

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

BRIEF OF AMICUS CURIAE OHIO RURAL ELECTRIC COOPERATIVES, INC.

Scott A. Campbell (0064974),  
 Counsel of Record  
 Kurt P. Helfrich (0068017)  
 Michael L. Dillard (0083907)  
 THOMPSON HINE LLP  
 41 South High Street, Suite 1700  
 Columbus, Ohio 43215  
 (614) 469-3200  
 (614) 469- 3361 – Facsimile  
 Email: Scott.Campbell@ThompsonHine.com  
 Email: Kurt.Helfrich@ThompsonHine.com  
 Email: Michael.Dillard@ThompsonHine.com  
*Attorneys for Amicus Curiae*  
*Ohio Rural Electric Cooperatives, Inc.*

James E. Hood (0076789)  
 City Attorney  
 City of Reynoldsburg  
 7232 East Main Street  
 Reynoldsburg, OH 43068  
 (614) 322-6803  
 (614) 322-6874 – Facsimile  
 Email: jhood@ci.reynoldsburg.oh.us  
 COUNSEL FOR APPELLANT  
 REYNOLDSBURG, OHIO

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John W. Bentine (006388)  
 Mark S. Yurick (0039176), Counsel of Record  
 Jason H. Beehler (0085337)  
 CHESTER, WILLCOX AND SAXBE, LLP  
 65 East State Street, Suite 1000  
 Columbus, OH 43215-3413  
 (614) 221-4000  
 (614) 221-4012 – Facsimile  
 Email: jbentine@cwslaw.com  
 Email: myurick@cwslaw.com  
 Email: jbeehler@cwslaw.com  
 COUNSEL FOR APPELLANT,  
 CITY OF REYNOLDSBURG, OHIO

Matthew J. Satterwhite (0071972), Counsel of  
 Record  
 Marilyn McConnell (0031190)  
 Steven T. Nourse (0046705)  
 American Electric Power Service Corporation  
 1 Riverside Plaza, 29th Floor  
 Columbus, OH 43215-2373  
 (614) 716-1606  
 (614) 716-2950 – Facsimile  
 Email: mjsatterwhite@aep.com  
 Email: mmccConnell@aep.com  
 Email: stnourse@aep.com  
 COUNSEL FOR INTERVENING  
 APPELLEE, COLUMBUS SOUTHERN  
 POWER COMPANY

Richard Michael DeWine (0009181)  
Attorney General of Ohio  
William L. Wright (0018010)  
Assistant Attorney General  
Chief, Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, OH 43215  
(614) 466-4395  
(614) 644-8764 – Facsimile  
Email: [william.wright@puc.state.oh.us](mailto:william.wright@puc.state.oh.us)  
COUNSEL FOR APPELLEE, THE PUBLIC  
UTILITIES COMMISSION OF OHIO

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## **I. Introduction**

Ohio Rural Electric Cooperatives, Inc. (“OREC”) respectfully submits this amicus curiae brief in support of Intervening Appellee Columbus Southern Power Company (“CSP”).

OREC’s interests as amicus will be limited to a discussion of the constitutional arguments. While Reynoldsburg insists that its ordinance requiring removal of existing electric utility facilities is an exercise of “local self-government” and therefore purportedly immune from judicial review, the reality is that the ordinance is a classic exercise of Reynoldsburg’s police power. Among other problems, it would require the abandonment of existing utility facilities, it would impose upon non-citizens the costs of benefits which flow only to city residents, and by purporting to allocate costs within the utility rate base, it would invade the domain of public utility ratemaking that has always been within the exclusive province of the Public Utilities Commission of Ohio (“PUCO”). Regardless of the particular legal doctrine under which this dispute is considered, as a matter of Ohio law, the Home Rule Amendment to the Ohio Constitution only protects municipal regulations which are not in conflict with state law. Because the local ordinance at stake here is in such conflict, the Public Utilities Commission’s decision should be affirmed.

