

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.	:	

REPLY BRIEF OF APPELLANT CITY OF REYNOLDSBURG, OHIO

John W. Bentine (006388)
 Mark S. Yurick (0039176), Counsel of Record
 Jason H. Beehler (0085337)
 Chester Willcox & 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

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,
 CITY OF REYNOLDSBURG, OHIO

Kathleen M. Trafford (0021753)
 Porter Wright Morris & Arthur, LLP
 41 South High Street
 Columbus, OH 43215
 (614) 227-1915
 (614) 227-2100 – Facsimile
 Email: ktrafford@porterwright.com
 COUNSEL FOR INTERVENING-APPELLEE,
 COLUMBUS SOUTHERN POWER
 COMPANY

FILED
 DEC 20 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

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
COUNSEL FOR APPELLEE, THE PUBLIC
UTILITIES COMMISSION OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
A. Reynoldsburg Enacted Its Ordinance Pursuant to Its Powers of Local Self-Government, not Its Police Powers, and There is Therefore No Conflict With a General Law Under the Home Rule Analysis.	3
B. CSP’s Tariff is Not a Statute	7
1. CSP’s Tariff is Not Equivalent to a Statute Simply Because Title 49 Gives the Commission the Power to Approve Tariffs.	7
2. CSP’s Tariff Itself is Not a Statute.	9
C. Reynoldsburg’s Ordinance Does Not Infringe on the Commission’s Jurisdiction, and Therefore Does Not Conflict with a General Law.	11
D. The Traditional Common Law Right to Municipal Reimbursement of the Cost to Underground Utility Facilities Applies.	15
E. The Commission Erred in Finding that CSP’s Tariff Applies, and Erred in Applying the Tariff Language.	16
1. Reynoldsburg did not Require CSP to Relocate Its Utility Lines Underground, and the Commission Therefore Erred in Finding that CSP’s Tariff Applies.	17
2. The Tariff Language Requires that Municipalities Pay Only the Costs of Undergrounding that are In Excess of the Costs of Standard Construction.	19
CONCLUSION	20
CERTIFICATE OF SERVICE	21
APPENDIX	A - 1
4939.03 Prohibited conduct concerning public ways	A - 1
4939.06 Appeal of levy of public way fee	A - 1
4939.07 Application to recover fees and costs	A - 2
4905.04 Power to regulate public utilities and railroads.	A - 4

TABLE OF AUTHORITIES

Cases

<i>Allen v. General Tel. Co.</i> , 578 P.2d 1333 (1978).....	16
<i>Carlin Co. v. Hines</i> (1923), 107 Ohio St. 328, 329	9, 10
<i>City of Port Angeles v. Our Water-Our Choice!</i> , 239 P.3d 589, 596 n.7 (Washington 2010)	15
<i>Cleveland Elec. Illuminating Co. v. City of Painesville</i> (1968), 15 Ohio St.2d 125, 129	4, 6
<i>Dublin v. State</i> , 2002-Ohio-2431, ¶ 108	6
<i>General Telephone Co. of the Northwest v. Bothell</i> , 716 P.2d 879, 883 (Washington 1986) 15, 16	
<i>Grafton v. Ohio Edison Co.</i> (1996), 7 Ohio St.3d 102, 106-108	4
<i>Haning v. Pub. Util. Comm.</i> (1999), 86 Ohio St.3d 121,125.....	10
<i>Kettering v. State Emp. Rel. Bd.</i> (1986), 26 Ohio St.3d 50	12
<i>Linndale v. State</i> (1999), 85 Ohio St.3d 52, 54.....	10
<i>Marich v. Bob Bennett</i> (2008), 116 Ohio St.3d 553	12
<i>Mendenhall v. City of Akron</i> (2008), 117 Ohio St.3d 33, 40	11
<i>Moore v. Pacific Northwest Bell</i> , 662 P.2d 398 (1983).....	15, 16
<i>Ohio Ass'n. of Private Detective Agencies v. North Olmstead</i> (1992), 65 Ohio St.3d 242.....	12
<i>Ohio Bell Tel. Co. v. PUCO</i> (1990), 49 Ohio St.3d 123, 128.....	18
<i>Peters Family Farm, Inc. v. Savings Bank</i> , Fourth Dist. No. 10CA2, 2011-Ohio-665, ¶ 12	15
<i>Reardon v. Hale</i> , Twelfth Dist. No. CA2006-09-105, 2007-Ohio-4351, ¶ 16	15
<i>Reynoldsburg v. Pub. Util. Comm.</i> , No. 11-1274	13
<i>State ex rel. Columbus S. Power Co. v. Fais</i> , 117 Ohio St.3d 340, 2008-Ohio-849	11
<i>Vorhees v. Jovingo</i> , Fourth Dist. No. 04CA16, 2005-Ohio-4948, ¶ 46.....	10

Statutes

R.C. 4939.01	14
R.C. 4939.02(A).....	14
R.C. 4939.03(C)(1)	5
R.C. 4939.06	13
R.C. 4939.07	13
R.C. 4939.07(B)(1)	13
R.C. 4939.07(B)(2)	14
R.C. 4939.07(B)(2)(b).....	14
Title 49 of the Revised Code	3, 7, 8, 11, 14, 15

Constitutional Provisions

Ohio Constitution, Article XVIII, Section 4.....	4
--	---

INTRODUCTION

In their briefs, the Public Utilities Commission of Ohio (“PUCO” or “Commission”) and Columbus Southern Power (“CSP”) (collectively “Appellees”) encourage this Court, based on highly suspect legal grounds, to create for private utility companies a private property right in public rights of way. The result of Appellees’ argument would be that, in order to make necessary municipal public improvements to public property, a municipality would have to purchase a new, Public Utilities Commission of Ohio-created property right in what has always been public property: the municipal right of way.

