

ORIGINAL

IN THE
SUPREME COURT OF OHIO

City of Reynoldsburg, Ohio,	:	Case No. 11-1274
	:	
Appellant,	:	
	:	Appeal from the Public Utilities
v.	:	Commission of Ohio, Case No. 08-
	:	846-EL-CSS, <i>In the Matter of the</i>
The Public Utilities Commission of Ohio,	:	<i>Complaint of the City of</i>
	:	<i>Reynoldsburg v. Columbus Southern</i>
Appellee.	:	<i>Power Company for the Alleged</i>
	:	<i>Unfair and Unjust Billing Practices.</i>

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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FILED
 NOV 22 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

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**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

The City of Reynoldsburg (Reynoldsburg) is attempting to turn a straight-forward ratemaking case into a constitutional challenge. Under the guise of home-rule authority, Reynoldsburg claims it has the authority to force ratepayers that live outside its borders to pay for its utility line relocation project. Reynoldsburg, however, has no authority to do so. Decisions regarding the rates and charges for services of public utilities, including allocating responsibility for the cost of relocating utility lines, are within the exclusive jurisdiction of the Public Utilities Commission of Ohio (Commission). The Commission decided that Reynoldsburg caused the cost and, thus, should pay the cost of burying the utility lines as part of its Main Street beautification project. The Commission's decision

is consistent with Columbus Southern Power's (CSP) duly approved tariff that has been in effect for nearly two decades.

The Commission does not dispute Reynoldsburg's right to control usage of its public rights-of-way. The real question presented in this case is who should pay for a project designed to make Reynoldsburg's business district more attractive to its residents. Reynoldsburg wants to force non-resident ratepayers to pay these costs. If Reynoldsburg is successful, municipalities throughout the state would follow suit and shift the cost of similar "economic development" projects to non-resident ratepayers. The Court should avoid setting such a dangerous precedent and prevent Reynoldsburg from circumventing the Commission-approved tariff. The Commission's Opinion and Order should be affirmed.

STATEMENT OF FACTS

In 1992, CSP filed Item 17 (Temporary and Special Service) of its tariff (the Tariff) as part of its rate case. *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*, Case No. 91-418-EL-AIR (hereinafter "rate case") (Opinion and Order) (May 12, 1992); *In the Matter of the City of Reynoldsburg, Ohio v. Columbus Southern Power*, Case No. 08-846-EL-CSS (hereinafter *In re Reynoldsburg v.*

CSP) (Agreed Statement of Facts at ¶¶ 5, 6) (November 5, 2009) (hereinafter Statement of Facts), Supp. at 2; CSP PUCO Tariff No. 6 at ¶ 17, Supp. at 4.¹ The Tariff states:

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 standard facilities) shall be paid for by that municipality or public authority.

In the rate case, CSP's witness testified regarding the proposed language of the Tariff. Statement of Facts at ¶ 7, Supp. at 3. Mr. William Forrester, Director of Rates, Tariffs, and Contracts for CSP, testified that CSP included in the Tariff "language that will require a municipality that requires the installation of underground electric service to pay the additional cost of such construction." *Rate Case* (Direct Test. W. Forrester at 7) (April 16, 1991), Supp. at 44. Mr. Forrester testified that "[u]nderground construction is considerably more costly than overhead construction..." *Id.* In addition, he stated that "[i]f a municipality requires the Company to install the general distribution lines underground, the cost differences need to be paid by the municipality. Otherwise, all of the Company's customers, including those outside the municipality will have to pay more because of this increased cost." *Id.* In the Staff Report in the rate case, Commission Staff also discussed the proposed Tariff language and recommended approval of this

¹ References to appellee's appendix attached hereto are denoted "App. at ____;" references to appellee's supplement are denoted "Supp. at ____;" references to appellant's appendix are denoted "Appellant's App. at ____."

language. Statement of Facts at ¶ 8, Supp. at 3. Reynoldsburg never intervened in CSP's rate case and, therefore, never objected to the language of the Tariff during the rate case. *In re Reynoldsburg v. CSP* (Opinion and Order at 14) (April 5, 2011), Appellant's App. at 18. Based upon Mr. Forrester's testimony and the recommendation of Staff, the Commission approved the Tariff. Statement of Facts at ¶¶ 5, 6, Supp. at 2.

In the mid-1990's, Reynoldsburg began a comprehensive plan for revitalizing its commercial corridors. *Id.* (Direct Test. R. McPherson at 2) (November 20, 2009), Supp. at 32. The primary purpose of this plan was to give new life to the business district of Reynoldsburg. *Id.* Part of the plan was implementing a number of beautification projects, which included relocating overhead utility lines into an underground duct bank. *Id.* at 3, Supp. at 33.² Reynoldsburg hoped that these revitalization projects would "make the area more attractive to business" and "attract more revenue" for the city. *Id.* at 4, Supp. at 34. On April 24, 2000, Reynoldsburg passed an Ordinance granting a five year franchise to CSP to construct, maintain, and operate utility lines in its rights-of way. Statement of Facts at ¶ 9, Supp. at 9.

During Phase I of the revitalization project, Reynoldsburg paid the cost of relocating the utility lines underground without dispute. Tr. 84-85, Supp. at 54-55. Reynoldsburg also contemplated that CSP would relocate its facilities in the right-of-way underground throughout the planning, development, and implementation of Phase II. *In*

²

Reynoldsburg admits in its brief that relocating the utility lines underground was done for "primarily economic development reasons." Appellant's Brief, at 21. *See also* Tr. at 26-27, Supp. at 52-53.

re Reynoldsburg v. CSP (Opinion and Order at 4) (April 5, 2011), Appellant’s App. at 8; Statement of Facts at ¶ 14, Supp. at 4. Reynoldsburg spent at least \$816,676 to construct an underground duct bank, with the expectation that CSP would eventually relocate its utility lines into this duct bank. *In re Reynoldsburg v. CSP* (Opinion and Order at 5) (April 5, 2011), Appellant’s App. at 9; Statement of Facts at ¶ 23, Supp. at 5. In fact, Reynoldsburg referred to this duct bank as the “AEP duct bank” on numerous occasions. *In re Reynoldsburg v. CSP* (Opinion and Order at 5) (April 5, 2011), Appellant’s App. at 9; Statement of Facts at ¶ 20, Supp. at 5.³

Briefly before Phase II of the project (and only one month after CSP’s franchise had expired), Reynoldsburg City Council enacted a Comprehensive Right of Way Management Policy Ordinance (the Ordinance). Ordinance § 907.06(A)(4)(ii) (Statement of Facts at Ex. A at 21), Supp. at 16. The Ordinance required any utility that had facilities located within Reynoldsburg’s public rights-of-way to relocate its facilities at its “sole costs” if the Public Service Director instructed the utility to relocate such facilities. *Id.* (emphasis added). On July 8, 2005, Reynoldsburg’s Public Service Director informed CSP that it was “**required** to relocate [its] respective facilities within the public right of way of the Project into the underground duct bank” within sixty (60) days (emphasis added). July 8, 2005 Letter from S. Reichard (July 8, 2005 Letter), Supp. at 49 (Statement of Facts at Ex. I).

