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**TABLE OF CONTENTS**

Page

**COMBINED STATEMENT OF THE FACTS AND STATEMENT OF THE CASE ..... 1**

    A. Introduction.....1

    B. Summary of Relevant Facts .....2

**LAW AND ARGUMENT.....7**

***Proposition of Law No. 1***

The Public Utilities Commission of Ohio has the exclusive authority to regulate the rates and charges and terms and conditions for offering electric distribution service in Ohio and a provision in a tariff, approved by and filed with the Commission, which requires a municipality to pay the costs of constructing or relocating general distribution lines underground, when the municipality requires such undergrounding to occur for its own purposes, cannot be overridden by a municipal ordinance which seeks to impose those same costs on the public utility .....8

A. The fact that the right-of-way ordinance relates to the use or control of the public streets does not make the ordinance a matter of self-government .....9

B. Subsection 907.06(A)(4) of the Reynoldsburg ordinance conflicts with the general state law giving the Commission the authority to establish the rates and charges for electric distribution service and specifically conflicts with CSP Tariff ¶17 .....14

***Proposition of Law No. 2***

The Public Utilities Commission of Ohio’s finding that ¶17 of the CSP Tariff is just and reasonable is fully supported by the record, is a proper exercise of the Commission’s powers, and does not conflict with Reynoldsburg’s authority to regulate its public right-of-way.....18

A. The comprehensive statutory scheme regulating public utilities, not the common law, is the controlling law.....18

B. CSP Tariff ¶17 does not contravene Reynoldsburg’s statutory authority to govern its public right-of-way .....21

C. The Commission’s finding that CSP Tariff ¶17 is just and reasonable is fully supported by the record.....24

***Proposition of Law No. 3***

The Public Utilities Commission of Ohio’s finding that ¶17 of the CSP Tariff required Reynoldsburg to pay the full cost of relocating CSP’s general distribution lines from above ground to the underground duct is fully supported by the record and was a lawful exercise of the Commission’s authority to regulate the rates and charges for electric distribution service.....28

A. The record fully supports the Commission’s findings that ¶17 applies here.....28

B. The record fully supports the Commission’s findings that Reynoldsburg must bear the full costs of relocation.....31

**CONCLUSION** .....33

**CERTIFICATE OF SERVICE** .....34

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Am. Fin. Servs. Assn. v. City of Cleveland</i> , 112 Ohio St.3d 170, 2005-Ohio-6043.....	13
<i>Canton v. State</i> , 95 Ohio St.3d 149, 2002-Ohio-2005.....	15, 17
<i>Carlin Co. v. Hines</i> (1923), 107 Ohio St. 328, 333 .....	17
<i>Carter v. Am. Telephone &amp; Telegraph Co.</i> (C.A.5, 1966), 365 F.2d 486 .....	17
<i>City of Auburn v. Qwest Corp.</i> (C.A.9, 2001), 260 F.3d 1160 .....	19, 20
<i>City of Cleveland v. State</i> , 128 Ohio St. 3d 135, 2010-Ohio- 6218.....	9
<i>City of Kettering v. State Employment Relations Bd.</i> (1986), 26 Ohio St.3d 50, 496 N.E.2d 983 .....	13
<i>Cleveland Elec. Ill. Co. v. Pub. Util. Comm.</i> (1976), 46 Ohio St.2d 105, 346 N.E.2d 778.....	16
<i>City Mesgr. Serv., Hollywood v. Cap RCD DISG.</i> (C.A.6, 1971), 446 F.2d 6 .....	17
<i>Columbus Gaslight &amp; Coke Co. v. City of Columbus</i> (1893), 50 Ohio St. 65, 33 N.E. 292 .....	18
<i>Consumers' Counsel v. Pub. Util. Comm.</i> (1986), 25 Ohio St.3d 213, 495 N.E.2d 930 .....	8
<i>Froelich v. City of Cleveland</i> (1919), 99 Ohio St. 376.....	9
<i>General Telephone Co. v. Bothell</i> (1986), 105 Wash.2d 579, 716 P.2d 879.....	20, 21
<i>Globalcom v. Ill. Commerce Comm.</i> (2004), 347 Ill. App. 3d 592, 806 N.E.2d 1191 .....	17
<i>Grossman v. Pub. Util. Comm.</i> (1966), 5 Ohio St.2d 189, 190, 214 N.E.2d 666.....	25
<i>Hausman v. Dayton</i> (1995), 73 Ohio St.3d 671, 653 N.E.2d 1190 .....	24
<i>Kazmaier Supermarket, Inc. v. Toledo Edison Co.</i> (1991), 61 Ohio St. 3d 147, 573 N.E.2d 655 .....	14, 15, 18
<i>Keco Industries, Inc. v. Cincinnati &amp; Suburban Tel. Co.</i> (1957), 166 Ohio St.2d 254, 141 N.E.2d 465 .....	16

<i>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. 91-481-EL-AIR</i> .....	3
<i>Lowden v. Simonds Etc. Grain Co.</i> (1923), 306 U.S. 516, 520, 50 S.Ct. 612, 83 L.Ed. 953 .....	17
<i>Luntz Corp. v. Pub. Util. Comm.</i> (1997), 79 Ohio St.3d 509, 684 N.E.2d 43 .....	8, 25
<i>Magnesia Specialties v. Pub. Util. Comm.</i> , 129 Ohio St.3d 485, 2011-Ohio-4189.....	8, 28
<i>Marich v. Bob Bennett Const. Co.</i> , 116 Ohio St.3d 553, 2008-Ohio-92 .....	10, 21, 22
<i>Mendenhall v. City of Akron</i> , 117 Ohio St. 3d 33, 2008-Ohio-270 .....	9
<i>Migden-Ostrander v Pub. Util Comm.</i> , 102 Ohio St.3d 451,2004-Ohio-3924.....	24
<i>Monongahela Power Co. v Pub. Util. Comm.</i> , 104 Ohio St.3d 571, 2004-Ohio-6896 .....	24
<i>New Orleans Pub. Serv., Inc. v. New Orleans</i> (1989), 491 U.S. 350, 371, 109 S.Ct. 2506, 105 L.Ed. 298.....	17
<i>Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted</i> (1992), 65 Ohio St.3d 242, 602 N.E.2d 1147 .....	15, 16
<i>Ohioans for Concealed Carry, Inc. v. City of Clyde</i> , 120 Ohio St. 3d 96, 2008-Ohio-4605.....	10, 11
<i>Ohio Bell Tel. Co. v. Pub. Util. Comm.</i> (1990), 14 Ohio St.3d 49, 471 N.E.2d 475 .....	25
<i>Prentis v. Atlantic Coast Line Co.</i> (1908), 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150.....	16, 17
<i>State of Ohio v. LaSalle</i> , 96 Ohio St.3d 178, 2002-Ohio-4009 .....	23
<i>State ex rel. Columbus S. Power Co. v. Fais</i> , 117 Ohio St.3d 340, 2008-Ohio-849.....	<i>passim</i>
<i>Teegardin v. Foley</i> (1957), 166 Ohio St. 449, 143 N.E.2d 824.....	24
<i>Vernon v. Warner Amex. Cable Comm.</i> (1986), 25 Ohio St.3d 117, 495 N.E.2d 375 .....	9
<i>Village of Beachwood v. Bd. of Elec. of Cuyahoga Cty.</i> (1958), 167 Ohio St. 369, 371, 148 N.E. 921 .....	11
<i>Vorhees v. Jovingo</i> , 4th Dist. No. 04CA16, 2005-Ohio-4948 .....	17

**Ohio Constitution and Statutes**

Ohio Const. Art. XVIII, § 3 .....6, 9

Ohio Rev. Code § 1.48.....23

Ohio Rev. Code §723.01.....21, 22

Ohio Rev. Code § 4905.22.....16

Ohio Rev. Code § 4905.26.....25

Ohio Rev. Code § 4905.30.....16

Ohio Rev. Code §4905.65.....21, 22

Ohio Rev. Code § 4939.01.....21, 22

Ohio Rev. Code § 4939.07.....23, 24

## COMBINED STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

### A. Introduction.

The issue before the Court is whether an electric distribution utility's tariff governing the utility's rates and charges for service, approved by and filed with the Public Utilities Commission of Ohio (the "Commission"), that requires a municipality to bear the cost of undergrounding the utility's general distribution lines when such undergrounding is required by the municipality, is valid and enforceable against a municipality that subsequently adopts an ordinance that requires the cost of undergrounding to be borne by the utility. The Commission and Columbus Southern Power ("CSP") contend that the Commission, which has the exclusive authority to regulate the rates and charges for offering electric distribution service in Ohio, may approve such tariff, and that once such tariff is approved, a municipality may not enforce a local ordinance that would require the utility to bear the cost of undergrounding required by the municipality. The City of Reynoldsburg disagrees, contending that it may exercise its home rule powers under the Ohio Constitution to nullify a Commission-approved tariff and require the utility, and its broader customer base, to bear the costs of undergrounding existing facilities, even though the municipality requires the undergrounding as part of its own discretionary master plan.

