

**IN THE SUPREME COURT OF OHIO**

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

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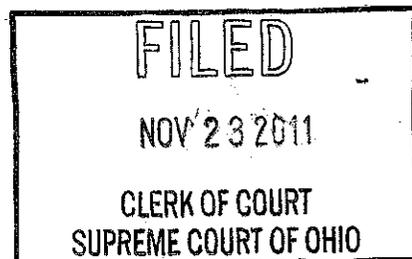
**BRIEF OF AMICUS CURIAE, DUKE ENERGY OHIO, INC.,  
IN SUPPORT OF APPELLEE**

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**INTRODUCTION**

Duke Energy Ohio, Inc., (Duke Energy Ohio) is an Ohio corporation engaged in the business of supplying electric transmission, distribution, and generation service in Adams, Brown, Butler, Clinton, Clermont, Hamilton, Montgomery, and Warren Counties in southwestern Ohio to approximately 660,000 consumers, and supplying electric transmission and distribution service to approximately 210,000 customers who receive generation service from competitive retail electric service providers. Duke Energy Ohio is a “public utility,” as defined by R.C. 4905.02 and 4905.03, subject to regulation by Appellee, the Public Utilities Commission of Ohio (Commission), and provides electric service pursuant to tariffs approved by the Commission. Relevant to this appeal, Duke Energy Ohio operates pursuant to a Commission-approved tariff similar to that at issue herein

as Duke Energy Ohio's tariff also requires a municipality to incur the additional costs associated with special construction, *e.g.*, placing distribution utility facilities underground.<sup>1</sup>

Duke Energy Ohio and its customers will be affected by the Supreme Court of Ohio's decision in this appeal. More specifically, if the Commission's Opinion and Order is reversed, Duke Energy Ohio would be forced to incur additional and non-standard costs for beautification in one of the many municipalities in which it provides service and thereafter seek recovery of these additional costs from all of its customers. Such an outcome would significantly alter traditional ratemaking principles by obligating ratepayers to pay for municipality specific improvements that are not necessary for the provision of adequate service and from which those ratepayers will not benefit. And, importantly, reversal of the Commission's Opinion and Order would undeniably encourage all municipalities to initiate costly beautification projects, with the expectation that such costs would not be borne by that municipality, but instead from all customers of a public utility. Furthermore, a reversal of the Commission's Opinion and Order would severely undermine the Commission's exclusive, initial jurisdiction over the services, rates, and charges of public utilities. Indeed, if a municipality can successfully rely upon the Home Rule Amendments to dictate cost recovery for utility facility relocation, could it similarly invoke the Home Rule in dictating the manner in which a public utility must provide – and recover for – other services?

Duke Energy Ohio acknowledges the right of a municipality to engage in self-government and the Commission's Opinion and Order does not infringe upon that right. But Duke Energy Ohio submits that a municipality's exercise of self-government does not extend to matters that impact

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<sup>1</sup> P.U.C.O. Electric No. 19, Sheet No. 23.3, pg. 2. Tariff approved in PUCO Case No. 08-709-EL-AIR (July 8, 2009).

persons residing beyond its boundaries. Consequently, Duke Energy Ohio supports the position taken by the Commission and thus respectfully requests that the Court affirm the Commission's Opinion and Order.

### STATEMENT OF FACTS

Duke Energy Ohio defers to the Statement of Facts as set forth in the merit briefs of Appellant, the City of Reynoldsburg (Reynoldsburg), the Commission, and Intervening Appellee, Columbus Southern Power.

### ARGUMENT

Duke Energy Ohio addresses below the arguments related to the statutory interpretations made by the Commission, as identified in Reynoldsburg's first two propositions of law. These issues have implications across the state and thus aptly identify Duke Energy Ohio's interest herein. Duke Energy Ohio takes no position on the evidentiary record below insofar as it concerns facts specific to Reynoldsburg's underlying complaint and thus declines to address its remaining arguments on appeal.