³ CSP is a subsidiary of AEP.

Relying upon the Tariff, CSP refused to pay the relocation costs, and informed Reynoldsburg that it was responsible for the costs under the terms of the Commission-approved Tariff. In order not to delay the revitalization project, Reynoldsburg and CSP entered into a letter of agreement, whereby Reynoldsburg would pay the costs to relocate the utility lines within the public right-of-way, and the parties would resolve the issue of who is ultimately responsible for the costs at a later time. *In re Reynoldsburg v. CSP* (Opinion and Order at 5-6) (April 5, 2011), Appellant's App. at 9-10. In 2008, Reynoldsburg filed a Complaint with the Commission, requesting the Commission to declare the Tariff unjust, unreasonable, or unlawful. The Commission denied Reynoldsburg's request and found that the Tariff was applicable to the case. *Id.* at 30, Appellant's App. at 34.

ARGUMENT

Proposition of Law I:

The Public Utilities Commission has exclusive jurisdiction over matters involving the rates and charges of public utilities.
Kazmaier Supermarket, Inc. v. Toledo Edison Co., 61 Ohio St. 3d 147, 150, 573 N.E.2d 655, 658 (1991).

This case is about who bears the costs of providing utility service when a municipality requires that utility lines be buried underground. It is undisputed that the Commission has the power to hear and decide cases concerning a public utility's rates and tariffs. This Court has observed that:

The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed

statutory framework for the regulation of utility service and the fixation of rates charged by the utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49. The commission may fix, amend, alter or suspend rates charged by public utilities to their customers. R.C. 4909.15 and 4909.16. 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. R.C. 4905.30. And a utility must charge rates that are in accordance with tariffs approved by, and on file with, the commission. R.C. 4905.22.

Kazmaier Supermarket, Inc. v. Toledo Edison Co., 61 Ohio St. 3d 147, 150, 573 N.E.2d 655, 658 (1991). The Court in *Kazmaier* concluded that this statutory scheme demonstrates that “the broad and complete control of public utilities shall be within the administrative agency, the Public Utilities Commission.” *Id.* at 150-151, 573 N.E. 2d at 658.

This Court has further observed that:

There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested with the authority to determine rates in the first instance, and in which the authority to review such rates is vested exclusively in the Supreme Court by Section 4903.12, Revised Code * * *.

Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 256, 141 N.E.2d 465, 467 (1957). See also *Inland Steel Dev. Corp. v. Pub. Util. Comm'n*, 49 Ohio St. 2d 284, 288-289, 361 N.E.2d 240, 243-244 (1977); *Akron v. Pub. Util. Comm'n*, 149 Ohio St. 347, 359, 78 N.E.2d 890, 897 (1948).

More recently, the Court again emphasized that “the commission has exclusive jurisdiction over various matters involving public utilities, such as rates and charges, classifications, and service.” *State ex rel. Columbus Southern Power Co. v. Fais*, 117 Ohio St. 3d 340, 343, 884 N.E.2d 1, 4 (2008); *see also State ex rel. Northern Ohio Telephone Co. v. Winter*, 23 Ohio St. 2d 69, 9, 260 N.E.2d 827 (1970); *State ex rel. Ohio Bell Telephone Co. v. Court of Common Pleas of Cuyahoga County*, 128 Ohio St. 553, 557, 192 N.E. 787, 788-789 (1934).

A common thread among these decisions is that the General Assembly has granted the Commission broad authority over public utilities, particularly with regard to utility cost allocation and ratemaking matters. The Commission is “vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law. . . .” Ohio Rev. Code Ann. § 4905.04 (West 2011), App. at 1. Pursuant to R.C. 4905.30, “[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” Ohio Rev. Code Ann. § 4905.30 (West 2011), App. at 3. Furthermore, R.C. 4909.18 provides:

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 any regulation or practice affecting

the same, shall file a written application with the public utilities commission

Ohio Rev. Code Ann. § 4909.18 (West 2011), App. at 4. After a rate schedule is approved, “[n]o public utility shall charge, demand, exact, receive or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule” Ohio Rev. Code Ann. § 4905.32 (West 2011), App. at 3.

Under Sections 4905.30 and 4909.18, all tariffs must be approved by the Commission in order to become effective. As noted in Joint Exhibit 1 at ¶ 17 of CSP’s tariff was approved by the Commission in its Opinion and Order in an earlier rate case. *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*, Case No. 91-418-EL-AIR (Opinion and Order) (May 12, 1992). After this tariff provision was approved by the Commission, CSP was required to adhere to it. As explained by the Court, “the only proper rate is that set out in the approved rate schedule on file with the commission and open to public inspection, and that this schedule can be changed only by an order of the commission.” *Cleveland Electric Illuminating Co. v. Pub. Util. Comm’n*, 46 Ohio St. 2d 105, 115, 346 N.E.2d 778, 785 (1976). See also *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E. 2d 465, 468 (1957) (“a utility has no option but to collect the rates set by the commission”).

Contrary to Reynoldsburg’s arguments, this case does not present a question about Reynoldsburg’s right to control the use of its rights-of-way. Rather, as the Commission

emphasized, this case “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.” *In re Reynoldsburg v. CSP* (Entry on Rehearing at 5) (June 1, 2011), Appellant’s App. at 63.

This Court has already determined that the assignment of the costs resulting from Reynoldsburg’s decision was a rate matter proper for the Commission’s adjudication. *State ex rel. Columbus Southern Power Co. v. Fais*, 117 Ohio St. 3d 340, 343, 884 N.E.2d 1, 5 (2008). The Court found that the Franklin County Court of Common Pleas erred in finding that the costs of relocating overhead electrical lines did not relate to rates or charges. *Id.* The Court stated that “[t]hese costs are included in the rates and charges for services broadly defined in the pertinent statutes that are within the exclusive jurisdiction of the commission.” *Id.* Thus, the issue of responsibility for the relocation costs was properly before the Commission.

There is a clear distinction between a municipality’s authority to control its rights-of-way and the authority to set utility rates. To the extent that a municipal ordinance goes beyond regulation of the use of rights-of-way and purports to govern the assignment of costs associated with electric service, the ordinance improperly infringes on the Commission’s jurisdiction to set rates. There is no legal support for such assumption of power.

Moreover, ceding such authority to municipalities would allow them to shift the costs of their decisions to ratepayers outside their boundaries. As the Commission recognized, “in the context of asserting its authority over its right-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.” *In re Reynoldsburg v. CSP* (Entry on Rehearing at 5) (June 5, 2011), Appellant’s App. at 63. To ensure consistent treatment, decisions over the allocation of costs must be made by the agency with the expertise and statutory mandates to regulate utility rates and charges.

Proposition of Law II:

The complainant bears the burden of proof in a proceeding brought under R.C. 4905.26. *Luntz Corp. v. Pub. Util. Comm’n*, 79 Ohio St. 3d 509, 513, 684 N.E.2d 43, 46 (1997).