CSP is not contesting the right of a municipality to regulate the use of its rights-of-way, including regulating where public utilities may place their lines. The issue is whether a municipality can impose on an electric utility the cost of relocating existing, fully-functioning electric distribution lines from above ground to underground for the convenience of the municipality when the PUCO has already determined that such costs should be borne by the municipality. It is undisputed that "the payment of the costs to relocate overhead electrical lines in a Reynoldsburg right of way to the underground" are "costs ... included in the rates and

charges for services broadly defined in the pertinent statutes that are within the exclusive jurisdiction of the commission,” as that was this Court's holding in *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St.3d 340, 343, 2008-Ohio-849 at ¶20. It also undisputed that the Commission has found that it is just and reasonable for the CSP Tariff to impose the higher costs of undergrounding distribution lines on an entity requiring such undergrounding. *In the Matter of the Complaint of City of Reynoldsburg*, Opinion and Order (April 5, 2011) (“Opinion”) at 14-15. The Commission also heard the testimony of the parties and found that the CSP Tariff does apply to the facts in this case and that, properly applied, the tariff required Reynoldsburg to pay the cost of relocating CSP's distribution lines to the City's new underground duct.

While the issue here is related to the costs associated with Reynoldsburg's decision to beautify its commercial district by undergrounding utility lines, the significance of the case is much broader. If Reynoldsburg is right that it can by municipal ordinance usurp the Commission's authority over the rates and charges for electric service, then every other Ohio municipality can do so as well. Every other city that determines its downtown or neighborhoods would be more aesthetically pleasing without overhead poles and wires could simply pass an ordinance requiring such facilities to be relocated underground at the utility's expense. Electric utility rates would skyrocket, not because the cost of service changed, but simply because city councils would have an easy way to shift costs of their master planning projects from their own residents to residents throughout the public utility's service territory.

**B. Summary of Relevant Facts.**

The facts that bring this issue to the Court are set forth in detail in the Commission's April 5, 2011 Opinion and Order at 4-7. Most relevant for purpose of this appeal is the fact that

on May 12, 1992, the Commission approved a provision in CSP's filed tariffs for electric service that provided, in pertinent part:

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.

See CSP PUCO Tariff No. 6, Original Sheet 3-6, (“Temporary and Special Service”) at ¶17 (“CSP Tariff ¶17”). (CSP Supp. at 7.) CSP Tariff ¶17 essentially establishes above ground service as the standard service for distribution, and requires that the higher cost of undergrounding distribution lines be borne by the entity requiring undergrounding. (Dias Testimony, CSP Ex. 1 at 5.) (CSP Supp. at 88.) This provision has remained in CSP's filed tariffs without change up to the present. As a result of this provision, all municipalities in CSP's service territories – Worthington, Upper Arlington, Dublin, to name a few – have borne the cost of undergrounding general distribution lines. (Opinion at 13, citing Tr. at 155-57.) CSP Tariff ¶17 also applies to private subdivisions, commercial and industrial parks, or any time CSP incurs greater expense to install underground facilities. *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. 91-481-EL-AIR (“CSP Rate Case”) Opinion and Order (May 12, 1992) at 110. (Jt. Ex. 1, Att. B at 110.) (CSP Supp. at 12.)

In the mid-1990's, Reynoldsburg commissioned a study, the purpose of which was to produce a comprehensive plan for the revitalization of the City's commercial corridors. (McPherson Testimony, Reynoldsburg Ex. 2 at 2.) (CSP Supp. at 81.) The plan identified a number of problems, including traffic congestion, traffic speed, parking availability, and poor

streetscape design, that were contributing to “Reynoldsburg losing business and commercial development to other areas of central Ohio, and to an unwillingness on the part of the general public to patronize businesses along Main Street.” (Id.)

Reynoldsburg developed a set of projects to accomplish its revitalization plan, which were to be carried out in six phases over a ten-year period. (Id. at 2-3.) Certain projects, primarily the installation of curb cuts and driveway aprons, were developed to address the traffic safety concerns caused by a proliferation of ingress and egress points to parking lots. Other projects were related to fulfilling the City's desire to have the downtown “streetscape” design more visually pleasing to better compete with newer commercial districts in nearby communities. (CSP Ex. 2 at 1-2.) (CSP Supp. at 101-02.) Creating a utility duct underground and moving overhead lines into the duct was a key component of the streetscape beautification plan. (CSP Ex. 2 at 2-3,12.) (CSP Supp. at 102-03, 105.) Although former Mayor McPherson's direct testimony suggested that the relocation of distribution lines related to safety concerns, he ultimately conceded that there was no evidence to support such link and that the relocation of CSP's lines was related to the City's aesthetic design goals. (Tr., at 76-79, 86-94.) (CSP Supp. at 118-121, 128-136.)

During Phase I of its streetscape project, Reynoldsburg required CSP to relocate certain of its overhead general distribution lines to underground, and paid CSP to do so, consistent with CSP Tariff ¶17. (Dias Testimony, CSP Ex. 1 at 3.) (CSP Supp. at 86.) Reynoldsburg always contemplated that CSP would relocate its facilities underground throughout the planning, development and implementation stages of the Phase II project, and took affirmative steps in 2004 and 2005 to prepare property owners in the commercial corridor to take service from the relocated underground facilities. (Jt. Ex. 1 at 4, ¶¶17-21.) (CSP Supp. at 4-5.) Reynoldsburg

even included the costs of funding the relocation of CSP's facilities underground as the City's responsibility in its planning documents for Phase II. (Id. at ¶23.)

Yet, on May 9, 2005, the City of Reynoldsburg enacted a Comprehensive Right-of-Way Management Policy Ordinance, codified as City Code Chapter 907, that authorizes the city public service director to require a permittee, including a public utility regulated by the Commission, to relocate its facilities underground at the permittee's sole cost. The ordinance provides in pertinent part:

At the direction of the Director upon reasonable written notice of not less than ninety (90) days, as determined by the Director taking into account the size of the project, the difficulty associated with such removal or rearrangement, costs and such other matters as the Director deems appropriate, *any Permittee shall, at its sole cost*, including but not limited to engineering, construction, permits and other such costs, *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 or that facilities should occupy only one side or a specified portion of a street or other public way, provided that such determination is reasonable and a part of an overall improvement or beautification plan or project . . .

Reynoldsburg C.C. § 907.06(A)(4) (emphasis added). (Jt. Ex. 1, Att. F at 21.) (CSP Supp. at 47.)

On July 8, 2005, the Reynoldsburg public service director advised CSP that it would be required to relocate its general distribution lines to an underground duct bank constructed by the City. That letter stated: "AEP (herein "Utility") is hereby given notice 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." (Jt. Ex. 1, Att. I.) (CSP Supp. at 73.) Recognizing the conflict between the CSP Tariff ¶17 and the ordinance, Reynoldsburg committed to advance the costs of undergrounding CSP's general distribution lines, in an amount not to exceed \$1,185,535.30, and the parties agreed to settle their dispute by way of litigation in an appropriate forum. (Jt. Ex. 1, Att. M.)