#### **Proposition of Law No. I**

#### **The Commission's Opinion and Order Upholding Paragraph 17 of Columbus Southern Power's Tariff Does Not Violate Section 3, Article VXIII of the Ohio Constitution.**

Succinctly stated, the central issue on appeal is whether Reynoldsburg has the power, under the Home Rule Amendments of Ohio's Constitution, to implement a beautification ordinance that, if applied, will increase the costs of utility regulation for individuals located outside of its territorial limits. As discussed herein, the Commission did not run afoul of the state's Constitution in approving the enforceability of CSP's tariff, which requires a municipality to assume the costs

associated with relocating overhead utility facilities to an underground installation. Rather, it was Reynoldsburg that attempted to improperly regulate the services and rates of a public utility through a local ordinance, thereby contravening well settled law in Ohio. The state's Home Rule Amendment does not justify Reynoldsburg's inappropriate regulation of a public utility.

It is axiomatic that "Ohio cities have only such powers as are conferred upon them, either directly by the Constitution or by the Legislature under the authority of the Constitution."<sup>2</sup> As set forth in Section 7, Article XVIII of the state's Constitution, "a municipality is free to adopt its own form of government."<sup>3</sup> As this Court has summarized:

[A]ny municipality may, through the adoption of a charter, enact legislation specifically designed to address the needs and desires of its residents. A municipality that chooses to adopt a charter does so in order to manage its own purely local affairs without interference from the state, with the understanding that those local laws will not conflict with the constitution and general laws.<sup>4</sup>

As the Court's comments confirm, the Constitution does not confer extra-territorial authority upon a municipality.<sup>5</sup> Similarly, the Home Rule Amendment, set forth in Section 3, Article XVIII of the Constitution, clearly establishes that a municipality's authority is restricted to matters that are purely local in nature. Under the Home Rule Amendments, municipalities are authorized "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."<sup>6</sup>

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<sup>2</sup> *Kligler v City of Elyria*, 2 Ohio App.2d 181, 185, 207 N.E.2d 389 (Lorain Cty. 1965).

<sup>3</sup> *Rispo Realty & Development Co. v. City of Parma*, (1990), 55 Ohio St.3d 101, 102, 564 N.E.2d 425.

<sup>4</sup> *Id.*

<sup>5</sup> See also, *Kligler*, 2 Ohio App.2d at 185; *Tatco Development, Ltd. v. City of Oakwood*, 2001 Ohio App. LEXIS 74, \*16 (Montgomery Cty. 2001)("the provisions of [Article XVIII] do not confer extraterritorial authority" upon a municipality), citing, *Prudential Co-Op Realty Co. v. City of Youngstown*, (1928), 118 Ohio St. 204, 207, 160 N.E. 695.

<sup>6</sup> *Mendenhall v. City of Akron*, 117 Ohio St.3d 33, 2008 Ohio 270, ¶16, 881 N.E.2d 255. See also, *Fondessy Enterprises, Inc., v. City of Oregon*, (1986), 23 Ohio St.3d 213, 215, 492 N.E.2d 797 ("the Constitution grants

The ordinance at issue is not properly limited to Reynoldsburg's purely local affairs; nor does it narrowly address the needs and desires of the residents of Reynoldsburg. Rather, the ordinance extends beyond the boundaries of Reynoldsburg as it is an express attempt to regulate the rates and charges of a public utility, without regard to a Commission order. Indeed, the undeniable consequence of the ordinance is that it compels a public utility to seek recovery, from all of its customers, of the additional costs incurred in providing enhanced utility service in an isolated location of its service territory. The ordinance is not limited to the right of Reynoldsburg to control the occupancy and maintenance of its rights-of-way. The critical – and undisputed – element of the ordinance is its impermissible allocation, to all of CSP's customers, of utility relocation costs associated with the services provided by CSP.<sup>7</sup> Neither the state's Constitution nor the legislature empowered any municipality to declare, by local ordinance, how a public utility recovers for the utility services that it provides under the regulatory scheme codified in Title 49 of the Revised Code.

As the ordinance is not limited to self-government within the boundaries of a municipality, the question then becomes whether it is a police, sanitary, or similar regulation intended to be enforced within Reynoldsburg that does not conflict with a general law. It is undeniable that a state statute will take precedence over a local ordinance and the Court has established a three-part test to ascertain whether a municipality has exceeded its powers, with the relevant considerations being “whether (1) the ordinance is an exercise of the police power, rather than local self-government, (2)

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municipalities the power “to adopt and enforce *within their limits* such local police, sanitary and other similar regulations, as are not in conflict with general laws”)(emphasis added).