Complaints filed before the Commission are governed by R.C. 4905.26. That statute provides:

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing

and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

Ohio Revised Code Ann. § 4905.26 (West 2011), App. at 3. Applying this statute, the Court has held that a complainant bears the burden of proving its allegations. *Luntz Corp. v. Pub. Util. Comm'n*, 79 Ohio St. 3d 509, 513, 684 N.E.2d 43, 46 (1997); *Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 14 Ohio St. 3d 49, 50, 471 N.E.2d 475, 477 (1984); *Grossman v. Pub. Util. Comm'n*, 5 Ohio 2d 189, 190, 214 N.E.2d 666, 667 (1966).

Reynoldsburg asserts, despite this clear precedent, that CSP was required to show that the city ordinance was unconstitutional. There is no legal support for this contention. As the complainant, Reynoldsburg had the burden to show that the tariff provision it challenged was unjust, unreasonable, or unlawful. Reynoldsburg did not meet this burden.

As discussed above in Proposition of Law I, the General Assembly has charged the Commission with the setting of rates and charges for public utilities. The Commission acted within the statutory framework and applied the proper legal standard. Accepting Reynoldsburg's argument and requiring the respondent utility to prove the ordinance invalid would distort the statutory framework for utility regulation. There is no legal support for this argument and it should be rejected.

Nor is there any basis for Reynoldsburg's contention that it was denied the ability to bring a complaint case because the city had not intervened in the rate case that

originally approved the tariff. While the Commission observed that Reynoldsburg could have sought intervention in that case and provided comments, this observation in no way meant that the City was foreclosed from bringing the case below. The Commission held a hearing at which Reynoldsburg had the opportunity to present evidence. The Commission then considered that evidence in making its decision. In no way was Reynoldsburg denied an opportunity to present its case.

Proposition of Law No. III:

Reynoldsburg's Ordinance is not entitled to home-rule protection because it has extra-territorial effects and conflicts with the general laws of the State.

Reynoldsburg inaccurately claims that the Tariff violates its home-rule authority to regulate its public rights-of-way. This case is not about home-rule authority. As discussed above, this case involves an attempt by Reynoldsburg to usurp the Commission's ratemaking authority. Assuming, however, this case does involve a question of Reynoldsburg's home-rule authority, the Court should find that Reynoldsburg's Ordinance is not entitled to home-rule protection.

The Home-rule Amendment of the Ohio Constitution grants municipalities certain powers of local self-governance. The Home-rule Amendment grants municipalities two types of authority: (1) the power of local self-government and (2) the power to adopt and enforce local police, sanitary, and other similar regulations that are not in conflict with general laws of the state. Section 3, Article XVIII, Ohio Constitution. The Ohio Supreme Court devised a three-pronged test to determine whether a municipality's

ordinance is entitled to home-rule protection: (1) whether the ordinance is an exercise of the municipality's police power, rather than of local self-government, (2) whether the applicable statute is a general law, and (3) whether the ordinance is in conflict with the general laws of the state. *Mendenhall v. Akron*, 117 Ohio St. 3d 33, 37, 881 N.E.2d 255, 260 (2008).

In this case, Reynoldsburg's Ordinance is an unlawful exercise of police power that conflicts with the general law of Title 49 and the Commission's statutory authority to regulate the rates and charges of public utilities. The Tariff does not infringe upon Reynoldsburg's home-rule authority and, therefore, the Ordinance must yield to the Commission's statutory authority.

A. The Ordinance is not an exercise of local self-governance because it has the extra-territorial effect of shifting costs to non-Reynoldsburg residents.

The first step in the home-rule analysis is to determine whether the local ordinance is an exercise of local self-governance or an exercise of local police power. *Am. Financial Servs. Assn. v. Cleveland*, 112 Ohio St. 3d 170, 858 N.E.2d 776 (2006). An ordinance created under the power of local self-government must relate solely to the government and administration of the internal affairs of the municipality. *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St. 3d 553, 556, 880 N.E.2d 906, 911 (2008). To constitute an exercise of local self-governance, the ordinance cannot have any extraterritorial effects. *Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 129, 239 N.E.2d 75 (1968), citing *Beachwood v. Cuyahoga Cty. Bd. of*

Elections, 167 Ohio St. 369, 371, 148 N.E.2d 921 (1958). If the ordinance has any effects outside of the municipality, the ordinance is not an exercise of local self-governance. *Id.*

The Ordinance in this case will undoubtedly have an effect on citizens outside of Reynoldsburg. The Ordinance forces CSP to pay the entire cost of relocating the electric lines underground. This cost would ultimately be paid by ratepayers in CSP's service territory that do not live in Reynoldsburg. *In re Reynoldsburg v. CSP* (Direct Test. of S. Dias at 9) (November 20, 2009), Supp. at 26. In essence, Reynoldsburg is attempting to force non-Reynoldsburg residents to pay for its "economic development" project. Reynoldsburg essentially admits this in its brief. Appellant's Merit Brief at 12. Reynoldsburg claims, however, that forcing non-residents to pay \$1.185 million for Reynoldsburg's revitalization project would have a "negligible" effect on these non-resident ratepayers. *Id.* This statement is troubling for a number of reasons. First, it's contradictory for Reynoldsburg to claim \$1.185 million is "negligible" when it has been fighting over this very amount for over seven years.⁴ This amount is too much for Reynoldsburg to pay for its own "economic development" project, but Reynoldsburg is apparently fine with shifting this cost to ratepayers outside of its borders.

Second, and more importantly, the extra-territorial effect of the Ordinance is not "negligible" because the Ordinance will, if found to be valid, cause numerous

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Reynoldsburg and CSP entered in a Letter of Agreement in November 8, 2005, where Reynoldsburg agreed to pay the relocation cost and reserved its right to bring an action against CSP for the \$1.185 million.

municipalities throughout the state to adopt similar ordinances. CSP already receives numerous requests each year from municipalities to have their utility lines constructed underground. Tr. at 155; Supp. at 56. Some of these municipalities, such as Worthington, Upper Arlington, and Dublin, have ordinances similar to Reynoldsburg's. *Id.* These municipalities, however, agreed to pay the cost of constructing electric lines underground because they acknowledged the applicability of the Tariff. *In re Reynoldsburg v. CSP* (Direct Test. of S. Dias at 6-7) (November 20, 2009); Supp. at 23-24; Tr. at 156-157; Supp. at 57-58. If the Tariff is determined to be invalid, this will open the floodgates to other municipalities passing similar ordinances that shift the costs of relocating utility facilities to non-residents. Ratepayers throughout the state will be repeatedly forced to pay the costs of utility relocation projects taking place in municipalities they do not reside in. Furthermore, this would affect all public utilities, not just CSP. Once this door is open, the Commission would lose any ability to stop these massive cost-shifting efforts, and this would substantially diminish the Commission's statutory authority to regulate rates and charges.

Because of this extra-territorial effect, the Ordinance cannot be considered an act of local self-governance. Therefore, Reynoldsburg was acting under its police powers, and it must be determined if the Ordinance conflicts with the general laws of the state.