## **II. The Interests Of Ohio Rural Electric Cooperatives, Inc.**

OREC is a statewide association representing the interests of all twenty-five of Ohio’s electric distribution cooperatives. OREC’s distribution cooperative members are owned by the consumers whom they serve, and are operated on a non-profit basis. Collectively, OREC’s members provide electric service to their member-owners in seventy-seven of Ohio’s eighty-eight counties. Their respective certified service territories cover approximately 40% of this State, serving approximately 8% of Ohio residential and commercial consumers, via approximately 49,000 miles of electric distribution line. While many of the member-owners of

Ohio's electric distribution cooperatives live and work in rural areas of the state beyond municipal boundaries, their certified service territories include dozens of Ohio municipalities and many hundreds of miles of lines and associated facilities within those municipalities, much of which is installed overhead. Importantly, the cost to electric cooperatives of removing and replacing overhead electric service facilities within municipal boundaries with underground facilities, at approximately \$56,000 per mile, is nearly double the original-installation cost of overhead service, before accounting for the lost value of their stranded investment, *i.e.*, the losses inherent in removing in-service facilities before the conclusion of their natural service life.

### **III. Discussion**

OREC supports and concurs in the arguments made by CSP; as noted, OREC will focus its discussion herein on the constitutional issues presented, and in particular, the Home Rule Amendment to the Ohio Constitution (Section 3, Article XVIII, Ohio Constitution).

#### **A. Ohio Law Supports Access To Public Rights-Of-Way.**

##### **1. Ohio Law Provides For Utility Access To Public Rights-Of-Way As A Means To Ensure Reasonable Utility Rates.**

The Ohio General Assembly has consistently determined that public road rights-of-way should have multiple uses, and that those uses include location of utility company facilities within such rights-of-way. To that end, Ohio has declared that it is the public policy of the state to ensure, among other things, the provision of retail electric service at reasonable rates. *See, e.g.,* R.C. 4928.02(A). The legislature has further announced that it is the public policy of Ohio to provide utility companies with access to all public rights-of-way, declaring that “[i]t is the public policy of this state to do all of the following: \* \* \* Ensure that access to and occupancy or use of public ways advances the state policies specified in sections 4927.02 [regarding telephone service], 4928.02 [just cited *supra*], and 4929.02 [regarding natural gas service] of the Revised

Code.” R.C. 4939.02(A)(3) (emphasis added). Furthermore, R.C. 4939.04(A)(1) imposes upon municipalities a duty of access for utility companies: “A municipal corporation shall provide public utilities \* \* \* with open, comparable, nondiscriminatory, and competitively neutral access to its public ways.” Because private landowners can extract hostage payments for utility easements (thereby increasing costs of service overall), or can refuse to provide an easement altogether (forcing utility companies to reroute facilities at considerable expense), allowing utility companies to use public road rights-of-way is an important tool in achieving the stated policy of keeping utility rates reasonable.

## **2. Ohio Law Forbids Forced Abandonment Of Utility Facilities.**

A municipality may not effectively force a utility to abandon its electric facilities. R.C. 4905.20 provides that:

no public utility \* \* \* furnishing service or facilities within this state, shall abandon *or be required to abandon* or withdraw any \* \* \* main pipe line, gas line, electric light line, water line, sewer line, steam pipe line, or any portion thereof, pumping station, generating plant, power station, sewage treatment plant, or service station of a public utility, or the service rendered thereby that has once been laid, constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in section 4905.21 of the Revised Code [*i.e.*, except as application to do such is made to and granted by the P.U.C.O.]. \* \* \* (Emphasis added.)

## **3. Ohio Comprehensively Regulates Public Utility Rates.**

Ohio has a well-settled and comprehensive statutory scheme governing public utilities and all matters concerning their rates, which this Court restated and reaffirmed when the parties were last before the Court in this litigation:

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.

*State ex. rel. Columbus Southern Power Co. v. Fais*, 117 Ohio St.3d 340, 343, 2008-Ohio-849, at ¶ 18 (quoting, *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150).

**B. Reynoldsburg's Ordinance Conflicts With The Foregoing State Law And Policy.**

**1. Reynoldsburg's Ordinance Purports To Compel Abandonment Of Utility Facilities Which Are Already In Place.**

Reynoldsburg's ordinance, purporting to require an electric utility to remove existing facilities and replace them with new facilities underground, runs afoul of the foregoing state law. Specifically, the ordinance requires the replacement of *existing* facilities, in which CSP has substantial investment, with new underground service. In the utility industry, the "relocation" of facilities is not a matter of taking overhead facilities and dropping them into a trench dug for that purpose. Rather, it means installing new equipment, specifically manufactured for that different application, *i.e.*, underground service. Further, utility poles and the various fixtures installed thereon are unnecessary in an underground installation. Thus, those already-installed overhead facilities essentially become stranded capital investments, and are in practical effect forced to be "abandoned." Furthermore, in addition to its conflict with the code provisions which apply to facility abandonment, ordinances such as that at issue in this case increase capital costs, and thereby conflict with state policy to the effect that one important purpose of right-of-way access is to facilitate reasonable electric rates.