<sup>7</sup> See Appellant, Reynoldsburg's Merit Brief, at pp. 11-12 (Oct. 4, 2011). See also, Appellant's Merit Brief, at pp. 9-10 and the cases cited therein, which do not equate a municipality's act of shifting costs to non-residents with a municipality's valid regulation of its public ways.

the statute is a general law, and (3) the ordinance is in conflict with the statute.”<sup>8</sup> In applying this three-part test, the Court has further instructed:

The first part of the test relates to the ordinance. As we have held, “if an allegedly conflicting city ordinance relates *solely* to self-government, the analysis stops, because the Constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.” If, on the other hand, the ordinance pertains to “local police, sanitary and other similar regulations,” Section 3, Article XVIII, Ohio Constitution, the municipality has exceeded its home rule authority only if the ordinance is in conflict with a general state law. If that ordinance does not relate to local self-government, the second part of the test examines the state statute to determine whether it is a general law. If the statute is not a general law, the ordinance will not be invalidated. Only when the municipality has not exercised a power of self-government and when a general state law exists do we finally consider the third part of the test, whether the ordinance is in conflict with the general law.<sup>9</sup>

Significantly, the ordinance cannot be enforced within the limits of Reynoldsburg. Rather, as discussed above, carrying the ordinance to its logical conclusion requires CSP to seek recovery from all of its customers for the costs associated with non-standard installations intended to beautify one area. But should the Court find the ordinance to be an exercise of police power, it remains that Reynoldsburg cannot invoke the Home Rule Amendment to render CSP’s tariff a nullity and the Commission’s Opinion and Order erroneous, as doing so would conflict with general law.

General laws operate uniformly throughout the state, prescribe a rule of conduct upon citizens generally, and operate with uniform application throughout the state under the same circumstances and conditions. As Reynoldsburg concedes, the consideration is whether its ordinance permits or licenses “anything forbidden under any Ohio statute.”<sup>10</sup> Here, the ordinance

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<sup>8</sup> *Id.*, 2008 Ohio at ¶17.

<sup>9</sup> *Id.*, 2008 Ohio at ¶18. (Emphasis added.)

<sup>10</sup> *City of Reynoldsburg v. The Public Utilities Commission of Ohio*, Case No. 11-1274, Appeal from PUCO Case No. 08-846-EL-CSS, Merit Brief of Appellant, City of Reynoldsburg, Ohio, at pg. 13.

impermissibly seeks to instill in one municipality the authority to determine the rates and charges of a public utility, in contravention of the firmly established precedent on this issue.

Title 49 of the Revised Code sets forth the statutory basis for utility regulation. And in connection therewith, the Commission is vested with exclusive, initial jurisdiction to administer and enforce the provisions of Title 49. Importantly, the Commission is “vested with the power and jurisdiction to supervise and regulate public utilities..., [and] to require all public utilities to furnish their products and render all services exacted by the commission or by law... .”<sup>11</sup> The Commission’s jurisdiction extends to the plant or property of every public utility that lies within the state.<sup>12</sup>

It cannot be disputed here that the Commission has exclusive jurisdiction over the services provided and rates charged by public utilities.<sup>13</sup> Indeed, in the prior appeal involving the underlying dispute, the Court reiterated the exclusive jurisdiction of the Commission in respect of the administration and enforcement of Title 49 of the Revised Code. Significantly, in confirming the scope of the Commission’s jurisdiction, the Court found that:

Judge Fais found incorrectly that the issue of payment of the costs to relocate overhead electrical lines in a Reynoldsburg right of way to the underground did not involve rates, charges, or any service. These costs are included in the rates and charges for services broadly defined in the pertinent statutes that are within the exclusive jurisdiction of the commission. R.C. 4905.22 provides, “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,

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<sup>11</sup> R.C. 4905.04.

<sup>12</sup> *Id.*

<sup>13</sup> *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, (1991), 61 Ohio St.3d 147, 151, 573 N.E.2d 655. See also, *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas*, 97 Ohio St. 3d 69, 2002 Ohio 5312, ¶ 18, 776 N.E.2d 92.

or in connection with, any service, or in the excess of that allowed by law or by order of the commission.”<sup>14</sup>

