 5.) The presence of some extraterritorial effect is not sufficient to push the Ordinance out of the realm of Reynoldsburg's "powers of local self-government" and into the realm of "police powers." Whether or not a regulation falls in the area of local self-government is determined by examining "if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants * * *." *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St.3d 50, 54, 496 N.E.2d 983, 987 (emphasis added). The requirement that a regulation must affect the general public of the state more than it affects local inhabitants is crucial to the analysis, because without that requirement, the Home Rule power would be eviscerated. *Dublin v. State*, 2002-Ohio-2431 ¶

108 (noting that “almost any legislation concerning local matters will have at least some minor and/or indirect extraterritorial effect”).

There are two reasons why Reynoldsburg’s Ordinance does not affect the general public of the state more than it affects local inhabitants. First, the vast majority of the statute has no effect at all on the general public of the state; the general public of the state has no interest or stake in Reynoldsburg’s regulation of its public rights of way. Second, the only extraterritorial effect of the statute is a result of CSP’s actions, not Reynoldsburg’s. CSP’s expert testified that in most instances where CSP is forced by engineering or other concerns to underground its lines, the company would recover the cost through “general ratemaking principles”—in other words, a charge on all CSP customers. (Tr. 129:6-16.) At the Commission hearing, Mr. Dias was asked whether \$1.185 million cost of undergrounding CSP’s lines in Reynoldsburg for the Phase II project, if spread across all of CSP’s customers statewide, would cause a substantial increase in rates for CSP customers statewide:

Q: Now, when you talked about the \$1.185 million, if you assume that that could be put into a rate case as a system improvement charge and spread across CSP’s service territory, wouldn’t that cause a substantial increase in rates?

A: Mr. Yurick, that 1.185 – 1.185 million by itself is probably a rounding error.

(Tr. 153: 4-10.)

Mr. Dias’ answer confirms that the extraterritorial affect of Reynoldsburg’s Ordinance, if there is any, is negligible. There is not sufficient extraterritorial effect in the Ordinance to push ~~the regulation out of the realm of powers of local self-government and into the realm of police~~ powers. The Ordinance was therefore passed pursuant to the City’s powers of local self-government. As a result, the inquiry into the validity of the Ordinance is over. *Ohioans for Concealed Carry, Inc. v. Clyde* (2008), 120 Ohio St.3d 96, 2008-Ohio-4605, ¶ 24. The

Ordinance is valid. CSP's attempts to override the Ordinance by means of its tariff provision are therefore unavailing.

B. Even If Reynoldsburg's Regulation of Its Public Rights of Way Relates to the City's Police Powers, the Ordinance Does Not Conflict with the General Laws and Is Therefore Valid.

Even if Reynoldsburg's Ordinance and regulation of its public rights of way were an exercise of the City's authority to promulgate "policy, sanitary, and other similar regulations," the Ordinance is still valid, because it does not conflict with any "General Law." Even when a municipality acts pursuant to its police power, its regulation may be invalidated only if the regulation conflicts with a "general law." Section 3, Article XVIII, Ohio Constitution; *Fondessy Enterprises v. Oregon* (1986), 23 Ohio St.3d 213, 217. To determine whether an ordinance conflicts with a general law, "the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Fondessy*, 23 Ohio St.3d at 217. Reynoldsburg's Ordinance does not permit or license anything forbidden under any Ohio statute. The Ordinance does not conflict with the "general laws," and is therefore valid under the Home Rule Amendment.

Moreover, during the proceedings below, CSP never identified any "general law" that allegedly conflicted with Reynoldsburg's Ordinance. CSP stated that Reynoldsburg's Ordinance conflicts with Paragraph 17 of CSP's tariff filed with the PUCO. (CSP Post Hearing Br. 10) ("Complainant's ordinance does not override CSP's Commission-approved tariff"). CSP's tariff, however, is not a statute.

The term "general laws" refers to state statutes. *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, ¶ 15; *Linndale v. State* (1999), 85 Ohio St.3d 52, 54 (general laws are "those enacted by the General Assembly"). This Court has stated:

To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

Canton v. State, 95 Ohio St.3d 149, 2002-Ohio-2005, syllabus.

Under the *Canton* test, CSP's tariff provision is not a "general law." Indeed, CSP's tariff is not a law at all. CSP's tariff was not passed by the General Assembly. The tariff was not part of a "statewide and comprehensive legislative enactment" under prong two of the *Canton* test, because it was not part of a legislative enactment at all, and applies only in CSP's service territory. The tariff was approved by the PUCO, a state agency, which has only the authority granted to it under Title 49 of the Ohio Revised Code. The tariff provision seeks to limit the legislative power of municipalities to recover right of way costs. Because it applies only to municipalities, it clearly does not prescribe a rule of conduct upon citizens generally. The tariff provision, by its own terms, says nothing about the conduct of the general citizenry. It is a bald attempt to limit municipal power, and nothing more.

More importantly, if a provision of a utility tariff were considered a "general law" sufficient for a constitutional conflict under Section 3, Article XVIII, then nothing would stop a utility from inserting into its tariff a provision stating that its service trucks do not have to obey the speed limit. Such a result is plainly unacceptable according to the Ohio Constitution, Ohio case law, Ohio statutory law, and common sense.

In its briefs to the Commission, CSP stated only that Reynoldsburg's Ordinance "goes beyond the location and reasonable regulation of the right-of-way and deals with the assignment of costs of the utility, [and therefore] the ordinance interferes with the Commission's clear

statutory jurisdiction to govern the rates of public utilities.” (CSP Post Hearing Br. 10.) CSP’s argument is undermined by the fact that, as Commissioners Lemmie and Roberto pointed out in their dissent below, assignment of utility costs is governed not by Reynoldsburg’s Ordinance, but by the right of way statutes, which provide a specific statutory mechanism by which utilities can recoup the costs of complying with municipal regulation of public rights of way. (Op. & Order, Dissent of Lemmie & Roberto at 2) (citing R.C. 4939.07(B)(1) and 4939.07(B)(2)(b)).

If the contention of CSP and the Commission is that Reynoldsburg’s Ordinance somehow conflicts with Ohio’s right of way statutes, the contention is misplaced, as discussed fully below in Argument Section II. Reynoldsburg’s Ordinance does not conflict with any general law, and is therefore valid, even if the Ordinance was promulgated pursuant to the municipality’s police powers.

C. Even if Reynoldsburg Acted Pursuant to Its Police Powers, CSP Must Bear the Cost of Undergrounding Its Lines, According to the Well-Established Common-Law Rule Concerning Utility Relocation in Public Rights of Way.

The traditional common-law rule, recognized by the United States Supreme Court as far back as 1905 and reaffirmed by the same Court in 1983, requires utilities “to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities.” *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *New Orleans Gaslight Co. v. Drainage Comm’n of New Orleans*, 197 U.S. 453, 462 (1905)). This proposition has gained almost universal acceptance. 12 E. McQuillin, *The Law of Municipal Corporations*, § 37.74(a) (3d Ed. 1970); see also *City of*

Auburn v. Qwest Corp., 260 F.3d 1160, 1167 (9th Cir. 2001)⁷ (noting that the common-law rule “is followed in virtually every jurisdiction,” except possibly Arkansas).

Like other jurisdictions, this court has recognized the common-law rule concerning utility relocation since at least the late nineteenth century. *Columbus Gaslight & Coke Co. v. City of Columbus*, 50 Ohio St. 65, 33 N.E. 292 (1893). In *Columbus Gaslight & Coke*, a gas company sued the City of Columbus for the cost of re-laying its gas lines when the city dug up the lines while re-grading a public street. 50 Ohio St. at 66-67. This court held that any right a utility may have to use the public streets “must give way to the paramount duty of the city to care for the streets, and keep them open, in repair, and convenient for the general public.” *Id.* at 70.⁸ The basis for this simple principle is the fact that utilities operate in the public right of way only by virtue of municipal permission to do so. The Court held that, because the utility operates in the public right of way,

under a grant from the city . . . [and] does so subject to the right of the city to change [the public way] whenever the necessities of the public require it; and, in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate [the city’s change].

⁷ Overruled on other grounds by *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008).

⁸ See also Baldwin’s Ohio Practice, Local Government Law—Municipal, § 21:4(B) (1st Ed. 2010), which states:

The right of a utility corporation to occupy the streets for purposes of its operations is at all times subject to the paramount right of the public to grade and improve the streets in order to maintain them suitable and convenient for use by the traveling public and for any other legitimate public purposes. Hence, as a general rule, changes in the facilities of public utilities located in the streets must be made at the expense of such public utilities when made necessary by reason of municipal street improvements.

(citing *Columbus Gaslight, Elster v. City of Springfield*, 49 Ohio St. 82, 30 N.E. 274 (1892), and *City of Mt. Vernon v. Berman & Reed*, 100 Ohio St. 1, 125 N.E. 116 (1919)).

Columbus Gaslight & Coke, 50 Ohio St. 65, syl. ¶ 2.

The private utility company couldn't recover from Columbus the cost of complying with municipal regulations because allowing such recovery would make the municipality hostage to the utility. A municipality's power to regulate its public ways would be seriously compromised if the municipality could exercise that power only,

upon the condition that it should make compensation to every gas company, and water company, and telephone company, and electric light company, and street-railway company, for inconvenience and expense thereby occasioned.

Id.

The Court reaffirmed this principle in 1959, when it held that a municipality may prescribe reasonable regulations for the installing of electric power lines through or into its territorial limits and may withhold its consent for the installation of such power lines until such regulations are complied with. *State ex rel. Cleveland Electric Illuminating Co. v. Euclid* (1959), 169 Ohio St. 476, syl. ¶ 1.

With its Ordinance and Phase II of the Main Street redevelopment, Reynoldsburg has made a reasonable improvement of its streets, supported by competent record evidence that such change was in the best interests of the City. (McPherson 2:9 – 4:7; Statement of Facts, Ex. G.) In the proceedings below, CSP sought, and the PUCO awarded to CSP compensation for CSP's inconvenience and expense caused by that municipal improvement. The Commission's Order is at odds with longstanding Ohio law stating that a utility operates in a public right of way only with permission of the municipality, and that the municipality need not compensate the utility every time it upgrades the public right of way. The Commission's Order should therefore be reversed.

II. Paragraph 17 of Columbus Southern Power’s Tariff Contravenes Reynoldsburg’s Statutory Authority to Govern Its Public Rights-of-Way Pursuant to R.C. 4939.01 et seq., R.C. 723.01, and R.C. 4905.65.

No fewer than three separate sections of the Ohio Revised Code provide Reynoldsburg with express statutory authority to regulate its public ways with respect to the placement of public utilities. The Commission’s Order directly contravenes Reynoldsburg’s express statutory authority, and should therefore be reversed.

A. Under R.C. 4939.01 Reynoldsburg Has Express Authority to Govern Its Public Rights of Way.

Reynoldsburg’s Ordinance was passed based on Reynoldsburg’s authority to regulate its public rights of way under R.C. 4939.01, *et seq.*, which provides:

It is the public policy of this state to * * *

(4) Recognize the authority of a municipal corporation to manage access to and the occupancy or use of public ways to the extent necessary with regard to matters of local concern, and to receive cost recovery for the occupancy or use of public ways in accordance with law.

* * *

(6) Promote coordination and standardization of municipal management of the occupancy or use of public ways, to enable efficient placement and operation of structures, appurtenances, or facilities necessary for the delivery of public utility or cable services; * * *

R.C. 4939.02(A).

Ohio’s statutory scheme regarding municipal power over rights of way further provides:

No person⁹ shall use or occupy a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.

R.C. 4939.03(C)(1)

⁹ The definition of “person” includes any natural person, corporation, or partnership. R.C. 4939.01(C).

The Ohio Revised Code therefore specifically authorizes Reynoldsburg to regulate its public ways. Reynoldsburg exercised its regulatory authority through the passage of the Right of Way Ordinance. (Compl. Ex. A., p. 7) (“The purpose of this chapter is to provide for the regulation of the use or occupation of all rights of way in the City.”) (emphasis added). Even the Commission acknowledged that Reynoldsburg has the power to enact such regulations. (Entry on Reh’g. 5) (“Reynoldsburg does possess the authority to maintain its rights-of-ways [sic].”) Nonetheless, the Commission found that CSP’s tariff pre-empted Reynoldsburg’s Ordinance because Reynoldsburg’s power to maintain its rights of way is not “unbridled.” (Entry on Reh’g. 5.) Whether Reynoldsburg’s authority over its rights of way is “unbridled,” however, is not the question. The question is whether Reynoldsburg’s power over its rights of way can be pre-empted by a tariff provision drafted by a private utility company and approved by the Commission. Nothing in Ohio law suggests that such pre-emption is valid.

In its Opinion and Order, the Commission found that CSP’s tariff was not unjust, unreasonable, or unlawful, and therefore prevailed in a conflict with Reynoldsburg’s Ordinance. (Op. & Order 30, Conclusion of Law #18.) Given Reynoldsburg’s express authority under R.C. 4939.01 et seq. to regulate its public rights of way, and the absence of any such authority on the part of CSP, the Commission’s conclusion of law was erroneous, and the Commission’s Order should therefore be reversed.

B. Under R.C. 723.01 Reynoldsburg Has Express Authority to Regulate Its Streets and Public Ways.

As with R.C. 4939.01 et seq., Section 723.01 of the Ohio Revised Code states:

Except as provided in section 5501.49 of the Revised Code,¹⁰ the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation.

R.C. 723.01.

The improvements undertaken by Reynoldsburg as part of Phase II of the Main Street redevelopment relate expressly to care and control of the City's public ways. (McPherson 3:3-9.) The Ordinance and the Main Street Project are therefore expressly authorized by statute. According to CSP, its tariff requires a municipality to bear the cost of placing overhead utility facilities underground. (CSP Post Hearing Br. 9.) By forcing a municipality to pay the cost of relocating utility lines, CSP's tariff purports to radically curtail the authority of municipalities to control public ways within their boundaries. To the extent CSP's tariff conflicts with Reynoldsburg's express authority to control its public ways, the tariff is unlawful. The Commission's Opinion and Order to the contrary is therefore erroneous and should be reversed.

C. Under R.C. 4905.65 Reynoldsburg Has Express Authority to Restrict the Location of Public Utility Facilities.

Finally, R.C. 4905.65 provides:

* * *

(B) To the extent permitted by existing law a local regulation may reasonably restrict the construction, location, or use of a public utility facility, unless the public utility facility:

(1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and

(2) Is to be constructed in accordance with generally accepted safety standards; and

¹⁰R.C. 5501.49, which deals with maintenance of bridges located within a municipality, is not at issue here.

(3) Does not unreasonably affect the welfare of the general public. * * *

R.C. 4905.65

Nothing about Paragraph 17 of CSP's tariff states or suggests that CSP is exempt from regulation by Reynoldsburg pursuant to the factors enumerated in R.C. 4905.65(B). CSP offered no testimony in support of an exemption. The Commission made no findings relative to these three factors. (See generally Op. & Order.) Reynoldsburg therefore has clear statutory authority under R.C. 4905.65 to restrict the location of public utility facilities, so long as that restriction is reasonable. Reynoldsburg decided for primarily economic development reasons that placing utility lines underground was the proper course of action. (McPherson 2:17-21; Tr. 78: 11-13) (indicating that unwillingness of general public to patronize businesses along Main Street was a major problem, and stating that the purpose of Phase II was to improve the economic situation along Main Street). The City has express statutory authority to restrict the location of utility facilities. Paragraph 17 of CSP's tariff thus contradicts this express statutory authority, and is therefore unlawful. The Commission's finding to the contrary was therefore erroneous, and the Commission's Order should therefore be reversed.

III. The Commission Erred in Finding That Columbus Southern Power had Presented Sufficient Evidence to Invalidate Reynoldsburg's Right of Way Ordinance.

In Ohio, legislative enactments, such as municipal ordinances, are presumed to be valid. *State v. Sturbois*, Fourth Dist. No. 10CA-38 and 10CA49, 2011-Ohio-2728, ¶ 18. The party challenging a legislative enactment has the burden of proving beyond a reasonable doubt that the enactment is unconstitutional. *Id.* (citing *Ohio Grocers Ass'n. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11). In the proceeding below, in spite of the fact that Reynoldsburg was the Complainant, CSP challenged Reynoldsburg's Ordinance as unconstitutional because the

Ordinance allegedly conflicted with a state law of general application. (See generally CSP Post Hearing Br.) The Commission found that Reynoldsburg bore the entire burden of proof with respect to the Complaint case. (Op. & Order 30, Conclusion of Law #30.) The Commission's finding as to the respective burdens of proof of the parties was erroneous.

Furthermore, invalidating Reynoldsburg's Ordinance without requiring CSP to show conclusively that the Ordinance is unlawful reverses the presumption of validity for legislative enactments. Under the Commission's formulation, Reynoldsburg's Ordinance is presumed *invalid* unless the City proves otherwise. Reynoldsburg claimed in its Complaint that its Ordinance controlled in any conflict with a utility tariff, because of the City's constitutional and statutory authority to govern its public rights of way. Reynoldsburg had the burden of establishing a prima facie complaint case sufficient to show that Paragraph 17 of CSP's tariff was unjust, unreasonable, and unlawful. *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1990), 49 Ohio St.3d 123, 126. Reynoldsburg met its burden by describing in detail how CSP's tariff conflicts with the Ohio Constitution and the Ohio Revised Code. (Reynoldsburg Initial Br. 8-23.) Once Reynoldsburg met that burden, it was CSP's burden to "refute the evidence presented by the complainant." *Ohio Bell*, 49 Ohio St.3d at 125-26. In short, the respondent bears the burden of presenting sufficient evidence refuting the complainant's testimony. *Id.* at 128.

CSP provided no authority contrary to Reynoldsburg's argument. In finding that CSP's tariff pre-empts the Ordinance, the Commission stated only that the "intent of the tariff provision is . . . to compensate the utility for complying with the City's directives concerning its rights of way." (Op. & Order 15.) It is no surprise that the intent of the tariff provision is to compensate the utility, but that was not the question before the Commission. Reynoldsburg claims that

Paragraph 17 of CSP's tariff violates the City's constitutional and statutory rights to regulate its public rights of way. If the answer to that claim is found by simply asking whether the utility intended its tariff provision to provide compensation to the utility, the examination is hardly worth undertaking. The effect of the Commission's finding is that Reynoldsburg's Ordinance, which should be entitled to a presumption of validity under *Ohio Bell*, can be invalidated simply because the utility says it is so. The Commission's allocation of the burden of proof in this matter contravenes Ohio law regarding the validity of municipal ordinances, and should therefore be reversed.

IV. The Commission Erred in Finding That Declining to Intervene in a Tariff Case before the PUCO Renders a Party Unable to Bring a Subsequent PUCO Complaint to Challenge a Provision of That Tariff.

The Commission found that CSP's tariff was not unjust, unreasonable, or unlawful in part because, "Reynoldsburg could have sought intervention to participate in that proceeding [in which the tariff was approved] and provided comments relative to ¶17." (Op. & Order 14.) The fact that Reynoldsburg could have sought intervention in CSP's rate case in no way decides the issue of whether CSP's tariff is unjust, unreasonable, or unlawful as applied. The result of the Commission's finding on this point is that any party who fails to intervene in a rate case is found to have waived its right to bring a subsequent complaint case before the Commission on any subject that is contained in the tariff approved during the rate case proceeding. This result is inequitable and contrary to Ohio law, and the Commission's Order should therefore be reversed.

As detailed above, Reynoldsburg has constitutional and express statutory authority to regulate its public rights of way. Neither the Ohio Constitution nor the Revised Code requires Reynoldsburg to intervene in a Commission rate case in order to preserve its authority to regulate its public rights of way in a reasonable manner. Requiring such intervention renders

meaningless the constitutional and statutory rights of municipalities, and would give the Commission statutory authority to impose restrictions on municipalities that the legislature has never granted the agency.