Reynoldsburg first filed a civil action for a declaratory judgment in the Franklin County Court of Common Pleas. On March 5, 2008, this Court, however, granted a writ of prohibition enjoining that court's exercise of jurisdiction over the action for the reason that the costs of relocating overhead electrical lines in the Reynoldsburg right-of-way to underground "are included in the rates and charges for services broadly defined in the pertinent statutes that are within the exclusive jurisdiction of the commission." *State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St.3d at 343, ¶20. Thereafter, Reynoldsburg filed a complaint with the Commission that was resolved by the Opinion on appeal.

In its Opinion, the Commission made three key findings of fact. It found that CSP Tariff ¶17 applies to the facts in this case in that "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." Opinion at 13. The Commission also found that under CSP Tariff ¶17 Reynoldsburg was responsible for the entire cost of the relocation of CSP general distribution lines from overhead to underground because CSP had already built the standard facilities and the distribution lines were fully functional. Opinion at 25. The Commission also found that the tariff provision is just and reasonable in that it "help[s] ensure that the utility or its rate payers not incur the expense of relocating facilities underground upon the request of a municipality," and "is consistent with the principle that the cost causer be the cost payer." Opinion at 14-15.

The Commission, however, did not render any findings or opinions with respect to Reynoldsburg's claim that CSP Tariff ¶17 violates Ohio Constitution Article XVIII, Section 3 and that its right-of-way ordinance overrides or supersedes the CSP Tariff. The Commission held that, while it could take testimony and argument relevant to the constitutional claim, the constitutional claim should be resolved by this Court on appeal. Opinion at 23. In the

proceeding below, Reynoldsburg also claimed that CSP Tariff ¶17 violated Ohio Constitution Article XVIII, Section 4, which authorizes municipalities to operate a public utility or contract with others for utility products or services. Opinion at 15-18. Reynoldsburg has not pursued this claim on rehearing or on appeal.

### **LAW AND ARGUMENT**

The Commission's Order interpreting and enforcing CSP Tariff ¶17 does not violate Reynoldsburg's home rule authority to regulate its public ways. Rather, it affirms Reynoldsburg's right to regulate its public ways, while preventing Reynoldsburg from improperly expanding that authority to interfere with the Commission's own exclusive authority to establish the rates and charges for CSP's service. *State ex rel. Columbus S. Power Co. v. Fais* at ¶20. Its effect is not to deny Reynoldsburg its right to beautify its downtown streetscape by requiring the undergrounding of facilities in its right-of-way; its effect is to prevent Reynoldsburg from shifting the cost of its streetscape beautification project to CSP and ultimately CSP's customers. Consistent with its prior ruling in *Columbus S. Power Co. v. Fais* as to the Commission's exclusive authority over rates and charges for electric service, the Court should hold that CSP Tariff ¶17 does not violate Reynoldsburg's home rule powers and should affirm the Commission's Order enforcing the CSP Tariff.

Based on the stipulation of facts and testimony before it, the Commission correctly found that CSP Tariff ¶17 was properly approved as just and reasonable, that it applied to Reynoldsburg's requirement that CSP relocate its general distribution lines underground, and that it required Reynoldsburg to pay the entire cost to relocate the existing lines from above ground to underground. The Commission acted within its legislative mandate, deciding in CSP's favor regarding Reynoldsburg's complaint that CSP was charging a rate in excess of law. The

Commission's findings with respect to the reasonableness of CSP Tariff ¶17 and its proper application to Reynoldsburg's specific requirement that CSP relocate its lines underground may not be disturbed on appeal unless it appears from the record that such findings are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show a misapprehension or mistake or willful disregard of duty. *Magnesia Specialties v. Pub. Util. Comm.*, 129 Ohio St.3d 485, 489, 2011-Ohio-4189, ¶20; *Luntz Corp. v. Pub. Util. Comm.* (1997), 79 Ohio St.3d 509, 511, 684 N.E.2d 43; *Consumers' Counsel v. Pub. Util. Comm.* (1986), 25 Ohio St.3d 213, 215, 495 N.E.2d 930.

***Proposition of Law No. 1***

**The Public Utilities Commission of Ohio has the exclusive authority to regulate the rates and charges and terms and conditions for offering electric distribution service in Ohio and a provision in a tariff, approved by and filed with the Commission, which requires a municipality to pay the costs of constructing or relocating general distribution lines underground, when the municipality requires such undergrounding to occur for its own purposes, cannot be overridden by a municipal ordinance which seeks to impose those same costs on the public utility.**

Reynoldsburg's assertion that the Commission's order reaffirming and enforcing CSP Tariff ¶17 violates the Home Rule amendment of the Ohio Constitution is based upon its erroneous re-definition of key legal principals, disregard for the statutory authority conferred on the Commission, and misrepresentation of the factual nature of the conflict. Reynoldsburg portrays its ordinance as merely regulating its right-of-way, when in reality the ordinance goes far beyond right-of-way regulation and infringes on the Commission's exclusive authority to establish the rates and charges for electric distribution service in Ohio. Reynoldsburg argues that the Commission Order deprives it of its right to regulate its public rights-of-way, when in fact it merely requires Reynoldsburg to bear the costs of its own decision to beautify its downtown rather than shift those costs to CSP and customers throughout its service territory.

This Court uses a three-part test to evaluate conflicts arising under the Home Rule Amendment. It recently reaffirmed that test, stating: “A state statute takes precedence over a local ordinance when “(1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute” *City of Cleveland v. State*, 128 Ohio St.3d 135, 137, 2010-Ohio-6318 (quoting *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 36-37, 2008-Ohio-270 at ¶ 17). Applying this test to the facts of this case, it is clear that: 1) the portion of Reynoldsburg’s ordinance at issue is not a matter of local self-government; 2) the Commission’s authority under Title 49 to approve CSP’s rates and charges for service is a general law, as is the tariff itself once approved; and 3) Reynoldsburg ordinance is in conflict with the general law regulating the rates and charges for electric distribution service and the approved CSP Tariff.

**A. The fact that the right-of-way ordinance relates to the use or control of the public streets does not make the ordinance a matter of self-government.**

Reynoldsburg argues that its right-of-way ordinance is sacrosanct because the Court has recognized the use and regulation of the public streets and rights-of-way to be the exercise of powers of local self-government under Ohio Const. Art. XVIII, § 3. (Merit Brief at 9-10.) While it is true that the Court has consistently supported a municipality’s right to control its streets and rights-of-way as an exercise of its Art. XVIII, §3 home rule powers, that right does not equate to the exercise of powers of self-government. As the Court recognized in *Vernon v. Warner Amex. Cable Comm.* (1986), 25 Ohio St.3d 117, 120, 495 N.E.2d 374, (after reviewing the precedents upon which Reynoldsburg relies, including *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376):

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, which necessarily include the municipality’s police powers.

More recently, this Court recognized that a municipal ordinance regulating traffic on its public streets is an exercise of the police power, and not an exercise of the power of self-government. *Marich v. Bob Bennett Const. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92. In *Marich*, the Court notes that “[i]n the years since *Froelich* was decided, this court has more fully defined . . . the police power vested in local government.” *Id.* at ¶14. The distinction between the power of local self-government and the police power is now stated as follows:

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.” *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369, 5 O.O.2d 6, 148 N.E.2d 921, paragraph one of the syllabus. Conversely, the police power allows municipalities to enact regulations only to protect the public health, safety, or morals, or the general welfare of the public. See *Downing v. Cook* (1982), 69 Ohio St.2d 149, 150, 23 O.O.3d 186, 431 N.E.2d 995.

*Marich*, 116 Ohio St.3d at 556, ¶ 11. See also, *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 101, 2008-Ohio-4605. Thus, Reynoldsburg cannot avoid a full analysis of the home rule question by relying on turn-of-the-century precedent to argue that its ordinance is solely a matter of self-government because it relates to the public streets. Even assuming that some aspects of Reynoldsburg's multi-phase commercial revitalization project are intended to address public safety concerns, as opposed to the aesthetic desires fulfilled by undergrounding distribution lines, its local self-government argument fails.