**2. Reynoldsburg's Ordinance Discriminates Against Non-Residents And Purports To Have Extraterritorial Effects By Imposing Costs Upon Non-Residents.**

If Reynoldsburg can require the removal of existing overhead utility facilities and the replacement of them with new underground facilities, all solely at the utility company's cost, then Reynoldsburg will have effectively imposed upon those outside of Reynoldsburg the costs of "improvements" that solely benefit the people of Reynoldsburg. Specifically, costs will increase for utility customers outside of Reynoldsburg, as the city simultaneously increases the utility's costs—by imposing new-equipment costs and forcing the utility to abandon valuable assets before the end of the life cycle of those assets—while also unilaterally defining the universe of those who may be made to bear the costs of such: the ratepayers throughout the utility's service territory.

If the Court were to rule for Reynoldsburg in this case, such precedent would likely inspire other municipalities, some undoubtedly much larger in population, to enact similar ordinances. In that event, more and more costs would be socialized across the respective utility companies' entire ratepaying consumer base, even though all of the purported benefits (almost entirely aesthetic) would inure exclusively to the citizens of those municipalities and not to any consumers in rural areas. The practical effect would be a substantial—and importantly, disproportionate—shift of utility service costs onto the non-municipal customers of those utilities. Such municipal ordinances would thereby discriminate against non-citizens in favor of their own residents. Further, by such enactments, those municipalities would purport to set a utility company's rates—something they may never do. *See, e.g., State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St.3d 447, 450-451. The public policy of Ohio, as pronounced by the legislature, is that regulatory control of public

utilities shall lie with the PUCO. *Id.* at 450. Indeed, the PUCO specifically discussed this danger of extraterritorial impact, which was critical to its conclusion on rehearing:

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

(Entry on Rehearing at 5; *see also id.* at Concurring Op. of Comm’r Centolella (“The City’s authority over public ways does not extend to insisting that the costs of local improvements be paid for by all CSP consumers or absorbed by the utility.”); *accord Fais*, 2008-Ohio-849, at ¶ 24 (“These 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).”))

One of the controls to be exclusively exercised by the PUCO is the setting of a public utility company’s rates. *Cleveland Elec. Illum.*, 88 Ohio St.3d at 450-451. But, here, by enacting its ordinance and demanding that utility companies pay for the removal of their old lines and reinstallation of new lines, and absorb the lost value of their abandoned facilities, all at the expense of all of their customers, Reynoldsburg attempts to usurp the PUCO’s exclusive power with respect to the setting of rates and the recovery of costs. Indeed, this Court recognized this conflict when it considered the first appeal in this case:

Judge Fais found incorrectly that the issue of the 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.

*Fais*, 2008-Ohio-849, at ¶ 20.

**C. In This Case The Municipal Ordinance Conflicts With The General Law.**

Reynoldsburg argues at the bottom of page 9 of its Merit Brief that a state statute takes precedence over a local ordinance or action when: (1) the ordinance is in conflict with the statute; (2) the ordinance is an exercise of the police power, rather than of local self-government; and (3) the statute is a general law. *See Ohio Assn. of Private Detective Agencies, Inc. v. North Olmsted* (1992), 65 Ohio St.3d 242, 244; *Marich v. Bob Bennett Construction Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, at ¶ 9 (same). OREC will assume that Reynoldsburg is correct as to that proposition of law in this section, and explain why even under that test, the Reynoldsburg ordinance fails.

**1. Regulation Of The Streets Is A Police Power, Not A Matter of Local Self-Government.**

While Reynoldsburg spends much of its brief insisting that its facility-removal ordinance is an exercise of “local self-government,” rather than an exercise of the police power, Ohio law is to the contrary.