Further, Reynoldsburg brought this case under R.C. 4905.26. (Compl. ¶ 3.) This Court has expressly stated that R.C. 4905.26 is “a means of collateral attack on a prior proceeding.” *Office of Consumers’ Counsel v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 22, 24. The Court further stated: “that statute [R.C. 4905.26] may be used to investigate the reasonableness of rate schedules” previously approved by the Commission. *Id.* (citations omitted). If R.C. 4905.26 can be used as a means of collateral attack on a prior Commission proceeding, the present action may be used to challenge the tariff approved by the Commission in 1992. Reynoldsburg therefore did not forfeit the right to challenge CSP’s tariff by not intervening in CSP’s tariff case. If the Commission’s position is that failure to intervene in a tariff case precludes any later challenge to that tariff, there is no reason for R.C. 4905.26 to exist.

The Commission’s finding that CSP’s tariff is just, reasonable, and lawful because Reynoldsburg did not intervene in CSP’s tariff case is wrong, and the Commission’s April 5, 2011 Opinion and Order should therefore be reversed.

V. The Commission Erred in Finding that Paragraph 17 of Columbus Southern Power’s Tariff Applies to the Factual Situation at Issue in this Matter.

By its own terms, Paragraph 17 of CSP’s tariff does not apply to Reynoldsburg’s decision to require utilities to place overhead lines underground. The Commission therefore erred in finding that Paragraph 17 does apply to the present matter. The exact language of Paragraph 17 of CSP’s tariff states that CSP,

shall not be required to construct general distribution lines underground unless the cost of such special construction * * * shall be paid for by that municipality or public authority.

CSP tariff, Paragraph 17 (emphasis added).

The tariff, then, applies only when CSP is “required” to construct general distribution lines underground. As Commissioners Lemmie and Roberto recognized in their dissent, Reynoldsburg has never required CSP to construct lines underground. (Op. & Order, Dissent of Lemmie & Roberto at 1.) The letter from Reynoldsburg’s Safety/Service Director Sharon Reichard to CSP states: “[O]n or about October 15, 2005, the Utility [CSP] will be required to relocate their respective facilities *in the public right of way* of the Project into the underground duct bank.” (Exhibit I to Agreed Statement of Facts and Legal Issues) (emphasis added). However, occupying the public right of way is not the only way to provide utility service to customers in Reynoldsburg. R.C. 4933.15 specifically grants to CSP the power to appropriate private property for its distribution facilities. CSP’s witness acknowledged at the hearing that CSP currently has facilities in private utility easements. (Tr. 128:11-13.)

CSP, like all utilities operating in the public right of way in the Phase II Project area, had a choice. First, it could elect to forego operating in the City’s public right of way, with its attendant conditions, and instead place facilities in private utility easements. Second, it could continue to operate in the City’s public right of way and relocate its facilities underground. CSP chose the latter. CSP therefore cannot credibly claim that it believed the only way to continue serving customers in Reynoldsburg was to operate facilities located in the public right of way.

~~In short, CSP was not “required” to construct general distribution lines underground~~ within the meaning of Paragraph 17 of its tariff. Rather, CSP elected to maintain general distribution facilities in the City’s public right of way, knowing full well that by doing so the company would be subject to Reynoldsburg’s constitutionally authorized regulations governing

access to and use of its public right of way. Accordingly, Paragraph 17 applies to the relocation of its facilities in connection with Phase II of the Reynoldsburg. The Commission's Order should therefore be reversed.

VI. The Commission erred by Misconstruing and Improperly Applying the Language of Paragraph 17 of Columbus Southern Power's Tariff in the Present Matter.

Even if Paragraph 17 of CSP's tariff does apply to Phase II of Reynoldsburg's Main Street Project, which Reynoldsburg disputes, the Commission did not properly apply the tariff to determine the relative contributions of Reynoldsburg and CSP to the total cost of relocation.

Again, the operative language from the tariff is as follows:

The company [CSP] shall not be required to *construct general distribution lines* underground unless the cost of *such special construction* for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority **(to the extent that such cost exceeds the cost of construction of the Company's standard facilities)** shall be paid for by that municipality or public authority.

CSP tariff, Paragraph 17 (emphasis added).

The language contemplates two types of construction. First, the tariff mentions "special construction," apparently a reference to the construction, from scratch, of new general distribution lines underground (italicized portion). Second, the tariff mentions a change of existing overhead general distribution lines to underground (underlined portion). The description of those two kinds of construction is followed by a parenthetical, in bold text above, regarding the incremental cost over and above the cost of construction of the Company's standard facilities. The term "standard facilities" refers to above-ground lines. (Tr. 117:15-19.) The parenthetical uses the phrase "such cost." CSP's witness, Selwyn J. Dias, interprets this phrase as referencing only the costs of the first type of construction—the construction of new general

distribution lines from scratch. (Tr. 123:9-15, 140:21-23.) CSP's witness, however, also admitted that the parenthetical does not distinguish on its face between the costs of new construction and the costs of relocation. (Tr. 141:11-13.)

In fact, the most sensible reading of the parenthetical is that it applies to both new construction and relocation. The parenthetical uses the phrase "such cost," without clear reference to which costs are implicated, and the phrase appears after the second of the two contemplated types of construction (relocation), an odd placement if the parenthetical is intended to apply only to the first type of construction (new). More importantly, however, Mr. Dias' reading is inconsistent with CSP's position as a whole in this case. On the one hand, CSP claims that it has been required to construct general distribution lines in the City's underground duct bank so as to trigger the operation of Paragraph 17 of its tariff. When it comes to application of the tariff language regarding cost allocation, however, CSP claims that it has not been required to construct underground facilities. The two positions are irreconcilable. Either CSP has not been required to "construct" underground facilities, in which case the tariff does not apply, or CSP has been required to construct underground facilities, in which case the correct amount for which Reynoldsburg is liable is the cost of relocating the lines *in excess* of what it would have cost to move the lines from one above-ground location to another.

The Commission stated that the tariff was properly applied because "the objective of the ¶17 [sic] is to ensure that the cost causer is the cost payer" and "the tariff language must be interpreted to assure that CSP is compensated for the full cost of the relocation." (Op. & Order at 25.) Just as the utility's self-serving principle was not an answer to Reynoldsburg's assertion that the tariff language did not apply to Reynoldsburg's Main Street Project, neither is it an answer to Reynoldsburg's assertion that the Commission improperly construed the language of

the tariff regarding relocation costs. The question is not what CSP intended in drafting its tariff language. No doubt, CSP intended to compensate itself for any costs of compliance with municipal regulations. The question is what the language of the tariff says about the cost of relocation. The answer to that question is found by examining the language of the tariff—which the Commission declined to do—not the intentions of the utility that drafted it.

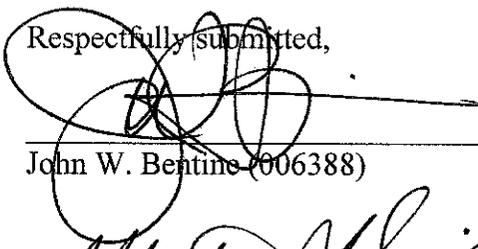
The Commission erred by misconstruing and improperly applying the language of Paragraph 17 of CSP's tariff. The Commission's Order should therefore be reversed.

CONCLUSION

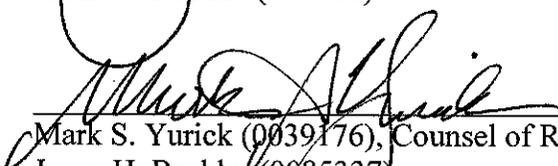
If the Commission's Order below is upheld, utilities in the public right of way across Ohio will gain a free, Commission-created property right in those public rights of way, despite the fact that the utilities operate in the public right of way only by municipal consent. If the Commission's Order stands, a municipality desiring to undertake economic development and other public improvement projects will face significantly increased costs to relocate any utility located in the public right of way. Such a result is at odds with Ohio constitutional and statutory law. Moreover, as local and municipal governments face increasingly tight budgets in these tough economic times, such a result will hinder exactly the kind of economic development that Reynoldsburg undertook with its Main Street Project.

Appellant City of Reynoldsburg respectfully asks the Court to rule that the Paragraph 17 of CSP's tariff language violates Section 3, Article XVIII of the Ohio Constitution. For that reasons, and for the other reasons explained more fully above, the April 5, 2011 Opinion and Order of the Commission must be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MERIT BRIEF OF APPELLANT CITY OF REYNOLDSBURG, OHIO** was served upon the following:

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APPENDIX

Constitutional and Statutory Provisions A-1

Opinion and Order of The Public Utilities Commission of Ohio A-5

Application for Rehearing of The City of ReynoldsburgA-41

Entry of Rehearing of The Public Utilities Commission of Ohio.....A-59

Notice of Appeal of Appellant City of Reynoldsburg, OhioA-75

4841-3497-6778, v. 7

Constitutional and Statutory Provisions

Section 3, Article XVIII, Ohio Constitution

Municipalities shall have 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.

(Adopted September 3, 1912.)

Ohio Revised Code

4939.02 State policy.

(A) It is the public policy of this state to do all of the following:

- (1) Promote the public health, safety, and welfare regarding access to and the occupancy or use of public ways, to protect public and private property, and to promote economic development in this state;
- (2) Promote the availability of a wide range of utility, communication, and other services to residents of this state at reasonable costs, including the rapid implementation of new technologies and innovative services;
- (3) Ensure that access to and occupancy or use of public ways advances the state policies specified in sections 4927.02, 4928.02, and 4929.02 of the Revised Code;
- (4) Recognize the authority of a municipal corporation to manage access to and the occupancy or use of public ways to the extent necessary with regard to matters of local concern, and to receive cost recovery for the occupancy or use of public ways in accordance with law;
- (5) Ensure in accordance with law the recovery by a public utility of public way fees and related costs;
- (6) Promote coordination and standardization of municipal management of the occupancy or use of public ways, to enable efficient placement and operation of structures, appurtenances, or facilities necessary for the delivery of public utility or cable services;

(7) Encourage agreement among parties regarding public way fees and regarding terms and conditions pertaining to access to and the occupancy or use of public ways, and to facilitate the resolution of disputes regarding public way fees.

(B) This policy establishes fair terms and conditions for the use of public ways and does not unduly burden persons occupying or using public ways or persons that benefit from the services provided by such occupants or users.

Effective Date: 07-02-2002

4939.03 Prohibited conduct concerning public ways

(A) No person shall occupy or use a public way except in accordance with law.

(B) In occupying or using a public way, no person shall unreasonably compromise the public health, safety, and welfare.

(C) (1) No person shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.

(2) Except as otherwise provided in division (C)(5) of this section, a municipal corporation, not later than sixty days after the date of filing by a person of a completed request for consent, shall grant or deny its consent.

(3) A municipal corporation shall not unreasonably withhold or deny consent.

(4) If a request by a person for consent is denied, the municipal corporation shall provide to the person in writing its reasons for denying the request and such information as the person may reasonably request to obtain consent.

(5) Except in the case of a public utility subject to the jurisdiction and recognized on the rolls of the public utilities commission or of a cable operator possessing a valid franchise awarded pursuant to the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 541, a municipal corporation, for good cause shown, may withhold, deny, or delay its consent to any person based upon the person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare.

(6) Initial consent for occupancy or use of a public way shall be conclusively presumed for all lines, poles, pipes, conduits, ducts, equipment, or other appurtenances, structures, or facilities of a public utility or cable operator that, on the effective date of this section, lawfully so occupy or use a public way. However, such presumed consent does not relieve the public utility or cable

operator of compliance with any law related to the ongoing occupancy or use of a public way.

Effective Date: 07-02-2002

723.01 Legislative authority to have care, supervision, and control of public roads, grounds and bridges.

Municipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation. The liability or immunity from liability of a municipal corporation for injury, death, or loss to person or property allegedly caused by a failure to perform the responsibilities imposed by this section shall be determined pursuant to divisions (A) and (B)(3) of section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

4905.65 Local regulation restricting construction, location, or use of public utility facility.

(A) As used in this section:

(1) "Public utility" means any electric light company, as the same is defined in sections 4905.02 and 4905.03 of the Revised Code.

(2) "Public utility facility" means any electric line having a voltage of twenty-two thousand or more volts used or to be used by an electric light company and supporting structures, fixtures, and appurtenances connected to, used in direct connection with, or necessary for the operation or safety of such electric lines.

(3) "Local regulation" means any legislative or administrative action of a political subdivision of this state, or of an agency of a political subdivision of this state, having the effect of restricting or prohibiting the use of an existing public utility facility or facilities or the proposed location, construction, or use of a planned public utility facility or facilities.

(B) To the extent permitted by existing law a local regulation may reasonably restrict the construction, location, or use of a public utility facility, unless the public utility facility:

(1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and

(2) Is to be constructed in accordance with generally accepted safety standards; and

(3) Does not unreasonably affect the welfare of the general public. Nothing in this section prohibits a political subdivision from exercising any power which it may have to require, under reasonable regulations not inconsistent with this section, a permit for any construction or location of a public utility facility proposed by a public utility in such political subdivision.

Effective Date: 10-10-1963

4826-3669-0955, v. 1

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the)
City of Reynoldsburg, Ohio,)
)
Complainant,)
)
v.) Case No. 08-846-EL-CSS
)
Columbus Southern Power Company,)
)
Respondent.)

OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, hereby issues its opinion and order.

APPEARANCES:

Steven T. Nourse, Matthew J. Satterwhite, and Marilyn M. McConnell, American Electric Power, 1 Riverside Plaza, Columbus, Ohio 43215, on behalf of the Columbus Southern Power Company.

Chester Willcox & Saxbe, LLP, by Mark S. Yurick, Jason H. Beeler, and John Bentine, 65 East State Street, Suite 1000, Columbus, Ohio 43215, and Judd Hood, City Attorney, on behalf of the city of Reynoldsburg.

OPINION:

I. INTRODUCTION

The city of Reynoldsburg (Reynoldsburg, the City, or complainant) is a municipal corporation, organized and operating pursuant to the constitution and laws of the state of Ohio, and is a "Charter Municipality" governed by a charter. On May 9, 2005, the Reynoldsburg City Council enacted a Comprehensive Right-of-Way Management Policy Ordinance (Reynoldsburg City Code Chapter 907 or Ordinance) that authorized the City's Public Service Director to require a permittee to relocate its facilities underground at the permittee's sole cost [Reynoldsburg City Code 907.06(A)(4)].

In July 2005, Reynoldsburg informed Columbus Southern Power Company (CSP, company, or respondent) that it would be ordered to relocate its facilities within the right-of-way of the Reynoldsburg Major Commercial Corridors Revitalization Project (the Phase II Project) into the City's underground duct bank. In November 2005, Reynoldsburg agreed to pay in advance for the estimated cost of CSP's facility relocation in an amount not to exceed \$1,185,535.30, and the parties agreed that any disputes regarding reimbursement would be resolved in the appropriate forum.

In July 2006, Reynoldsburg filed a complaint for declaratory relief in Franklin County Court of Common Pleas requesting a declaratory ruling that CSP had a legal obligation to relocate its facilities at its own cost and that the City is entitled to reimbursement of the cost incurred. *Id.* On March 5, 2008, the Ohio Supreme Court (the Court) determined that, because Reynoldsburg's declaratory judgment action would involve a challenge to the validity of CSP's PUCO Tariff No. 6, Original Sheet 3-6 ("Temporary and Special Service" or ¶17), Reynoldsburg must bring that challenge as a complaint to the Commission in accordance with Sections 4905.22 and 4905.26, Revised Code. See *State, ex rel. Columbus Southern Power Co. v. Fais* (2008), 117 Ohio St.3d 340, 884 N.E.2d 1.

Reynoldsburg filed a complaint against CSP on July 1, 2008, alleging that the Ordinance supersedes CSP's tariff. Reynoldsburg also alleges that CSP has violated a November 1, 2005, letter agreement between the parties regarding the relocation of CSP's electric distribution facilities as part of the Phase II Project. Reynoldsburg submits that, under the terms of the agreement, CSP agreed to relocate its facilities to underground ducts, and Reynoldsburg agreed to advance the reasonable and necessary costs associated with CSP's relocation of its facilities and to then bring suit against CSP seeking a declaratory judgment for purposes of determining CSP's obligation to relocate its facilities at its own costs. In particular, Reynoldsburg alleges that subsequent attempts to seek a judgment from the courts were opposed by CSP.

In its answer of July 22, 2008, CSP maintains that it is not obligated to relocate its facilities at its own cost. Instead, the company contends that, pursuant to its tariff, Reynoldsburg is required to pay incremental costs when requiring CSP to relocate its facilities. While admitting that it opposed Reynoldsburg's lawsuit seeking a declaratory judgment, CSP denies that it violated the November 1, 2005, letter agreement.

Pursuant to an attorney examiner entry issued on October 26, 2009, the parties filed an agreed statement of facts and disputed legal issues on November 5, 2009, as amended on November 10, 2009. On November 20, 2009, CSP pre-filed the direct testimony of Selwyn J. Dias and, Reynoldsburg pre-filed the direct testimony of both Robert L. McPherson and Sharon Reichard.

A settlement conference was held in this matter on December 4, 2008; however, the parties were unable to resolve the complaint. An evidentiary hearing was held on December 2, 2009. Both parties filed post-hearing initial briefs on January 22, 2010, and reply briefs on February 5, 2010.

II. APPLICABLE LAW

CSP is an electric light company as defined by Section 4905.03(A)(3), Revised Code, and a public utility by virtue of Section 4905.02, Revised Code. CSP is, therefore, subject to the jurisdiction of the Commission pursuant to Sections 4905.04 and 4905.05, Revised Code. The complaint in this proceeding was filed pursuant to Section 4905.26, Revised Code, which provides, in relevant part, that the Commission will hear a case:

[u]pon complaint in writing against any public utility . . .
that any rate . . . charged . . . is in any respect unjust,
unreasonable, unjustly discriminatory, unjustly preferential,
or in violation of law

Section 4905.30, Revised Code, in pertinent part, provides that "[e]very public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them." Pursuant to Section 4909.18, Revised Code, in pertinent part, "[a]ny public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce, any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission." In accordance with Section 4905.22, Revised Code, all charges for service shall be just and reasonable and not more than allowed by law or by order of the Commission.

In complaint cases before the Commission, the complainant has the burden of proving its case. *Grossman v. Public Utilities Commission*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666, 667 (1966). Thus, in order to prevail, the complainant must prove the allegations in its complaint, by a preponderance of the evidence.

III. SUMMARY OF EVIDENCE

A. Joint Stipulations of Facts

On November 5, 2009, as amended on November 10, 2009, the parties filed an Agreed Statement of Facts and Legal Issues (Jt. Ex. 1). This document was admitted into

the record at the hearing. According to the Agreed Statement, the parties stipulate, among other things, to the following facts:

- (1) On April 24, 2000, Reynoldsburg's City Council passed Reynoldsburg Ordinance 50-2000, granting CSP a five-year nonexclusive franchise to construct, maintain, and operate lines for the transmission and distribution of electrical energy, along with all necessary appurtenances and appliances, in order to provide electrical service in Reynoldsburg.
- (2) In October, 2004, in conjunction with its Phase II Project, Reynoldsburg applied for a grant with Franklin County, indicating in its application that the existing overhead utilities in the right-of-way (including electric) would be removed and replaced underground.
- (3) CSP's utility facilities "occupy" and "use" Reynoldsburg's public ways, as those terms are used in Chapter 4939.01 and the Ordinance.
- (4) CSP has placed facilities in the public ways underground pursuant to the requirements of right-of-way permits and/or franchise agreements with political subdivisions other than Reynoldsburg.
- (5) Reynoldsburg "owns or controls the public way" in the area of the Phase II Project, as those terms are defined in Section 4939.03(C)(1), Revised Code.
- (6) The Phase II Project required that all utilities in the City's Main Street right-of-way be placed underground.
- (7) Reynoldsburg contemplated that CSP would relocate facilities in the right-of-way underground throughout the planning, development and implementation stages of the Phase II Project.
- (8) In the last half of 2004 and continuing through the first half of 2005, Reynoldsburg engaged a consultant to survey the electrical facilities of various property owners and business owners and operators in order to determine electrical

service requirements for "undergrounding of overhead facilities, as well as business signage requirements." The utility duct bank was completed at Reynoldsburg's expense in the summer of 2005.