In addition to lacking sound legal precedent, Reynoldsburg's local self-government argument is undercut by the language in the ordinance itself and the testimony of its witnesses. The ordinance states, in part, that its purpose is: “[t]o promote the utilization of Rights-of-Way for the public health, safety and welfare and to promote economic development in the City,” §907.02(d)(1); and, “[t]o promote public safety and protect public property,” §907.02(d)(4). (CSP Supp. at 34.) Even though it is not dispositive of the issue, when the plain language of an

ordinance declares that it relates to police powers it “undermines any argument that it is one relating to local self-government.” *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d at 102, ¶ 37.

In the proceedings below, Reynoldsburg further undercut its argument that the ordinance is not an exercise of its police powers by its testimony that one purpose of relocating the distribution lines was “to better provide for the safety of the vehicular and pedestrian traffic” or “promote public safety.” (Merit Brief at 2.) See also, Opinion at 9 (summarizing testimony of former Reynoldsburg mayor Robert McPherson). The language of the ordinance and the candid testimony of its former mayor bring this case in line with the Court's holding in *Marich* that municipal traffic regulations relate to the police power and not the power of local government.

Reynoldsburg's argument is further undercut by the obvious extra-territorial effect of that portion of the ordinance in dispute. This Court has held that the extra-territorial effect of an ordinance will take it outside the area of local self-government, though it might otherwise fall within such area. This Court articulated the significance of the extra-territorial effect of an ordinance in *Village of Beachwood v. Bd. of Elec. of Cuyahoga Cty.* (1958), 167 Ohio St. 369, 371, 148 N.E. 921, as follows:

To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself with no extra-territorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.

In analyzing the components of the Court's home rule analysis in this case, it is important to bear in mind that the dispute in this case is not over the city's right to regulate the public right-of-way; the dispute here is limited to the narrower issue of whether the city can shift the costs of

its decision to beautify its downtown streetscape from its residents to CSP's customers generally. CSP is not contesting the right-of-way ordinance in total or even in significant part. The ordinance is a thirty-five page document, with thirteen sections, most of which contain multi-subsections. It is a comprehensive right-of-way management policy. CSP took issue with only § 907.06(A)(4), the cost-shifting section that conflicts with CSP Tariff ¶17.

This Court spoke to the extra-territorial effect of § 907.06(A)(4) in *State ex rel. Columbus S. Power v. Fais*. It recognized that the conflict between the ordinance and CSP's Tariff meant that "[t]hese relocation costs will affect the rates of either all Columbus Southern customers (if the utility is ordered to pay the costs) or those customers living in Reynoldsburg (if the city cannot recover its payment of the costs)." *Fais*, at ¶24. After reviewing the facts and the legal arguments, the Commission likewise found that the ordinance had the extra-territorial effect of shifting the cost of Reynoldsburg's municipal improvements onto CSP's other customers. Opinion at 14.

Reynoldsburg admits that its ordinance shifts the costs of CSP's relocation to CSP's other ratepayers outside of its municipality, but advances the argument that because the cost of the relocation during Phase II of its beautification project — \$1,185,000.00 — is a small amount of money when spread over all of the customers in CSP's service territory, the extra-territorial effect of the ordinance is so slight as to have no legal significance. (Merit Brief at 11-12.) Its argument misses a critical point. This case is significant for the principle it seeks to establish — not the amount at issue in one phase of Reynoldsburg's ten-year, multi-phase project. The outcome in this case will affect whether Reynoldsburg can force CSP to bear the cost of undergrounding its facilities in other phases of the project underway and in projects Reynoldsburg may conceive and implement in the future. The outcome in this case also will

determine whether other cities throughout Ohio can do likewise, meaning this \$1 million case could open the door for several hundred million dollars in costs being shifted unfairly from municipal improvement budgets to utility customers.

On the merits, there is no case law to support this novel idea that the amount of money at issue in one project determines whether an ordinance has extra-territorial effect. The case cited by Reynoldsburg certainly does not support this extraordinary proposition. *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St.3d 50, 496 N.E.2d 983, involved Kettering's home rule challenge to the newly enacted state collective bargaining statute. The Court upheld the statute by following the "statewide concern" doctrine. *Id.*, 26 Ohio St.3d at 54. The Court held that because the subject of public employee collective bargaining affects the general public of the state as a whole more than it does local inhabitants, "the matter passes from what was a matter for local government to a matter of general state interest." *Id.*

Reynoldsburg would have the Court turn the statewide concern doctrine on its head. If applicable here, the doctrine would support the Commission's Order. Applied here, the doctrine would have the Court find that because the rates and charges for public utility service is a matters that affects the general public of the state as a whole, more than it does local inhabitants, the issue of who pays for the cost of relocating general distribution lines is an issue that passes from what might have been a matter of local government to a matter of general state interest. "It is a fundamental principle of Ohio law that, pursuant to the "statewide concern" doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general or statewide concern.'" *Am. Fin. Servs. Assn. v. City of Cleveland*, 112 Ohio St.3d 170, 174, 2006-Ohio-6043 at ¶24.

**B. Subsection 907.06(A)(4) of the Reynoldsburg ordinance conflicts with the general state law giving the Commission the authority to establish the rates and charges for electric distribution service and specifically conflicts with CSP Tariff ¶17.**

There is no dispute that § 907.06(A)(4) of the ordinance conflicts with CSP Tariff ¶17. Reynoldsburg would not have filed its Complaint with the Commission otherwise. Instead, Reynoldsburg argues that its ordinance does not conflict with any state statute or general law. Its position ignores both established case law and this Court's own pronouncements in *State ex rel. Columbus S. Power Co. v. Fais* at ¶20 that the costs of relocating overhead electrical lines in the municipal right-of-way to underground "are included in the rates and charges for services broadly defined in the pertinent statutes that are within the exclusive jurisdiction of the commission."

Reynoldsburg's entire position in this appeal is based on the fallacy that the CSP Tariff has no legal significance. The City studiously ignores the fact that a tariff is the result of a comprehensive legislative scheme and that § 907.06(A)(4) of its ordinance seeks to usurp or negate the Commission's rate-making authority under that comprehensive legislative scheme. CSP's Tariff is an order of the Commission, not something CSP created in a vacuum. Once it was approved and filed with Commission, the CSP Tariff became part of the comprehensive general law established by the General Assembly by the enactment of Title 49 of the Ohio Revised Code.

In *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655, the Court reviewed the legislative scheme regarding the Commission's oversight of utilities and their tariffs and the public policy behind the legislative scheme. It found:

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 public 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.

The broad and comprehensive statutory scheme of public utility regulation described in *Kazmaier Supermarket*, and so recently re-affirmed in *Columbus S. Power v. Fais*, clearly constitutes a “general law for purposes of home-rule analysis” as defined in *Canton v. State*, 95 Ohio St.3d 149, 153, 2002-Ohio-2005. Indeed, one of the cases cited in *Canton v. State* to illustrate the general law test is virtually on point with this case. In *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted* (1992), 65 Ohio St.3d 242, 602 N.E.2d 1147, the Court struck down an ordinance attempting to exact a fee for the registration or licensure of private investigators because it conflicted with a statewide regulatory program. In finding the general law requirement satisfied, the Court concluded:

In *Westlake v. Mascot Petroleum Co.* (1991), 61 Ohio St.3d 161, 573 N.E.2d 1068, this court concluded that a statewide permit scheme (*i.e.*, liquor sales regulation) precluded local enactments on the same subject which were inconsistent therewith. In the present case, R.C. 4749.09 prohibits the imposition of a local registration fee for private security personnel.

Considered in isolation, such a provision may fail to qualify as a general law because it prohibits a municipality from exercising a local police power while not providing for uniform statewide regulation of the same subject matter. See *Youngstown v. Evans* (1929), 121 Ohio St. 342, 168 N.E. 844. However, consideration of R.C. 4749.09 alone is not dispositive of the present controversy. R.C. Chapter 4749 in its entirety does provide for uniform statewide regulation of security personnel in the same manner that R.C. Chapter 4303 provided for statewide liquor sales regulation in *Mascot, supra*. Accordingly, R.C. 4749.09 must be considered a general law of statewide application.