B. The Tariff constitutes a general law of the State because it was approved under the comprehensive statutory scheme of Title 49, which that empowers the Commission to set rates and charges.

The next step in the home-rule analysis is to determine if the Tariff is a “general law” of the state. Because the Ordinance is an exercise of Reynoldsburg’s police powers, and not an exercise of local self-governance, the Ordinance will be preempted if it conflicts with a general law of the state. In *Canton*, the Ohio Supreme Court delineated a four-part test defining what constitutes a “general law”:

[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, 153, 766 N.E.2d 963, 969 (2003).

i. The Tariff is part of the statewide and comprehensive legislative enactment of Title 49.

This case involves much more than the validity of the Tariff. In essence, by questioning the validity of the Commission-approved Tariff, Reynoldsburg is really attacking the Commission’s Title 49-authority to establish rates and charges of public utilities. As discussed above, tariffs are a necessary part of the comprehensive framework of Title 49 and cannot be viewed in isolation. R.C. 4905.30 and R.C. 4909.18. Because tariffs are necessary parts of the Commission’s Title 49-authority, the home-rule analysis in this case must focus on Title 49 itself.

Title 49 is a “complete and comprehensive statutory scheme” that provides the Commission with exclusive control over public utilities’ rates and charges. *Hull v. Columbia Gas of Ohio*, 110 Ohio St. 3d 96, 100, 850 N.E.2d 1190, 1194 (2006) (the Court held that disputes regarding rates charged under a tariff fall within Title 49’s “statutory regime and, thus, are within the sole jurisdiction of the Commission”); and *Kazmaier*, 61 Ohio St. 3d at 150-153. In fact, the Court has held that the Tariff and relocation costs at issue in this particular case fall within the “complete and comprehensive statutory scheme” of Title 49. *Fais*, 117 Ohio St. 3d 340. In *Fais*, the Court stated that Title 49 is a “detailed statutory framework for the regulation of service and the fixation of rates charged by public utilities.” *Id.* at 343. The Court also stated that “it is readily apparent the General Assembly has provided for [C]ommission oversight of filed tariffs.” *Id.* at 345.

The Tariff must be viewed in the context of the Commission’s Title 49 rate-making authority. Tariffs are essentially public records of rules and regulations approved by the Commission, which contain schedules of rates and charges. *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451, 812 N.E.2d 955, ¶ 8, fn. 5 (2004). They are crucial parts of the Commission’s statutory authority to regulate rates, charges and services of public utilities. If municipalities are able to override Commission-approved tariffs, the Commission will be stripped of its ability to set, modify, or enforce rates and charges of public utilities. This would defeat the primary purpose of Title 49, thereby thwarting the General Assembly’s intent. Therefore, the Tariff should be viewed as part of the statewide and comprehensive legislative enactment of Title 49.

- ii. **The ratemaking provisions of Title 49, under which the Tariff was approved, apply to all parts of the state alike and operate uniformly throughout the state.**

The Tariff, as part of the statutory framework of Title 49, also satisfies the second element of the general laws test. In order to constitute a general law, a statute must apply to all parts of the state alike and operate uniformly throughout the state. *Marich*, 116 Ohio St. 3d. at 558.

In this case, Reynoldsburg argues that the Tariff is not applied uniformly throughout the state because the Tariff applies only to CSP's service territory. But Reynoldsburg, once again, ignores the fact that Commission-approved tariffs are part of the framework of Title 49, which applies uniformly throughout the state. Two specific sections of Title 49 are important to consider in determining whether the Tariff is part of a uniform statutory scheme - R.C. 4905.22 and R.C. 4905.30. CSP's Tariff was approved by the Commission in CSP's rate case and was filed with the Commission pursuant to R.C. 4905.30. Under R.C. 4905.22, CSP is required to comply with the Tariff, and the Commission maintains exclusive authority over issues regarding the applicability of the Tariff. *See Hull v. Columbia Gas of Ohio*, 110 Ohio St. 3d 96, 100, 850 N.E.2d 1190, 1194, 850 N.E.2d 1190 (2006) (public utilities must comply with the rates and charges that are in the tariff schedules approved by and on file with the Commission). These sections of Title 49 apply throughout the state, not only in CSP's service territory. They do not differentiate between particular locales or municipalities, and both sections clearly state that "every public utility" must comply with the terms of these sections. Ohio Rev.

Code Ann. §§ 4905.22, 4905.30 (West 2011), App. at 3, 4. Furthermore, by granting the Commission exclusive jurisdiction over issues arising from these tariffs, the General Assembly created a uniform system of regulating issues related to rates and services.

The Ordinance, on the other hand, creates an inconsistency in the regulation of rates and charges of public utilities. The Ordinance forces CSP to pay for the relocation costs in Reynoldsburg, while CSP is not required to pay for similar costs in other municipalities. Tr. at 155-157; Supp. at 56-58. If Reynoldsburg is allowed to ignore a tariff approved under the Commission's Title 49-authority, this would cause glaring inconsistencies in the Commission's regulation of rates and services. Even worse, this would strip the Commission of its ability to enforce tariffs and diminish the authority of the Commission overall.

iii. Title 49 sets forth police, sanitary, or similar regulations instead of merely limiting municipalities' powers.

The third element in the "general law" analysis is that the statute must set forth police, sanitary, or similar regulations, instead of merely granting or limiting a municipality's power to create such regulations. *Marich*, 116 Ohio St. 3d at 559. When examining this element, the Court must determine if the law affects the general public of the state as a whole more than it does the local inhabitants of a particular municipality. *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 49, 442 N.E.2d 1278, 1282 (1982).

The Ohio Supreme Court has held that state laws regulating electric transmission lines are valid state police power regulations. *Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 130, 239 N.E.2d 75, 78 (1968) (the Court held that an ordinance requiring a utility to construct its electrical lines underground was invalid because it conflicted with statutory regulation of intercity electrical lines). *See also State ex rel. Klapp v. Dayton Power & Light Co.*, 10 Ohio St. 2d 14, 17, 225 N.E.2d 230, 23 (1967) (holding that an attempt by a city to terminate a public utility's use of streets and alleys was an invalid use of home-rule authority because of the state's general police powers under R.C. 4905.20 and R.C. 4905.21).

In this case, Title 49 is a broad and comprehensive statutory scheme that regulates public utilities throughout the entire state. Title 49 does not merely limit municipalities' ability to regulate rates and charges of public utilities. Rather, it grants the Commission exclusive control over rates and charges for public utilities throughout the state. Therefore, the Tariff meets the third element of the general laws test.

iv. Title 49 prescribes a rule of conduct upon citizens generally.

The fourth step in the general law analysis is to determine if Title 49 addresses the conduct of citizens generally. *Canton*, 95 Ohio St. 3d at 156. In analyzing this element, the Supreme Court looks to the general law to determine if it "extends its application to the citizens of the state generally" or whether the law "single[s] out any group or class for different treatment." *Mendenhall*, 117 Ohio St. 3d at 39.