- (9) During 2004 and 2005, Reynoldsburg also engaged a consultant to facilitate underground electric service drops to serve businesses along Main Street in the Phase II Project. The underground service drops were completed at Reynoldsburg's expense.
- (10) On May 9, 2005, the Reynoldsburg City Council enacted the Ordinance.
- (11) On July 8, 2005, the City Public Service Director issued a letter to CSP.
- (12) Prior to the July 8, 2005, letter, the City referred to the underground right-of-way as the "AEP duct bank" in multiple written communications. Additionally, prior to the July 8, 2005, letter, the City performed work for businesses to prepare to take service from relocated underground facilities.
- (13) Reynoldsburg included the costs of funding the relocation of CSP's underground as the City's responsibility as part of its planning documents for Phase II.
- (14) Reynoldsburg spent at least \$816,676 for duct bank and electrical work related to businesses in connection with the Phase II Project.
- (15) On or about September 1, 2005, CSP applied for a General Right-of-Way permit and paid the required fee, pursuant to the Ordinance.
- (16) In order to avoid delaying the Phase II Project, the City and CSP entered into a letter agreement dated November 1, 2005. Pursuant to this agreement, Reynoldsburg committed to advance the reasonable and necessary costs as a result of the Phase II Project to be incurred by CSP to relocate its facilities underground. This amount is not to exceed

\$1,185,535.30.

- (17) On March 28, 2006, Reynoldsburg approved CSP's application for a General Right-of-Way Permit pursuant to the terms of the Ordinance and granted CSP a General Right-of-Way Permit to occupy space in Reynoldsburg's public ways for a period of ten years expiring March 31, 2016.
- (18) The cost of constructing facilities underground is higher than the cost of constructing those same facilities above ground.
- (19) CSP's "Temporary and Special Service" tariff language, was first approved in 1992, as part of Case No. 91-418-EL-AIR (91-418), *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*, Opinion and Order, May 12, 1992. The tariff provisions provides as follows:

The customer shall pay to the Company the cost of establishing service and of removing its equipment when the service is of short term or emergency character, and a cash deposit covering the estimated net cost of such work may be required of the customer before the work is commenced.

The Company shall not be required to construct general distribution lines underground unless the cost of such special construction for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority (to the extent that such cost exceeds the cost of construction of the Company's standard facilities) shall be paid for by that municipality or public authority. The "cost of any change" as used herein, shall be the cost to the

Company of such change. The "cost of special construction" as used herein, shall be the actual cost to the Company in excess of the cost of standard construction. When a charge is to be based on the excess cost, the Company and municipality or other public authority shall negotiate the amount thereof.

Other services requested by a customer and considered by the Company to be either of a temporary nature, or service of a type requiring facilities the estimated net cost of which is not justified by the anticipated revenue therefrom, or special construction (costs of special construction that exceed the cost of standard construction) will be provided by the Company under special contract. Such contract will guarantee the net cost of the additional facilities prior to the construction thereof by either a contribution in aid of construction or by deposit as set forth in any applicable supplement or supplements to the rate schedules set forth in PUCO No. 5, if any.

Service to customers using energy only during certain seasons of a year at the same location, and requiring facilities which may not be completely removed and replaced, shall not be classed as temporary service.

B. City of Reynoldsburg

1. Sharon Reichard

Ms. Reichard was the Public Service Director for the city of Reynoldsburg from the spring of 2003 through August 2006. As part of her responsibilities, she was in charge of overseeing the Phase II Project (Reynoldsburg Ex. 1 at 2, 3).

Ms. Reichard explains that, pursuant to the City's Comprehensive Right-of-Way Ordinance, when a utility provider or other entity wishes to occupy space in the City's right-of-way, it must apply for a permit, pay a fee, and agree to be bound by a number of terms and conditions. She states that the main purpose of maintaining a public right-

of-way is to provide a safe and efficient means for vehicular and pedestrian traffic (*Id.* at 3). She testifies that CSP requested a right-of-way permit from the City in September 2005 and that the certificate issued to it required that it abide by the terms set forth in the Ordinance. The witness further explains that CSP had no other form of permission to place its facilities in the utility right-of-way inasmuch as its prior franchise agreement expired on April 24, 2005 (*Id.* at 4).

According to Ms. Reichard, the Ordinance requires that the Safety and Services Department determine when it might be necessary to move or relocate utility lines located in the Reynoldsburg right-of-way, including those situations in which it is necessary to move utility lines from above ground poles to a duct underground. She indicated that the City does not require the relocation to underground utility lines in the right-of-way every time it undertakes an infrastructure project of some kind but, rather, makes such decisions on a case-by-case basis (*Id.* at 5, 6).

Ms. Reichard opines that in this case a lawfully adopted regulation (i.e., the Ordinance) is being challenged on the basis that there is a tariff provision that is inconsistent with the Right-of-Way Ordinance. The witness submits that, if a tariff provision is permitted to supersede a lawfully adopted local regulation, no municipality can be expected to effectively regulate the public right-of-way. In particular, the witness asserts that, under such a scenario, any attempt on the part of a local governmental entity to effectively regulate uses and access to rights-of-way could be quickly eliminated by a tariff amendment (*Id.* at 7). In support of the Ordinance, Ms. Reichard explains that Reynoldsburg is responsible to keep the right-of-way in Reynoldsburg safe and attractive for the public, primarily for use in aiding safe and attractive pedestrian and vehicular traffic (*Id.*). Finally, the witness notes that the Ordinance would not prohibit a utility provider from placing facilities above ground in a utility easement on private property (*Id.* at 6, 7).

2. Robert L. McPherson

Robert L. McPherson served as mayor of Reynoldsburg from January 1988 to December 2007 (CSP Ex. 1 at 1). In that capacity, he was involved with the Phase II Project (*Id.* at 2). He describes how the project was an attempt to address some of the problems that existed along the City's commercial corridors. These problems included the following: (1) traffic congestion, (2) parking availability, (3) speed of traffic along major arteries, (4) lack of sidewalks or decrepit sidewalks, (5) poor streetscape design, and (6) lack of design standards for commercial activity (*Id.* at 2).

According to Mr. McPherson, the specific projects identified included the following: (1) resurfacing the streets, (2) repairing sidewalks, (3) installing sidewalks where none existed, (4) replacing water lines, (5) creating a utility duct underground

and moving overhead lines into the duct, (6) replacing traffic signals, (7) replacing street lighting, (8) upgrading electrical service, (9) installing irrigation systems, (10) installing street trees, and (11) constructing commercial signage (*Id.* at 3). Mr. McPherson explains that public safety was one of the primary reasons for the revitalization project. Specific to relocating the utility lines in the right-of-way underground, Mr. McPherson indicates that the City believed that the proliferation of overhead utility lines, wires, and signage was a distraction to drivers. Therefore, in order to address this concern and to protect the safety of both motorists and pedestrians, the City required the relocating of utility lines underground (*Id.* at 3, 4).

C. CSP

1. Selwyn J. Dias

Selwyn J. Dias is employed as Vice President, Regulatory and Finance, for AEP Ohio, CSP, and Ohio Power Company (OPCo). In this capacity he is responsible for regulatory affairs and financial performance related to CSP and OPCo (CSP Ex. 1 at 2). The purpose of Mr. Dias' testimony is to address some of the factual and policy issues raised in the complaint in this case.

Mr. Dias explains that Reynoldsburg had undertaken a "streetscape" community beautification effort in multiple phases. According to Mr. Dias, in Phase I, the City required CSP to relocate its overhead general distribution lines to underground and paid CSP for the cost of the relocation (*Id.* at 3). Mr. Dias notes that the applicable tariff has been in effect since 1992 and was originally approved by the Commission as part of Case No. 91-418.

The witness opines that ¶17 in CSP's Terms and Conditions of Service, Temporary and Special, Original Sheet 3-6, applies to the dispute in question with respect to Phase II of the "streetscape" effort. Specifically, Mr. Dias describes that subsequent to the completion of Phase I, Reynoldsburg enacted Ordinance No. 32-05 that requires a utility, such as CSP, to relocate facilities at the utility's cost (CSP Ex. 1 at 5). Notwithstanding the Reynoldsburg Ordinance, CSP submits that its aforementioned tariff provision applies to the scenario presented in Phase II of Reynoldsburg's "streetscape" effort. In particular, Mr. Dias asserts that the applicable tariff language requires that overhead line construction is the standard method for providing general distribution electric service and that a municipality must pay for the cost of constructing underground lines or relocating overhead lines underground if the municipality requires or specifies such special construction or relocation (*Id.*).

In support of CSP's position, Mr. Dias indicates that, pursuant to a letter of July 8, 2005, the complainant's Safety Director notified the respondent that it was required to

relocate its facilities within the Phase II right-of-way into the underground duct bank. Mr. Dias avers that CSP has consistently applied the terms of the applicable tariff provisions. At the same time, he recognizes that there are possible exceptions where underground facilities have been installed or overhead facilities were relocated underground that do not fall within the scope of the tariff (*Id.* at 7, 8). Mr. Dias also clarifies that the applicable tariff language only applies to general distribution lines and does not apply to underground transmission lines (*Id.* at 8).

According to Mr. Dias, the amount in dispute in this case is the \$1.185 million that it spent to relocate the general distribution lines underground in connection with the Phase II streetscape effort (*Id.* at 6). He opines that, pursuant to the tariff, Reynoldsburg is either required to pay the costs of relocating CSP's general distribution lines underground or the cost will need to be recovered through a special rider either applicable to customers in the municipality or to all customers in CSP's territory (*Id.* at 9). Mr. Dias explains that CSP requested the tariff provision in question in order to ensure that local decisions were based on local considerations (including the cost impacts) and were not based on the opportunity to shift costs associated with local decisions to CSP's customers (*Id.*). Specifically, the witness identifies the concern that numerous municipalities across CSP's service territory may approve legislation similar to the Reynoldsburg Ordinance with the intent to pass the cost of relocating overhead distribution lines underground across all of CSP's customers (*Id.* at 10, 11).

To the extent that the Commission was to determine that the applicable tariff provision should be modified or discontinued, Mr. Dias states that it would be the respondent's preference that the Commission establish a surcharge applied to CSP's customers in that municipality in order to recover the costs resulting from that local decision (*Id.* at 10). The respondent believes that such an approach is more preferable inasmuch as it will avoid all of CSP's customers incurring an additional cost based on localized interests (*Id.* at 11, 12).

IV. PARTIES' LEGAL ARGUMENTS

1. Does ¶17 of CSP's Tariff Apply to the Facts of this Case?

a. Reynoldsburg

Reynoldsburg asserts that ¶17 of CSP's tariff, by its own terms, does not apply to Phase II, because Reynoldsburg did not "require" CSP to underground its distribution lines (Reynoldsburg Initial Brief at 8). Consistent with its position, Reynoldsburg notes that occupying the public right-of-way is not the only manner to provide utility service to customers in Reynoldsburg. Specifically, Reynoldsburg notes that, pursuant to Section 4933.15, Revised Code, CSP has the power to appropriate private properties for

its distribution facilities (*Id.* at 8-9). Accordingly, Reynoldsburg contends that, since CSP could have opted to place facilities in private utility easements, but did not elect to do so, the respondent elected to maintain general distribution facilities in the public right-of-way, knowing that its decision made it subject to Reynoldsburg's lawful regulation of its right-of-way (*Id.* at 9).

b. CSP

CSP disputes Reynoldsburg's claim that the respondent's tariff does not apply because CSP had the option of re-routing all of its lines out of the public right-of-way and on to private property. CSP submits that Reynoldsburg is ignoring the plain language of CSP's tariff ¶17 (CSP Reply Brief at 10). In particular, CSP asserts that its tariff applies when a municipality requires or specifies that existing overhead general distribution lines be moved underground. Specific to this case, CSP emphasizes that the parties have stipulated to the fact that the Phase II Project required that all of the utilities in the Main Street public right-of-way be placed underground, and that such action was not voluntary. In response to Reynoldsburg's assertion that the relocation of the distribution lines was voluntary as a result of the implicit option of re-routing all of the respondent's lines on to private property, CSP finds such assertion to be disingenuous and implausible (*Id.* at 11). In support of its position, CSP references Reynoldsburg's Letter of July 8, 2005, which provided that "on or about October 15, 2005, the Utility will be required to relocate their respective facilities within the public right-of-way of the Project into the underground duct bank" (*Id.* citing Jt. Ex. 1, Att. I). Further, CSP maintains that the record reflects that throughout the entire Phase II Project, including during the planning stages, Reynoldsburg intended for CSP's facilities to be relocated underground (*Id.* at 12 citing Jt. Ex. 1, ¶17). According to CSP, this point is reiterated in Ms. Reichard's testimony that both Phase I and Phase II "required" relocation of utility facilities underground. (CSP Reply Br. at 12, citing Tr. at 22).

Relying upon the illustrations included in the March 2001 design guidelines/standards for the Phase II Project (CSP Ex. 2), which depict the street with electric facilities underground and not placed on private property behind the public right-of-way, CSP concludes that that Reynoldsburg never intended for the complainant to relocate its facilities onto private easements (CSP Reply Br. at 12). Additionally, CSP argues that the fact that Reynoldsburg spent at least \$816,676 constructing an underground duct bank (referred to it as the "AEP duct bank" in correspondences) and stated in a block grant application that the existing overhead utilities would be removed and placed underground demonstrates that Reynoldsburg always planned on having CSP relocate its electric lines underground (*Id.* at 11-13).

CSP also points out that the City, pursuant to its letter of July 8, 2005, provided approximately a 90-day notice regarding the relocation of the above-ground lines.

Based on this short time frame, CSP avers that it is not feasible or financially reasonable for Reynoldsburg to have contemplated that CSP would pursue the option of private easements (*Id.* at 13). Finally, CSP notes that its tariff would still apply in this case even if Reynoldsburg had not required CSP to relocate its facilities underground, because the tariff applies to scenarios involving "any change of existing overhead general distribution lines to under ground which is required or specified by a municipality or other public authority ..." Based on the record in this case, CSP maintains that that Reynoldsburg has "specified" that CSP relocate its electric lines underground (*Id.* at 14).

In response to the arguments set forth by Reynoldsburg, CSP argues that, while Reynoldsburg's entire legal position is based on the premise that the Ordinance was applied to CSP and supersedes the tariff, the City's own evidence demonstrates that the Ordinance was not relied upon or applied by Reynoldsburg in connection with Phase II. Accordingly, CSP maintains that, inasmuch as constitutional issues should not be decided until the necessity for a decision arises on the record, all of Reynoldsburg's legal and constitutional claims premised on the Ordinance are not being ripe for adjudication and should not be decided by the Commission at this time (CSP Reply Br. at 17-18, citing *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.* (1958), 167 Ohio St. 182, 186; *State ex rel. Herbert v. Ferguson, Aud.* (1944), 142 Ohio St. 496, 503; and *Belden v. Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, 352).

In support of its position, CSP argues that the record does not factually support Reynoldsburg's claim that the Ordinance was applied to Phase II. Rather, CSP states that Ms. Reichard, who was in charge of the City's implementation of Phase II, testified that the decision to require relocation of overhead facilities underground was made during Phase I of the Main Street project and was simply carried through, without deliberation, during Phase II (*Id.* at 18, citing Tr. 27). CSP notes that Phase I was implemented prior to the enactment of the Ordinance. Since the Ordinance requires the safety director to consider various issues, such the size and cost of a project, before ordering a permittee to pay for removal or relocation of facilities, and Ms. Reichard testified that she did not exercise any independent judgment, discretion or authority relative to Phase II, CSP believes that Phase II merely implemented the prior decision that was made before the Ordinance existed. (*Id.* at 18-19, citing Tr. 30, 40, 47, 54, 56-57).

c. Commission ruling

Upon a review of the record relative to the allegations set forth in this count of the complaint, the Commission recognizes that the resolution of this dispute centers on the interpretation of language set forth in ¶17. The Commission agrees with CSP that ¶17 of the company's Terms and Conditions of Service applies to the facts of this case. In particular, the Commission focuses on the following language:

[t]he Company shall not be required to construct general distribution lines underground unless the cost of such special construction for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority (to the extent that such cost exceeds the cost of construction of the Company's standard facilities) shall be paid for by that municipality or public authority.

Pursuant to Joint Ex. 1, the record is clear that the change of the existing overhead general distribution lines was either required or, at a minimum, specified by the municipality. In reaching this determination, the Commission references ¶¶16 and 17 of Joint Ex. 1 which clearly states that "[t]he Phase II Project required that all (emphasis added) utilities in the City's Main Street right-of-way be placed underground," and that "Reynoldsburg contemplated that AEP would relocate facilities in the right-of-way underground throughout the planning, development and implementation stages of the Phase II Project." When considering the entire record, the Commission agrees with CSP's contention that the surrounding facts set forth in this case refute Reynoldsburg's contention that, while the respondent could have opted to place facilities in private utility easements, it did not elect to do so. In particular, the Commission concurs with CSP's position that, based on the limited 90-day time frame set forth in Reynoldsburg's letter of July 8, 2005, for the removal of the overhead distribution lines to an underground location, there was not sufficient time for CSP to do anything other than relocate the distribution lines to the duct banks at the center of this dispute. Additionally, the Commission notes that the letter of July 8, 2005, states that "the utility will be required (emphasis added) to relocate their respective facilities within the public right-of-way of the project into the underground duct bank." Therefore, based on the record as a whole, it is clear that the parties intended for ¶17 of CSP's tariff to apply to the issue being considered in this case. Finally, the Commission notes that CSP has applied ¶17 in a manner similar to that advocated in this case.

Specifically, the Commission references the prior ordinances passed by the cities of Worthington, Upper Arlington, and Dublin requiring the undergrounding of CSP facilities and municipalities reimbursement of the associate expenses (Tr. 155-157).

2. Is CSP's Tariff Unjust, Unreasonable, or Unlawful?

a. Reynoldsburg

Reynoldsburg asserts that, pursuant to Section 4905.37, Revised Code, the Commission should declare that ¶17 is unjust, unreasonable, and unlawful since ¶17 of

CSP's tariff purports to vest power in a utility to force municipalities to pay for relocation, contrary to the clear constitutional authority possessed by municipalities to regulate public rights-of-way (Reynoldsburg Initial Br. at 23). While recognizing that Ohio statutory law gives utilities some power to regulate the utilities' relationship with consumers, Reynoldsburg submits that CSP has failed to cite any authority for the proposition that a utility can dictate a municipality's power over its rights-of-way. As additional support for its contention that ¶17 of CSP's tariff is unreasonable, Reynoldsburg asserts that it is inconsistent with the structure set forth in Section 4939, Revised Code (*Id.*).

b. CSP

CSP focuses on the Commission's authority to approve tariffs pursuant to Section 4905.30, Revised Code. In particular, CSP notes that, consistent with Section 4905.30, Revised Code, every public utility in Ohio is required to file, for Commission review and approval, tariff schedules that detail rates, charges, and classifications for every service offered and utilities must charge rates in accordance with the tariffs approved by and on file with the Commission (CSP Reply Br. at 27, 28).

c. Commission ruling

Based upon a review of the record relative to the allegations set forth in this count of the complaint, the Commission finds that CSP's tariff is not unjust, unreasonable, or unlawful. Pursuant to Section 4905.30, Revised Code,

Every public utility shall print and file with the public utilities Commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules, regulations affecting them

As noted in Joint Ex. 1, ¶17 of CSP's tariff was approved in Case No. 91-418. Pursuant to its May 12, 1992 Opinion and Order, the Commission found that, based on the record in that case, the tariff language be adopted. Specifically, in its Opinion and Order, the Commission pointed out that "[n]o party objected to this language..." Opinion and Order at 111. The Commission notes that, while the record does not indicate as such, Reynoldsburg could have sought intervention to participate in that proceeding and provided comments relative to ¶17. By approving the tariff language, the Commission tacitly signified that the proposed provision was neither unjust nor unreasonable on its face. A review of ¶17 reflects that the intent of the provision is to help ensure that the utility or its rate payers not incur the expense of relocating facilities underground upon the request of a municipality. The Commission believes that the

tariff language continues to be just and reasonable inasmuch as it is consistent with the principle that the cost causer be the cost payer.