The outcome CSP advocates would be a radical departure from this Court's established Constitutional jurisprudence, not to mention a terrible public policy decision. Such an outcome would require any municipality needing to improve its public right of way to pay private utility companies located in that right of way, companies that pay little or nothing for such rights.¹ This would add untold hundreds of thousands, if not millions, of dollars to numerous municipal public improvement and economic development projects, ensuring that such projects die before they see the light of day. Municipalities² already burdened by the loss of state funds to local governments (Section 757.10, Am.Sub.H.B. 153) will find that necessary public improvements and economic development projects are unattainable.

Appellees’ argument is built upon a faulty premise: that the Reynoldsburg Right of Way Ordinance (“Ordinance”) somehow attempts to limit the jurisdiction of the Public Utilities Commission of Ohio. (PUCO’s Br. 17; CSP Br. 8). This contention is plainly false; it is an

¹ CSP pays a nominal annual fee of \$1,200 to Reynoldsburg for occupancy of the public right of way. (Compl., Ex. B.)

² Though it is municipal rights at issue in the present case, CSP’s tariff language also ostensibly applies to townships and counties. CSP Tariff ¶ 17 (tariff purports to apply to “municipality or other public authority”).

argument invented to obfuscate the fact that there is no general law with which Reynoldsburg's Ordinance conflicts. More importantly, even if CSP's tariff could somehow be considered a "statute," Reynoldsburg's Ordinance does not threaten the Commission's jurisdiction because R.C. 4939.07 expressly permits the precise type of cost recovery that CSP claims is unthinkable here.

Appellees more or less accurately state the applicable test under the Home Rule analysis. (CSP Br. 9, citing *City of Cleveland v. State*.) After stating the test, however, Appellees ignore it in favor of extraneous and erroneous arguments not important to this Court's determination of the Home Rule question. The Home Rule analysis is relatively straightforward, as is the conclusion it compels.

ARGUMENT

Appellees' argument that CSP is not responsible for the cost to underground its utility lines in the public right of way is misplaced for several reasons. First, Reynoldsburg's Ordinance is an exercise of the City's powers of local self-government, not an exercise of the police power, and so there can be no conflict with the "general laws." Second, the "statute" supposedly at issue is a tariff drafted by a private utility company and approved by the Commission, not a statute enacted by the General Assembly. Third, even if the Ordinance was enacted under the City's police powers, the Ordinance does not conflict with the only other "general law" that CSP alleges is at issue, Title 49 of the Revised Code. Furthermore, the traditional common law rule regarding the undergrounding of utility lines applies. Finally, if the Court finds that the tariff trumps the municipal ordinance in this matter, the Commission did not properly apply the language of the tariff.

A. Reynoldsburg Enacted Its Ordinance Pursuant to Its Powers of Local Self-Government, not Its Police Powers, and There is Therefore No Conflict With a General Law Under the Home Rule Analysis.

Reynoldsburg promulgated its Ordinance pursuant to its powers of local self-government. Appellees' claim that the Ordinance relates to the City's police powers rather than powers of local self-government is unpersuasive. The Commission claims that Reynoldsburg's Ordinance is an exercise of police power rather than local self-government because of its extra-territorial effect. (PUCO Br. 14.) The Commission further claims that an ordinance alleged to be an exercise of local self-government cannot have any extra-territorial effect (PUCO Br. 14, citing *Painesville*). *Painesville* does not say that an ordinance promulgated under a municipality's powers of local self-government can have no extra-territorial effect. What *Painesville* says is the following:

[I]f the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.

Cleveland Elec. Illuminating Co. v. City of Painesville (1968), 15 Ohio St.2d 125, 129.

The Ordinance does not impact the general public more than local inhabitants of Reynoldsburg. In fact, the Ordinance itself does not impact the general public at all. The disputed Ordinance states that its purpose is to regulate the use and occupancy of “all Rights-of-Way in the City.” (Reynoldsburg Codified Ordinance § 907.02(A)) (emphasis added). The portion of the Ordinance primarily at issue here, Section 907.06(A)(4), regulates only “Permittees,” which are defined by the Ordinance as any person permitted to “use or occupy all or a portion of the Rights-of-Way.” Reynoldsburg Codified Ordinance § 907.01(N). “Rights-of-Way” in turn is defined as those portions of the street and sidewalk “held by the City.” Reynoldsburg Codified Ordinance § 907.01(S). It is impossible for Reynoldsburg’s Ordinance, which regulates the use and occupancy of only those public rights of way that are under the City’s control, to impact the general public more than it impacts the inhabitants of Reynoldsburg.³

More importantly, any extra-territorial effect of Reynoldsburg’s Right-of-Way Ordinance is caused not by Reynoldsburg, but by CSP. Utility companies are tenants-at-sufferance in public rights of way. See, e.g., Section 4, Article XVIII, Ohio Constitution (giving municipalities the right to operate public utility); see also *Grafton v. Ohio Edison Co.* (1996), 7 Ohio St.3d 102, 106-108 (discussing the rights of municipalities and public utilities that serve

³ In response to CSP’s argument that the Ordinance has an impact on the general public, because ratepayers outside Reynoldsburg will pay the cost of undergrounding CSP lines in Reynoldsburg, Reynoldsburg again directs the Court’s attention to the fact that CSP’s own witness stated that, when spread across CSP’s service territory, this cost is “a rounding error.” Reynoldsburg Br. 12; Tr. 153:4-10.

their inhabitants). They have no inherent right to occupy public property, but rather may be permitted to do so by municipal regulation. R.C. 4939.03(C)(1) (“No person shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.”). CSP chooses to occupy the public right of way in Reynoldsburg to provide service, presumably because such occupancy is far less expensive and cumbersome than placing its utility lines in private rights of way. (CSP Br. 30) (relocating lines into private utility easements would be a “very expensive” undertaking). That is CSP’s choice. The fact that CSP chooses to operate in the public right of way, and would choose to pass along the cost of underground power lines to all ratepayers, does not invariably lead to the conclusion that Reynoldsburg’s Ordinance—which after all speaks of nothing but municipal control of access to public property entirely inside the city—has any extra-territorial effect.