Title 49 broadly governs the conduct of all public utilities operating in the state. The statutory scheme of Title 49 specifically regulates utilities' rates and charges for services, and provides the Commission exclusive authority over tariffs that reflect these rates and charges. The sections of Title 49 that relate to the filing of and compliance with tariffs state that the regulations apply to "every public utility." Ohio Rev. Code Ann. §§ 4905.22, 4905.30 (West 2011), App. at 3, 4. This language indicates that Title 49, and the Tariff which was approved under Title 49, apply generally throughout the state.

The Tariff, as part of the statutory scheme of Title 49, constitutes a general law under the *Canton* test. In the last step of the home-rule analysis, the Court must determine if there is a conflict between this general law and the Ordinance.

C. The Ordinance is preempted because it conflicts with the Tariff.

For purposes of the home-rule analysis, there is a conflict where the "ordinance declares something to be right which the state law declares to be wrong, or vice versa." *Id.*, citing *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923). It is well established that "in order for such a conflict to arise, the state statute must positively permit what the ordinance prohibits, or vice versa..." *Cincinnati v. Baskin*, 112 Ohio St. 3d 279, 283, 859 N.E.2d 514, 518 (2006).

The Tariff states that "the Company shall not be required to construct general distribution lines underground unless ... 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... shall be paid for by that municipality or public authority."

CSP PUCO Tariff No. 6 at ¶ 17, Supp. at 12. The Ordinance, on the other hand, states that CSP must relocate its facilities located within the public right-of-way underground at its sole costs. Ordinance § 907.06(A)(4)(ii) (Statement of Facts at Ex. A at 21), Supp. at 16. The Ordinance and the Tariff set forth conflicting directives. The Ordinance requires CSP to pay for the relocation costs, while the Tariff requires Reynoldsburg to pay for these costs. These two, opposite directives cannot be reconciled and, therefore, the Tariff supersedes the Ordinance.

D. Summary of the Home-Rule Analysis.

Reynoldsburg's Ordinance is not protected under the Home-rule Amendment. Reynoldsburg's attempt to assign responsibility for the relocation costs will have disastrous extra-territorial effects throughout the state by initiating similar acts by other municipalities. Furthermore, the Ordinance would usurp the Commission's Title 49- authority to regulate rates and charges of public utilities. Therefore, the Ordinance is not entitled to home-rule protection.

Proposition of Law No. IV:

Reynoldsburg does not have a common-law right to circumvent the terms of a tariff approved pursuant to the Commission's statutory authority.

Reynoldsburg claims it has a "traditional common-law" right to force CSP to pay the entire cost of relocating the utility lines, but the case law it cites fails to support this contention. Appellant's Merit Brief at 15-17. The *Norfolk Redevelopment case* Reynoldsburg cites addresses a Virginia common-law law right regarding utility

relocation costs. *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Virginia*, 464 U.S. 30, 42, 104 S.Ct. 304, 311 (1983). This case is not applicable because it does not address Ohio law, nor does it address a conflict between an ordinance and a Commission-approved tariff. Reynoldsburg's reliance upon *Columbus Gaslight*, an Ohio case from 1893, is equally misplaced. *Columbus Gaslight & Coke Co. v. City of Columbus*, 50 Ohio St. 65, 33 N.E. 292 (1893). This case was decided long before the General Assembly established the Commission. Therefore, the Commission's statutory authority to regulate the rates and charges of public utilities was not addressed in this case.⁵

Finally, Reynoldsburg's reliance on *City of Euclid* is also misplaced. *State ex rel. Cleveland Elec. Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 476-477, 159 N.E.2d 756, 757-758 (1959). In this case, the Court held that a municipality was allowed to order an electric utility to underground its electrical lines located within the public right-of-way. *Id.* The Commission does not dispute that Reynoldsburg has such authority, and submits that CSP has already relocated the electric lines underground as demanded. However, Reynoldsburg lacks the authority to dictate how the relocation cost will be paid. This authority is within the exclusive jurisdiction of the Commission. *Kazmaier*, 61 Ohio St. 3d at 150. Furthermore, the *City of Euclid* case does not support

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The Public Service Commission, which was the predecessor of the current Commission, was established in 1911 through the Public Utilities Act. 1911 Ohio Laws Ohio 342.

Reynoldsburg's argument that it has a common-law right to assign the cost of the utility relocation project to ratepayers that reside outside its borders.

Proposition of Law No. V:

The Tariff does not conflict with Reynoldsburg's statutory authority to govern its public rights-of-way.

Reynoldsburg points to sections of the Revised Code regarding municipalities' authority to regulate their public rights-of-way. But, again, the Commission does not dispute this. Reynoldsburg argues that its Ordinance is valid under R.C. 4939.01, *et seq.*, which generally authorizes municipalities to manage and administer public utilities' usage of their public rights-of-way. The Commission does not dispute that Reynoldsburg had the right to order CSP to relocate its utility lines located within the public rights-of-way under R.C. 4939. This statute does not, however, give Reynoldsburg the right to force CSP to pay for the relocation of the utility lines. In fact, R.C. 4939.05(A) prohibits Reynoldsburg from demanding that CSP relocate its utility lines for free in exchange for the right to use its public right-of-ways.⁶ Ohio Rev. Code Ann. § 4939.05(A) (West 2011), App. at 6.

Reynoldsburg also points to R.C. 723.01 for the general principle that municipalities have the authority to control their public rights-of-way. In addition, Reynoldsburg argues that it has the right to restrict the construction, location, or use of

⁶ This Court found that constructing the underground utility lines constitutes a "service" provided by CSP. *Fais* 117 Ohio St. 3d at 344, 884 N.E.2d 1, 5.

utility facilities within its public rights-of-way under R.C. 4905.65. Again, this argument misses the point. Whether Reynoldsburg has authority to control the construction or the location of utility lines within its public rights-of-way is not at issue. The primary issue in this case is who will be responsible for the cost of relocating the utility lines. Should Reynoldsburg, whose residents and businesses will benefit from the underground utility lines, pay this cost? Or should CSP (and ultimately ratepayers from outside the boundaries of Reynoldsburg) be forced to bankroll Reynoldsburg's \$1.185 million beautification project? Reynoldsburg would choose the latter. But this is a utility cost allocation issue that will impact the rates CSP charges to all its customers. The Commission determined, pursuant to its ratemaking authority, that municipalities that demand the undergrounding of utility lines should bear the costs of such construction, not CSP and not ratepayers that live outside the boundaries of these municipalities. The Tariff reflects the Commission's decision, and the Court should reject Reynoldsburg's attempt to circumvent the Commission's ratemaking authority.

Proposition of Law No. VI:

The Commission properly applied the Tariff based upon the facts of this case.

A. The Commission's factual finding that Paragraph 17 of the Tariff applies in this case is reasonable, lawful, and supported by the evidence.

Reynoldsburg asks the Court to reweigh the evidence and reject the Commission's factual finding that Paragraph 17 of the Tariff applies to the facts of this case. This is not

the function of this Court in the review of Commission orders. The standard of review is found in R.C. 4903.13 which provides that a Commission order “shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” Ohio Rev. Code Ann. § 4903.13 (West 2011), App. at 1.