*Id.* 65 Ohio St.3d at 245. Reynoldsburg is seeking to do here what the Court held in *Ohio Assn. of Private Detective Agencies, Inc. v. N. Olmsted* should not be done. Reynoldsburg focuses only on the tariff and argues that it is not a general law because it “is not a law at all.” (Merit Brief at 14.) The focus of its argument is too narrow and its premise is plainly wrong.

The CSP Tariff does not stand alone, and it cannot be segregated from the law that put it into place. The CSP Tariff is the product of a legislative process required to be conducted under Ohio Rev. Code §§ 4909.15 and 4909.18. Once the tariff was approved by the Commission and filed with the Commission, it had the force and effect of law. By virtue of Ohio Rev. Code §§ 4905.22 and 4905.30, CSP is bound to follow its tariff and is required to collect the cost of undergrounding from a municipality or other customer in the circumstances described in ¶17. It could not lawfully do otherwise, unless or until the tariff was lawfully changed through a new rate-making process. *Cleveland Elec. Ill. Co. v. Pub. Util. Comm.* (1976), 46 Ohio St.2d 105, 115, 346 N.E.2d 778; *Keco Industries, Inc. v. Cincinnati & Suburban Tel. Co.* (1957), 166 Ohio St.2d 254, 257, 141 N.E.2d 465. Contrary to Reynoldsburg's assumption, the process that produces a public utility tariff is deemed by law to be a legislative process and – the tariff is deemed to be a law.

The United States Supreme Court first established this proposition of law in *Prentis v. Atlantic Coast Line Co.* (1908), 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150, where the question was whether a federal court should abstain in a case seeking to enjoin the enforcement of a rate-making order issued by the Virginia State Corporation Commission, the equivalent of the Ohio Commission. The Court determined that it was not a proper matter for federal judicial review because the rate-making process is a legislative process, not a judicial process. The Court held “the establishment of a rate is the making of a rule for the future, and therefore is an act

legislative and not judicial in kind,” even though the process is conducted by an administrative entity, not the legislature directly, and even though the process that leads up to the establishment of the tariff starts with an investigation or includes a hearing. *Id.*, 211 U.S. at 226-27. Over the years the Court has reaffirmed both the general mode of analysis of *Prentis* and “its specific holding that ratemaking is an essentially legislative act” in *New Orleans Pub. Serv., Inc. v. New Orleans* (1989), 491 U.S. 350, 371, 109 S.Ct. 2506, 105 L.Ed.2d 298.

Not surprisingly, because the process that produces a public utility tariff is a legislative process, the end product of that process – the tariff – is deemed to be a law. “[A] tariff, required by law to be filed, is not a mere contract. It is the law.” *City Mesgr. Serv., Hollywood v. Cap RCD DISG.* (C.A.6, 1971), 446 F.2d 6, 7 (quoting and following *Carter v. Am. Telephone & Telegraph Co.* (C.A.5, 1966), 365 F.2d 486, 496). “It is settled that the published tariff, so long as in force, has the effect of a statute, and is binding upon the railroad and the shipper alike.” *Carlin Co. v. Hines* (1923), 107 Ohio St. 328, 333. See, also, *Lowden v. Simonds Etc. Grain Co.* (1939), 306 U.S. 516, 520, 59 S.Ct. 612, 83 L.Ed. 953 (“tariffs bind . . . with the force of law”); *Globalcom v. Ill. Commerce Comm.* (2004), 347 Ill. App. 3d 592, 600, 806 N.E.2d 1194 (“[A] tariff is a statute, not a contract, and has the force and effect of a statute”); *Vorhees v. Jovingo*, 4<sup>th</sup> Dist. No. 04CA16, 2005-Ohio-4948 (“A tariff filed in accordance with the law has the force and effect of a statute.”)

The comprehensive legislative scheme established in Title 49, which results in, among other things, the establishment as a matter of law of a utility's rates and charges for service, is a general law for purpose of the *Canton* home rule analysis. Moreover, it is a general law that applies uniformly throughout the State of Ohio and prescribes a general rule of conduct that must be followed by all utilities and ratepayers. Title 49, and utility tariffs establishing rates and

charges for service, together are a function of the State's exercise of its own police power to provide for the public welfare; the legislative purpose is not just to limit the municipal powers. As a result, Reynoldsburg's home rule fails as a matter of law. While Reynoldsburg certainly has the authority to regulate its public rights-of-way and acted within its rights in requiring CSP to relocate its distribution lines underground, its home rule powers do not extend to imposing the cost of its streetscape beautification project on CSP when CSP's approved tariff requires the city to bear such cost.

***Proposition of Law No. 2***

**The Public Utilities Commission of Ohio's finding that ¶17 of the CSP Tariff is just and reasonable is fully supported by the record, is a proper exercise of the Commission's powers, and does not conflict with Reynoldsburg's authority to regulate its public right-of-way.**

**A. The comprehensive statutory scheme regulating public utilities, not the common law, is the controlling law.**

This Court recognized in *Fais* that the relocation of distribution lines for the convenience of a customer or third-party is part of the service CSP provides and the cost of such relocation is a component of CSP's rates and charges, subject to the exclusive jurisdiction of the PUCO. That conclusion is unassailable, given the "broad and comprehensive statutory scheme for regulating the business activities of public utilities" in Ohio. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d at 150. Reynoldsburg seeks to avoid this indisputable principle, however, by arguing that such relocation costs are to be determined by applying a traditional common-law rule. (Merit Brief at 15-16.) In Ohio, however, the statutes, not the common law, clearly govern this issue.

Reynoldsburg's reliance on *Columbus Gaslight & Coke Co. v. City of Columbus* (1893) 50 Ohio St. 65, 33 N.E. 292 is misplaced. In that case, Columbus Gaslight was seeking to

maintain an action for damages against the city to recover its cost in excavating and replacing its underground pipes after the city re-graded and improved the streets in which they were originally laid. There was no statute or tariff in place that governed the situation. And the situation there is not the situation here. CSP is not contending that a city must bear the cost of relocating its distribution lines anytime a relocation is necessitated to accommodate street improvements. CSP Tariff ¶17 does not extend to all relocation activities and costs. Rather, it establishes “overhead line construction as the standard method for providing general distribution electric service,” but allows a customer to elect non-standard service and have the lines constructed or relocated to underground at the customer's cost, and likewise requires a public entity that requires or specifies undergrounding to absorb the cost of this more expensive alternative. A city may require such construction or relocation, provided the customer or city absorbs the cost of doing so. CSP Tariff, ¶17. (Dias Testimony, CSP Ex. 1 at 5.) (CSP Supp. at 88.) This is a situation very different than that addressed by the common law principle discussed in *Columbus Gaslight*, as clarified by one of the other cases upon which Reynoldsburg purports to rely.

*City of Auburn v. Qwest Corp.* (C.A.9, 2001), 260 F.3d 1160, overruled on other grounds by *Sprint Telephony PCS, L.P. v. Cty of San Diego* (C.A.9, 2008), 543 F.3d 571, was triggered by Qwest's attempt to rely on its tariff to shift the costs of facilities relocation made necessary by right-of-way improvements to the cities within the State of Washington. The cities filed suit contending Washington common and statutory law provided that “when city street improvements require the displacement of telecommunications equipment located in the city's right-of-way, the utility company bears the expense of relocating the equipment.” *Id.*, 260 F.3d at 1166. The court held that the tariff did not require the cities to shoulder the relocation costs, but did so on the grounds that the tariff was ambiguous and, in any event, could not repeal or supersede a statute

allowing a city to require the utility to pay for relocation costs when a public street is improved or altered. Significantly, the court recognized “that a tariff properly filed and authorized by law can alter the common law.” *Id.* at 1168. The court also noted that the result would be different if the tariff was limited to “undergrounding costs,” rather than relocation costs. *Id.* at 1169 (citing *General Telephone Co. v. Bothell* (1986), 105 Wash.2d 579, 716 P.2d 879).