In response to Reynoldsburg's contention that CSP cannot dictate a municipality's power over its rights-of-way, the Commission finds that the intent of the tariff provision is not to dictate Reynoldsburg's power over its rights-of-way but, rather, to compensate the utility for complying with the City's directives concerning its rights-of-way. Thus, the Commission concludes that CSP's objective is consistent with existing law and that the current tariff language in dispute is not unjust, unreasonable, or unlawful.

3. Does CSP's Tariff Violate Article XVIII, Section 4 of the Ohio Constitution?

a. Reynoldsburg

Reynoldsburg argues that ¶17 of CSP's tariff is invalid because it violates Article XVIII, Section 4, of the Ohio Constitution. Specifically, the complainant alleges that, in pertinent part, Article XVIII, Section 4 provides that any municipality may operate any public utility and may contract with others for any such [utility] product or service (CSP Initial Br. at 9). Reynoldsburg contends that through the franchise agreement and the general right-of-way permit Reynoldsburg issued to CSP, Reynoldsburg contracted with CSP for electric service in the city. Reynoldsburg maintains that CSP's tariff provision is not part of the contract, and CSP's attempt to retroactively make the tariff part of the contract infringes on Reynoldsburg's constitutional right to contract for utility service (*Id.* at 10).

Relying on *Link v. Public Utilities Commission of Ohio* (1921), 102 Ohio St. 336, 340 (*Link*), Reynoldsburg contends that the contract between itself and CSP is a valid contract for utility services, entered into by a utility provider and a municipality pursuant to the municipality's Article XVIII, Section 4, authority and, therefore, is not subject to review by this Commission. Reynoldsburg notes that the Court reaffirmed the *Link* decision in both *Akron v. Public Utilities Commission* (1933), 126 Ohio St. 333 (*Akron*), and in *In re Residents of Struthers, Ohio* (1989), 45 Ohio St.3d 227 (*Struthers*)(Reynoldsburg Initial Br. at 10, 11).

b. CSP

CSP replies that Reynoldsburg's claim that CSP and Reynoldsburg entered into a contract for utility service should be ignored or rejected because it was never pled or raised in the complaint (CSP Reply Brief at 19-20). In addition, CSP argues that the case law cited by the City fails to support Reynoldsburg's underlying contractual theory.

According to CSP, all of the cases cited by Reynoldsburg involve whether the Commission could, based on Section 4909.36, Revised Code, exercise jurisdiction over an explicit written agreement between a municipality and a utility provider at the request of a third party, when neither the municipality nor the utility was aggrieved or sought to have the Commission intervene. CSP maintains that, while the case law holds that the Commission lacks jurisdiction under such circumstances, since those facts are not present in this matter, the case law relied upon by Reynoldsburg is not relevant to the case at hand. In addition, CSP also points out that, unlike *Link, Akron, and Struthers*, in this case one of parties—Reynoldsburg—actually invoked the Commission's jurisdiction, by filing the complaint in this matter (CSP Reply Brief at 20-21, 23.)

Further, CSP argues that no contractual agreement exists between it and Reynoldsburg with regard to the cost of relocating facilities underground. According to CSP, it has consistently maintained that the city was required to pay the relocation costs and that the only evidence in the record supporting Reynoldsburg's contention that CSP contractually agreed to pay the relocation costs is the boilerplate language contained in the permit order issued unilaterally by the City (CSP Reply Brief at 21). Further, CSP notes that the terms of the Ordinance itself, to which the permit order refers, are conditional. The Ordinance allows the service director to require underground utility facilities only "to the extent permitted by law," and CSP notes that Ms. Reichard agreed that such phrase qualified the director's right under the Ordinance to require underground relocation. (CSP Reply Brief at 22, citing Jt. Ex. 1, Att. F at 21 and Tr. 38-39.)

c. Commission ruling

In this count of its complaint, Reynoldsburg seeks a determination as to whether CSP's tariff violates [Article XVIII, Section 4] the Ohio Constitution. This section of the Ohio Constitution provides that:

Any municipality may acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the products or service of which is or is not to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or produce of any such utility.

In considering this request, the Commission must exercise its delegated authority within the scope of its statutorily established powers. Specifically, pursuant to Section 4901.02(A), Revised Code, the Commission shall possess the powers and duties, specified in, as well as all powers necessary and proper to carry out the purposes of Chapters 4901, 4903, 4905, 4907, 4909, 4921, and 4923, Revised Code. Further, pursuant to Section 4905.04, Revised Code, the Commission, in pertinent part, is:

[V]ested with the power and jurisdiction to supervise and regulated public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law

Pursuant to Section 4905.30, Revised Code, in pertinent part:

Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them

Pursuant to Section 4909.18, Revised Code, in pertinent part:

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce, any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission

Consistent with Sections 4905.30, and 4909.18, Revised Code, to become effective all tariffs must be approved by the Commission. As previously stated, on May 12, 1992, the Commission approved the tariff pages incorporating ¶17. In doing so, the Commission determined that the provision does not appear to be unjust or unreasonable. This determination is reaffirmed pursuant to the discussion set forth in the prior count of the complaint supra. In the instant case, Reynoldsburg is in actuality challenging the constitutionality of the factual application of Sections 4905.30, and 4909.18, Revised Code, inasmuch as the disputed ¶17 of CSP's tariff was submitted for the Commission's approval.

Such consideration of the reasonableness of a tariff provision did not include a specific examination of whether the provision violated Article XVIII, Section 4 of the Ohio Constitution with respect to the Reynoldsburg municipal ordinance raised in this case. The Commission is an administrative body whose powers are delineated by statute. Such questions of constitutionality extend beyond the scope of the Commission's designated authority. Rather, the determination of the constitutionality of ¶17 of CSP's tariff is more appropriate for determination by the courts. Therefore, the Commission must continue to enforce the disputed tariff provision until directed otherwise by the courts. To do otherwise would place the Commission in the untenable position of having to contemplate all current and future municipal ordinances when considering whether a proposed tariff provision is unjust or unreasonable. It does not have the requisite jurisdiction to adjudicate as to whether ¶17 of CSP's tariff violates Article XVIII, Section 4 of the Ohio Constitution.

In support of this ruling, the Commission relies on the Court's decision that administrative agencies (e.g., the Commission) have their powers specifically granted by the Revised Code and, therefore, have no authority to declare a statute unconstitutional. See, e.g., *Panhandle E. Pipeline Co. v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 334, 346, 383 N.E.2d 1163. At the same time, the Commission recognizes that the Court has previously determined that, unlike a facial constitutional challenge, where a party challenges the constitutionality of a statute as applied to a specific set of facts, an evidentiary record is required prior to a case being appealed to the Court. See e.g., *City of Reading v. Public Utilities Commission of Ohio et al.* (2006), 109 Ohio St.3d 193, 846 N.E.2d 840. Consistent with this holding, the Commission has provided the parties with the opportunity to develop an evidentiary record. Additionally, the Commission finds that, consistent with *Panhandle Eastern Pipe Line Company*, the resolution of the constitutional ramifications of the factual application of statutory sections should be left to the Court. The Commission also relies on the Court's determination in *State ex rel. Columbus Southern Power Company v. Fais* (2008), 117 Ohio St.3d 340, 884 N.E.2d 1, that municipal home-rule issues may be resolved by the Court in an appeal from an order of the Commission.

4. Whether Reynoldsburg's "Home Rule" Powers Under the Ohio Constitution Override or Supersede the Tariff?
5. Whether, and to What Extent, the Terms of Reynoldsburg's Ordinance Override CSP's Tariff?
 - a. Reynoldsburg

Reynoldsburg contends that, to the extent the Ordinance conflicts with the terms of CSP's tariff, the Ordinance controls. In support of its position, Reynoldsburg

maintains that the Ordinance is valid because it was enacted pursuant to the City's powers of local self-government, granted by the Home Rule Amendment, and not under the city's police powers. However, even if the Right-of-Way Ordinance was enacted pursuant to the city's police powers, Reynoldsburg argues that the Ordinance would still remain valid, as it does not conflict with any "general" laws of Ohio. (Reynoldsburg Initial Br. at 11.) Reynoldsburg also contends that the Commission has no jurisdiction to invalidate a municipal ordinance, especially in this situation in which the Ohio Constitution and the Revised Code expressly provide municipalities with the authority to regulate their public rights-of-way (Reynoldsburg Reply Br. at 3).

Reynoldsburg submits that the Home Rule Amendment of the Ohio Constitution (Ohio Const. Art. XVIII, Section 3) provides that: "Municipalities shall have 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." Reynoldsburg argues that, pursuant to the amendment, two separate, but related, sources of municipal power exist: "powers of local self-government" and "local police, sanitary, and other similar regulations" (Reynoldsburg Initial Br. at 12). While the provision places a limit on the exercise of municipal powers, in that municipal regulations must not "conflict with the general laws," Reynoldsburg states that, in *City of Twinsburg v. State Emp. Rel. Bd.* (1988), 39 Ohio St.3d 226, 228 (overruled on other grounds by *Rocky River v. State Emp. Rel. Bd.* (1989), 43 Ohio St.3d 1, 20), the Court held that this phrase only applies to police, sanitary, and other similar regulations (*Id.* at 12). When a municipal ordinance relates solely to matters of self-government, Reynoldsburg, citing *Ohioans for Concealed Carry, Inc. v. Clyde* (2008), 120 Ohio St.3d 96, argues that "the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction" (*Id.* at 12, 13). Reynoldsburg states that, pursuant to *Village of Beachwood v. Board of Elections of Cuyahoga County* (1958), 167 Ohio St. 369, 371, if a municipal ordinance affects only the municipality itself, with no extra-territorial effects, the subject matter of the ordinance is within the power of local self-government and is a matter for the determination of the municipality (*Id.*). Because the Right-of-Way Ordinance only regulates the use of the rights-of-way within the city itself, Reynoldsburg argues that the Ordinance has no extra-territorial effect, and accordingly is clearly within the power of local self-government (*Id.* at 14).

Further, even if the Ordinance was enacted under the City's police powers, Reynoldsburg maintains that it does not conflict with the state's general laws and, therefore, the Ordinance remains valid (*Id.*). Citing *City of Canton et al. v. The State of Ohio et al.* (2002), 95 Ohio St.3d 149, Reynoldsburg asserts that the Court formulated a three-part test to determine when a local ordinance conflicts with a state statute. Reynoldsburg states that, based on this test, "[a] state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute

is a general law" (*Id.*). Reynoldsburg claims there is no state statute with which its Ordinance conflicts. In fact, Reynoldsburg notes that, in part, its Ordinance was passed based on the authority granted to municipal corporations to regulate their public rights-of-way by Chapter 4939, Revised Code (*Id.* at 15).

Reynoldsburg argues that CSP's tariff provision is not a "general law." Citing *Canton v. State*, Reynoldsburg submits that the Supreme Court of Ohio has determined that:

To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary or similar regulations, and (4) to proscribe a rule of conduct upon citizens generally.

(*Id.* at 16). According to Reynoldsburg, CSP's tariff is not a general law because, in short, it is not law at all. In support of its position, Reynoldsburg raises the following arguments: (1) the tariff provision was not passed as part of a statewide and comprehensive legislative enactment, (2) applies only in CSP's service territory, and (3) does not prescribe a rule of conduct upon citizens generally, as it applies only to municipalities. Specific to these arguments, Reynoldsburg submits that there is nothing pursuant to Chapter 4939 *et seq.* which permits the Commission to declare that a utility provider's tariff supersedes a municipality's constitutional and statutory authority to regulated its rights-of-way (*Id.* at 15, 16). Reynoldsburg also notes that, notwithstanding the fact that the Commission may have previously approved a tariff provision, the Court has held "that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders [Reynoldsburg Reply Br. at 2 citing *Allnet Comm. Services v. Public Util. Comm.* (1987), 32 OhioSt.3d 115, 117, 512 N.E.2d 350]. Finally, Reynoldsburg submits that the Commission is not prohibited from reversing a prior order unless and until that order is overturned by the Supreme Court of Ohio (*Id.* at 3, 5). Reynoldsburg also submits that, in approving a tariff, the Commission does not pass judgment on the constitutionality of every provision contained in the tariff. Specific to the Home Rule Issue, Reynoldsburg asserts that there is no indication that the Commission passed judgment on this issue when it approved CSP's tariff (*Id.* at 5).

Reynoldsburg challenges CSP's claim that the company never agreed to be bound by the Ordinance. According to Reynoldsburg, this argument fails as a matter of law

and fact. Reynoldsburg argues that it has constitutional and statutory authority to regulate its rights-of-way, provided that the regulation is not unreasonable or arbitrary, and that CSP, like all other utility providers, must obtain the City's permission to operate in the public right-of-way, not the other way around. Reynoldsburg maintains that nothing in CSP's tariff changes this essential constitutional and statutory scheme. According to Reynoldsburg, since the City's enactment of the Ordinance is a constitutionally permissible exercise of Reynoldsburg's Home Rule power to regulate its public rights-of way, to the extent that ¶ 17 of CSP's tariff conflicts with the Ordinance, the Ordinance controls. Therefore, Reynoldsburg concludes that the question of CSP's consent to be subject to the applicable ordinance is irrelevant and CSP's tariff has no impact on the question of cost recovery for relocation of CSP's electric lines underground. Based on the arguments presented, Reynoldsburg avers that the Commission should order CSP to pay the City for the full cost of the relocation. (Reynoldsburg Initial Br. at 17, 18.)

As noted above, Reynoldsburg asserts that public safety was one of the primary reasons for revitalization project Reynoldsburg takes issue with CSP's argument that the Phase II Project was, in essence, a beautification project. The City argues that the record demonstrates that beautification was an effect, and not a purpose, of the Phase II Project. In addition, even if beautification was the sole purpose of the project, Reynoldsburg maintains that it may permissibly regulate aesthetics. Therefore, according to Reynoldsburg, CSP would remain subject to the City's constitutionally authorized regulation of its public rights-of-way. (*Id.* at 18 citing, e.g., Reynoldsburg Ex. 2 at 2-4.)

b. CSP

Notwithstanding Reynoldsburg's claims to the contrary, CSP asserts that the City's Ordinance is not an exercise of self-government pursuant to Article XVIII, Section 3, of the Ohio Constitution. While recognizing the appropriateness of the Home Rule provision of the Ohio Constitution, CSP points out that the application of the provision should be limited to matters that are purely local in nature. In regard to the record in this case, CSP submits that the action at issue in this case is not of a purely local nature but, rather, results in Reynoldsburg exercising its power and attempting to shift the costs of its local decision to citizens outside of its municipal boundaries. Specifically, CSP contends that the Ordinance has extra-territorial effects making the issues involved a matter of the General Assembly, and not a matter governed by the Ordinance (CSP Reply Br. at 25 citing *Village of Beachwood v. Board of Elections of Cuyahoga County* (1958), 167 Ohio St. 369, 371, 148 N.E.2d 921, 923). Specifically, CSP asserts that it is clear that Reynoldsburg's order to relocate CSP's facilities has the effect of impacting the rates of all CSP customers, including those outside the city of Reynoldsburg (*Id.* at 25, 26). More to the point, CSP argues that the extra-territorial effects of the portion of the Ordinance

requiring utilities to pay the costs of relocating utility facilities underground crosses over the line of issues involving purely local concerns and infringes on the Commission's clearly defined jurisdiction over utility rates and services pursuant to Title 49, Revised Code. Thus, CSP considers the Ordinance to be an attempted exercise of police power, and not an act of self-governance (*Id.* at 26-29).

Addressing the direct conflict raised in this case between the application of a narrow portion of the relevant CSP tariff and the Reynoldsburg Ordinance, CSP states that "the Supreme Court of Ohio has already provided guidance on this topic, finding that the costs to relocate overhead electrical lines in a Reynoldsburg right-of-way to underground involve statutes under the exclusive jurisdiction of the Commission (*Id.* at 28 citing *CSP v. Fais* at ¶ 20). CSP also asserts that the Court recognized in *CSP v. Fais* that a ruling that the applicable ordinance prevails over the relevant tariff would impair the Commission's order approving the tariff (*Id.* at 28). CSP also notes that pursuant to Section 4939.07, Revised Code, the Commission has specifically been delegated the authority to address cost recovery and rate design matters involving costs "directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way aside from public way fees" (*Id.* at 9 citing Section 4939.07, Revised Code).

CSP notes that the General Assembly has empowered the Commission with broad authority to administer and enforce the provisions of Title 49, Revised Code, and that the Commission possesses extensive and exclusive regulatory authority over CSP and other public utilities regarding utility service offerings, rates, and other terms and conditions (*Id.* at 4, 8). CSP opines that the Commission's approval of the company's tariff pursuant to Title 49, Revised Code, qualifies as general law. CSP calls attention to the fact that the tariff was approved and found to be reasonable as part of a Commission May 12, 1992, Opinion and Order in Case No. 91-418 (*Id.* at 4, 30). CSP maintains that the tariff continues to be just, reasonable, and lawful based on the same considerations that were present when the Commission initially adopted the tariff and that the Commission continues to maintain general authority to approve, modify, and enforce public utility tariffs (*Id.* at 4, 9).

In support of its contention that the approved tariff constitutes general law, CSP states that the tariff encompasses "the broad regulatory scheme applicable throughout the state of Ohio, governing utility service and rates that affect all citizens as distinguished by the General Assembly in differing certified territories for electric service (*Id.* at 30). According to CSP, the Commission is in the best position to allocate costs associated with activities of a public utility and to ensure that customers pay only a just and reasonable rate for service they actually receive (*Id.*). CSP states that the approved CSP's tariff, including the disputed ¶17, is based on the premise that the additional cost to provide underground service to one municipality should not be borne by ratepayers of another municipality (*Id.* citing 91-418, Opinion and Order at 110, 111).

Based on its review of the record, including CSP Ex. 2 (Reynoldsburg Major Commercial Corridors Streetscape and Development Design Guidelines/Standards), CSP posits that the application of the Reynoldsburg Ordinance was actually pursued as a beautification project and that safety had little or nothing to do with the creation of the Ordinance. Upon analyzing the support provided by Reynoldsburg, CSP finds that the citations relied by the complainant are not actually included in Joint Ex. 1 as represented in Reynoldsburg's Initial Brief (*Id.* at 32). Further, CSP focuses on the testimony of Reynoldsburg witness McPherson and his alleged inability to substantively support his contention that public safety was the significant basis for the Phase II Project (*Id.* at 33-35).

c. Commission ruling

Pursuant to these two counts of the complaint, Reynoldsburg seeks a determination as to whether Reynoldsburg's "Home Rule" under the Ohio Constitution supersedes CSP's tariff or whether the terms of Reynoldsburg's Ordinance override CSP's tariff. In considering this request, the Commission must exercise its delegated authority within the scope of its statutorily established authority. The Commission points out that the Court, in determining that the Commission has exclusive jurisdiction to adjudicate this complaint, recognized that the Commission's jurisdiction comes from its statutory authorization. *CSP v. Fais* at ¶19. Specifically, the Court noted that the costs to relocate overhead electric lines are costs included in the rates and charges for services defined in Sections 4905.22 and 4905.26, Revised Code, which are within the exclusive jurisdiction of the Commission. *Id.* at ¶20.

Based on the determinations of issues 1, 2, 3 discussed supra, the Commission determines that ¶17 is applicable to the facts of this case and that the provision is not unjust, unreasonable, or unlawful. We also determined that we lack statutory authority to adjudicate the question of whether CSP's tariff violates Article XVIII, Sections 3 and 4 of the Ohio Constitution. Consistent with these determinations, while the Commission can address the reasonableness of the CSP's tariff provision and the ultimate implementation of the provision specific to Reynoldsburg based on the facts in this case, we cannot opine as to the constitutional question of whether the tariff or the Ordinance supersedes the other. As stated supra, such a determination is more appropriate for the courts. In support of this conclusion, the Commission notes the Court's recognition that municipal home rule issues may be resolved in appeal from an order of the Commission. *Id.* at ¶31.

6. Did CSP Properly Apply its Tariff and Appropriately Charge Reynoldsburg for the Relocation Expenses?

a. Reynoldsburg

Even if the Commission finds that ¶17 of CSP's tariff is applicable in this matter, Reynoldsburg argues that CSP has not correctly applied the tariff provision to determine each party's relative contributions to the total cost of relocation. Specifically, Reynoldsburg focuses on the following tariff language:

The company [CSP] shall not be required to construct general distribution lines underground unless the cost of such special construction for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority (to the extent that such cost exceeds the cost of construction of the Company's standard facilities) shall be paid for by that municipality or public authority. . . .