Under this statutory standard, “this court will not reverse or modify a PUCO decision as to questions of fact where the record contains sufficient probative evidence to show the PUCO’s determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm’n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000), quoting *MCI Telecommunications Corp. v. Pub. Util. Comm’n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988). In matters involving the Commission’s special expertise and the exercise of discretion, the Court will generally defer to the judgment of the Commission. *Constellation New Energy, Inc. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262, 264 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm’n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990).

Reynoldsburg claims the Tariff does not apply in this case because Reynoldsburg did not *require* CSP to relocate its utility lines. The Commission thoroughly summarized the evidence that clearly showed that the Tariff applies in this case. *In re Reynoldsburg* (Opinion and Order) (April 5, 2011), Appellant’s App. at 28-29. The Commission relied

not only upon the plain language of the Tariff, but also based its decision upon Reynoldsburg's admissions. For example, Reynoldsburg admitted that the "Phase II Project required that all utilities in the City's Main Street right-of-way be placed underground," and that "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." (emphasis added) *In re Reynoldsburg* (Opinion and Order) (April 5, 2011), Appellant's App. at 29; Statement of Facts, ¶¶ 16 and 17, Supp. at 4.

In addition, Reynoldsburg stated in a July 8, 2005 letter 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." (emphasis added) July 8, 2005 letter, Supp. at 49. Sharon Reichard, Reynoldsburg's Public Service Director, testified that the project required the relocation of the utility lines underground. Tr. at 22, Supp. 51. Finally, the Commission determined that, contrary to Reynoldsburg's contentions, CSP did not have the ability to move its utility lines to private rights-of-way. *In re Reynoldsburg* (Opinion and Order) (April 5, 2011), Appellant's App. at 17. Based upon the limited time frame Reynoldsburg gave CSP to relocate the utility lines, CSP had no option but to relocate the utility lines located within the public right-of-way. *Id.*

The Commission correctly applied the Tariff in this case. Reynoldsburg demanded that CSP relocate the utility lines within the public right-of-way. Pursuant to its ratemaking authority, the Commission determined that when a particular municipality causes utility relocation costs to occur, that municipality should bear this cost. This is completely consistent with established ratemaking principles, such as cost causation.

Therefore, the Commission's finding that Paragraph 17 of Tariff applied in this case was supported by the evidence in the record and should be affirmed by this Court.

B. The Commission properly applied the Tariff when it determined that Reynoldsburg caused the cost of relocating the utility lines and, thus, should be held responsible for paying entire cost.

In a final attempt to avoid paying for its economic development project, Reynoldsburg claims that it should only be responsible for the portion of the cost of undergrounding the utility lines which exceeds the cost of constructing overhead utility lines. Reynoldsburg's argument, however, is based upon a flawed interpretation of the Tariff. The Commission correctly found that the entire cost of relocating the utility lines should be paid by Reynoldsburg based on the language and intent of the Tariff and the particular facts of this case. *In re Reynoldsburg v. CSP* (Opinion and Order) (April 5, 2011), Appellant's App. at 28 -29. The Tariff states:

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 standard facilities) shall be paid for by that municipality or public authority. *The "cost of any change" as used herein, shall be the actual cost to the Company of such change.* The "cost of special construction" as used herein, shall be the actual cost to 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.
(emphasis added)

The Tariff sets forth two circumstances where a municipality is required to pay for the cost of constructing underground utility lines: (1) “special construction” and (2) a change of existing overhead lines. “Special construction” involves undergrounding utility lines where no electric service lines previously existed. Basically, CSP would construct new underground utility lines as opposed to relocating existing overhead lines. The parenthetical language in the Tariff, which Reynoldsburg relies upon, is referring to such “special construction.” Under these circumstances, the municipality would only be required to pay the excess cost of undergrounding the utility lines because CSP would be installing all new underground lines, *not* relocating existing utility lines. This is only fair because, if a municipality did not demand underground utility lines, CSP still would be required to construct overhead lines with no charge to the municipality, as required under CSP’s standard service obligations. Therefore, when there is “special construction”, municipalities should only have to pay the amount that exceeds the cost of constructing standard service overhead lines and should not be required to pay the entire cost of constructing new underground utility lines.

“Special construction” is *not* what happened in this case. In this case, CSP was required to take *existing, overhead lines* and bury them underground. This was a “change of existing overhead distribution lines underground.” The Tariff specifically states that the “cost of any change” will be “the *cost to the Company* of such change.” *Id.* (emphasis added). The entire cost of moving overhead utility lines underground is the cost CSP actually incurred in relocating the lines. Reynoldsburg fails to differentiate between the construction of new utility lines and the relocation of existing overhead lines.

Reynoldsburg's interpretation of the Tariff, if accepted, would defeat the purpose of the Tariff and force CSP to absorb the majority of the cost of relocating utility lines.

Overhead distribution lines are part of CSP's standard service, and when a municipality demands that CSP relocate its existing overhead lines (which would require CSP to go beyond its standard service obligations), this municipality should pay these extra costs. In this case, the entire cost to CSP to relocate the existing electrical lines underground was \$1.185 million, and Reynoldsburg is unquestionably responsible for causing these costs. *In re Reynoldsburg v. CSP* (Direct Test. of S. Dias at 6) (November 20, 2009), Supp. at 23.

The Commission's application of the Tariff is consistent with the original intent of the Tariff, which was explained in CSP's rate case, accepted by the Commission's Staff, and implemented by the Commission in its approval of the Tariff. Statement of Facts at ¶ 6,7,8, Supp. 6, 7, 8; *Rate Case* (Direct Test. of W. Forrester at 7-8) (April 16, 1991), App. at 36; *Rate Case* (Staff Report at 48) (November 13, 1991), Supp. at 48. Therefore, the Commission correctly determined that Reynoldsburg is responsible for the entire cost of relocating the utility lines.

CONCLUSION

Reynoldsburg must not be allowed to shift the cost of its Main Street revitalization project to ratepayers that live outside its borders. Not only would such an act be fundamentally unfair to non-Reynoldsburg ratepayers, but it would also invite all municipalities throughout the state to follow in Reynoldsburg's footsteps. Ultimately, if

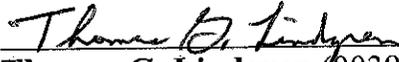
the Court approves of Reynoldsburg actions, every municipality would have the ability to force non-resident ratepayers to subsidize their economic development projects under the guise of home-rule authority.

This case, however, is not about home-rule authority. And it is not about Reynoldsburg's authority to control usage of its public rights-of-way. The real question in this case is who has authority to set the rates and charges of public utilities. This Court has consistently held that public utility ratemaking is within the exclusive jurisdiction of the Commission. The Commission, under its statutory ratemaking authority, decided that each municipality should bear the cost of relocating utility lines within its rights-of-way where, as here, the relocation is demanded by the municipality. The Commission's decision is reflected in the Tariff, and Reynoldsburg is obligated to comply with the Tariff's terms. The Court should prevent Reynoldsburg from circumventing the Commission-approved Tariff, fundamentally undermining the Commission's rate-making authority. The Commission's Order and Opinion should be affirmed.