The Commission further claims that the extra-territorial effect of Reynoldsburg’s Ordinance is too great because (if the Court finds the Ordinance valid) other municipalities will enact similar laws. (PUCO Br. 15.) This argument substitutes the collective extra-territorial effect of all ordinances (extant or not) with the supposed extra-territorial effect of Reynoldsburg’s Ordinance. The Commission provides no support for the proposition that the supposed extra-territorial effect of Reynoldsburg’s Ordinance should be evaluated by examining the effect of similar hypothetical regulations in the speculative aggregate. The case law properly focuses on any extra-territorial effects of the ordinance under examination, and not other similar possible ordinances to be enacted by hypothetical local authorities. To consider such hypothetical effects short-circuits the examination entirely, and puts Reynoldsburg’s Ordinance at the mercy of factors outside its control, and which may never exist.

Finally, the Commission claims that the Reynoldsburg Ordinance is a police regulation because it regulates electric transmission lines. (PUCO Br. 21, citing *Painesville*.) One look at the Reynoldsburg Ordinance makes clear that the Ordinance does not regulate transmission lines. It regulates municipal rights of way. The fact that regulation of public rights of way may impact one aspect of the location of transmission lines among a vast array of other infrastructure is not the same thing as regulating transmission lines. By contrast, the ordinance at issue in the *Painesville* case directly regulated transmission lines. *Cleveland Elec. Illuminating Co. v. Painesville* (1968), 15 Ohio St.2d 125, 126 (city ordinance required utilities to obtain a permit for the construction of transmission lines).

For its part, CSP claims that the Ordinance falls under Reynoldsburg's police powers, because regulation of public property is inherently an exercise of powers of local self-government, which includes police powers (CSP Br. 9, citing *Froelich*.) CSP's quote from *Froelich* is misleading. It does not mean that regulation of public property necessarily involves police powers. The quoted passage from *Froelich*, that powers of local self-government include police powers, is just another way of saying that powers of local self-government are broader in scope than police powers, and that the former is broad enough to include the latter. If CSP's position were correct, there would be no need for the Home Rule inquiry at all. Every exercise of the powers of local self-government would necessarily also be an exercise of the police power, and "powers of local self-government" would essentially cease to exist for purposes of Home Rule authority. See, e.g., *Dublin v. State*, 2002-Ohio-2431, ¶ 108 (noting that "almost any legislation concerning local matters will have at least some minor and/or indirect extraterritorial effect").

CSP states that the Ordinance’s purpose is to promote use of the right-of-way for public health, safety and welfare, and to promote public safety and protect public property. (CSP Br. 10.) But the portions of the Ordinance quoted by CSP do not state or represent the *purpose* of the Ordinance. Rather, both sections appear in the portion of the Ordinance describing the City’s *policy* with respect to public rights of way. Reynoldsburg Codified Ordinance § 907.02(D) (delineating “[t]he City’s policy regarding Rights-of-Way” and listing seven aspects of that policy). There is a section of the Ordinance that states its purpose. That section states:

The purpose of this Chapter is to provide for the regulation of the use or occupation [sic] of all Rights-of-Way in the City, the issuance of Right-of-Way permits to Persons for such use or occupancy and to set forth the policies of the City related thereto.

Reynoldsburg Codified Ordinance § 907.02(A).

Regulation of the public right-of-way is a matter of local self-government, for all of the reasons cited in Reynoldsburg’s Merit Brief. (Reynoldsburg Br. 8-13.) As a result, the first prong of the Home Rule analysis is not met, the Ordinance cannot conflict with a general law, and Reynoldsburg’s Ordinance is therefore valid under the Ohio Constitution.

B. CSP’s Tariff is Not a Statute

Even if the Ordinance was passed pursuant to Reynoldsburg’s police powers, CSP’s arguments regarding its tariff are misplaced. First, CSP argues that the tariff is equivalent to a state statute because the tariff was approved by the Commission acting under authority granted to the Commission by Title 49, which CSP asserts is a general law. (CSP Br. 14.) Second, CSP argues that the tariff itself is a statute. (CSP Br. 17.) Both arguments are incorrect.

1. CSP’s Tariff is Not Equivalent to a Statute Simply Because Title 49 Gives the Commission the Power to Approve Tariffs.

CSP argues that its “tariff is the result of a comprehensive legislative scheme.” (CSP Br. 14.) This is clever sleight-of-hand. For the tariff is not the result of the legislative scheme that

gives the Commission the authority to approve tariffs; it is the result of CSP's own drafting. CSP argues that, once its tariff was approved by the Commission, the "tariff became part of the comprehensive general law established by the General Assembly by the enactment of Title 49 of the Ohio Revised Code." (CSP Br. 14.) CSP further states, "the process that produces a public utility tariff is deemed by law to be a legislative process and – the tariff is deemed to be law." (CSP Br. 16.) The cases cited by CSP in support of this proposition actually support only the proposition that a utility is bound by the terms of a Commission-approved tariff. (CSP Br. 16, citing *Cleveland Elec. Ill. Co. v. PUCO* and *Keco Industries v. Cincinnati & Suburban Tel. Co.*)

Moreover, CSP mistakes the process of *producing* a tariff (i.e. a utility drafting the tariff) with the process of *approving* the tariff (the process discussed in Title 49). The fact that the Commission is required to approve a tariff before it takes effect in no way necessitates the conclusion that a tariff approved by the Commission becomes law. In fact, there is nothing in Title 49 stating that a tariff is a law. There is nothing in Title 49 delegating legislative authority to the Commission to create laws, particularly laws that conflict with valid municipal ordinances, by approval or otherwise.