(¶17).

Reynoldsburg maintains that either CSP has not been required to construct underground facilities and, therefore, the tariff provision does not apply or the tariff applies and that the City is only responsible for the cost of relocating the lines in excess of what it would have cost to move the lines from one above-ground location to another, rather than the total cost incurred while relocating the lines underground (Reynoldsburg Initial Br. at 21-22).

b. CSP

In response to the arguments set forth by Reynoldsburg regarding this issue, CSP contends that the Commission must look at ¶17 in its entirety and not just the portion highlighted by the City. In particular, CSP notes that the remaining portion of the language of the paragraph cited by Reynoldsburg provides that:

The "cost of any change" as used herein, shall be the cost to the Company of such change. The "cost of special construction" as used herein shall be the actual cost to the Company in excess of the cost of standard construction. When a charge is to be based on the excess cost, the

Company and municipality or other public authority shall negotiate the amount thereof.

(¶17).

Pursuant to this tariff language, CSP opines that the entire cost of changing from existing overhead lines to underground is the municipality's obligation. In support of its position, CSP notes that it has already built the standard facilities in Reynoldsburg and the distribution lines are fully functional. Therefore, according to CSP, the cost of any change to relocate facilities underground is "the cost to the Company of such change" (CSP Reply Br. at 17).

c. Commission ruling

With respect to this count of the complaint, based on a review of the language of ¶17, and the stated intent for the purpose of the tariff provision, the Commission finds that CSP's interpretation of ¶17 is accurate and should be applied. In reaching this determination, as discussed in our ruling relative to Count 1 supra, ¶17 does apply to the facts of this case. Further, consistent with our ruling in Count 2 supra, the Commission finds that the objective of the ¶17 is to ensure that the cost causer is the cost payer. Therefore, consistent with this interpretation, the tariff language must be interpreted to assure that CSP is compensated for the full cost of the relocation. To do otherwise would not satisfy the stated objective of the tariff provision.

7. Should the Commission Provide a Rate Recovery Mechanism to CSP in this Case if it Amends or Revokes CSP's Tariff?

a. Reynoldsburg

In response to CSP's request for the Commission to provide a rate recovery mechanism to CSP in this case if the Commission amends or revokes CSP's tariff, Reynoldsburg states that, while pursuant to Section 4905.37, Revised Code, the Commission can determine procedures that the company should follow when the Commission finds that a utility's practices are unjust or unreasonable, the Commission cannot, pursuant to Section 4905.37, Revised Code, unilaterally determine the terms of a utility's rates or tariff. Rather, Reynoldsburg insists that such an order is to be formulated through a properly brought rate-making case pursuant Chapter 4909, Revised Code (Reynoldsburg Reply Br. at 10, 11).

b. CSP

CSP submits that, if the Commission decides that ¶17 of the company's tariff should not be enforced against the complainant, the Commission must provide CSP with a rate recovery mechanism to address the additional costs resulting from the complainant's local decision to cause the costs to be incurred (CSP Initial Br. at 14). CSP recommends that any Commission revocation of the company's tariff should occur on a prospective basis (*Id.* at 14, 15). One of the proposed cost recovery mechanisms proposed by CSP includes, pursuant to Section 4905.37, Revised Code, the establishment of a surcharge applied to CSP's customers in the complainant's municipality in order to recover the costs resulting from the complainant's local decision that caused the costs to be incurred (*Id.* at 14, 15 citing CSP Ex. 1 at 10, 11).

Another cost recovery option proposed by CSP involves the implementation of a special rider applicable to all of CSP's customers. CSP downplays this specific option due to the fact that such an approach may become problematic if numerous municipalities across CSP's service territory pass similar ordinances for the purpose of passing off the cost of local projects to all of CSP's customers. According to CSP, such a scenario will result in an increase in the cost of electric service to all customers based on local interests (*Id.*).

c. Commission ruling

In light of the Commission's determination, discussed *supra*, that CSP's tariff provision ¶17 applies, this count of the complaint is now moot.

V. OTHER PENDING ISSUES IN NEED OF RESOLUTION

a. Outstanding motions

On February 9, 2010, CSP filed a motion to strike limited portions of Reynoldsburg's reply brief. Reynoldsburg filed a memorandum contra on February 12, 2010, and CSP filed a reply memorandum on February 19, 2010. CSP maintains that, in its reply brief, Reynoldsburg improperly attached, and speculated about, a newspaper article pertaining to a dispute involving AEP's undergrounding of facilities in another municipality. CSP argues that, inasmuch as this information is not part of the evidentiary record, the article should not be considered as in this case. Specifically, CSP asserts that Commission precedent forbids attaching nonevidentiary information to a post-hearing brief in order to rely on it for argumentation. (Motion at 4 citing e.g., *In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 06-786-TR-CVF, Opinion and Order, November 21, 2006, at 3). As additional

support, CSP contends that the attached article fails to support Reynoldsburg's argument regarding the application of the tariff as general law.

Reynoldsburg considers its attachment of the newspaper article to be no different than its inclusion of a copy of an Ohio Supreme Court decision. Additionally, the City submits that, similar to the case cited, the article is not intended to be record evidence but, instead, is an outside source of information that reflects upon the present dispute specific to CSP's cost allocation for undergrounding of utility lines.

On February 12, 2010, Reynoldsburg filed a motion to accept corrected citations to portions of the Agreed Statement of Facts and Legal Issues (Joint Ex. 1) that were referenced in its initial brief filed in this case. Reynoldsburg also filed a memorandum in support of its motion. Reynoldsburg notes that CSP's February 5, 2010, reply brief correctly points out that Reynoldsburg had cited the portions of original Exhibit G to the Agreed Statement of Facts and Legal Issues, rather than the corrected Exhibit G later filed by agreement of the parties and marked as an exhibit at the time of hearing. In its memorandum in support, Reynoldsburg not only identifies the correct citations to Exhibit G, but references additional record support for its advocated position. See Memorandum at 2.

By memorandum contra filed February 22, 2010, CSP argues that Reynoldsburg's motion inappropriately serves as an attempt to provide surreply in this case. CSP also contends that, through its motion, Reynoldsburg is improperly attempting to rehabilitate a witness. CSP additionally maintains that, by moving to accept corrected citations, Reynoldsburg acknowledges that its initial brief contains citations to information outside the record; CSP accordingly asks that the extra-record information be stricken from the record. On February 24, 2010, Reynoldsburg filed a reply memorandum, arguing that CSP cites no legal authority to support its contention that Reynoldsburg's arguments concerning the rationale behind the Phase II Project should be stricken. Reynoldsburg also denies that it made any attempt to rehabilitate a witness through the filing of its motion. While maintaining that its motion was not a surreply, Reynoldsburg stipulates that CSP is welcome to reply to any and all arguments made by Reynoldsburg in this motion or any other pleading.

On February 17, 2010, Reynoldsburg filed a motion for oral argument. In its motion, as well as in its reply memorandum of March 25, 2010, Reynoldsburg asserts that oral argument is necessary to clarify the nature of the statutory and constitutional arguments made by CSP. Reynoldsburg also maintains that because the Court has expressly said that this case may return to that court, the parties are entitled to develop the factual and legal arguments in this case as fully as possible. The City opines that the request for oral argument is appropriate pursuant to Rule 4901-1-32, Ohio Administrative Code, and that oral argument will assist the Commission in

understanding the complex issues raised in this case and provide the Commission with the opportunity to ask clarifying questions. CSP filed a memorandum contra on March 1, 2010, arguing that Reynoldsburg had already had ample opportunity to develop its case and its legal arguments in its briefing. CSP further notes that any case before the Commission presents the possibility of a direct appeal to the Supreme Court.

b. Commission rulings

With respect to CSP's motion to strike limited portions of Reynoldsburg's reply brief, the Commission finds that the motion should be granted. The newspaper article in question is hearsay and consistent with Commission precedent and the Rules of Evidence should not be considered as part of the record in this case. See, e.g., *In the Matter of FAF Inc. supra*, and *In the Matter of the Complaint of Wendell and Juanita Thompson v. Columbia Gas of Ohio, Inc.*, Case No. 04-22-GA-CSS, Opinion and Order, June 1, 2005.

Relative to Reynoldsburg's motion to accept corrected citations, the Commission finds that the motion should be granted in part and denied in part. Specifically, the Commission finds that the citations identified on pp. 1-2 of its memorandum in support can be substituted for the citations incorporated on p. 19 of the City's initial brief. In reaching this determination, the Commission finds that the correction will coincide with the substance of Joint Ex. 1 admitted into evidence at the time of hearing. The remaining portion of the February 12, 2010, memorandum in support shall be stricken from the record inasmuch as it is an impermissible surreply filing which goes beyond the simple correction of citations.

In regard to Reynoldsburg's motion for oral argument, the Commission determines that the motion should be denied. Specifically, the Commission finds that Reynoldsburg has failed to set forth reasonable grounds as to any new issues that have arisen that would necessitate the holding of an oral argument. The Commission opines that the record before it is sufficient for the purpose of rendering a decision in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) This complaint was filed by the Reynoldsburg against CSP following the Court's decision in *State, ex rel. Columbus Southern Power Co. v. Fais*.
- (2) Reynoldsburg is a municipal corporation, organized and operating pursuant to the constitution and laws of the state of Ohio, and is a "Charter Municipality" governed by a charter.

- (3) CSP is an electric light company, as defined in Section 4905.03(A)(3), Revised Code, and is a public utility as defined by Section 4905.02, Revised Code.
- (4) CSP operates pursuant to a Commission-approved tariff.
- (5) CSP P.U.C.O Tariff No. 6, Original Sheet No. 3-6, contains ¶17 entitled "Temporary and Special Service" which includes provisions addressing the relocation of distribution lines at the request of a municipality or other public authority.
- (6) The tariff provision was first approved by the Commission in 1992 in Case No. 91-418.
- (7) On April 24, 2000, Reynoldsburg passed Ordinance 50-2000 which granted a five-year nonexclusive franchise to CSP to construct, maintain, and operate lines and appurtenances and appliances for conducting electricity in, over, under and through the streets, avenues, alleys and public places in the City.
- (8) On May 9, 2005, Reynoldsburg enacted a "Comprehensive Right-of-Way Management Policy Ordinance" addressing the relocation of distribution lines at the request of a municipality subsequent to the receipt of the specified notice.
- (9) On July 8, 2005, Reynoldsburg issued a letter to CSP informing it of the requirement to relocate its facilities within the public right-of-way.
- (10) In order to avoid delaying the Phase II Project, the City and CSP entered into a letter agreement dated November 1, 2005, in accordance with which the City agreed to advance the reasonable and necessary costs associated with Phase II to be incurred by AEP Ohio to relocate its facilities underground subject to reimbursement if it is determined pursuant to a declaratory action that CSP is required to pay the costs of relocating its facilities in conjunction with Phase II.
- (11) The complaint alleges that CSP is in violation of the "Comprehensive Right-of-Way Management Policy Ordinance"

and should be required to reimburse Reynoldsburg for the City's costs to have CSP relocate its facilities.

- (12) In a complaint such as this one, the burden of proof rests with the complainant. *Grossman v. Public Utilities Commission*, 5 Ohio St. 2d 189, 190, 214 N.E. 2d 666, 667 (1966).
- (13) The Commission's jurisdiction in this proceeding is controlled by its statutorily delegated authority.
- (14) Based on the record in this matter, ¶17 of CSP's tariff applies to the facts of this case.
- (15) Based on the record in this matter, ¶17 of CSP's tariff is not unjust, unreasonable, or unlawful.
- (16) The Commission does not have the requisite jurisdiction to adjudicate if ¶17 of CSP's tariff violates Article XVIII, Section 4 of the Ohio Constitution.
- (17) The Commission does not have the requisite jurisdiction to adjudicate whether Reynoldsburg's Home Rule powers or its Ordinance supersede CSP's tariff.
- (18) CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.
- (19) The question of whether the Commission should provide a rate recovery mechanism if it amends or revokes CSP's tariff is moot.

It is, therefore,

ORDERED, That Reynoldsburg's allegation that ¶17 of CSP's tariff is unjust, unreasonable, or unlawful is denied. It is, further,

ORDERED, That CSP's motion to strike limited portions of Reynoldsburg's reply brief is granted. It is, further,

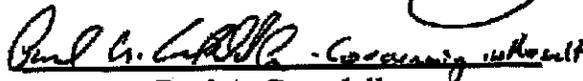
ORDERED, That Reynoldsburg's motion to accept corrected citations in its initial brief is granted in part and denied in part. It is, further,

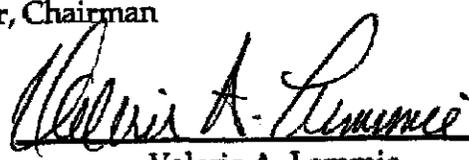
ORDERED, That Reynoldsburg's motion for oral argument is denied. It is, further,

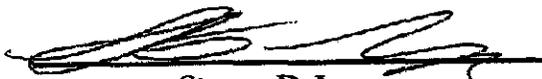
ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella

 *Separate comments*
Valerie A. Lemmie

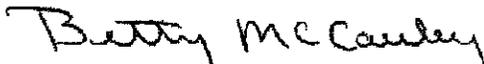

Steven D. Lesser

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Cheryl L. Roberto

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Entered in the Journal

APR 05 2011


Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the)
City of Reynoldsburg, Ohio,)
)
Complainant,)
)
v.) Case No. 08-846-EL-CSS
)
Columbus Southern Power Company,)
)
Respondent.)

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

As the recovery of costs in this case is not a purely local concern, I concur that in this case the City has failed to demonstrate that Columbus Southern Power Company's (CSP) tariff is inapplicable, unjust or unreasonable.

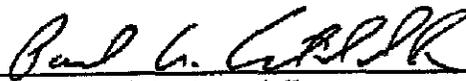
With respect to whether CSP's tariff is applicable, given CSP's ability to seek access to customers through easements outside the public right of way, the City has not shown that this is more than a theoretical possibility. Given the time constraints imposed by the City and the cost of obtaining additional easements, the City has failed to demonstrate that obtaining private utility easements was a reasonable approach for serving CSP's customers. In the absence of such a showing, I am persuaded that CSP's tariff is sufficiently broad to cover a de facto requirement that CSP underground its facilities.

Reynoldsburg may require that the use of its right of way in a given area be through underground facilities. The location of facilities in a public way is a matter of local concern. However, the recovery of resulting public utility costs is not in this case a purely local question.

The General Assembly created a comprehensive framework for local regulation of the use public ways, Ohio Revised Code, Chapter 4939. As part of that framework, public utilities are authorized to apply to the Commission for the classification of costs resulting from such local regulation as a regulatory asset and for cost recovery. Section 4939.07(D), Revised Code.¹

¹ Consistent with Section 1.51, Revised Code, this section should be read as supplementing the Commission's general rate setting authority. It does not present an irreconcilable conflict with other sections of Title 49 of the Revised Code, or an exclusive means for the utility to secure recovery of costs associated with local regulation of facilities located in public ways.

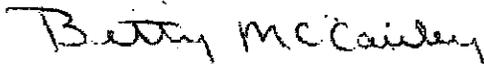
The recovery of the costs of placing CSP's lines underground in this instance is not a matter of only local interest. If the City had an Ordinance (or were to amend its existing Ordinance) specifying how CSP's costs should be allocated or assigned and recovered from Reynoldsburg residents and/or the City itself, that was at variance with CSP's existing tariff, cost recovery might have remained a matter of local concern. CSP still would have been entitled to apply for regulatory asset treatment and recovery under Section 4939.07(D), Revised Code, and the City's preferences could have been accorded due deference in such a proceeding. However, that is not this case. The City has argued alternatively that costs should be spread among all CSP customers - directly impacting consumers outside Reynoldsburg - or that costs should be absorbed by CSP - affecting the utility's profitability and its cost of capital for investments outside of the City. Thus, the City has placed its Ordinance into conflict with the State's general statutes governing the setting of utility rates and the jurisdiction of this Commission. As applied to the facts now before us, I am not persuaded that CSP's tariff is unjust and unreasonable. The existing tariff was implicitly found to be just and reasonable when approved by the Commission. Moreover, as it assigns costs to the City, the City remains free to assess as sees fit those subject to its jurisdiction to pay for these improvements.



Paul A. Centolella

Entered in the Journal

APR 05 2011



Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the)
City of Reynoldsburg, Ohio,)
)
Complainant,)
)
v.) Case No. 08-846-EL-CSS
)
Columbus Southern Power Company,)
)
Respondent.)

DISSENTING OPINION OF
COMMISSIONERS VALERIE A. LEMMIE AND CHERYL L. ROBERTO

As the majority notes, the Commission has no authority to adjudicate any conflict that may exist between a tariff duly issued by this Commission and Article XVIII, Section 4 of the Ohio Constitution. The Commission, however, does have a continuing obligation to act within the confines of its own statutory authority. Because we believe that the majority's application of Tariff 17 to the facts in this case exceeds that authority, we dissent.

The Ohio Supreme Court reminded the litigants in this action no less than four times that the Commission has exclusive *initial* jurisdiction to interpret its tariffs. (Emphasis added, *Fais* at pp. 6, 8, 9, and 10.) This matter is before us to exercise that initial jurisdiction. We urge that we use this opportunity to apply the tariff consistently with our statutory authority.

One reading of the tariff that fits squarely within our authority is the literal application advocated by Reynoldsburg: By its own terms, Tariff 17 does not apply to the project at issue because Reynoldsburg did not "require" CSP to place its distribution line underground. (Reynoldsburg Initial Brief at 8.) The facts in this matter do establish that Reynoldsburg's permission for CSP's use of its right-of-way was contingent upon placing the lines underground but the facts do not establish that Reynoldsburg has authority to require CSP to use that right-of-way. To the contrary, Reynoldsburg notes that CSP is free to seek an alternate location for its distribution line outside of the right-of-way. Thus, a defensible application of Tariff 17 is that it is inapplicable to the facts of this matter.

The majority, however, finds that Tariff 17 is applicable and "the intent of the tariff provision is not to dictate Reynoldsburg's power over its rights-of-way but, rather, to

compensate the utility for complying with the City's directive concerning rights-of-way." (Majority at p. 15.) Using a tariff in this manner to permit recovery of costs related to a utility's use of a right-of-way is in direct contravention of the statutory grant of authority that resides in this Commission pursuant to Revised Code Chapter 4939, Use of Municipal Public Way. The legislature recognized in Chapter 4939 that "[t]he management, regulation, and administration of a public way of a municipal corporation with regard to matters of local concern shall be presumed to be a valid exercise of power of local self-government granted by Section 3 of Article XVIII of the Ohio Constitution." Section 4939.04(B), Revised Code. In order to both honor that right of self-government and assure utilities of proper cost recovery, the legislature adopted a mechanism for the utility to recover public way fees and costs directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way. Section 4939.07, Revised Code. It is precisely those costs that arise in this matter.

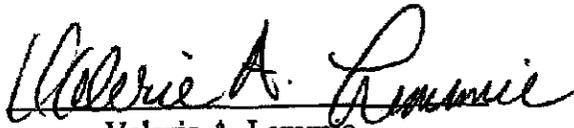
Chapter 4939 establishes a comprehensive mechanism to answer the question of utility cost recovery in instances in which a municipality is exercising its right of self-governance in its rights-of-way. The utility must first apply to the Commission to recover any fees it pays or costs it incurs as a result of municipal right-of-way regulation. *Id.* With regard to the recovery of the public way fee, upon receiving that application, the Commission is directed to authorize, by order, timely and full recovery. Section 4939.07(B)(1), Revised Code. Chapter 4939 requires that recovery of these public way fees is to be from all customer of the public utility generally. Section 4939.07(B)(2)(b), Revised Code. With regard to the recovery of eligible costs, if the utility's application includes costs directly incurred as a result of local regulation of its occupancy or use of the public way, the Commission is directed to authorize a regulatory accounting mechanism to book the cost for later recovery. Section 4939.07(D)(1), Revised Code. Unlike the recovery of the public way fee, Chapter 4939 does not dictate that recovery of costs must be from all customers of the public utility generally, leaving it to the discretion of the Commission as to how to structure the cost recovery. The Commission is directed to conclude its consideration of any application for recovery of either public way fees or cost recovery not later than 120 days after the date that the application was submitted to the Commission. Section 4939.07(E), Revised Code. CSP never paid the costs nor made the requisite application. Tariff 17, as applied by the majority in the matter, circumvents this exclusive process.