Numerous Ohio cases stand for the proposition that a municipality’s regulation of its streets and rights-of-way by legislative action is an exercise of the municipality’s police power. *See, e.g., Tolliver v. Newark* (1945), 145 Ohio St. 517, 517, at syllabus, *overruled on other grounds by Frankhauser v. City of Mansfield* (1969), 19 Ohio St.2d 102, 102-103, syllabus (“The enactment and enforcement of a municipal ordinance which provides for the regulation of traffic upon the streets, involves the exercise of the police power . . . .”); *Columbus v. Webster* (1960), 170 Ohio St. 327 (a city has the right to regulate traffic pursuant to its police powers); *Leslie v. Toledo* (1981), 66 Ohio St.2d 488, 491 (identifying “several hazards which the city may lawfully regulate pursuant to its police powers: protection of pedestrians and drivers, regulation of traffic congestion and on-street parking, and reduction of air and noise pollution”); *State v. Parker*

(1994), 68 Ohio St.3d 283, 284-86 (analyzing a city ordinance regulating traffic as an exercise of the city's home rule police powers to determine whether it conflicted with general state law); *Marich*, 2008-Ohio-92, at ¶ 15 (finding that a municipality's ordinance, which regulated traffic on its public roads, was an exercise of the municipality's police power because it related to public health and safety); *City of Whitehall v. Moling* (10th Dist. 1987), 40 Ohio App.3d 66, 69 ("Under the police power, municipalities have broad discretion to regulate the use of streets and highways within their limits . . . .").

Although these cases were not decided in the context of utility companies, in each, the respective courts noted that when the stated purpose of local legislation is to regulate and bolster public safety in and around the public right-of-way, that regulation is an exercise of the municipality's police power. Based on this law, Reynoldsburg must admit that its facility-removal ordinance was an exercise of its police power, as the ordinance's stated purpose is to "stimulate economic development and to promote public safety." (See Merit Brief of Appellant City of Reynoldsburg, Ohio, filed October 4, 2011 (the "Merit Brief"), at 2, 5.) Therefore, the Court must consider whether the local ordinance conflicts with a general state law.

Because it is particularly recent, and concerns roadways, this Court's *Marich* decision merits further discussion. *Marich* first analyzed by which power the municipality passed the ordinance at issue (*i.e.*, local self-government or police power). *Id.* at ¶ 10. The Court explained that an ordinance passed under the power of local self-government must relate "solely to the government and administration of the internal affairs of the municipality." *Id.* at ¶ 11 (quoting, *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369). On the other hand, a municipality's police powers allow the municipality to regulate "only to protect the public health, safety, or morals, or the general welfare of the public." *Id.* (citing, *Downing v. Cook*

(1982), 69 Ohio St.2d 149, 150). Stopping right here, it becomes apparent that the passing of Reynoldsburg's right-of-way ordinance was an exercise of its police power, as it has nothing to do with the internal affairs and operations of the city's government. Indeed, as noted, Reynoldsburg admits as much when it describes the ordinance's stated purpose as promoting "public safety." (See Merit Brief at 2, 5.) The *Marich* Court marched through the types of activities, the regulation of which Ohio courts view as an exercise of police powers, including regulation of traffic by placement of stop signs, regulation of truck routes within a city, and a zoning ordinance regulating the accessibility of off-street parking because it was directed at the "protection of pedestrians and drivers, elimination of traffic congestion and reduction of air and noise pollution." *Marich*, 2008-Ohio-92, at ¶ 14. The Court concluded that the regulation of traffic is an exercise of police power that relates to public health and safety as well as the public's general welfare. *Id.* The *Marich* Court determined that since the ordinance regulated the traffic passing through the city, it was enacted to protect drivers and pedestrians. While OREC respectfully suggests that Reynoldsburg's right-of-way ordinance has little if anything to do with traffic and everything to do with municipal aesthetics and the physical appearance of the city's streetscapes, for purposes of this argument Reynoldsburg will be taken at its word. On that basis alone, the ordinance at issue here was indeed passed pursuant to the city's police power—and would therefore be considered invalid if it conflicts with the general law of Ohio. See *Marich*, 2008-Ohio-92, at ¶ 15.

## **2. There Is A General Statute Regulating The Same Subject Matter.**

The *Marich* Court proceeded next to analyze the third element of the conflicts test: whether Ohio had a general law covering the subject matter of the ordinance. 2008-Ohio-92, at ¶ 16. To decide whether a law is general for the purposes of the home rule analysis, the law must:

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

*Id.* (citing, *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, at syllabus).

