

**FILE**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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City of Reynoldsburg,

Complainant,

v.

Columbus Southern Power Company,

Respondent.

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Case No. 08-846-EL-CSS

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**COLUMBUS SOUTHERN POWER COMPANY'S  
MEMORANDUM CONTRA  
APPLICATION FOR REHEARING FILED BY  
THE CITY OF REYNOLDSBURG**

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On May 4, 2001, the City of Reynoldsburg (Reynoldsburg) filed an Application for Rehearing of the Commission's Opinion and Order (Order) in this case. Reynoldsburg seeks to re-argue the same issues that were fully addressed in the Order and Columbus Southern Power Company (CSP) asks the Commission to deny their motion re-hearing.

**I. Reynoldsburg's Assignment of Error 1**

Reynoldsburg first assignment of error is that the Commission erred in finding that Paragraph 17 of CSP's tariff is not unjust, unreasonable, or unlawful. It attacks the Commission's findings essentially because it believes that the Commission's authority ends at a municipality's border. It states that the Commission's principal of the "cost-causer is the cost-payer" is irrelevant in the face of anything remotely, at any point,

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interacting with a municipality's right of way (Motion, ¶ 2). The authority of the Commission over rates and services of public utilities is not trumped by Reynoldsburg's right-of-way authority here.

Reynoldsburg asserts that the Commission "neglect[ed] to analyze how CSP's tariff conflicts with Reynoldsburg's constitutional and statutory authority to regulate its public rights of way." (Motion, ¶ 2). On the contrary, in holding that the tariff was not unjust, unreasonable, or unlawful, the Commission specifically found that the "intent of the tariff provision is not to dictate Reynoldsburg's power over its rights-of-way, but, rather, to compensate the utility for complying with the City's directives concerning its rights-of-way." (Order, ¶15). The Commission ruled within its authority to express the scope of its jurisdiction. The Commission found that the tariff at issue is consistent with Sections 4905.30 and 4909.18 and reaffirmed that the provision is not unjust or unreasonable. (Order, ¶17).

Reynoldsburg is the only entity seeking to expand its authority by asserting its Home Rule powers dictate that CSP customers outside of Reynoldsburg should be responsible for the local Reynoldsburg decision to move functioning overhead lines underground as a local preference. The Commission simply recognized that Reynoldsburg should be responsible for its local decision, to the extent that local cost causing decision impacts a statewide system overseen by the Commission. It is appropriate and proper for the Commission to regulate the industry entrusted to it by the General Assembly and ensure that local preferences for aesthetic reasons can not be used to harm the larger customer base of a public utility. Factually, the Commission found that this was the case, based on an overabundance of record evidence. Reynoldsburg may

not like the result of the analysis, but it cannot accurately state that the Commission neglected to make it.

Reynoldsburg's analysis that the intent of CSP in developing the tariff and the process by which the Commission approved it is lacking is also without merit. Reynoldsburg seems to assert that the Commission failed to act as the intermediary between citizens and utilities by asserting that the Commission relied solely on the intent of the utility in drafting the tariff and that it was only a very small part of a large complex case. Reynoldsburg's argument ignores the discussion in CSP's posthearing reply brief (pages 4-9) and the documents found in the Agreed Stipulation of facts that showed evidence from a previous case raising this exact scenario and the concern "that a customer in one city would be paying more because some other city requires underground construction." (CSP Reply Brief at 5 citing Joint Exhibit 1, Attachment C, Testimony of William Forrester at 7-8, CSP Rate Case). The Staff agreed with CSP in that case and sought to expand the scope of the tariff proposed by CSP stating in its Staff Report:

Staff agrees that the additional cost to provide underground service to one municipality should not be borne by ratepayers in another municipality.

(CSP Reply Brief at 6 citing Joint Exhibit 1, Attachment D, Staff Report of Investigation at 47-48, CSP Rate Case). Contrary to Reynoldsburg's assertions that the Commission simply deferred to the intent of a utility, this tariff was the subject of testimony, expansion of the scope by the Commission Staff, and did not receive any opposition to the municipalities that did participate in that hearing. Any claim that the Commission did not consider the impact of this tariff on customers ignores the very real concern the

Commission Staff expressed and the Commission ultimately adopted to protect customers from local decisions beyond their control, like the one present in this case.

The Commission's decision correctly leaves in place the procedures under Title 49 whereby a tariff is approved by the Commission and that utility's customers are put on notice of what charges they will be expected to pay for if they request different service. Reynoldsburg was fully aware of the fact that it would be expected to pay for requiring CSP to underground its utility lines in the Reynoldsburg right-of-way. It attempted to circumvent the oversight of the Commission on utility costs and rates by broadening the definition of Home Rule control of its right-of-way beyond the statutory and case law. Since the Commission correctly declined to find its own Title 49 procedures unconstitutional, Reynoldsburg is free to make its arguments to the Supreme Court and there is no reason to have a rehearing.