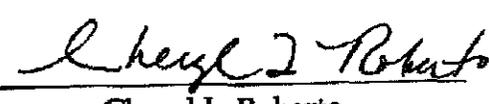
While Tariff 17 may have been drafted, and even adopted, with the intention of answering the question of cost recovery for the utility, it need not and, as discussed herein, should not be applied in this manner, as this is the sole province of Chapter 4939. Applied as the majority does, Tariff 17 opens the door not only to the conflict arising as here with a municipality's authority to manage its own rights-of-way but to other direct conflicts with a municipality's right of self-governance. For instance, a municipality could adopt a zoning requirement that requires all new subdivisions to install underground utilities. As

applied by the majority here today, Tariff 17 would direct that the costs for this requirement "shall be paid for by that municipality." Thus, while a developer or home owner would normally bear this cost, the Commission has directed the municipality to open its coffers to pay for it. By what authority could the Commission direct such a result? Would a developer be empowered to refuse to pay for the installation and direct those bills to the municipality?

We do not disagree with the majority's impulse to exercise our responsibility to permit appropriate cost recovery. We do advocate that we do it within the confines of our authority as delegated in Chapter 4939. Within that mechanism, CSP would first make prudent expenditures required to comply with the Reynoldsburg's right-of-way requirements. CSP would then make application to this Commission to both book and recover those prudently incurred expenses. It would then be within this Commission's discretion as to how those expenses should be recovered; including, but not limited to recovery from all customers of the public utility generally or recovery only from those customers within the geographic confines of the City of Reynoldsburg. It is possible to apply Tariff 17, as written, to only those situations in which a municipality had "required or specified" the undergrounding of utilities for construction of its own facilities such as a police station or fire station. Thus, it may be possible to find that Tariff 17 is not unjust, unreasonable, or unlawful but merely inapplicable. A statement within Tariff 17 that it should be applied consistent with Chapter 4939 would add to its clarity, however.

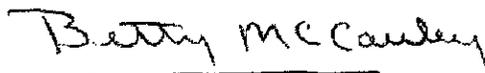
The legislature provided a path to navigate the potentially conflicting self-governance rights of municipalities and this Commission's responsibility to regulate utilities. If we stay on that path, we would take full advantage of the opportunity the Supreme Court granted us to exercise our initial jurisdiction consistent with our authority.


Valerie A. Lemmie


Cheryl L. Roberto

Entered in the Journal

APR 05 2011


Betty McCauley
Secretary

FILE

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

City of Reynoldsburg, Ohio

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Complainant,

Complaint Case
Case No. 08-846-EL-CSS

v.

Columbus Southern Power,

Respondent.

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**APPLICATION FOR REHEARING
OF
THE CITY OF REYNOLDSBURG**

On July 1, 2008, Complainant the City of Reynoldsburg ("Reynoldsburg") filed a Complaint against Columbus Southern Power ("CSP") alleging that portions of CSP's tariff on file with the Public Utilities Commission of Ohio ("Commission") were unjust, unreasonable, and/or unlawful. Specifically, Reynoldsburg challenged Paragraph 17 of CSP's tariff, which purports to afford CSP the power to force Reynoldsburg to pay for underground relocation of CSP's overhead utility facilities located in Reynoldsburg's public right of way as part of a significant public improvement project. Reynoldsburg supported its Complaint with the testimony of two witnesses. The parties submitted a joint stipulation of facts and legal issues on November 9, 2009 (amended on November 10, 2009). The Commission held an evidentiary hearing on December 2, 2009. The parties submitted post-hearing initial briefs on January 22, 2010, and reply briefs on February 5, 2010.

On April 5, 2011, the Commission issued an Opinion and Order ("Order") finding that, among other things, Paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful. In response to the Order, Reynoldsburg submits this Application for Rehearing pursuant to R.C.

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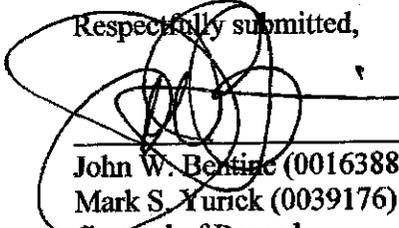
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4903.10 and Ohio Administrative Code 4901-1-35. Reynoldsburg asserts that the Commission's Order is unlawful and/or unreasonable in the following respects:

- 1.) The Commission erred in finding that Paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful.
- 2.) The Commission erred in finding that the Commission cannot rule on the constitutionality of Paragraph 17 of CSP's tariff.
- 3.) The Commission erred in finding that Paragraph 17 of CSP's tariff applies to the facts of this case.
- 4.) The Commission erred in finding that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.

Based upon these errors, Reynoldsburg respectfully requests that the Commission modify its Order on rehearing to find that CSP's tariff is unjust, unreasonable, and/or unlawful, as described in Reynoldsburg's Complaint and briefs. A Memorandum in Support of this Application is attached.

Respectfully submitted,



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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

City of Reynoldsburg, Ohio	:	
	:	
	:	
Complainant,	:	
	:	Complaint Case
v.	:	Case No. 08-846-EL-CSS
	:	
Columbus Southern Power,	:	
	:	
Respondent.	:	

**MEMORANDUM IN SUPPORT OF
APPLICATION FOR REHEARING
OF THE CITY OF REYNOLDSBURG**

The City of Reynoldsburg, Ohio ("Reynoldsburg") submits the following memorandum to the Public Utilities Commission of Ohio ("Commission") in support of its Application for Rehearing. Reynoldsburg alleges five errors for the Commission's consideration, and urges the Commission to grant a rehearing and reverse in their entirety the conclusions referenced herein.

I. Assignment of Error 1

The Commission erred in finding that Paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful¹.

The Commission erroneously found that Paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful, on the grounds that the tariff provision is "consistent with the principle that the cost causer be the cost payer," and because Reynoldsburg could have sought, but did not seek, intervention to participate in the proceeding through which CSP's tariff was originally approved by the Commission. (Order at 14-15.)

¹ The arguments contained in this application for rehearing relate primarily to Reynoldsburg's assertion that CSP's tariff is unconstitutional as applied, an argument developed through evidence, testimony, and briefing in this case. Reynoldsburg also restates and reserves its challenge to the tariff as unconstitutional on its face.

A. Whether the cost-causer is the cost-payer is irrelevant.

Nowhere in its briefing does CSP cite any authority for the proposition that a utility can alter or eliminate a municipality's power over its rights of way—powers expressly granted by the Ohio Constitution and state statutes. Article XVIII, Sections 3 and 4; R.C. 4939.01 et seq. Similarly, the Commission cites no authority for such a proposition. Instead, the Commission states that the “tariff language continues to be just and reasonable inasmuch as it is consistent with the principle that the cost causer be the cost payer.” (Order at 15.)

Whether the tariff provision follows the “cost-causer, cost-payer” principle may be an interesting question for a municipality to consider and resolve in regulating its rights of way. However, the Commission is not empowered to make this decision for a municipality. The question before the Commission is whether CSP's tariff—regardless of the tariff's goal—is unjust, unreasonable, or unlawful because it infringes on clear constitutional and statutory authority of municipalities to regulate their own public rights of way. The Commission examines CSP's goals and, finding those goals sufficiently sound, neglects to analyze how CSP's tariff conflicts with Reynoldsburg's constitutional and statutory authority to regulate its public rights of way.

Reynoldsburg asserted in its Initial Brief that Paragraph 17 of CSP's tariff is unjust, unreasonable, and/or unlawful for essentially two reasons. First, the tariff provision conflicts with the *constitutional* authority granted to municipalities to regulate their public rights of way. Second, the tariff provision conflicts with the *statutory* authority granted to municipalities to regulate their public rights of way. The Commission's Order does not address either argument. The Commission expressly refused to address the constitutional issues. (Order at 18, 23.)

Even if upholding the “cost-causer, cost-payer” principle was a proper goal of the Commission, upholding CSP’s tariff on these grounds would not further the goal. CSP’s own witness testified that when CSP decides on its own to underground certain utility facilities, it recovers its costs for that activity through general ratemaking efforts, not through a surcharge for the particular municipality. (Dias Cross 40:1-24.) In such cases, CSP is the cost-causer, but CSP does not pay the cost out of its profits; it recoups the cost from all of its customers, not only those in the municipality at issue. Therefore, Reynoldsburg customers pay for underground facilities in other jurisdictions when CSP decides to underground those facilities.

CSP’s tariff is not consistent with the “cost-causer, cost-payer” principle. In the strict sense, CSP is causing the cost in this matter, because CSP desires to operate in the public right of way. Operating in the public right of way, and constructing utility facilities there, costs money. It also saves CSP the cost of having to obtain private utility easements, and can provide lower-cost maintenance. CSP desires to operate in the public right of way precisely because it is less expensive to do so. CSP has attempted to shift the cost for its operations in the public right of way to taxpayers in the City of Reynoldsburg, who should not shoulder the burden of paying for CSP’s decision, especially in light of the fact that CSP makes a substantial profit on its business. *In the Matter of the Application of Columbus Southern Power*, P.U.C.O. Case No. 10-1261-EL-UNC, Finding and Order dated January 27, 2011 at ¶ 1 (noting Commission finding that CSP had significantly excessive earnings of \$42.683 million for 2009).

B. The Commission Erred Because Its Order Fails to Account for Statutory Law that Gives Reynoldsburg Power to Regulate its Public Rights of Way.

The Commission never mentions or acknowledges that Reynoldsburg requested the Commission find CSP’s tariff unjust, unreasonable, or unlawful in part because the tariff conflicts with state statutory law. (Compl. ¶ 29.) The Ohio General Assembly has given

municipalities, including Reynoldsburg, express statutory power to regulate their public rights of way:

- R.C. 4939.02(A)(4) (acknowledging the state's policy of recognizing municipal authority over the use of public ways, and of promoting coordination and standardization of municipal management of occupation and use of public ways).
- R.C. 4939.03(C)(1) ("No person [including a corporation] shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.").
- R.C. 723.01 ("Municipal corporations shall have special power to regulate the use of the streets . . . [T]he legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation.")
- R.C. 4905.65 (local regulation may reasonably restrict the construction, location, or use of certain public utility facilities).

As a result of these statutory powers over public rights of way, Reynoldsburg's right of way ordinance must control in the event of any conflict with CSP's tariff. (Reynoldsburg Initial Br. at 14.)

The Commission's failure to address Reynoldsburg's statutory argument is inexplicable in light of the fact that the Commission frequently interprets and construes statutes. *See, e.g., City of Huron v. Ohio Edison Co.*, 2006 WL 1763685, P.U.C.O. Case No. 03-1238-EL-CSS, ¶¶ 9 (discussing rules of statutory interpretation, and applying them to R.C. 4928.37); *WorldCom, Inc. v. City of Toledo*, 2003 WL 21087728, P.U.C.O. Case No. 02-3207-AU-PWC ("[T]he Commission's goal must be to interpret statutes so as to give effect to the intentions of the General Assembly.").

~~C. CSP's Intent in Drafting its Own Tariff Provision is not Dispositive~~

The Commission also bases its finding that CSP's tariff is not unjust, unreasonable, or unlawful on the fact that "the intent of the tariff provision is not to dictate Reynoldsburg's power

over its rights-of-way but, rather, to compensate the utility.” (Order at 15.) It is no surprise that the intent of the tariff provision is to compensate the utility, but that is not the question the Commission must address in this case. Reynoldsburg claims that Paragraph 17 of CSP’s tariff violates the City’s constitutional and statutory rights to regulate its public rights of way. If the answer to that claim is found by simply asking whether the utility intended its tariff provision to provide compensation to the utility, the examination is hardly worth undertaking. “The Public Utilities Commission was established to be the intermediary between the citizen-consumer on one side and the public utility on the other.” *Dayton Comm. Corp. v. Pub. Util. Comm.* (1980), 64 Ohio St.2d 302, 307. If the Commission evaluates a challenge to a tariff provision by considering only what the utility’s intent was when it drafted the tariff, the Commission abdicates its role as intermediary and instead becomes an advocate for the utility.

Moreover, Paragraph 17 is not presumptively valid simply because the Commission approved CSP’s tariff as a whole as a very small part of a large, complex rate proceeding. When the Commission approves a tariff, it is approving the utility’s “schedule showing all rates . . . and charges for service of every kind *furnished by it*,” (i.e. the public utility). R.C. 4905.30(A). Paragraph 17 of CSP’s tariff does not describe a rate or charge for a service furnished by the utility. It simply requires Reynoldsburg to pay for the cost of undergrounding power lines. The Commission has no jurisdiction to approve a tariff provision such as this, which is unrelated to a rate or charge for a utility service furnished by a utility to consumers, and for good reason. If the Commission had such power, a utility could propose, and the Commission could approve, a tariff provision stating that the utility did not have to obey municipal traffic laws, or should not pay more than \$2.00 per gallon for gasoline to fuel its vehicle fleet, and enforcing this “commission-approved” tariff provision until a court of law says it cannot do so. If the Commission’s

approval of a tariff, regardless of the language in the tariff, means that every approved tariff provision is forever lawful, then the Commission is assuming powers never granted to it by the legislature.

D. The fact that Reynoldsburg did not Intervene in CSP's Tariff Case is Not Dispositive.

The fact that Reynoldsburg could have sought intervention in CSP's rate case where the subject tariff was approved in no way decides the issue of whether CSP's tariff is unjust, unreasonable, or unlawful. Reynoldsburg has constitutional and express statutory authority to regulate its public rights of way. Neither the Ohio Constitution nor the Revised Code requires Reynoldsburg to intervene in a Commission rate case in order to preserve its authority to regulate its public rights of way in a reasonable manner. Requiring such intervention tramples the constitutional and statutory rights of municipalities and grants to the Commission statutory authority to impose restrictions on municipalities that the legislature has never granted the Commission.

Further, the Ohio Supreme Court has expressly stated that R.C. 4905.26 is "a means of collateral attack on a prior proceeding." *Office of Consumers' Counsel v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 22, 24. The Court went on: "that statute [R.C. 4905.26] may be used to investigate the reasonableness of rate schedules . . ." previously approved by the Commission. *Id.* (citations omitted). Reynoldsburg has brought this case under R.C. 4905.26. (Compl. ¶ 3.) If R.C. 4905.26 can be used as a means of collateral attack on a prior Commission proceeding, the present action may be used to challenge the Commission's 1992 approval of CSP's tariff, and Reynoldsburg therefore did not forfeit the right to challenge CSP's tariff by not intervening in CSP's tariff case. More broadly, if the Commission's position is that failure to intervene in a tariff case precludes any later challenge to that tariff, there is no reason for R.C. 4905.26 to exist.

The Commission's finding that CSP's tariff is just, reasonable, and lawful because Reynoldsburg did not intervene in CSP's tariff case is misplaced, and the Application for Rehearing should therefore be granted. Accordingly, Reynoldsburg requests that the Commission reverse its finding that Paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful as applied.

II. Assignment Error 2

The Commission erred in finding that the Commission cannot rule on the constitutionality of Paragraph 17 of CSP's tariff.

The Commission stated in its Order that it "does not have the requisite jurisdiction to adjudicate as to whether ¶17 of CSP's tariff violates Article XVIII, Sections 3 and 4 of the Ohio Constitution. (Order at 18, 23.) The Commission's statement is based on its assertion that the Commission is an administrative body whose powers, delineated by statute, do not extend to constitutional matters. (Id.)

Reynoldsburg requests rehearing on the constitutional arguments involved in this matter, on the grounds that the Commission has in the past addressed constitutional issues. *See, e.g., In Re Intrado Comms., Inc.*, 2008 WL 1294837, P.U.C.O. Case No. 07-1199-TP-ACE, ¶¶ 6, 9 (Commission evaluated and rejected claim that PUCO itself had violated due process); *In re Application of Buckeye Wind, LLC*, 2010 WL 2863978, P.U.C.O. Case No. 08-666-EL-BGN, ¶¶82-84 (Commission evaluated and rejected claim that Power Siting Board action resulted in a taking that violated the Ohio and federal constitutions). In fact, in one case, the Commission evaluated and ultimately rejected the City of Huron, Ohio's argument that the Commission had violated the City's rights under Article XVIII, Section 4 of the Ohio Constitution, one of the constitutional provisions at issue in this case. *City of Huron v. Ohio Edison Co.*, 2006 WL

1763685, P.U.C.O. Case No. 03-1238-EL-CSS, ¶¶ 5-11. Either the Commission has the power to address constitutional concerns in any matter before it, or the Commission has no such power.

Further, the Commission's interpretation of the *Panhandle East Pipeline* and *Fais* cases is misplaced. The Commission cites *Panhandle E. Pipeline Co. v. Pub. Util. Com* to support its contention that it has no power to hear the constitutional issues. (Order at 18.) However, the Commission invokes *Panhandle* on the grounds that the case stands for the proposition that "administrative agencies . . . have no authority to declare a statute unconstitutional." (Id.) Reynoldsburg has not asked the Commission to "declare a statute unconstitutional," and the Commission's reliance on *Panhandle* is therefore misplaced. What Reynoldsburg has asked the Commission to do is determine that CSP's tariff is unlawful both facially and as applied because, *inter alia*, it conflicts with Reynoldsburg's Right of Way Ordinance, state statutes, and the Ohio constitution. (Compl. ¶¶ 28-35.) Although CSP may deem CSP's tariff provision equivalent to a statute, it is not. Reynoldsburg does not ask the Commission to declare a statute unconstitutional. And, Ohio case law prohibiting the Commission from doing so is no barrier to the Commission's consideration of the constitutional issues in this matter. The Ohio Revised Code gives the Commission the express authority to declare a utility rate or practice "unlawful." R.C. 4905.26. The Commission cannot determine whether a tariff provision or utility practice is unlawful without looking at the law—that is, court decisions, statutes, or the Ohio Constitution.

The Commission further claims that it has no power to hear the constitutional issues in part because the Ohio Supreme Court in *State ex rel. Columbus Southern Power Company v. Fais* stated that municipal home-rule issues may be resolved by the Court in an appeal from an order of the Commission." (Order at 18.) The Commission is correct that the Ohio Supreme Court made this statement, but is mistaken about its import. In fact, the Ohio Supreme Court

makes clear in *Fais* that “The [Public Utilities] commission has the exclusive, original jurisdiction over this matter, subject to the ultimate review of this Court.” *State ex rel. Columbus Southern Power Company v. Fais*, 2008-Ohio-849, ¶ 32. This statement that the Supreme Court has appellate jurisdiction to review the Commission’s findings is not equivalent to a statement that the Commission need not make findings in the first place.

Because the Commission has in fact considered and decided constitutional issues in the past, and because the Commission based its finding on an erroneous reading of the *Fais* case, Reynoldsburg respectfully requests that the Commission grant rehearing to decide the constitutional issues raised by Reynoldsburg, and find that CSP’s tariff provision violates the Ohio Constitution and is therefore unlawful.

III. Assignment of Error 3

The Commission erred in finding that Paragraph 17 of CSP’s tariff applies to the facts of this case.

The Commission’s finding that Paragraph 17 of CSP’s tariff applies because Reynoldsburg “required, or at a minimum, specified” the change of CSP’s utility facilities in Reynoldsburg’s right of way from overhead to underground, (Order at 13), is not based on competent, credible evidence.

As an initial matter, Reynoldsburg again points out that the only utility facilities that are at issue in this case are CSP’s utility facilities located *in the public right of way*. However, occupying the public right of way is not the only way for a utility to provide service to customers. R.C. 4933.15 specifically grants to utilities such as CSP the power to appropriate private property for placement of its distribution facilities. CSP’s own witness admitted that CSP currently owns and uses facilities located in private utility easements. (Dias Cross 128:11-13.) The July 8, 2005 letter from Reynoldsburg’s then-Safety/Service Director Sharon Reichard

to CSP specifically states that only those facilities located in the public right of way are subject to the City's requirement regarding relocation of overhead utility lines. (Jt. Ex. 1, Att. I.)