In the case at bar, Ohio statutes exist which regulate the same matter which the Reynoldsburg ordinance purports to regulate, *i.e.*, the provision of utility services. First, R.C. 4928.02 and R.C. 4939.02 announce that it is the statewide public policy of Ohio to encourage municipalities to provide utility companies with open access to all municipal rights-of-way, and to encourage the provision of electric service at affordable rates. Second, as discussed above, and in connection with *State ex rel. Klapp v. Dayton Power & Light Co.*, *infra*, R.C. 4905.20, which prevents municipalities from forcing utilities to abandon their instrumentalities, has been construed as a general Ohio law. Finally, the matter of public utility rates is subject to statewide regulation, and indeed the PUCO has been endowed with exclusive statewide jurisdiction over all matters that concern public utility rates to consumers and the recovery of the cost of service to those consumers. *See, e.g., Fais*, 2008-Ohio-849, at ¶ 18 (quoted *supra*); *State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas* (2000), 88 Ohio St.3d 447, 450 (“There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility [which are regulated by the PUCO].”).

**3. There Is A Clear Conflict Between The Reynoldsburg Ordinance And Ohio Law.**

In *Marich*, the Court analyzed the first element of the conflicts test last: whether a conflict existed as between the general state law and the local ordinance. *Marich*, 2008-Ohio-92, at ¶ 30. To decide whether a conflict exists, a court must decide “whether the ordinance permits

or licenses that which the statute forbids and prohibits, and vice versa.” *Id.* (quoting, *Struthers v. Sokol* (1923), 108 Ohio St. 263, at syllabus). The *Marich* Court determined that since the state statute mandated a permit in all cases in which a truck’s load exceeded certain width requirements, and the ordinance at issue eliminated the need for such a permit when traveling certain roads, the conflict was evident and the first element was satisfied. *Id.* at ¶¶ 31-35. Having met all elements of the conflicts test, the Court found that the ordinance was void. *Id.* at ¶ 35.

In the case at bar, the outcome is the same. First, Ohio law protects utilities from being forced to abandon facilities. Reynoldsburg would force the abandonment without compensation of all overhead facilities in the city. Second, Ohio law codifies right-of-way access and prohibits a municipality from discrimination in providing access to its rights-of-way. Reynoldsburg would eject existing utility facilities and allow reinstallation only upon the condition that new facilities be relocated underground. Third, Ohio law reposes in the PUCO the exclusive authority to review and approve public utility rates, and the manner in which the costs of public utility service are distributed across the base of public utility consumers. Reynoldsburg, under the guise of “home rule,” would enable municipalities to reengineer that long-settled authority, by effectively empowering the cities to decide who should have to pay for municipally-imposed costs whose benefits flow only to the municipality’s residents—and more importantly, who should not have to pay. Because Reynoldsburg’s ordinance conflicts with these general statutes, it is void notwithstanding Reynoldsburg’s Home Rule Amendment powers.

**D. Reynoldsburg Misreads *Kettering v. State Employment Relations Board***

At page 11 of its Merit Brief, Reynoldsburg cites *City of Kettering v. State Employment Relations Board* (1986), 26 Ohio St.3d 50, 54, for the proposition that “[w]hether or not a regulation falls in the area of local self-government is determined by examining ‘if the regulation

of the subject matter affects the general public of the state as a whole more than it does the local inhabitants \* \* \*.” (See Merit Brief at 11 (quoting, *Kettering*.)

This is not the “test” for whether or not a regulation falls within the area of local self-government. *Kettering* holds that even if the enactment was an exercise of local government power, such an exercise and enactment may still be subordinate to the exercise of a state’s police powers. *Kettering*, 26 Ohio St.3d at 53-54. As the Court explained, “the cities’ powers of local self-government are not completely unfettered. This Court has previously acknowledged that, in matters of statewide concern, municipal *powers of local self-government* may be subordinate to the exercise of the state’s police powers.” *Id.* at 53 (emphasis added) (citing, *Cleveland Elec. Illuminating Co. v. City of Painesville* (1968), 15 Ohio St.2d 125, 129). This is known as the “statewide concern” doctrine, *id.* at 54-55, and has nothing to do with determining whether a city’s enactment constitutes an exercise of its police power on the one hand or its local self-government power on the other hand. See *id.* Indeed, the appropriate test for making that determination is detailed above, and in the discussion of *Marich v. Bob Bennett Construction Co.* An ordinance passed under the power of local self government must relate “solely to the government and administration of the internal affairs of the municipality.” *Marich*, 2008-Ohio-92, at ¶ 11 (quoting, *Beachwood v. Cuyahoga Cty. Bd. of Elections* (1958), 167 Ohio St. 369). The ordinance here does not concern how the local government runs itself. Rather, it concerns what can and cannot be installed in city streets.