*General Telephone Co. v. Bothell*, (not cited by Reynoldsburg but fully disclosed and discussed in *City of Auburn v. Qwest*), is the more instructive case here; indeed, it is on point in that the Supreme Court of Washington expressly held that a public utility's tariff preempts contradictory provisions in subsequently enacted city ordinances. The facts in *Bothell* parallel those in this case. In 1977, General Telephone, with the approval of the Washington Utilities and Transportation Commission (“WUTC”) amended its tariff to pass the costs of relocating aerial facilities underground on to the property owners or “others requesting such underground construction.” *Id.*, 105 Wash.2d at 581. In 1985, the City of Bothell enacted an ordinance providing for street improvements that ordered General Telephone to underground existing aerial facilities along the improved streets and further ordered General Telephone to bear the costs of such relocation. *Id.* General Telephone refused to underground its lines at its own cost, and filed suit. In analyzing which law – the tariff or the ordinance – had precedence over the other, the court started with the proposition that Bothell's home rule powers under the Washington constitution were limited to making and enforcing such regulations as are not in conflict with the general laws. *Id.* at 584. It then noted that the general laws referred to in the Washington home rule provision included those promulgated by the WUTC, pursuant to its authority to regulate the rates, services, facilities and practices of telephone companies. *Id.* at 585. The Washington Supreme Court concluded:

[A] city's right to enact police power regulations in a given area ceases when the WUTC passes a general law concerning the same area and concurrent jurisdiction is not possible. General's undergrounding tariff was valid and pursuant to express WUTC authority. Concurrent jurisdiction is not possible since General's tariff conflicts with Bothell's subsequently enacted ordinances. Such conflicts generally are resolved in favor of the public service commission. One authoritative text acknowledges the rights of a municipality to modify the terms of a franchise by exercising its police power, but adds that a municipality cannot, under the guise of police regulations, usurp the functions of a state public service commission. Recent cases from other jurisdictions echo this observation.

The WUTC has authority to adopt regulations regarding the rates, services, facilities and practices of telephone companies. It adopted a valid regulation regarding facilities and practices of such companies, and General filed a tariff in response to that regulation, which became law. Whether seen as contractual or police power exercises, Bothell's subsequent ordinances do not have the authority to preempt that tariff. Those portions of the Bothell and Redmond ordinances that conflict with General's tariff are thus rendered null and void.

*Id.* at 587-88 (footnotes omitted). This Court should follow *Bothell* in this case, not just because it is directly on point, but more importantly, because its reasoning is sound.

**B. CSP Tariff ¶17 does not contravene Reynoldsburg's statutory authority to govern its public right-of-way.**

Reynoldsburg relies on various statutory enactments – Ohio Rev. Code §§ 4939.01 -.03, 723.01, and 4905.65 – to bolster its argument that its authority to govern its public right-of-way takes precedence over CSP Tariff ¶17. (Merit Brief at 18-21.) Its statutory arguments, however, add no weight to its position. Reynoldsburg's authority to regulate its public right-of-way flows from the Ohio Constitution and is not dependent upon, or augmented by, the general statutes cited. Such was this Court's holding in *Marich v. Bob Bennett Construction Co.*, 116 Ohio St.3d at 555:

As a preliminary matter, Bennett argues that Norton has statutory authority under R.C. 715.22, 723.01, 737.022, and 4511.07 to enact ordinances such as the one at issue. Bennett suggests that these statutes supplement the city's authority under the Home Rule Amendment, giving Norton enhanced power to control the streets within its jurisdiction. However, as we stated in *Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579, 621 N.E.2d 696, the power

to enact ordinances comes solely from the Constitution: “While the effect of R.C. 4511.07 \* \* \* could be viewed as very much like a grant of authority to the municipality, the municipality does not need the grant of authority because it already possesses it pursuant to its home rule powers. The power comes from the Ohio Constitution; it does *not* come from R.C. 4511.07.” (Emphasis sic.) Id. at 584, 621 N.E.2d 696. We see no reason to deviate from this conclusion for the other statutes cited by Bennett. See also *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph one of the syllabus.

*Marich* makes clear that Reynoldsburg did not need R.C. 723.01 to be enacted in order for it to provide care, supervision and control over its streets. It did not need R.C. 4905.65 to have the authority to restrict the construction, location, or use of a public utility facility. And it did not need R.C. 4939.02 -.03 to manage access and occupancy of its public ways. Thus, the conclusion that CSP ¶17 takes precedence over the exercise of Reynoldsburg's home rule powers, as supported by Proposition of Law 1, is fully dispositive of Reynoldsburg's statutory arguments as well.

Should the Court consider the statutory argument, however, it will note that CSP Tariff ¶17 is not inconsistent with the statutes upon which Reynoldsburg relies. R.C. 723.01 states only that “the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets . . . within the municipal corporation.” R.C. 4905.65 provides that “[t]o the extent permitted by existing law a local regulation may reasonably restrict the construction, location, or use of a public facility” unless certain exception.” CSP Tariff ¶17 does not affect Reynoldsburg's right to control its streets nor does it affect Reynoldsburg's right to control the location of the distribution lines. The dispute here is not whether Reynoldsburg can require CSP to underground its lines; the sole issue is who must pay the costs of relocating in-place and fully-functioning aerial lines underground when the city requires undergrounding in order to revitalize or beautify its commercial corridors “primarily for economic development reasons.” (Merit Brief at 21.) These statutes do not speak at all to the cost-shifting issue.

As noted by the dissenting commissioners below, R.C. 4939.07 does speak to recovery of costs associated with municipal regulation of the right-of-way. R.C. 4939.07(B) provides a mechanism for public utilities to recover “public way fees” levied by municipalities. R.C. 4939.07(D) provides a mechanism for public utilities to recover costs “directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way” other than costs arising from a public way fee. R.C. 4939.07(D)(2)(a). R.C. 4939.07(D)(1) allows the Commission to classify such costs as a regulatory asset so that the costs may be recovered in rates established in a subsequent rate-making proceeding. In the absence of a pre-existing tariff provision, such as CSP Tariff ¶17, the mechanism established in R.C. 4939.07(D) would govern costs associated with undergrounding electric distribution lines.

It does not apply in this instance, however, because the tariff already provides for the costs associated with municipal undergrounding requirements and the tariff provision pre-dates the enactment of R.C. 4939.07. There is nothing in the statute to suggest that it was intended to have retroactive application, such that it may be applied to nullify a pre-existing tariff provision. See Ohio Rev. Code §1.48; *State of Ohio v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009. Moreover, the statute is permissive in nature, stating that the public utility “may file” with the Commission for an order authorizing the recovery of costs it incurs due to local regulation. The statute does not purport to limit the Commission's authority to otherwise address the costs associated with undergrounding required by a municipality through the rates or terms and conditions established in the utility's tariff. The purpose of the new mechanism enacted in 2002 is apparent from subsection (D)(1) of the statute. The statute was intended to confirm that a public utility could recover from ratepayers, costs it is required to bear as a result of municipal regulation “[n]otwithstanding any other provision of law or agreement establishing price caps,

rate freezes, or rate increase moratoria.” The Court will recall that at the time R.C. 4939.07(D) was enacted, S.B. 3, the initial Ohio Public Utility Restructuring Act, was the law in Ohio, and it had frozen the rates an electric utility could charge its customers at the pre-1999 level for an initial five-year market development period. *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 456, 2004-Ohio-3924; *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 572, 2004-Ohio-6896.

**C. The Commission's finding that CSP Tariff ¶17 is just and reasonable is fully supported by the record.**

The Commission determined that CSP Tariff ¶17 is just and reasonable because it is intended “to help ensure that the utility or its ratepayers not incur the expense of relocating facilities underground upon the request of a municipality,” “is consistent with the principle that the cost causer be the cost payer,” and merely “compensate[s] the utility for complying with the City's directives concerning its rights-of-way.” (Opinion at 14-15.) While the “cost-causer” principle may not be applicable in every situation in which a municipal regulation imposes a cost on a utility, it certainly is properly applied in the situation here – where the cost of relocating existing, fully-functional distribution lines is imposed as a result of the city's decision to beautify its streetscape “primarily for economic development reasons.” (Merit Brief at 21.)