If the Court accepts CSP's position, any item contained in a tariff drafted by a utility becomes law upon approval by the Commission, trumping any other inconsistent law, ordinance, rule, or regulation. That is an astounding proposition. The Ohio Constitution, as interpreted by this Court, carefully balances power between state government and municipalities. CSP would have the Court destroy that balance of power, not in favor of the Commission over municipalities, but in favor of private utility companies over both. The concept that a private utility company may write its own laws, subject only to Commission approval, is foreign under Ohio law, and should not be accepted by the Court in this or any other instance.

2. CSP's Tariff Itself is Not a Statute.

CSP is simply wrong that a tariff is equivalent to a statute. The only Ohio cases cited by CSP to support this proposition are *Carlin Co. v. Hines*, an Ohio Supreme Court case from 1923, and *Vorhees v. Jovingo*, a Fourth District appellate case from 2005. (CSP Br. 17.) Neither case compels this Court to subscribe to CSP's argument that its tariff is a law. In the *Hines* case, the Director General of Railroads sued a railroad shipper for unpaid demurrage⁴ charges. *Carlin Co. v. Hines* (1923), 107 Ohio St. 328, 329. Demurrage charges were required by freight tariffs on file with the Interstate Commerce Commission and the Public Utilities Commission of Ohio. *Id.* The Court indeed stated that the "tariffs duly filed . . . have the effect of statutes." *Id.* at syllabus ¶ 1. However, the statement that the tariff has the "effect" of a statute is not tantamount to a statement that the tariff is law, as the context of the Court's decision makes clear. The purpose of the Court's statement is to ensure that the shipper understands that a tariff is not a legal document in the nature of a contract, which can be breached by the utility (or in the *Hines* case, railroad), but rather in the nature of a regulation to which the utility must adhere. The statement in *Hines* cannot be divorced from its context. CSP takes the Court's statement that a tariff has the effect of law *upon the regulated industry* and transforms it into a general statement that every filed tariff has the same force as a statute for the sake of the Home Rule analysis. A review of the *Hines* case shows that the Court never contemplated so broad an application of its pronouncement, particularly against a local legislative body. Furthermore, the Home Rule issue was not before the Court in *Hines*, and the applicability of the case to the present matter is therefore dubious.

⁴ Demurrage charges are liquidated damages owed by a shipper for the shipper's failure to load or unload cargo by the agreed time. Black's Law Dictionary (8 ed.) 465.

The second Ohio case cited by CSP is *Vorhees v. Jovingo*, in which the Fourth District Court of Appeals quotes, in dicta, the *Hines* statement about a tariff having the effect of law. The *Jovingo* case involved common law negligence claims, and the Court apparently quoted *Hines* simply because it wanted to use canons of statutory construction to analyze Columbia Gas' tariff, and the best way to do so was to quote *Hines* for the proposition that a tariff has the effect of a statute. *Vorhees v. Jovingo*, Fourth Dist. No. 04CA16, 2005-Ohio-4948, ¶ 46. As with *Hines*, *Jovingo* hardly provides a sound basis for this Court to conclude that every tariff drafted by a utility company and approved by the Commission has force and application equal to a statute enacted by the General Assembly.

This Court's Home Rule case law states that when analyzing a conflict between a municipal ordinance and a "general law," the Court is comparing the municipal ordinance to a state statute, which is to say a law enacted by the General Assembly. See, e.g., *Linndale v. State* (1999), 85 Ohio St.3d 52, 54 (general laws are "those enacted by the General Assembly"). A tariff is not enacted by the General Assembly. It is written by the utility company itself, and submitted to the PUCO for approval. Under CSP's erroneous interpretation, once approved by the PUCO, the tariff becomes law, on par with statutes introduced, debated, amended, supplemented, subjected to public hearings, and eventually passed by a body of elected state representatives. The flaw with this approach is clear and profound. According to CSP's logic, a document drafted by the regulated business itself becomes law, even if no elected official has ever reviewed it, scrutinized it, or even heard of it. The Public Utilities Commission was created by the General Assembly to regulate utilities, *Haning v. Pub. Util. Comm.* (1999), 86 Ohio St.3d 121,125, not to enable private utility companies to pass laws. See also *State ex rel. Columbus S.*

Power Co. v. Fais, 117 Ohio St.3d 340, 2008-Ohio-849 (General Assembly created the Public Utilities Commission to "regulat[e] the business activities of public utilities").

CSP's tariff is not a statute, and any conflict between Reynoldsburg's Ordinance and the tariff is not a conflict between an ordinance and a "general law."

C. Reynoldsburg's Ordinance Does Not Infringe on the Commission's Jurisdiction, and Therefore Does Not Conflict with a General Law.

The primary contention of both the Commission and CSP is that Reynoldsburg's Ordinance somehow infringes on the Commission's exclusive jurisdiction to fix, amend, alter, or suspend rates charged by public utilities. (PUCO Br. 7; CSP Br. 2.) The argument is built upon a mistaken premise: that the Ordinance conflicts with the provisions of Title 49 discussing the PUCO's jurisdiction. In fact, the Reynoldsburg Ordinance does not conflict with Title 49. The Ordinance is therefore a valid exercise of municipal authority under the Home Rule amendment.