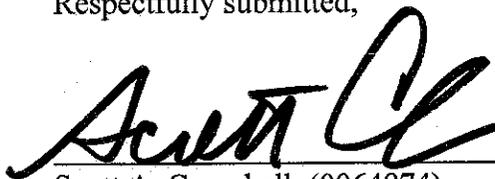
Though not couched in terms of this “statewide concern” doctrine, at least one decision of this Court has applied a state statute of general application to defeat a municipality’s local regulation which sought to force a power company to remove its wires and poles. In *State ex rel. Klapp v. Dayton Power & Light Co.* (1967), 10 Ohio St.2d 14, a charter municipality sought to

eject a power company's local electric lines from the municipality's public right-of-way. This Court concluded that R.C. 4905.20 and R.C. 4905.21 (prohibiting forced facility abandonment) were state statutes of general application which were passed pursuant to the state's police power, and as such the municipality's efforts to regulate in this area was an attempted circumvention of, and in direct conflict with, the state statutes. *Id.* at 17 ("Surely, statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations adopted in the exercise by a municipality of the powers of local self-government.") (citing, *Beacon Journal Publishing Co. v. City of Akron*, 3 Ohio St.2d 191, 195). *Klapp* thus supports the notion that regardless of whether a municipality's regulation is an exercise of its police power or of its local self-government function, the municipality's regulation must not directly conflict with a state statute of general application.

#### IV. Conclusion

For all of the foregoing reasons, and those advocated separately by CSP, OREC respectfully urges affirmance.

Respectfully submitted,



Scott A. Campbell (0064974)

Kurt P. Helfrich (0068017)

Michael L. Dillard (0083907)

THOMPSON HINE LLP

41 South High Street, Suite 1700

Columbus, OH 43215

(614) 469-3200

(614) 469-3361 – Facsimile

Email: [Scott.Campbell@ThompsonHine.com](mailto:Scott.Campbell@ThompsonHine.com)

Email: [Kurt.Helfrich@ThompsonHine.com](mailto:Kurt.Helfrich@ThompsonHine.com)

Email: [Michael.Dillard@ThompsonHine.com](mailto:Michael.Dillard@ThompsonHine.com)

*Attorneys for Amicus Curiae*

*Ohio Rural Electric Cooperatives, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing *Brief Of Amicus Curiae Ohio Rural Electric Cooperatives, Inc.* was served upon the following, via regular U.S. Mail, this 23d day of November, 2011:

John W. Bentine (006388)  
Mark S. Yurick (0039176), Counsel of Record  
Jason H. Beehler (0085337)  
CHESTER, WILLCOX AND SAXBE, LLP  
65 East State Street, Suite 1000  
Columbus, OH 43215-3413

COUNSEL FOR APPELLANT,  
CITY OF REYNOLDSBURG, OHIO

James E. Hood (0076789)  
City Attorney  
City of Reynoldsburg  
7232 East Main Street  
Reynoldsburg, OH 43068

COUNSEL FOR APPELLANT, CITY OF  
REYNOLDSBURG, OHIO

Matthew J. Satterwhite (0071972), Counsel of  
Record  
Marilyn McConnell (0031190)  
Steven T. Nourse (0046705)  
American Electric Power Service Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215-2373

COUNSEL FOR INTERVENING  
APPELLEE, COLUMBUS SOUTHERN  
POWER COMPANY

Richard Michael DeWine (0009181)  
Attorney General of Ohio  
William L. Wright (0018010)  
Assistant Attorney General  
Chief, Public Utilities Section  
180 East Broad Street, 9th Floor  
Columbus, OH 43215

COUNSEL FOR APPELLEE, THE PUBLIC  
UTILITIES COMMISSION OF OHIO

  
\_\_\_\_\_  
Scott A. Campbell (0064974)