Respectfully submitted,

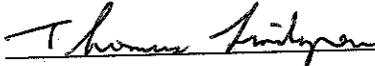
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PROOF OF SERVICE

I certify that a copy of the foregoing **Merit Brief** submitted by the Public Utilities of Ohio was sent by electronic mail and by U.S. postage paid mail to the parties listed on November 22nd, 2011.


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§ 4903.13 Reversal of final order - notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4905.04. Power to regulate public utilities and railroads

The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities and railroads, to require all public utilities to furnish their products and render all services exacted by the commission or by law, and to promulgate and enforce all orders relating to the protection, welfare, and safety of railroad employees and the traveling public, including the apportionment between railroads and the state and its political subdivisions of the cost of constructing protective devices at railroad grade crossings.

§ 4905.20. Abandonment of facilities

No railroad as defined in section 4907.02 of the Revised Code, operating any railroad in this state, and no public utility as defined in section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, electric light line, water line, sewer line, steam pipe line, or any portion thereof, pumping station, generating plant, power station, sewage treatment plant, or service station of a public utility, or the service rendered thereby that has once been laid, constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in section 4905.21 of the Revised Code. Any railroad or public utility violating this section shall forfeit and pay into the state treasury not less than one hundred dollars, nor more than one thousand dollars, and shall be subject to all other legal and equitable remedies for the enforcement of this section and section 4905.21 of the Revised Code.

§ 4905.21. Application to commission to abandon, withdraw or close

Any railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn, or closed for traffic or service all or any part of a main track or depot, and any public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for traffic or service all or any part of any line, pumping station, generating plant, power station, sewage treatment plant, or service station, referred to in section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing. The commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the commission for the hearing of the application.

Upon the hearing of the application, the commission shall ascertain the facts and make its findings thereon, and if such facts satisfy the commission that the proposed abandonment, withdrawal, or closing for traffic or service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, it may allow such abandonment, withdrawal, or closing; otherwise it shall be denied, or if the facts warrant, the application may be granted in a modified form. If the application asks for the abandonment or withdrawal of any main track, main pipe line, gas line, electric light line, water line, sewer line, steam pipe line, pumping station, generating plant, power station, sewage treatment plant, service station, or the service rendered thereby, in such manner as can result in the permanent abandonment of service between any two points on such railroad, or of service and facilities of any such public utility, no application shall be granted unless the railroad or public utility has operated the track, pipe line, gas line, electric light line, water line, sewer line, steam pipe line, pumping station, generating plant, power station, sewage treatment plant, or service station for at least five years. The notice shall be given by publication in a newspaper of general circulation throughout any county or municipal corporation that has granted a franchise to the railroad or public utility, under which the track, pipe line, gas line, electric light line, water line, sewer line, steam pipe line, pumping station, generating plant, power station, sewage treatment plant, or service station is operated or in which the same is located, once a week for two consecutive weeks before the hearing of the application. Notice of the hearing shall be given such county, municipal corporation, or public utility in the manner provided for the service of orders of the commission in section 4903.15 of the Revised Code. This section and section 4905.20 of the Revised Code do not apply to a gas company when it is removing or exchanging abandoned field lines.

This section applies to all service now rendered and facilities furnished or hereafter built and operated, and an order of the commission authorizing the abandonment or withdrawal of any such service or facility shall not affect rights and obligations of a

railroad or public utility beyond the scope of the order, anything in its franchise to the contrary notwithstanding.

§ 4905.22. Service and facilities required - unreasonable charge prohibited

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

§ 4905.26. Complaints as to service

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

§ 4905.30. Printed schedules of rates must be filed

(A) A 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. The schedules

shall be plainly printed and kept open to public inspection. The commission may prescribe the form of every such schedule, and may prescribe, by order, changes in the form of such schedules. The commission may establish and modify rules and regulations for keeping such schedules open to public inspection. A copy of the schedules, or so much thereof as the commission deems necessary for the use and information of the public, shall be printed in plain type and kept on file or posted in such places and in such manner as the commission orders.

(B) Division (A) of this section applies to a telephone company only regarding rates, joint rates, tolls, classifications, charges, rules, and regulations established pursuant to sections 4905.71, 4927.12, 4927.13, 4927.14, 4927.15, 4927.18, and 4931.47 of the Revised Code.

§ 4905.32. Schedule rate collected

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

§ 4909.18. Application to establish or change rate

Any public utility desiring to establish any 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. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the

same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed. If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

- (A) A report of its property used and useful, or, with respect to a natural gas company, projected to be used and useful as of the date certain, in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;
- (B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;
- (C) A statement of the income and expense anticipated under the application filed;
- (D) A statement of financial condition summarizing assets, liabilities, and net worth;
- (E) Such other information as the commission may require in its discretion.

§ 4939.01. Municipal public way definitions

As used in sections 4939.01 to 4939.08 of the Revised Code:

(A) "Cable operator," "cable service," and "franchise" have the same meanings as in the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 522.

(B) "Occupy or use" means, with respect to a public way, to place a tangible thing in a public way for any purpose, including, but not limited to, constructing, repairing, positioning, maintaining, or operating lines, poles, pipes, conduits, ducts, equipment, or other structures, appurtenances, or facilities necessary for the delivery of public utility services or any services provided by a cable operator.

(C) "Person" means any natural person, corporation, or partnership and also includes any governmental entity.

(D) "Public utility" means any company described in section 4905.03 of the Revised Code except in divisions (A) (2) and (9) of that section, which company also is a public utility as defined in section 4905.02 of the Revised Code; and includes any electric supplier as defined in section 4933.81 of the Revised Code.

(E) "Public way" means the surface of, and the space within, through, on, across, above, or below, any public street, public road, public highway, public freeway, public lane, public path, public alley, public court, public sidewalk, public boulevard, public parkway, public drive, and any other land dedicated or otherwise designated for a compatible public use, which, on or after the effective date of this section, is owned or controlled by a municipal corporation. "Public way" excludes a private easement.

(F) "Public way fee" means a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way.

§ 4939.02. State policy

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

(I) ~~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.

§ 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.

§ 4939.04. Management, regulation, and administration of public ways by municipal corporations

(A)(1) A municipal corporation shall provide public utilities or cable operators with open, comparable, nondiscriminatory, and competitively neutral access to its public ways.

(2) Nothing in division (A)(1) of this section prohibits a municipal corporation from establishing priorities for access to or occupancy or use of a public way by a public utility or cable operator when the public way cannot accommodate all public way occupants or users, which priorities as applied to public utilities or cable operators shall not be unduly discriminatory and shall be competitively neutral.

(B) The management, regulation, and administration of a public way by a municipal corporation with regard to matters of local concern shall be presumed to be a valid exercise of the power of local self-government granted by Section 3 of Article XVIII of the Ohio Constitution.