CSP argues that Reynoldsburg's Ordinance conflicts with Title 49 of the Ohio Revised Code, because the Ordinance allegedly infringes on the Commission's jurisdiction to set and approve utility rates. (CSP Br. 14). The argument is misplaced. Reynoldsburg's Ordinance does not conflict with the tariff in the way contemplated by this Court's Home Rule jurisprudence. The Home Rule cases make clear that a conflict will be found where an ordinance allows what a statute forbids, or vice versa. *Mendenhall v. City of Akron* (2008), 117 Ohio St.3d 33, 40. A simple comparison of the ordinances and statutes at issue in this Court's Home Rule cases, compared to the Ordinance and statute at issue in this case, reveals the flaw in CSP's argument.

Case	State Statute	Local Ordinance
<i>Ohio Ass'n. of Private Detective Agencies v. North Olmstead</i> (1992), 65 Ohio St.3d 242.	R.C. 4749.09 provided that no license or registration fee shall be charged by the state or any of its subdivisions for conducting the business of private investigations. 65 Ohio St.3d at 242.	North Olmstead Ordinance No. 79-27 provided that for any person who is employed in the City of North Olmstead to act as a private investigator, “Registration fee shall be fifteen dollars.” 65 Ohio St.3d at 242.
<i>Marich v. Bob Bennett</i> (2008), 116 Ohio St.3d 553.	R.C. 5577 provided that most vehicles traveling on public roads may be no more than 102 inches wide. 116 Ohio St.3d at 554.	Norton Codified Ordinances 440.01(a)(1) eliminated permit requirement for vehicles traveling on certain roads, and allowed vehicles wider than 102 inches. 116 Ohio St.3d at 554.
<i>Kettering v. State Emp. Rel. Bd.</i> (1986), 26 Ohio St.3d 50.	R.C. 4117.07(C)(10), Public Employees Collective Bargaining Act, required city to bargain collectively with a union representing its police command officers. 26 Ohio St.3d at 50.	Kettering Ordinance No. 2017-70 excluded from collective bargaining all supervisory employees or those who formulate personnel policy, and therefore would not recognize or bargain with any union representative of police sergeants, lieutenants or captains. 26 Ohio St.3d at 50.

In light of this chart of ordinances and statutes that clearly conflict—because one allows what the other prohibits—the flaw in CSP’s argument becomes apparent. The Ordinance at issue in the present case does not even regulate the same subject matter as the Ohio statutes discussing the Commission’s jurisdiction:

<i>Reynoldsburg v. Pub. Util. Comm.</i> , No. 11-1274.	R.C. 4905.04: “The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate public utilities.”	Reynoldsburg Codified Ordinances 907.04(A): “At the direction of the [Safety/Service] Director . . . any Permittee shall, at its sole cost . . . temporarily or permanently remove or rearrange its facilities . . . As part of the Director’s determination . . . that designated portions of its Rights-of-Way should accommodate only underground facilities...”
--	--	---

The Ordinance does not reference, directly or indirectly, the Commission’s power to supervise and regulate public utilities. The Ordinance does not so much as allude to the Commission’s power to supervise and regulate public utilities. The sole object of the Ordinance is to authorize a municipal official to regulate the use and occupancy of a right of way wholly within the municipality.

Without a direct conflict of the sort required by this Court before a Home Rule problem arises, CSP is left to argue that the Ordinance conflicts with the Commission’s jurisdiction because it purports to regulate rates, (CSP Br. 14), which are under the Commission’s jurisdiction. Appellees claim that it cannot possibly be accurate that utility customers outside of a given municipal jurisdiction would have to pay for the cost of improvements in Reynoldsburg. Unfortunately for Appellees, that is precisely what the Right of Way statutes provide. Specifically, the Ohio Revised Code permits municipalities to levy a right of way fee upon public utilities, subject to certain parameters. R.C. 4939.06. Hand in glove with 4939.06 is 4939.07, which permits a public utility required to pay a public way fee to apply to the PUCO for timely and full recovery of the right of way fee. R.C. 4939.07(B)(1). Upon application by a public utility, the Commission is required to establish a cost recovery mechanism. R.C.

4939.07(B)(2). Unless the PUCO determines that the public way fee levied by the municipality is unjust, unreasonable, or unlawful, "recovery [of the public way fee] shall be from all customers of the public utility generally." R.C. 4939.07(B)(2)(b). Thus, the General Assembly has endorsed the precise result that CSP claims is forbidden: recovery of a municipal public way fee through assessment of a fee upon all customers of a public utility.

Further, CSP's theory that the Reynoldsburg Ordinance conflicts with Title 49 is belied by the fact that an entire set of statutes in the Revised Code permits exactly the type of municipal regulation that CSP claims is somehow forbidden by Title 49. The Right of Way statutes, codified at 4939.01. et seq., expressly state that it is the public policy of Ohio to

* * *

(4) Recognize the authority of a municipal corporation to manage access to and the occupancy or use of public ways to the extent necessary with regard to matters of local concern * * * .

R.C. 4939.02(A) (emphasis added).

Admittedly, this may have some attenuated impact on rates. However, innumerable statutes, rules, and other regulations have minor and indirect rate impacts. Speed limits have a rate impact, because if utility repairmen were able to drive as fast as they wanted to, service calls could be completed more quickly.⁵ Requirements that drivers of certain-sized vehicles have CDL's impact rates, because hiring non-qualified drivers would be cheaper. Office buildings located in a municipality must conform to local building codes, though not conforming to such codes might be less expensive. Corporations must pay local taxes. And so on into infinity. None of these regulations, rules, or statutes usurp the jurisdiction of the PUCO to set rates.

⁵ See Reynoldsburg Br. 14.