In this situation it simply is not rational or fair to shift the cost of a municipality's downtown design aspirations to CSP customers outside the city, or even to require CSP to impose a special rider on its Reynoldsburg customers to underwrite the city's plans. While municipalities unquestionably have the right to regulate their rights-of-way and to beautify their core, they also have the obligation to do so in a narrowly-tailored way that “does not interfere with private rights beyond the necessities of the situation.” *Hausman v. Dayton* (1995), 73 Ohio St.3d 671, 678, 653 N.E.2d 1190 (quoting *Teegardin v. Foley* (1957), 166 Ohio St. 449, 143

N.E.2d 824). A city should be honest and transparent with its residents about the cost and effects of its revitalization/beautification plans and should not hide any of those costs by shifting them to a public utility.

Reynoldsburg complains that the Commission erred in imposing the burden of proof on it with respect to its complaint case. (Merit Brief at 22.) It argues that the Commission should have presumed its ordinance to be valid and shifted the burden of proof to CSP, because CSP challenged the ordinance as unconstitutional. That argument misses the key point. The Commission never ruled on the constitutional issue in this case. Its Opinion and Order “addresses the reasonableness of CSP’s tariff provision and the ultimate implementation of the provision specific to Reynoldsburg based on the facts in this case.” Opinion at 23. As to such *factual* issues, Reynoldsburg properly bore the burden of proof because it was the party challenging the reasonableness of the tariff provision and its application to Reynoldsburg’s streetscape project. *Grossman v. Pub. Util. Comm.* (1966), 5 Ohio St.2d 189, 190, 214 N.E.2d 666. See, also, *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49, 50, 471 N.E.2d 475. (“[T]he burden is upon the complainant to establish inadequate service in a proceeding under R.C. 4905.26.” (citing *Grossman v. Pub. Util. Comm.*)); *Luntz Corp v. Pub. Util. Comm.* 79 Ohio St.3d at 513 (the complainant bears the burden of proving factual issues alleged in a complaint). It was particularly appropriate for Reynoldsburg to have the burden of proof in challenging the reasonableness of the CSP Tariff ¶17 in this case because ¶17 was added to the CSP Tariff in 1992 as part of CSP’s last general rate proceeding. The Commission had already determined in the *CSP Rate Case* that ¶17 was just and reasonable.

The record in this case contains sufficient, probative evidence as to the justness and reasonableness of CSP Tariff ¶17. The record before the Commission included the testimony of

CSP witness Forrester from the 1992 *CSP Rate Case*. Mr. Forrester explained the rationale for requiring municipalities to bear the costs of undergrounding when they require such special service to be undertaken.

Underground construction is considerably more costly than overhead construction. When a customer requests that service lines be installed underground, the customer is required to pay the cost difference. If a municipality requires the Company to install general distribution lines underground, the cost difference needs 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.\*\*\* This could mean that a customer in one city would be paying more because some other city requires underground construction.

(Direct Testimony of William R. Forrester at 7-8) (Jt. Ex. 1, Att. C) (CSP Supp. at 20-21.) The Staff agreed with the CSP's position in 1992; it recommended "that the additional cost to provide underground service to one municipality should not be borne by ratepayers in another municipality." (*CSP Rate Case*, Staff Report at 47-48) (Jt. Ex. 1, Att. D) (CSP Supp. at 24-25.) The Staff even expanded the Company's underground proposal to include private developers and property owners, as well as municipal and public authorities, who desire and require this special service.

The reasons supporting the Commission's 1992 decision to approve ¶17 are equally compelling today, as explained by CSP witness Dias.

The Tariff was proposed in order to recognize overhead line construction as the standard method for providing general distribution electric service and to address a more specific concern that a municipality or public authority could require CSP to build or relocate facilities underground and avoid paying for the higher costs of doing so. \* \* \* \* The cost of constructing underground facilities is higher than the cost of constructing those same facilities above ground. In proposing the Tariff, CSP did not find it appropriate that its customers should pay for the local decisions of a municipality and proposed the tariff (which was supplemented and approved by the Commission in its present form). Under the Tariff, the costs associated with ordering CSP to relocate its functioning electric distribution lines underground is a factor to consider by a municipality determining if the benefits of its decision outweigh the costs. CSP requested the Tariff to ensure that local

decisions were based on local considerations (including the cost impacts) and were not based on an opportunity to such costs associated with local decisions to CSP customers.

(Dias Testimony, CSP Ex.1 at 8-9.) (CSP Supp. at 91-92.)

Significantly, neither of Reynoldsburg's witnesses attempted to offer a reason why it would be just or reasonable for Reynoldsburg to force CSP's customers to pick up the cost of undergrounding CSP's distribution lines in Reynoldsburg so that the city may reap the benefits of its streetscape re-design. Nor did Reynoldsburg in its briefing below attempt to offer a counter-argument as to why shifting the costs to CSP was just and reasonable. In briefing, Reynoldsburg stood pat on its argument that CSP Tariff ¶17 was unreasonable because Reynoldsburg had the power to pass a conflicting ordinance. (Initial Post-Hearing Brief of City of Reynoldsburg at 23.) Thus, the Commission properly reaffirmed its 1992 decision that ¶17 is just and reasonable because CSP supported this conclusion with evidence and Reynoldsburg never offered any reason why the "cost-causer" principle was unjustly or unreasonably applied to it.

Reynoldsburg also alleges that 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 in that tariff." (Merit Brief at 23-24.) This alleged "error" has no merit. While the Commission noted that Reynoldsburg could have intervened in the 1992 *CSP Rate Case* but did not, Opinion at 14, its observation did not affect its decision as to the merits of Reynoldsburg's position. Opinion at 28-31 (Findings of Fact and Conclusions of Law). The Commission did not conclude that Reynoldsburg "waived its right to bring a subsequent complaint case." (Merit Brief at 23.) The Commission did not conclude that Reynoldsburg "forfeit[ed] the right to challenge CSP's tariff by not intervening in CSP's tariff case." (Id. at 24.)

It certainly did find, as Reynoldsburg suggests, “that CSP's tariff is just, reasonable and lawful because Reynoldsburg did not intervene in CSP's tariff case.” (Id.) The Commission allowed Reynoldsburg to pursue its complaint to the fullest extent. Reynoldsburg is complaining about findings that were never found, conclusions that were never drawn, and an error that simply did not happen.

***Proposition of Law No. 3.***

**The Public Utilities Commission of Ohio's finding that ¶17 of the CSP Tariff required Reynoldsburg to pay the full cost of relocating CSP's general distribution lines from above ground to the underground duct is fully supported by the record and was a lawful exercise of the Commission's authority to regulate the rates and charges for electric distribution service.**

Reynoldsburg challenges the Commission's findings that CSP ¶17 applies to the Phase II relocation of CSP's distribution lines from above ground to underground and that it required Reynoldsburg to pay the full costs associated with such undergrounding. (Merit Brief at 25-28.) The Commission fully explained its reasoning for both of these purely factual findings related to proper interpretation and application of CSP Tariff ¶17 and supported its findings with appropriate citations to the record. Opinion at 12-13 and 24-25. The Commission's findings may not be disturbed unless it appears from the record that such finding and order are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show a misapprehension or mistake or willful disregard of duty. *Magnesia Specialties v. Pub. Util. Comm.*, 129 Ohio St.3d at 489, ¶ 20. They should not be disturbed because they are fully supported by the record in this case.

**A. The record fully supports the Commission's finding that ¶17 applies here.**

Reynoldsburg's claim that the Tariff does not apply is implausible and ignores the plain language of CSP Tariff ¶17. Reynoldsburg agreed as part of the factual stipulation in this case

that: “The Phase II Project required that all utilities in the City's Main Street right-of-way be placed underground.” (Jt. Ex. 1, ¶16) (CSP Supp. at 4.) Reynoldsburg's claim that CSP was not required to relocate its lines underground, simply because it implicitly had the option of re-routing all of its lines out of the public right-of-way and onto private property, is disingenuous and the Commission made an express finding of fact that it was without merit. Its position is also severely undercut by its July 8, 2005 Order 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.” (Jt. Ex. 1, Att. I.) (CSP Supp. at 73.) The phrase “within the public right of way” describes the utility facilities to which the order is directed and cannot be reconciled to the City's strained interpretation that only facilities that CSP “voluntarily” kept in the right-of-way after being given a reasonable chance to relocate its facilities into private easements would need to move. The July 8 Order plainly triggered the application of ¶17.