§ 4939.05. Levy of public way fees by municipal corporation

(A) A municipal corporation shall not require any nonmonetary compensation or free service, or levy any tax, for the right or privilege to occupy or use a public way, and shall not levy a public way fee except in accordance with this section.

(B)(1) A municipal corporation may levy different public way fees based upon the amount of public ways occupied or used, the type of utility service provided by a public utility, or any different treatment required by the public health, safety, and welfare.

(2) A municipal corporation may waive all or a portion of any public way fee for a governmental entity or a charitable organization.

(3) A municipal corporation shall not require any person, including a reseller, that does not occupy or use a public way owned or controlled by the municipal corporation to pay it a public way fee.

(4) A municipal corporation that charges a franchise fee or otherwise receives free service or other nonmonetary compensation as part of a franchise between a cable operator and the municipal corporation shall grant the cable operator, for the occupancy or use of the public way related to the provision of any services provided by the cable operator, a credit, offset, or deduction against any public way fee or like charge for all such payments and the retail value of the free service or other nonmonetary compensation.

(C) Public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way. The costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation, including, but not limited to, persons for which payments are waived as authorized by division (B) of this section or for which compensation is otherwise obtained. No public way fee shall include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user or pursuant to any reasonable classification of occupants or users.

(D) A municipal corporation that levies a public way fee shall establish and maintain a special fund for all such fees remitted to the municipal corporation and, with respect to that special fund, shall be subject to sections 5705.09, 5705.10, 5705.14, 5705.15, 5705.16, 5705.39, 5705.40, 5705.41, 5705.44, and 5705.45 of the Revised Code and any other applicable provision of Chapter 5705. of the Revised Code concerning the establishment or maintenance of a special fund.

(E) At least forty-five days prior to the date of enactment of a public way ordinance by a municipal corporation, the municipal corporation shall file with the public utilities commission a notice that the ordinance is being considered.

§ 4939.06. Appeal of levy of public way fee

(A) If a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission. The appeal shall be made by filing a complaint that the amount of a public way fee, any related classification of public way occupants or users, or the assignment or allocation of costs to the public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful. The complaint shall be filed not later than thirty days after the date the public utility first becomes subject to the ordinance. The complaint is subject to the same procedures as a complaint filed pursuant to section 4905.26 of the Revised Code. The commission shall act to resolve the complaint by issuance of a final order within one hundred twenty days after the date of the complaint's filing.

(B) Only upon a finding by the commission that reasonable grounds are stated for a complaint filed under division (A) of this section, the commission by order shall suspend the public way fee provisions of the municipal ordinance for the duration of the commission's consideration of the complaint. For the purpose of this division, if the commission so suspends an ordinance pursuant to a complaint filed not later than thirty days after the date that the ordinance first takes effect, the suspension shall apply to the public way fee for every occupancy or use of the public way to which the fee would otherwise apply. For any other complaint, the suspension shall apply only to the public utility filing the complaint. The municipal corporation may later collect, for the suspension period, any suspended public way fee only if the commission finds that the public way fee is not unreasonable, unjust, unjustly discriminatory, or unlawful.

(C) If the commission finds that the public way fee or classification complained of is unreasonable, unjust, unjustly discriminatory, or unlawful, it shall determine by order the just and reasonable public way fee or classification.

§ 4939.07. Application to recover fees and costs

(A) As used in this section, "most recent," with respect to any rate proceeding, means the rate proceeding most immediately preceding the date of any final order issued by the public utilities commission under this section.

(B)(1) Notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, a public utility subject to the rate-making jurisdiction of the commission may file an application with the commission for, and the commission shall then authorize by order, timely and full recovery of a public way fee levied upon and payable by the public utility both after January 1, 2002, and after the test year of the public utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates.

(2) Any order issued by the commission pursuant to its consideration of an application under division (B)(1) of this section shall establish a cost recovery mechanism including, but not limited to, an adder, tracker, rider, or percentage surcharge, for recovering the amount to be recovered; specify that amount; limit the amount to not more and not less than the amount of the total public way fee incurred; and require periodic adjustment of the mechanism based on revenues recovered.

(a) In the case of a cost recovery mechanism for a public way fee levied on and payable by a public utility but determined unreasonable, unjust, unjustly discriminatory, or unlawful by the commission pursuant to division (C) of section 4939.06 of the Revised Code, the mechanism shall provide for recovery, only from those customers of the public utility that receive its service within the municipal corporation, of the difference between that public way fee and the just and reasonable public way fee determined by the commission under division (C) of section 4939.06 of the Revised Code.

(b) In all other cases, recovery shall be from all customers of the public utility generally.

(C) In the case of recovery under division (B)(2)(a) or (b) of this section, the recovery mechanism payable by sale-for-resale or wholesale telecommunications customers shall provide for recovery limited to any public way fee not included in established rates and prices for those customers and to the pro rata share of the public way fee applicable to the portion of the facilities that are sold, leased, or rented to the customers and are located in the public way. The recovery shall be in a nondiscriminatory and competitively neutral manner and prorated on a per-line or per-line equivalent basis among all retail, sale-for-resale, and wholesale telecommunications customers subject to the recovery.

(D)(1) Notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, a public utility subject to the rate-making jurisdiction of the commission may file an application with the commission for, and the commission by order shall authorize, such accounting authority as may be reasonably necessary to classify any cost described in division (D)(2) of this section as a regulatory asset for the purpose of recovering that cost.

(2) A cost eligible for recovery under this division shall be only such cost as meets both of the following:

(a) The cost is directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way or an appropriate allocation and assignment of costs related to implementation of this section, excluding any cost arising from a public way fee levied upon and payable by the public utility.

(b) The cost is incurred by the public utility both after January 1, 2002, and after the test year of the public utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates.

(3) If the commission determines, upon an application under division (D)(1) of this section or its own initiative, that classification of a cost described in division (D)(2) of this section as a regulatory asset is not practical or that deferred recovery of that cost would impose a hardship on the public utility or its customers, the commission shall establish a charge and collection mechanism to permit the public utility full recovery of that cost. A hardship shall be presumed for any public utility with less than fifteen thousand bundled sales service customers in this state and for any public utility for which the annualized aggregate amount of additional cost that otherwise may be eligible for such classification exceeds the greater of five hundred thousand dollars or fifteen per cent of the total costs that are described in division (D)(2)(a) of this section and were considered by the commission for the purpose of establishing rates in the public utility's most recent rate increase proceeding or the rate increase proceeding of the public utility's predecessor, whichever is later.

(E) Any application submitted to the commission under divisions (B) to (D) of this section shall be processed by the commission as an application not for an increase in rates under section 4909.18 of the Revised Code. The application shall include such information as the commission reasonably requires. The commission shall conclude its consideration of the application and issue a final order not later than one hundred twenty days after the date that the application was submitted to the commission. A final order regarding a recovery mechanism authorized pursuant to this section shall provide for such retroactive adjustment as the commission determines appropriate.

(F) A public utility shall not be required to waive any rights under this section as a condition of occupancy or use of a public way.

(G) The commission may issue such rules as it considers necessary to carry out this section.