To summarize, nothing in the portion of Title 49 discussing the Commission's jurisdiction prohibits Reynoldsburg from regulating its public ways as it has done with its Right of Way Ordinance. Instead, the portion of Title 49 discussing municipal Rights of Way expressly provides for such regulation.

D. The Traditional Common Law Right to Municipal Reimbursement of the Cost to Underground Utility Facilities Applies.

The Commission argues that the common law rule regarding the assignment of costs for underground utility facilities has been displaced by the statutory scheme that created the Commission. (PUCO Br. 24.) However, a statute does not automatically displace common law. *Reardon v. Hale*, Twelfth Dist. No. CA2006-09-105, 2007-Ohio-4351, ¶ 16 (“However, the statute does not displace appellees’ common-law duties to borrowers.”); *Peters Family Farm, Inc. v. Savings Bank*, Fourth Dist. No. 10CA2, 2011-Ohio-665, ¶ 12 (statute will displace common law only when statute clearly conflicts).

On the issue of whether the traditional common law rule controls, CSP argues primarily that the *Bothell* case from Washington State should prove instructive to the Court.⁶ (CSP Br. 20.) In *Bothell*, the Supreme Court of Washington made exactly the error in reasoning that this Court should not make. Specifically, the Supreme Court of Washington stated in *Bothell* that “Once a utility’s tariff is filed and approved, it has the force and effect of law.” *General Telephone Co. of the Northwest v. Bothell*, 716 P.2d 879, 883 (Washington 1986). As support for this proposition, the Court cited two cases. *Id.* Like *Bothell* itself, the first cited case, *Moore v. Pacific Northwest Bell*, contains no discussion of this proposition. 662 P.2d 398 (1983).

⁶ It is important to note that Washington State is a “Dillon’s Rule” state, not a Home Rule state. *City of Port Angeles v. Our Water-Our Choice!*, 239 P.3d 589, 596 n.7 (Washington 2010). Under Dillon’s Rule, municipalities do not have inherent powers; they have only such powers as are specifically granted by the legislature, or necessarily implied therefrom.

Rather, *Moore* simply cites the second case cited by the Supreme Court of Washington in *Bothell, Allen v. General Tel. Co.*, 578 P.2d 1333 (1978). *Allen* is a Washington appellate court case regarding a phone company's failure to list a business customer's information in the yellow pages. *Id.* at 1334. The court's statement with respect to the enforceability of tariffs is as follows:

Further, the defendant [phone company], as a public utility, cannot charge what the market will bear for yellow-page listings as it is required to limit its charges to those which are "fair and reasonable," . . . and, once its tariff schedule is filed and approved, the defendant cannot enter into any agreement at variance with it.

Allen, 578 P.2d at 1337.

In other words, in *Allen*, a Washington appellate court stated that a utility company must abide by its filed tariff. In *Bothell*, the Supreme Court of Washington somehow transformed that statement into a pronouncement that every tariff filed by a utility has the force of law for Home Rule purposes. As is the case with the authority cited by CSP for the proposition that a tariff is law, see *supra* Argument Section A.2., the authority cited by the Washington Supreme Court does not in fact support that proposition. The appeals court in *Allen* was simply saying that a tariff is akin to a regulation upon a utility, not a contract that a utility can freely breach. This Court should not duplicate the Washington Supreme Court's error in twisting that statement into a pronouncement that every tariff filed by a public utility has the same legal effect as statutes passed by the General Assembly.

E. The Commission Erred in Finding that CSP's Tariff Applies, and Erred in Applying the Tariff Language.

In its Merit Brief, Reynoldsburg made two arguments regarding the Commission's interpretation of CSP's tariff language. First, Reynoldsburg argued that the Commission erred in finding that the tariff applies at all, because the tariff applies only when CSP is "required" to

relocate its facilities, and Reynoldsburg did not “require” CSP to remain in the public right of way. (Reynoldsburg Br. 24-26.) Second, Reynoldsburg argued that, even if the tariff language did apply, the Commission erred in interpreting it, because the tariff language provides that Reynoldsburg would be responsible for only the portion of CSP’s cost to underground its utility lines that exceeds the cost of constructing such facilities above-ground. (Reynoldsburg Br. 26-27.) In response to these arguments, Appellees do little more than summarize the Commission’s Order.

1. Reynoldsburg did not Require CSP to Relocate Its Utility Lines Underground, and the Commission Therefore Erred in Finding that CSP’s Tariff Applies.

With respect to the issue of whether CSP was “required” to relocate its lines within the meaning of the tariff, CSP states only that relocating into private easements was “not a real option,” because CSP would need more than a “couple months” to do so. (CSP Br. 29-30.) In making this statement, CSP reiterates the very factual error present in the Commission’s Order. There is no evidence in the record, much less competent and credible evidence, to support the Commission’s finding that “there was not sufficient time for CSP to do anything other than relocate the distribution lines to the duct banks.” (Op. & Order at 13.) Moreover, CSP has never provided any evidence that it could not have placed its lines in private utility easements rather than moving its overhead lines underground in the public right of way.

The Commission and CSP appear to have mis-read the July 8, 2005 letter from Reynoldsburg’s then-Safety/Service Director Sharon Reichard to CSP. The letter does not state that CSP’s facilities must be installed underground in a “limited 90-day time frame,” as the Commission and CSP claim. (Op. & Order at 13; CSP Br. 30.) Rather, the letter states that all utilities operating in the public right of way would have to underground any overhead utility

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

Even if the Commission were correct about the 90-day time frame, however, there is absolutely no evidence, and CSP cites none, that CSP did not have sufficient time to place its Reynoldsburg lines in private utility easements. It is not Reynoldsburg’s burden to demonstrate to the Commission that CSP could have placed its facilities in private easements; the burden to prove that defense is on CSP. *Ohio Bell Tel. Co. v. PUCO* (1990), 49 Ohio St.3d 123, 128 (finding the respondent had the burden to refute with sufficient evidence the complainant’s testimony offered during a PUCO hearing). CSP has not refuted with competent, credible evidence Reynoldsburg’s allegation that CSP could have placed its facilities in private utility easements. The two dissenting Commissioners agreed on this very point. (Apr. 5, 2011 Opinion and Order of the PUCO, Dissent of Commissioners Lemmie & Roberto at 1) (hereinafter “Op. & Order”). The Commission cited no evidence for its conclusion that placing utility lines in private easements was not a viable option for CSP. Respectfully, the Commission cannot substitute its own opinions for competent, credible evidence that Respondent must provide.