Through the exercise of its exclusive jurisdiction, the Commission approved a tariff that dictates how, and from whom, a public utility will recover the costs it incurs in providing just and reasonable services. Said tariff further establishes cost recovery when the services sought to be provided reflect an enhancement of the necessary and adequate services customarily provided by the utility. More specifically, the approved tariff establishes cost recovery for relocating overhead electric distribution systems to underground installations. This tariff, applicable to all of CSP’s jurisdictional customers, cannot be negated by one municipality’s ordinance that can only be enforced through the municipality’s impermissible avoidance of costs. Reynoldsburg’s ordinance cannot lawfully seek to impose restriction on how a public utility recovers its costs incurred in providing services regulated by the Commission. Consequently, the legality and enforceability of the tariff is not in dispute; nor is the Commission’s exclusive right to resolve issues related to the charges and rates of a public utility. And as demonstrated herein, Ohio’s Home Rule Amendment does not provide Reynoldsburg with an exception from well settled precedent such that it can now dictate the rates, charges, and services of a public utility.

**Proposition of Law No. II**

**Paragraph 17 of Columbus Southern Power’s Tariff Does Not Contravene Reynoldsburg’s Statutory Authority to Govern its Public Rights-of-Way Pursuant to R.C. 4939.01, et seq., R.C. 723.01, and R.C. 4905.65.**

The Commission’s Opinion and Order does not prejudice Reynoldsburg in its governance of the public rights-of-way located within its boundaries. Indeed, Reynoldsburg continues to have the

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<sup>14</sup> *State ex rel. Columbus Southern Power Company v. Fais*, 117 Ohio St.3d 340, 2008 Ohio 849, ¶20, 884 N.E.2d 1.

specific authority granted it by the state's Constitution or the legislature to pass those lawful ordinances necessary to address the needs and concerns of its residents. Notably, however, R.C. 4939.01, *et seq.*, does not vest a municipality, in the regulation of its rights-of-way, with the right to avoid the costs of burying utility facilities in contravention of a Commission-approved tariff or Commission order. Rather, the only fees or costs contemplated for consideration by a municipality in controlling its rights-of-way under R.C. 4939.01, *et seq.* are those public fees incurred by the municipality in connection with the use and occupancy of its public ways. The Commission's Opinion and Order does not compromise Reynoldsburg's ability to establish fair or reasonable terms and conditions for the use of rights-of-way by public utilities in providing utility service to the residents of Reynoldsburg. Nor does the Commission's Opinion and Order prevent Reynoldsburg from recovering its costs in administering a lawful right-of-way ordinance. But the Opinion and Order properly restricts Reynoldsburg's apparent desire to regulate the rates and charges of a public utility and the manner in which said rates and charges will be recovered.

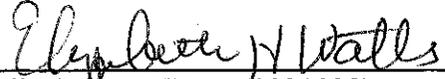
Similarly, the Commission's Opinion and Order does not infringe upon Reynoldsburg's authority under R.C. 4905.65 regarding the construction of utility facilities within its territories, subject to the exceptions serving to restrict that authority as set forth in R.C. 4905.65(B), or its authority under R.C. 723.01 to properly regulate the use of its streets. But here, Reynoldsburg exceeded the permissible scope of the Home Rule Amendments by enacting an ordinance that is not limited to local self-government and can only be enforced by unduly burdening all of a public utility's ratepayers, without regard to the orders of the Commission.

## CONCLUSION

The Commission's Opinion and Order properly allows for the provision of adequate and non-discriminatory utility service at rates that are fair, just, and reasonable. Further, it does not violate the Home Rule Amendment or run afoul of constitutional considerations as the regulation of a public utility is not within the jurisdiction of any municipality in the state of Ohio. Rather, the Opinion and Order upholds an approved tariff – applicable to all jurisdictional customers of Columbus Southern Power – that controls the manner in which charges associated with certain utility services will be recovered and from whom. To overturn the Commission's Opinion and Order will improperly expand the Home Rule Amendments of the state's Constitution and undermine the Commission's regulation of public utilities as municipalities would be empowered to enact ordinances without regard to whether they are limited to specific issues of self-government or the lawful exercise of police powers.

Duke Energy Ohio thus respectfully requests that the Court affirm Appellee, The Public Utility Commission of Ohio's Opinion and Order serving to affirm the enforceability of Intervening Appellee, Columbus Southern Power Company's tariff and the responsibility of a municipality to assume the costs associated with beautification projects specific to its territorial boundaries.

Respectfully submitted,



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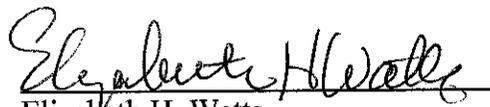
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