The supposed option of moving overhead lines to private easements would not only render Reynoldsburg's multi-million dollar duct bank worthless but would also have wasted the City's substantial investment in underground electric service drops for each customer located along the corridor. (Jt. Ex. 1 at ¶23.) (CSP Supp. at 5.) The duct bank was referred to as the “AEP duct bank” by the City and all of the City's planning documents indicate the consistent expectation that the distribution lines would be moved underground. (Jt. Ex. 1 at ¶20) (CSP Supp. at 5.) Indeed, it was a stipulated fact 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.” (Jt. Ex. 1, ¶17) (CSP Supp. at 4.)

Relocating a few feet behind the public right-of-way was not a real option because it clearly conflicted with the manifest purpose of the City's beautification plan. The City's own

witness, the safety director in charge of the right-of-way and responsible for implementing Phase II, supported this fact testifying that both Phase I and Phase II “required” relocation of utility facilities underground. (Tr., at 22) (CSP Supp. at 117.)

The stipulated fact of record that is perhaps most compelling is found in the Community Development Block Grant Application the City submitted to Franklin County in October 2004. (Jt. Ex. 1, Att. G) (CSP Supp. at 64.) In this application, Reynoldsburg represented as an unqualified fact that “the existing overhead utilities will be removed and replaced underground” (Id. at 3a.) (CSP Supp. at 66.) The application also identified “a major problem is that of massive conflicting overhead wires which must be undergrounded in order for the City to proceed with, its comprehensive streetscape program for the same area.” (Id. at 3b.) Finally, Reynoldsburg made the following representation to Franklin County in order to obtain funds: “With the undertaking of this project, and with the financial assistance of CDBG funding, the massive overhead wires will be undergrounded into a concrete duct bank to be located along the northern curb line of Main Street....” (Id.) In each of these statements, Reynoldsburg made unqualified representations in order to obtain funding from Franklin County that the electric lines would be required to be relocated underground.

In any case, unless the City intended to cause a major extended service interruption for its residents, CSP would have needed more notice than a couple months if a meaningful option to relocate out of the right-of-way was truly contemplated. The July 8, 2005 Order gave CSP approximately 90 days of notice that its above-ground lines would need to be relocated to the underground vault. It would be a major and very expensive undertaking for CSP to acquire the private easements needed for such a significant re-routing of distribution lines, assuming hypothetically that it could be done through voluntary negotiations and condemnation

proceedings did not have to be initiated. Even if it were possible for CSP to acquire easements and plan the project, purchase needed materials and complete construction by three months, the price to be paid would be enormous once property owners understood that CSP was operating under such duress and unreasonable time constraints. Of course, if condemnation proceedings were needed (something that could not have been known or determined by the City when it issued its July 8 Order), it would clearly have been impossible to obtain private easements through condemnation in a couple months - let alone actually construct the re-routed lines after obtaining the easements. Thus, as the Commission found, it is completely implausible from a practical standpoint to suggest that Reynoldsburg contemplated that it was an option for CSP to relocate to private easements.

**B. The record fully supports the Commission's finding that Reynoldsburg must bear the full costs of relocation.**

Relying on a parenthetical statement in ¶17, Reynoldsburg argues that the Commission erred in interpreting ¶17 to mean that it must bear the full relocation costs here. Reynoldsburg asserts that even if ¶17 applies here, CSP can only charge a municipality requiring relocation of distribution facilities underground the incremental cost that exceeds standard construction costs. (Merit Brief at 26-27.) The parenthetical statement, however, must be read in conjunction with the entire paragraph and not, as Reynoldsburg suggests, in isolation. The second paragraph in ¶17 which sets forth specific definitions for the applicable charges, is controlling here. The first sentence provides that:

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.

(Jt. Ex. 1, Att. A) (CSP Supp. at 7.) (Emphasis added.)

Specific definitions of the core terms are contained in the second sentence and this structure highlights the inherent flaw of Reynoldsburg's argument. Under the tariff language, the *cost of any change* from the first sentence is defined as “the cost to the Company of such change.” (Id.) Thus, the tariff clearly provides that the entire cost of changing from existing overhead lines to underground is what must be paid by the municipality. That approach makes sense because the existing lines are functioning and the costs for standard construction would be reflected in due course as part of the Company's distribution rates. By contrast, it makes no sense to conclude that CSP would deduct from the cost the original cost of standard construction of the line – that would obviously leave CSP short on recovering costs incurred solely as a result of Reynoldsburg's Ordinance.

Reynoldsburg completely ignores the definition of the core terms in the second sentence and third sentences of the tariff making its interpretation of the tariff nonsensical. The third sentence in the paragraph is the only place in the tariff where an incremental cost concept is introduced and it only applies to the “cost of special construction” highlighted by the first sentence, not relocation. The parenthetical in the first sentence is a modifier to both options only because the two conditions could exist in tandem.

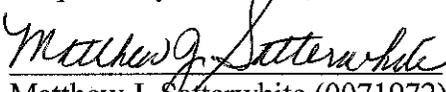
The Commission's interpretation also makes sense because the whole purpose of the provision is to establish overhead facilities as the standard form of service and require the municipality to pay for the additional costs caused by a requirement to relocate underground. CSP already built standard facilities in Reynoldsburg and the existing distribution lines were fully functional. As the second sentence provides, the cost of any change to relocate facilities underground is “the cost to the Company of such change.” That is precisely what CSP charged

Reynoldsburg. Thus, in addition to being unfair and illogical, Reynoldsburg's strained interpretation has no basis in the tariff language and conflicts with the stated purpose for which the tariff was adopted. The second and third sentences govern the applicable charge and, with respect to relocating existing overhead lines to underground, the Tariff plainly provides for recovery of the full relocation cost from the municipality or public authority imposing the underground requirement.

### CONCLUSION

The Court should affirm the Commission's findings as they are fully supported by the record. It should also hold that a municipality's home rule powers cannot be invoked to negate a lawful order of the Public Utilities Commission of Ohio approving the rates and charges a public utility may impose for its electric distribution service. The Order in this case is just and reasonable because it properly balances the city's right to regulate its rights-of-way with the Commission's right to establish rates and charges for utility service. Reynoldsburg's position seeks to give municipalities free reign to shift to public utilities and their customers the costs associated with municipal beautification or revitalization projects. That result clearly violates the core ratemaking principles and would "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 ratepayers as a whole." Entry on Rehearing at 6, ¶10.

Respectfully submitted,

  
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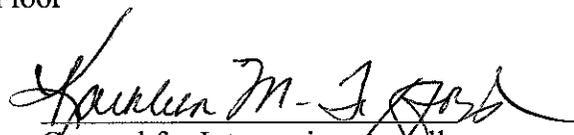
### CERTIFICATE OF SERVICE

The Undersigned counsel certifies that a copy of the foregoing Merit Brief of the Columbus Southern Power Company was served by regular U.S. Mail, postage pre-paid on the following counsel of record this 23<sup>rd</sup> day of November, 2011:

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# APPENDIX

Ohio Const. Art. XVIII, § 3 .....	2
Ohio Rev. Code § 1.48.....	2
Ohio Rev. Code §723.01.....	2
Ohio Rev. Code § 4905.22.....	3
Ohio Rev. Code § 4905.26.....	3
Ohio Rev. Code § 4905.30.....	4
Ohio Rev. Code §4905.65.....	4
Ohio Rev. Code § 4939.01.....	5
Ohio Rev. Code § 4939.07.....	6

**Ohio Constitution, Art. XVIII, § 3**

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.

**Ohio Rev. Code § 1.48**

A statute is presumed to be prospective in its operation unless expressly made retrospective.

**Ohio Rev. Code § 723.01**

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.

**Ohio Rev. Code § 4905.22**

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.

**Ohio Rev. Code § 4905.26**

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 Rev. Code § 4905.30**

(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.

### **Ohio Rev. Code § 4905.65**

(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.

### **Ohio Rev. Code § 4939.01**

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.

#### **Ohio Rev. Code § 4939.07**

(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.