2. The Tariff Language Requires that Municipalities Pay Only the Costs of Undergrounding that are In Excess of the Costs of Standard Construction.

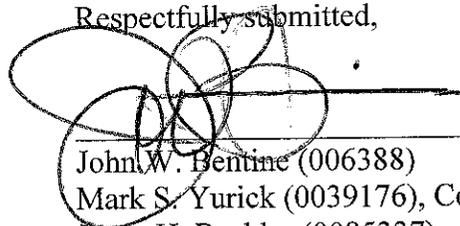
With respect to the language of the Tariff itself, CSP adheres to the Commission's interpretation of the language because "The Commission's interpretation also makes sense because the whole purpose of the [tariff] provision is to establish overhead facilities as the standard form of service and require the municipality to pay for the additional costs caused by a requirement to relocate underground." (CSP Br. 32.) In other words, the Commission's interpretation is correct because that interpretation supports CSP's belief that it should be compensated. Reynoldsburg has argued repeatedly throughout this matter that the answers to interpretive questions related to the tariff are not solved by merely acceding to the wishes of the drafter. (App. for Reh'g. at 4-6; Reynoldsburg Br. 28.) As the sole drafter of its own tariff language, CSP is responsible for any confusion that language creates.

CONCLUSION

Reading CSP's Brief, the Court could be forgiven for believing that the Ohio Constitution creates public utilities and endows them with comprehensive powers that can be curtailed only in certain circumstances. Of course, it is municipalities, not public utilities, that derive broad powers from the Ohio Constitution.

In this case, Reynoldsburg exercised its proper constitutional authority to govern a necessary public improvement project on public property located entirely in Reynoldsburg. No state statute prohibits it from doing so. Accordingly, Reynoldsburg respectfully asks this Court to vacate the Opinion and Order of the Public Utilities Commission and hold that Reynoldsburg acted within the scope of its authority granted by the Ohio Constitution.

Respectfully submitted,



John W. Bentine (006388)

Mark S. Yurick (0039176), Counsel of Record

Jason H. Beehler (0085337)

CHESTER WILLCOX AND SAXBE, LLP

65 E. State Street, Suite 1000

Columbus, OH 43215-3413

(614) 221-4000

(614) 221-4012 – Facsimile

COUNSEL FOR APPELLANT,

CITY OF REYNOLDSBURG, OHIO

CERTIFICATE OF SERVICE

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

James E. Hood
City Attorney
City of Reynoldsburg
7232 East Main Street
Reynoldsburg, OH 43068
COUNSEL FOR APPELLANT,
CITY OF REYNOLDSBURG, OHIO

Matthew J. Satterwhite , Counsel of Record
Marilyn McConnell
Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215-2373
COUNSEL FOR INTERVENING
APPELLEE, COLUMBUS SOUTHERN
POWER COMPANY

Kathleen M. Trafford
Porter Wright Morris & Arthur, LLP
41 South High Street
Columbus, OH 43215
COUNSEL FOR INTERVENING-
APPELLEE, COLUMBUS SOUTHERN
POWER COMPANY

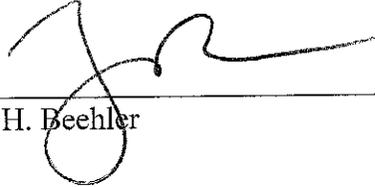
Richard Michael DeWine
Attorney General of Ohio
William L. Wright
Assistant Attorney General
Chief, Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215
COUNSEL FOR APPELLEE, THE PUBLIC
UTILITIES COMMISSION OF OHIO

Scott A. Campbell, Counsel of Record
Kurt P. Helfrich
Michael L. Dillard
Thompson Hine LLP
41 South High Street, Suite 1700
Columbus, OH 43215
COUNSEL FOR AMICUS CURIAE,
OHIO RURAL ELECTRIC
COOPERATIVES, INC.

Elizabeth H. Watts
Associate General Counsel
155 East Broad Street, 21st Floor
Columbus, OH 43215

Amy B. Spiller
Deputy General Counsel
139 East Fourth Street, 1303 Main
Cincinnati, OH 45201
COUNSEL FOR AMICUS CURIAE,
DUKE ENERGY OHIO, INC.

by regular U.S. Mail, postage prepaid, this 20th day of December, 2011.