The Commission's finding that CSP was required to relocate its facilities underground ignores the simple reality that CSP had a choice between two alternatives: (1) CSP could elect to forego operating in the City's public right of way, with its attendant conditions, and instead place facilities in private utility easements, or (2) CSP could continue to operate in the City's public right of way and place its facilities underground subject to reasonable conditions. CSP chose the latter. The fact that choosing the former would entail greater work or expense on CSP's part does not make the decision a Hobson's choice. Companies frequently have to decide between two costly and imperfect solutions to a problem. CSP decided it is less expensive and time consuming to continue to operate in the public right of way. Having done so, CSP should not be endowed with the ability to dictate the terms and conditions of its presence on public property through its tariff. This is especially true where, as here, CSP has the option to occupy private property as well.

Further, there is no evidence in the record, much less competent and credible evidence, to support the Commission's finding that "there was not sufficient time for CSP to do anything other than relocate the distribution lines to the duct banks." (Order at 13.) Regarding the time frame for the change from overhead to underground lines, CSP has never provided any evidence that it could not have placed its lines in private utility easements rather than moving its overhead lines underground in the public right of way. The Commission appears to have mis-read the July 8, 2005 letter from Reynoldsburg's then-Safety/Service Director Sharon Reichard to CSP. The letter does not state that CSP's facilities must be installed underground in a "limited 90-day time frame," as the Commission states in its Order. (Order at 13.) Rather, the letter states that all

utilities operating in the public right of way would have to underground any overhead utility lines “within sixty (60) days of *receiving written notice* from the city that the duct bank construction is complete and that the duct bank is available for installation.” (Jt. Ex. 1, Att. D) (emphasis added). The letter states that Reynoldsburg *estimates* that the construction will be completed “on or around October 15, 2005.” Even if the construction project experienced no delays, and Reynoldsburg notified CSP of the duct bank’s completion on October 15, 2005, CSP would still have an additional sixty (60) days—or until December 15, 2005—to underground its lines if it chose to continue to occupy the public right of way. This is a five-month time frame at the very least. Of course, CSP could have asked for an extension. The Commission’s statement that CSP’s only option given the “limited 90-day time frame” is therefore without basis in fact or the evidentiary record.

Even if the Commission were correct about the 90-day time frame, however, there is absolutely no evidence, and the Commission cites none, that CSP did not have sufficient time to place its Reynoldsburg lines in private utility easements. CSP’s witness testified that CSP has utility facilities in private easements, (Dias Cross: 34:22 – 35:2), and also testified that various scenarios outside of a mandate from a municipality have led CSP itself to underground certain utility facilities. (Dias Direct: 7:4-19.) However, CSP provided no evidence of any kind suggesting that it was impossible to place its Reynoldsburg facilities in private utility easements in response to Reichard’s July 8, 2005 letter. It is not Reynoldsburg’s burden to demonstrate to the Commission that CSP could have placed its facilities in private easements; the burden to prove that defense is on CSP. *Ohio Bell Tel. Co. v. PUCO* (1990), 49 Ohio St.3d 123, 128 (finding the respondent had the burden to refute with sufficient evidence the complainant’s testimony offered during a PUCO hearing). CSP has not refuted with competent, credible

evidence Reynoldsburg's allegation that CSP could have placed its facilities in private utility easements. Two Commissioners dissented on this very point. (Order, Dissent of Commissioners Lemmie & Roberto at 1.). The Commission cited no evidence for its conclusion that placing utility lines in private easements was not a viable option for CSP. Respectfully, the Commission cannot properly substitute its own opinions for competent, credible evidence that Respondent must provide.

Further, viability of an option to occupy private easements is not relevant. It is not incumbent upon the taxpayers of Reynoldsburg to provide a private for-profit business with a viable, convenient, and economically desirable location in which to place its facilities. The fact that Reynoldsburg may provide such an option does not require it to do so, nor by doing so does Reynoldsburg grant to CSP property rights in perpetuity in the publicly owned right of way.

In short, the Commission erroneously found that CSP was "required" to construct general distribution lines underground within the meaning of Item #17 of its tariff. Facilities outside the right of way were permitted to be above ground. Rather, CSP elected to maintain general distribution facilities in the City's public right of way, knowing full well that by doing so the company would be subject to Reynoldsburg's constitutionally and statutorily authorized regulations governing access to and use of its public right of way.

The Commission also apparently found that CSP's tariff applies to this case because CSP was applying the tariff consistently with how it had applied the tariff in past matters. (Order at 13.) It is unclear why CSP's consistent application of its tariff language leads the Commission to the conclusion that the tariff applies to this matter. If the issue of whether the tariff applies is determined by soliciting CSP's opinion on the matter, there is little reason for the Commission to

review the question. CSP's opinion is no substitute for an examination of the facts, evidence, and legal arguments made in this case.

Accordingly, Reynoldsburg requests that the Commission reverse its finding that Paragraph 17 of CSP's tariff applies to the relocation of CSP's facilities in connection with Phase II of the Reynoldsburg project.

IV. Assignment of Error 4

The Commission erred in finding that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.

Reynoldsburg has alleged that, even if CSP is correct that its tariff is just and applies to the present case, Reynoldsburg is responsible for only the costs of the relocation that exceed CSP's costs to move the company's utility lines from one above-ground location to another. The operative language from the tariff mentions two types of construction—(1) construction from scratch ("special construction"), and (2) relocation of existing facilities:

The company [CSP] shall not be required to *construct general distribution lines underground* unless the cost of *such special construction* for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority **(to the extent that such cost exceeds the cost of construction of the Company's standard facilities)** shall be paid for by that municipality or public authority.

CSP tariff, Item #17 (emphasis added).

The parenthetical phrase (in bold above) contains language limiting the costs that a municipality must pay with respect to relocation of lines. That is, municipalities must pay only the cost that "exceeds the cost of construction of the Company's standard facilities". The most sensible reading of the parenthetical is that it applies to both new construction and relocation. That is, whether a municipality requires CSP to construct new utility facilities from scratch in the underground duct bank, or instead requires CSP to relocate overhead lines into an underground

duct bank, the municipality will be responsible only for the cost of the undergrounding over and above what it would cost CSP to construct or relocate its lines above-ground. The parenthetical uses the phrase "such cost," without clear reference to which costs are implicated, and the phrase appears after the second of the two contemplated types of construction (relocation), an odd placement if the parenthetical is intended to apply only to the first type of construction (new), which is the interpretation CSP suggests. (Dias Cross 123:9-15, 140:21-23.)

The Commission's finding that CSP properly applied the tariff and correctly charged Reynoldsburg is without competent, credible evidence in the record. In support of its finding, the Commission merely states, "the tariff language must be interpreted to assure that CSP is compensated for the full cost of the relocation. To do otherwise would not satisfy the stated objective of the tariff provision." (Order at 25.) Why the Commission must satisfy the stated objective of the tariff provision is not clear to Reynoldsburg. Reynoldsburg has alleged an interpretation of CSP's tariff provision that is consistent with the rules of grammar and common sense. CSP has offered no alternative explanation, and the Commission has cited none. Further, although Reynoldsburg is not a "customer" that can be controlled by the tariff, ambiguities in a tariff are resolved by construing the tariff language in favor of the customer, not the utility. *Saalfeld Pub. Co. v. Pub. Util. Comm.* (1948), 149 Ohio St. 113, syl. ¶ 2.

Even if CSP is correct that its tariff is lawful and applies to this case, CSP has over-charged Reynoldsburg for the cost of the relocation, and accordingly, Reynoldsburg requests that the Commission reverse its finding that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.

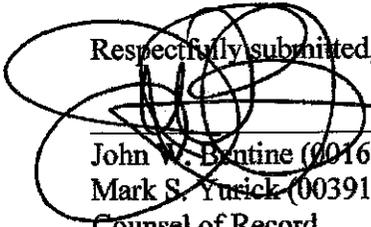
V. Request for Oral Argument

Reynoldsburg also respectfully requests that the Commission reconsider its denial of Reynoldsburg's request for oral argument. As detailed above, this matter involves a number of complex statutory, constitutional, and jurisdictional issues. Reynoldsburg believes that the Commission, the parties, and the public would benefit from an oral argument to probe the contours of these important issues. *In re Application of Ohio Edison Company*, PUCO Case No. 03-2144-EL-ATA (April 14, 2004), 2004 WL 1803951 (oral argument granted to help Commission understand complex issues, and provide opportunity for Commission to ask clarifying questions).

VI. Conclusion

Based upon these errors, Reynoldsburg respectfully requests that the Commission modify its Order on rehearing to find that CSP's tariff is unjust, unreasonable, and/or unlawful, as described in Reynoldsburg's Complaint and briefing. Reynoldsburg requests that the Commission grant rehearing as discussed above in Assignments of Error 1 through 4, and take action to correct the errors discussed therein. Finally, Reynoldsburg requests that the Commission reconsider its denial of oral argument, and grant oral argument in this matter.

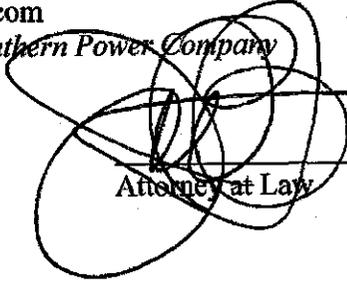
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CERTIFICATE OF SERVICE

This undersigned certifies that a true and accurate copy of the foregoing was served by electronic mail and U. S. mail, postage prepaid, on this 4th day of May, 2011 upon the following:

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the)
City of Reynoldsburg, Ohio,)
)
Complainant,)
)
v.) Case No. 08-846-EL-CSS
)
Columbus Southern Power Company,)
)
Respondent.)

ENTRY ON REHEARING

The Commission finds:

- (1) On April 5, 2011, the Commission issued its Opinion and Order in this case. The Commission found that, based on the record in this matter, ¶17 of Columbus Southern Power Company's (CSP) tariff applies to the facts of this case and that ¶17 is not unjust, unreasonable, or unlawful. Additionally, the Commission determined that it does not have the requisite jurisdiction to adjudicate if ¶17 of CSP's tariff violates Article XVIII, Section 4 of the Ohio Constitution. Further, the Commission found that it does not have the requisite jurisdiction to adjudicate whether the city of Reynoldsburg's (Reynoldsburg, complainant, or city) home rule powers or its ordinance supersede CSP's tariff. Finally, the Commission concluded that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.
- (2) On May 4, 2011, Reynoldsburg filed an application for rehearing of the Commission's April 5, 2011, Opinion and Order. Reynoldsburg asserts that the Opinion and Order, was unjust and unreasonable based on the following assignments of error:
 - (a) The Commission erred in finding that ¶17 of CSP's tariff is not unjust, unreasonable, or unlawful.
 - (b) The Commission erred in finding that it cannot rule on the constitutionality of ¶17 of CSP's tariff.

- (c) The Commission erred in finding that Paragraph 17 of CSP's tariff applies to the facts of this case.
 - (d) The Commission erred in finding that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.
 - (e) The Commission erred in denying Reynoldsburg's request for oral argument.
- (3) On May 13, 2011, CSP filed its memorandum contra Reynoldsburg's application for rehearing.
- (4) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a proceeding may apply for rehearing with respect to any matter determined in the proceeding by filing an application within 30 days of the entry of the Order in the Commission's journal. The Commission may grant and hold rehearing on the matters specified in the application if, in its judgment, sufficient reason appears to exist.
- (5) Reynoldsburg's application for rehearing has been timely filed as required by Section 4903.10, Revised Code.
- (6) In support of its first assignment of error, Reynoldsburg focuses on the Commission's discussion regarding the cost causer being the cost payer and the fact that Reynoldsburg did not seek intervention in the proceeding in which CSP's tariff was originally approved. (Application for Rehearing Memorandum at 1). Specifically, Reynoldsburg opines that the goal of the tariff provision and consideration of whether the cost-causer is the cost-payer are irrelevant and have no bearing on whether a utility can alter or eliminate a municipality's power over its rights-of-way powers. According to Reynoldsburg, this power is granted by the Ohio Constitution (i.e., Article XVIII, Sections 3, 4) and state statutes [Sections 4939.01, 4939.02(A)(4), 4939.03(C)(1), 723.01, 4905.65, Revised Code]. Therefore, Reynoldsburg concludes that the tariff conflicts with state statutory law. Reynoldsburg asserts that the Commission and CSP have failed to cite to any authority for the proposition that a utility can alter or eliminate a municipality's power over its rights-of-way. Reynoldsburg questions why the Commission would fail to address the city's statutory arguments, especially in light of the fact that the Commission frequently interprets and construes statutes.

Reynoldsburg asserts that ¶17 is not presumptively valid simply because the Commission approved CSP's tariff, which was only a small part of a very complex rate proceeding. Additionally, Reynoldsburg submits that ¶17 does not describe a rate or charge for a service furnished by the utility. Therefore, Reynoldsburg argues that, pursuant to Section 4905.30(A), Revised Code, the Commission has no jurisdiction to approve such a tariff provision. Reynoldsburg argues that, if the approval of a tariff, regardless of the language in the tariff, means that every approved tariff provision is forever lawful, then the Commission is assuming powers never granted to it by the legislature.

With respect to the Commission's consideration of the principle of "cost-causer, cost-payer," Reynoldsburg asserts that CSP is the entity actually causing the cost in this matter because it desires to operate in the public right-of-way since it is less expensive to do so. Reynoldsburg avers that CSP is actually attempting to shift the cost of its operations in the public right-of-way onto the taxpayers of Reynoldsburg. The city does not believe that its residents should have to shoulder the burden of paying for CSP's decision, especially in light of the fact that CSP makes a substantial profit from its business.

Additionally, Reynoldsburg argues that the fact that it did not intervene in CSP's tariff proceeding in which ¶17 was approved is not dispositive of the issue of whether CSP's tariff is unjust, unreasonable, or unlawful. Regardless of whether it has pursued intervention in the prior CSP rate case, Reynoldsburg avers that it has the constitutional and express authority to regulate its public rights-of-way in a reasonable manner. In particular, Reynoldsburg contends that the Ohio Supreme Court has recognized that Section 4905.26, Revised Code, may be used to investigate the reasonableness of rate schedules previously approved by the Commission [Application for Rehearing at 6 citing *Office of Consumers' Counsel v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 22, 24]. Therefore, Reynoldsburg asserts that, if Section 4905.26, Revised Code, can be used as a collateral attack on a prior Commission proceeding, then the complainant can use this case to challenge the Commission's 1992 approval of CSP's tariff. Finally, Reynoldsburg posits that there would be no reason for Section 4905.26, Revised Code to exist if the Commission can simply conclude that failure to intervene in a tariff case precludes any late challenge to that tariff.

- (7) In response to the first assignment of error, CSP asserts that the authority of the Commission over rates and services of public utilities is not trumped by the city's right-of-way authority. CSP opines that the Commission properly considered the question of how CSP's tariff conflicts with Reynoldsburg's constitutional and statutory authority to regulate its public rights-of-way and found that that "the intent of the tariff provision is not to dictate Reynoldsburg's power over its rights-of-way, but, rather, to compensate the utility for complying with the city's directive concerning its rights-of-way" (Memorandum Contra at 2 citing Opinion and Order at Finding 15). CSP also notes that, pursuant to its jurisdiction, the Commission found that the tariff is consistent with Section 4905.30 and 4909.18, Revised Code, and that the tariff provision is not unjust or unreasonable.

CSP considers the Commission's decision with respect to this issue to be appropriate in order to ensure that a local decision by a municipality for aesthetic reasons does not result in harm to the larger customer base of the public utility. Rather than the Commission simply deferring to the company's stated intent of the tariff in question, CSP notes that the appropriateness of the tariff provision was actually addressed in the context of the CSP rate case (Memorandum Contra at 3). In support of its position, CSP states that the Commission's decision properly leaves in place the procedures set forth pursuant to Title 49 whereby a tariff is approved by the Commission and then utility consumers are put on notice of the applicable charges if they request a different service. CSP submits that, since the Commission correctly declined to find its own Title 49 procedures to be unconstitutional, Reynoldsburg is free to make its arguments directly to the Ohio Supreme Court (*Id.* at 4).

- (8) With respect to Reynoldsburg's first assignment of error, the application for rehearing is denied. The Commission notes, as discussed in the April 5, 2011, Opinion and Order, that ¶17 of CSP's tariff was approved pursuant to the May 12, 1992, Opinion and Order in Case No. 91-418-EL-AIR, *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service*. This consideration and approval was appropriate inasmuch as, consistent with Section 4905.30, Revised Code, ¶17 pertains to "... classifications, and charges for service furnished by it [CSP], and all rules and regulations affecting them."

Additionally, the Supreme Court of Ohio determined that the issue of the reasonableness of ¶17 should be brought before the Commission in accordance with Sections 4905.22 and 4905.26, Revised Code. See *State, ex rel. Columbus Southern Power Co. v. Fais* (2008), 117 Ohio St.3d 340. 884 N.E.2d 1.

The Commission highlights the fact that, pursuant to the allegations set forth in the complaint, the Commission held a hearing pursuant to Section 4905.26, Revised Code, with one of the stated purposes being consideration of the reasonableness of ¶17. Based on its review of the record in this case, the Commission determined that, consistent with its regulatory authority, the specified tariff provision is reasonable. Contrary to Reynoldsburg's assertions, this decision does not signify that "every approved tariff provision is forever lawful." Rather, to the extent that a complaint is appropriately brought before the Commission, each applicable tariff provision will be reviewed on an individual case basis consistent with the Commission's jurisdiction.

The Commission emphasizes that this case is not a "Home Rule" proceeding but, rather, centers on the issue of ratemaking and the ultimate determination of who should be financially responsible for Reynoldsburg's decision to require the undergrounding of facilities. The Commission notes that, pursuant to its April 5, 2011, decision, we clearly recognized that CSP cannot dictate a municipality's power over its rights-of-way. See Opinion and Order at 15. Consistent with this determination, the Commission clarifies that its Opinion and Order does not stand for the proposition that Reynoldsburg does not have the ability to exercise authority over its rights-of-way. Rather, Reynoldsburg was specifically able to require that CSP remove its above ground facilities in the public right-of-way and place them underground.

However, while Reynoldsburg does possess the authority to maintain its rights-of-ways, this authority is not unbridled. Specifically, in the context of asserting its authority over its rights-of-way, Reynoldsburg cannot unilaterally make decisions that have extraterritorial ramifications and result in cost allocations that impact CSP customers residing beyond the boundaries of the municipality. To decide otherwise will likely result in the "opening of the floodgates" with a number of other communities requiring a similar relocation of utility facilities at the expense of

CSP's ratepayers as a whole. Therefore, determinations such as these fall directly within the Commission's jurisdiction pursuant to Title 49, Revised Code.

Additionally, the Commission notes that, with respect to CSP's assertions regarding the applicability of Chapter 4939, the statutory provisions are not applicable here inasmuch as the issue in this case pertains to expenses related to a mandated relocation of facilities within a public right-of-way, rather than a fee charged by the municipality to use its public right-of-way.

- (9) In support of its second assignment of error, Reynoldsburg asserts that, while the Commission indicates that it does not have the requisite jurisdiction to adjudicate whether ¶17 violates particular sections of the Ohio Constitution, the Commission has addressed constitutional issues in prior cases. Additionally, Reynoldsburg, argues that the Commission's reliance on the *Panhandle East Pipeline* and *Fais* cases are misplaced. Specifically, Reynoldsburg opines that, while the holding in *Panhandle* may stand for the proposition that administrative agencies have no authority to declare a statute unconstitutional, the issue before the Commission in the current case pertains to the constitutionality of a tariff provision and not a statute. In support of its position, Reynoldsburg notes that Section 4905.26, Revised Code, provides the Commission with the authority to declare a utility rate or practice to be unlawful. Consistent with this designated authority, Reynoldsburg opines that the Commission must consider court decisions, statutes, as well as the Ohio Constitution. In regard to the Commission's reliance of the holding in *Fais*, Reynoldsburg believes that, pursuant to that decision, the Commission can make its initial findings subject to the ultimate review of the Supreme Court of Ohio.
- (10) In response to the second assignment of error, CSP responds that Reynoldsburg's entire constitutionality argument is based on a legal fallacy that has already been addressed by the Supreme Court on the facts at issue in this case. CSP submits that Reynoldsburg is now asking that the Commission find that the procedures and findings it adopted as part of CSP's tariff approval are unconstitutional. In support of its position, CSP's references the Supreme Court of Ohio's determination that the issue of the payment of costs to relocate electrical lines in a Reynoldsburg right-of-way to underground does involve rates and charges for

service that are within the exclusive jurisdiction of the Commission pursuant to Section 4905.22, Revised Code (Memorandum Contra at 5 citing *Fais*, 117 Ohio St. 3d, 343).