Jason H. Beehler

APPENDIX

Statutory Provisions

4939.03 Prohibited conduct concerning public ways.

- (A) No person shall occupy or use a public way except in accordance with law.
- (B) In occupying or using a public way, no person shall unreasonably compromise the public health, safety, and welfare.
- (C)(1) No person shall occupy or use a public way without first obtaining any requisite consent of the municipal corporation owning or controlling the public way.
 - (2) Except as otherwise provided in division (C)(5) of this section, a municipal corporation, not later than sixty days after the date of filing by a person of a completed request for consent, shall grant or deny its consent.
 - (3) A municipal corporation shall not unreasonably withhold or deny consent.
 - (4) If a request by a person for consent is denied, the municipal corporation shall provide to the person in writing its reasons for denying the request and such information as the person may reasonably request to obtain consent.
 - (5) Except in the case of a public utility subject to the jurisdiction and recognized on the rolls of the public utilities commission or of a cable operator possessing a valid franchise awarded pursuant to the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A. 541, a municipal corporation, for good cause shown, may withhold, deny, or delay its consent to any person based upon the person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare.
 - (6) Initial consent for occupancy or use of a public way shall be conclusively presumed for all lines, poles, pipes, conduits, ducts, equipment, or other appurtenances, structures, or facilities of a public utility or cable operator that, on the effective date of this section, lawfully so occupy or use a public way. However, such presumed consent does not relieve the public utility or cable operator of compliance with any law related to the ongoing occupancy or use of a public way.

4939.06 Appeal of levy of public way fee.

- (A) If a public utility does not accept a public way fee levied against it pursuant to the enactment of an ordinance by a municipal corporation, the public utility may appeal the public way fee to the public utilities commission. The appeal shall be made by filing a complaint that the

amount of a public way fee, any related classification of public way occupants or users, or the assignment or allocation of costs to the public way fee is unreasonable, unjust, unjustly discriminatory, or unlawful. The complaint shall be filed not later than thirty days after the date the public utility first becomes subject to the ordinance. The complaint is subject to the same procedures as a complaint filed pursuant to section 4905.26 of the Revised Code. The commission shall act to resolve the complaint by issuance of a final order within one hundred twenty days after the date of the complaint's filing.

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

4939.07 Application to recover fees and costs.

- (A) As used in this section, "most recent," with respect to any rate proceeding, means the rate proceeding most immediately preceding the date of any final order issued by the public utilities commission under this section.
- (B)(1) Notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, a public utility subject to the rate-making jurisdiction of the commission may file an application with the commission for, and the commission shall then authorize by order, timely and full recovery of a public way fee levied upon and payable by the public utility both after January 1, 2002, and after the test year of the public utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates.
- (2) Any order issued by the commission pursuant to its consideration of an application under division (B)(1) of this section shall establish a cost recovery mechanism including, but not limited to, an adder, tracker, rider, or percentage surcharge, for recovering the amount to be recovered; specify that amount; limit the amount to not more and not less than the amount of the total public way fee incurred; and require periodic adjustment of the mechanism based on revenues recovered.

- (a) In the case of a cost recovery mechanism for a public way fee levied on and payable by a public utility but determined unreasonable, unjust, unjustly discriminatory, or unlawful by the commission pursuant to division (C) of section 4939.06 of the Revised Code, the mechanism shall provide for recovery, only from those customers of the public utility that receive its service within the municipal corporation, of the difference between that public way fee and the just and reasonable public way fee determined by the commission under division (C) of section 4939.06 of the Revised Code.
- (b) In all other cases, recovery shall be from all customers of the public utility generally.
- (C) In the case of recovery under division (B)(2)(a) or (b) of this section, the recovery mechanism payable by sale-for-resale or wholesale telecommunications customers shall provide for recovery limited to any public way fee not included in established rates and prices for those customers and to the pro rata share of the public way fee applicable to the portion of the facilities that are sold, leased, or rented to the customers and are located in the public way. The recovery shall be in a nondiscriminatory and competitively neutral manner and prorated on a per-line or per-line equivalent basis among all retail, sale-for-resale, and wholesale telecommunications customers subject to the recovery.
- (D)(1) Notwithstanding any other provision of law or any agreement establishing price caps, rate freezes, or rate increase moratoria, a public utility subject to the rate-making jurisdiction of the commission may file an application with the commission for, and the commission by order shall authorize, such accounting authority as may be reasonably necessary to classify any cost described in division (D)(2) of this section as a regulatory asset for the purpose of recovering that cost.
- (2) A cost eligible for recovery under this division shall be only such cost as meets both of the following:
- (a) The cost is directly incurred by the public utility as a result of local regulation of its occupancy or use of a public way or an appropriate allocation and assignment of costs related to implementation of this section, excluding any cost arising from a public way fee levied upon and payable by the public utility.
- (b) The cost is incurred by the public utility both after January 1, 2002, and after the test year of the public utility's most recent rate proceeding or the initial effective date of rates in effect but not established through a proceeding for an increase in rates.
- (3) If the commission determines, upon an application under division (D)(1) of this section or its own initiative, that classification of a cost described in division (D)(2) of this section as a regulatory asset is not practical or that deferred recovery of that cost would impose a hardship on the public utility or its customers, the commission shall establish a charge and collection mechanism to permit the public utility full recovery of that cost. A hardship shall be presumed for any public utility with less than fifteen thousand bundled sales service customers in this state and for any public utility for which the annualized

aggregate amount of additional cost that otherwise may be eligible for such classification exceeds the greater of five hundred thousand dollars or fifteen per cent of the total costs that are described in division (D)(2)(a) of this section and were considered by the commission for the purpose of establishing rates in the public utility's most recent rate increase proceeding or the rate increase proceeding of the public utility's predecessor, whichever is later.

- (E) Any application submitted to the commission under divisions (B) to (D) of this section shall be processed by the commission as an application not for an increase in rates under section 4909.18 of the Revised Code. The application shall include such information as the commission reasonably requires. The commission shall conclude its consideration of the application and issue a final order not later than one hundred twenty days after the date that the application was submitted to the commission. A final order regarding a recovery mechanism authorized pursuant to this section shall provide for such retroactive adjustment as the commission determines appropriate.
- (F) A public utility shall not be required to waive any rights under this section as a condition of occupancy or use of a public way.
- (G) The commission may issue such rules as it considers necessary to carry out this section.

4905.04 Power to regulate public utilities and railroads.

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