CSP asserts that Reynoldsburg's argument that a tariff is not a law and can, therefore, be usurped by local ordinance is contrary to the Supreme Court's holding in *Fais*. To the extent that Reynoldsburg seeks to have the Commission rule on constitutional claims, CSP avers that such a request is not appropriate grounds for rehearing.

- (11) With respect to Reynoldsburg's second assignment of error, the application for rehearing is denied inasmuch as the city has failed to raise any new arguments for the Commission's consideration. Additionally, as noted in our April 5, 2011, Opinion and Order, in considering the question of whether Reynoldsburg's "Home Rule" authority under the Ohio Constitution supersedes CSP's tariff or whether the terms of Reynoldsburg's ordinance override CSP's tariff, the Commission is constrained by its delegated authority to defer questions of constitutionality for determination by the courts. While Reynoldsburg is correct that the Commission may have previously addressed constitutionality issues in prior cases, those decisions are distinguishable from the question raised in this case.
- (12) In support of its third assignment of error, Reynoldsburg asserts that the only utility facilities that are at issue in this case are CSP's utility facilities located in the public right-of-way. Reynoldsburg avers that occupying the public right-of-way was not the only way for CSP to provide service to customers. For example, the complainant notes that CSP could have appropriated private property for the placement of its distribution facilities. To illustrate this point, Reynoldsburg references CSP's own witness's admission that the respondent currently owns and uses facilities located in private easements (Application for Rehearing at 9). Reynoldsburg asserts that by CSP simply choosing to remain in the public right-of-way and incurring additional expenses as a result of the need for additional work does not signify that no choice existed.

According to Reynoldsburg, CSP failed to meet its burden of refuting the complainant's allegations that the respondent could have placed its lines in private utility easements rather than moving its overhead line underground in the public right-of-way. Additionally, Reynoldsburg asserts that there is no evidence to support the Commission's finding that there was insufficient time

for CSP to do anything other than relocate the distribution lines to the duct banks. In regard to the July 8, 2005, letter from then Safety Director Sharon Reichard to CSP, Reynoldsburg asserts that the only requirement was for CSP to underground any overhead utility lines within 60 days of receiving written notice from the city that the duct bank construction was complete and available for installation.

Reynoldsburg argues that the issue concerning viability of an option to occupy private easements is not germane to this proceeding inasmuch as it is not incumbent upon the taxpayers of Reynoldsburg to provide a private for-profit business with a viable and economically desirable location in which to place its facilities. Further, Reynoldsburg asserts that the mere fact that the city may have provided such an option in the past does not signify that it has granted CSP property rights in perpetuity relative to the publicly owned right-of-way. Reynoldsburg contends that CSP elected to maintain general distribution facilities in the city's public right-of-way knowing full well that in doing so the company would be subject to Reynoldsburg's constitutionally and statutorily authorized regulations governing access to use of its public rights-of-way. Finally, Reynoldsburg questions why the Commission's determination that CSP applied its tariff consistent with past applications has any relevancy to this proceeding. Specifically, Reynoldsburg asserts that CSP's opinion is no substitute for an examination of the facts, evidence, and legal arguments raised in this case.

- (13) In response to the third assignment of error, CSP highlights the language contained in the Reynoldsburg July 5, 2005, letter to CSP stating that "the utility will be required to relocate their respective facilities within the public right-of-way of the project into the underground duct bank." (Memorandum Contra at 6 citing Reynoldsburg July 5, 2005, letter). Additionally, CSP references the fact that a number of activities (e.g., the planning, grant applications, artist renderings, development, engineering, budgeting etc.) were performed based on the expectation that CSP would underground its facilities in the city's right of way and more specifically in the "AEP duct bank." As further support of its assertion that Reynoldsburg required that the facilities be moved underground, CSP also references the grant application that Reynoldsburg filed with Franklin County (*Id.* at 7).

- (14) With respect to Reynoldsburg's third assignment of error, the application for rehearing is denied inasmuch as the city has failed to raise any new arguments for the Commission's consideration. As determined in the Commission's April 5, 2011, Opinion and Order, the record [e.g., Joint Ex. 1, ¶¶ 16, 17, Ex. I (July 8, 2005, Letter)] is clear that the burial of existing overhead general distribution lines was required and specified by the municipality. Therefore, ¶17 of CSP's tariff applies to the facts of this case.
- (15) In support of its fourth assignment of error, Reynoldsburg asserts that, even if the tariff provision is applicable to the current case, the city is only responsible for the cost of the relocation that exceeds CSP's costs to move the company's utility lines from one above ground location to another. In support of its position, Reynoldsburg relies on the following language of ¶17:

The company shall not be required to construct general distribution lines underground unless the cost of such special construction for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority (to the extent that such cost exceeds the cost of construction of the Company's standard facilities) shall be paid for by that municipality or public authority.

Specifically, Reynoldsburg opines that, consistent with the rules of grammar and common sense, the above parenthetical language stands for the proposition that, to the extent that the municipality requires CSP to relocate overhead lines into an underground duct bank, the municipality will be responsible only for the cost of the undergrounding that exceeds what it would cost CSP to construct or relocate the lines above ground. As a result, Reynoldsburg submits that CSP has overcharged it for the cost of the relocation. In support of its position, Reynoldsburg states that ambiguities in are to be resolved in favor of the customer and not the utility (*Application for Rehearing at 14 citing Saalfield Pub. Co. v. Pub. Util. Comm. (1948), 149 Ohio St. 113*).

- (16) With respect to Reynoldsburg's fourth assignment of error, CSP argues that, despite the Commission and its staff originally approving the tariff provision in question in order to protect customers from the local decisions of other municipalities,

Reynoldsburg is incorrectly requesting the Commission to read the tariff to require others to pay for local preferences. In support of its position, CSP asserts that, to the extent that there is a difference in costs in an area where standard facilities are not already in service, then Reynoldsburg would only be required to pay the difference in the costs. However, in the current case, CSP notes that it already provided standard facilities for this area at the time that Reynoldsburg ordered the undergrounding of facilities and, therefore, Reynoldsburg should pay the entire cost of the relocation.

Finally, CSP asserts that a finding in favor of Reynoldsburg would only serve to show that the tariff should be discontinued or modified on a prospective basis. According to CSP, the approved tariff provision is valid and enforceable unless overturned by the Supreme Court of Ohio.

- (17) With respect to Reynoldsburg's fourth assignment of error, the application for rehearing is denied inasmuch as Reynoldsburg has failed to raise any new arguments for the Commission's consideration. Additionally, the Commission notes that Reynoldsburg has failed to demonstrate any record support for what it would cost CSP to construct or relocate the lines above ground in this case.
- (18) Finally, Reynoldsburg requests that the Commission reconsider its denial of Reynoldsburg's request for oral argument in light of the fact that this matter involves a number of complex statutory, constitutional, and jurisdictional issues. In support of its request, Reynoldsburg believes that the Commission and the parties would benefit from an oral argument "to probe the contours of these important issues."
- (19) CSP submits that the Commission has already denied Reynoldsburg's request for oral argument and that Reynoldsburg's disagreement with the Commission decision does not create new grounds for oral argument (Memorandum Contra at 9).
- (20) With respect to Reynoldsburg's fifth assignment of error, the application for rehearing is denied inasmuch as Reynoldsburg has failed to raise any new arguments for the Commission's consideration.

It is, therefore,

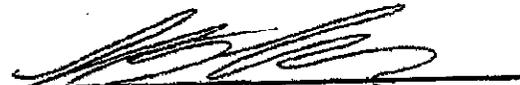
ORDERED, That Reynoldsburg's application for rehearing be denied in accordance with Findings (8), (11), (14), (17), and (20). It is, further,

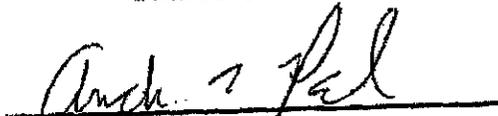
ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella

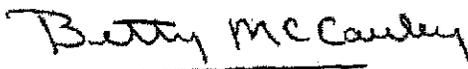

Steven D. Lesser


Andre T. Porter


Cheryl L. Roberto

JSA/dah

Entered in the Journal
JUN 01 2011


Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the City)
of Reynoldsburg, Ohio,)
)
Complainant,)
)
v.) Case No. 08-846-EL-CSS
)
Columbus Southern Power Company,)
)
Respondent.)

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

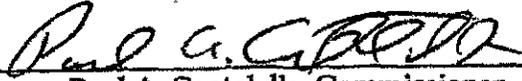
I concur that the City's application for rehearing should be denied as the City has failed to demonstrate that Columbus Southern Power Company's (CSP) tariff is inapplicable, unjust, unreasonable, or in conflict with the City's constitutional or statutory authority over public ways.

With respect to the City's first and second assignments of error, I do not find there to be any inherent conflict between the City's constitutional or statutory authority over public ways and CSP's tariff or the statute authorizing its approval. Recovery of the costs of placing CSP's lines underground is not a matter of only local concern. The City's authority over public ways does not extend to insisting that the costs of local improvements be paid for by all CSP consumers or absorbed by the utility.

With respect to the City's third assignment of error, I do not agree with the City's position that the viability of the private easement option is not germane. CSP has a continuing obligation to provide affordable and reliable distribution service to consumers in its service territory. In the absence of evidence that obtaining private utility easements was a viable approach for serving CSP's customers, I remain persuaded that CSP's tariff is sufficiently broad to cover a de facto requirement that CSP underground its facilities.

In its fourth assignment of error, the City proposes an alternative reading of the tariff language. While it is possible to see how someone might read the tariff in the manner the City suggests and, in hindsight, to imagine ways in which the tariff might have been more clearly phrased, the City's reading of the language is not consistent with the purpose of and policies supporting this tariff provision.

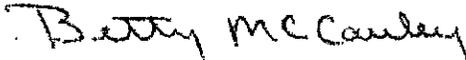
THE PUBLIC UTILITIES COMMISSION OF OHIO



Paul A. Centolella, Commissioner

Entered in the Journal

JUN 01 2011



Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the City)
of Reynoldsburg, Ohio,)

Complainant,)

v.)

Columbus Southern Power Company,)

Respondent.)

Case No. 08-846-EL-CSS

DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO

For the reasons set forth in my Dissenting Opinion to the Opinion and Order in this proceeding, I dissent.

Cheryl L. Roberto

Cheryl L. Roberto, Commissioner

Entered in the Journal

JUN 01 2011

Betty McCauley

Betty McCauley
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the City)
of Reynoldsburg, Ohio,)

Complainant,)

v.)

Columbus Southern Power Company,)

Respondent.)

Case No. 08-846-EL-CSS

CONCURRING OPINION OF COMMISSIONER ANDRE T. PORTER

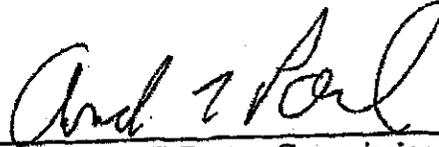
My term as commissioner commenced subsequent to the issuance of the initial opinion and order in this proceeding which previously prevented me from analyzing the subject addressed herein. Along with the entry on rehearing, I submit the following concurrence at this time.

Chapter 4939 of the Revised Code provides a mechanism for the levying of "public way fees" by municipalities against a public utility. Specifically, "a municipal corporation may levy . . . public way fees based upon the amount of public ways occupied or used." Section 4939.05(B)(1), Revised Code. "Public way fee" is defined in the statute as "a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way." Section 4939.01(F), Revised Code. Additionally, upon request by a public utility, Chapter 4939 authorizes the Commission to declare a cost assessed to the utility as a regulatory asset. Section 4939.01(D), Revised Code.

Indeed, as pointed out in the dissenting opinion (issued along the April 5 majority opinion), the authority of a municipal corporation to manage access to and the occupancy or use of public ways and to receive cost recovery for such access and occupancy must be honored. However, any recovery of costs by a municipality for the occupancy or use of its rights of way must be consistent with Chapter 4939 of the Revised Code. Likewise, any application for by a public utility for costs to be declared a regulatory asset must be consistent with Chapter 4939.

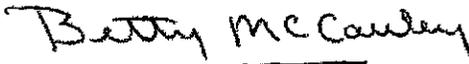
~~In the case of a public way fee and for costs related to amounts declared to be regulatory assets, the Revised Code requires that each be related to the use and occupancy of a right of way. For example, a municipality must ensure the safety of its rights of way. Thus, undoubtedly a municipality incurs costs to inspect facilities in its rights of way to ensure the safety of its rights of way. In such cases, in order to allow continued occupancy~~

and use of a right of way by a public utility, the costs for safety inspections would be difficult to avoid and might be appropriate for cost recovery upon review by the Commission. Without evidence supporting the public necessity for undergrounding facilities and that such undergrounding is necessary in order for a public utility to continue its use and occupancy of a right of way, recovery under Chapter 4939 should be limited.



Andre T. Porter, Commissioner

Entered in the Journal
JUN 01 2011



Betty McCauley
Secretary

ORIGINAL

IN THE SUPREME COURT OF OHIO

City of Reynoldsburg, Ohio

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

Appeal from the Public Utilities Commission of Ohio

Public Utilities Commission of Ohio
Case No. 08-846-EL-CSS

11-1274

Ohio Supreme Court Case No. _____

NOTICE OF APPEAL OF APPELLANT CITY OF REYNOLDSBURG, OHIO

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FILED
JUL 27 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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NOTICE OF APPEAL OF APPELLANT CITY OF REYNOLDSBURG, OHIO

Appellant City of Reynoldsburg, Ohio (herein "Reynoldsburg" or "City") hereby gives notice of its appeal as of right, pursuant to R.C. 4903.11 through 4903.13, to the Supreme Court of Ohio from the Opinion and Order of the Public Utilities Commission of Ohio (herein "Commission" or "Appellee" or "PUCO") entered on April 5, 2011, and from the Entry on Rehearing entered on June 1, 2011, in PUCO Case No. 08-846-EL-CSS.

Pursuant to R.C. 4905.04 and 4905.26, Reynoldsburg filed a Complaint against Columbus Southern Power Company with the Commission on July 1, 2008, requesting that the Commission declare Item #17 of Columbus Southern Power's tariff unjust, unreasonable, and unlawful. Reynoldsburg's Complaint was assigned PUCO Case No. 08-846-EL-CSS. Discovery was completed in September of 2009, the parties submitted an Agreed Statement of Facts and Legal Issues on November 5, 2009, and an evidentiary hearing was held at the offices of the Commission on November 17 through 19 of 2009. The parties submitted briefs in January and February of 2010. On April 5, 2011, the Commission issued an Opinion and Order finding that Item #17 of Columbus Southern Power's tariff was not unjust, unreasonable, or unlawful. On May 4, 2011, Reynoldsburg timely filed its Application for Rehearing in accordance with R.C. 4903.10. By Entry dated June 1, 2011, the Commission denied Reynoldsburg's Application for Rehearing. Specifically, the Application for Rehearing was denied with respect to the issues stated herein.

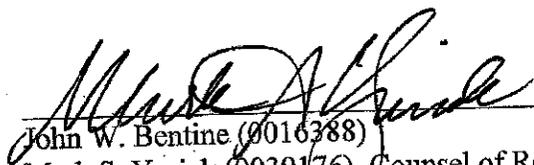
Reynoldsburg complains and alleges that Appellee's April 5, 2011 Opinion and Order and Appellee's June 1, 2011 Entry on Rehearing in PUCO Case No. 08-846-EL-CSS

are unlawful, unjust and unreasonable in the following respects, as set forth in Reynoldsburg's Application for Rehearing before the Commission:

1. Item #17 of Columbus Southern Power's tariff violates Section 3 of Article XVIII of the Ohio Constitution in that regulation of the municipal rights-of-way is a matter of local self government.
2. Item #17 of Columbus Southern Power's tariff contravenes Reynoldsburg's statutory authority to govern its public rights-of-way, pursuant to R.C. 4939.01 et seq., R.C. 723.01, and R.C. 4905.65.
3. The Commission erred in finding that Columbus Southern Power had presented sufficient evidence to invalidate Reynoldsburg's Right of Way Ordinance, codified at Reynoldsburg City Code § 907.
4. The Commission erred in finding that when a party declines to intervene in a tariff case before the PUCO, that party is rendered unable to bring a subsequent Complaint case before the PUCO to challenge a provision of that tariff.
5. The Commission erred in finding that Item #17 of Columbus Southern Power's ~~tariff applies to the factual situation at issue in this matter.~~

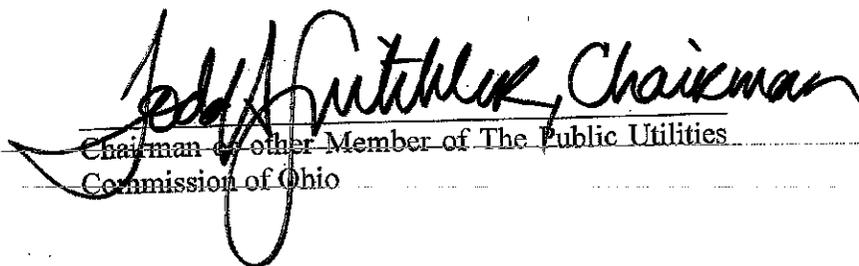
6. The Commission erred in misconstruing and improperly applying the language of Item #17 of Columbus Southern Power's tariff in the present matter.

WHEREFORE, Appellant Reynoldsburg respectfully submits that Appellee's April 5, 2011 Opinion and Order and Appellee's June 1, 2011 Entry on Rehearing in PUCO Case No. 08-846-EL-CSS are unlawful, unjust and unreasonable and should be reversed. The case should be remanded to Appellee with instructions to correct the errors complained of herein.


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*Counsel for Appellant the City of Reynoldsburg,
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The undersigned hereby certifies that I was served via hand-delivery with a copy of this Notice of Appeal of Appellant City of Reynoldsburg, Ohio on this 27 day of July, 2011.


Chairman of other Member of The Public Utilities
Commission of Ohio

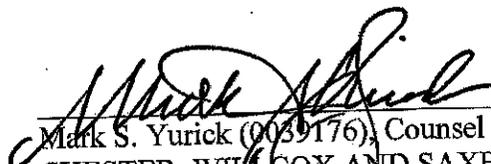
CERTIFICATE OF SERVICE

The undersigned hereby certifies the a copy of the foregoing **Notice of Appeal of City of Reynoldsburg, Ohio** was served by hand-delivery on the Chairman or other Member of the Public Utilities Commission of Ohio on July 27th, 2011, and served by regular U.S. Mail, postage prepaid on this 27th day of July, 2011 on the following, which are all of the parties to the proceedings before the Commission:

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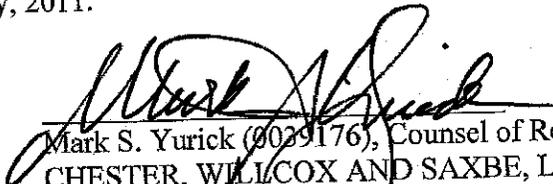
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Counsel for Appellant City of Reynoldsburg, Ohio

CERTIFICATE OF FILING

The undersigned hereby certifies the a copy of the foregoing **Notice of Appeal of City of Reynoldsburg, Ohio** has been filed with the docketing division of the Public Utilities Commission in accordance sections § 4901-1-02(A) and § 4901-1-36 of the Ohio Administrative Code this 27th day of July, 2011.



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