## **II. Reynoldsburg Assignment of Error 2:**

Again, Reynoldsburg takes issue with the Commission's decision that it "does not have the requisite jurisdiction to adjudicate as to whether ¶17 of CSP's tariff violated Article XVIII, Sections 3 and 4 of the Ohio Constitution." (Order, ¶ 18, 23).

Reynoldsburg maintains that it is not asking the Commission to declare a statute unconstitutional, just declare that CSP's tariff is unlawful on its face and as applied. (Motion, ¶8). The Commission correctly stated that what Reynoldsburg was really challenging was the constitutionality of the "factual application of Sections 4905.30, and 4909.18 of the Revised Code." (Order, ¶17). Reynoldsburg is asking the Commission to revisit its decision to refuse to hold that portions of Title 49 are unconstitutional as they

relate to Reynoldsburg's claimed home rule rights. It finds the Commission's failure to do so, "inexplicable" (Motion, ¶ 4).

Reynoldsburg's entire constitutionality argument is based on a legal fallacy that has already been addressed by the Supreme Court on the facts at issue in this case. CSP's tariff was approved by the Commission as part of Title 49. Reynoldsburg's legal theory wrests the CSP's tariff out of that framework, and attacks it as though CSP came up with it in something like a vacuum. It states, "Although CSP may deem CSP's tariff provision equivalent to a statute, it is not. Reynoldsburg does not ask the Commission to declare a statute unconstitutional." (Motion, ¶8). Yet, this is exactly what Reynoldsburg is asking the Commission to do—find that the procedures and findings it adopted and approved as part of CSP's tariff approval are unconstitutional. As has already been addressed by the Supreme Court in this matter:

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. R.C. 4905.22

*State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St. 3d 340, 343 (Ohio,2008).

and, again:

"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." *Kazmaier Supermarket, Inc. v. Toledo Edison Co.* (1991), 61 Ohio St.3d 147, 150, 573 N.E.2d 655.

*State ex rel. Columbus S. Power Co. v. Fais*, 117 Ohio St. 3d 340, 343 (Ohio 2008)

One cannot look at the constitutionality of a tariff provision without addressing the constitutionality of the parts of Title 49 that authorize the tariff. Reynoldsburg's argument that a tariff is not a law and can be usurped by local ordinance is not only out of line with Supreme Court decisions on the issue, it is out of line with what the Supreme Court has already stated in this case. Ultimately the argument advanced by Reynoldsburg is that the Commission can rule on constitutional claims. The Commission's position and precedent are clear on this point and Reynoldsburg's disagreement with the Commission is not proper grounds for rehearing. The Commission should deny Reynoldsburg's request for rehearing.

### **III. Reynoldsburg's Assignment of Error 3.**

Reynoldsburg disputes the Commission's factual finding that Paragraph 17 of CSP's tariff applies because Reynoldsburg "required, or at a minimum, specified" the change of CSP's facilities in Reynoldsburg's right of way from overhead to underground. (Order, ¶ 13). Reynoldsburg claims that this finding was not based on competent, credible evidence.

As quoted in the Order, the plain language of the July 5, 2005 letter from Reynoldsburg stating "the utility will be **required** (emphasis added) to relocate their respective facilities within the public right-of-way of the project into the underground duct bank." (Order, ¶ 13). Additionally, the Joint Stipulation of Facts set forth numerous instances where there were agreed facts that support the Commission's finding, which the

Commission referred to in its Order—the planning, grant applications, artist renderings, development, engineering, budgeting, etc. were all drafted and entered into based on the expectation that CSP would underground its facilities in the City’s right-of-way. (Order, ¶3 through ¶ 7). As discussed in CSP’s posthearing reply brief (CSP Reply Brief at 11-15), Reynoldsburg even referred to its underground duct bank as the “AEP duct bank” and all of Reynoldsburg’s assumptions, planning documents and actions (i.e. movement of service drops to the duct bank for customers along the path) show that was the only option. (CSP Reply Brief at 12 discussing agreed facts in the Joint Exhibit). Also, among the many examples of Reynoldsburg’s requirement that the facilities be moved underground, there is the grant application Reynoldsburg filed with Franklin County seeking assistance in building the underground duct. In that application, Reynoldsburg indicated the fact that the overhead wires would be underground by stating:

-“the existing overhead utilities will be removed and replaced underground” (Joint Exhibit 1, Attachment H, Community Development Block Grant Application at 3a).

-“a major problem is that of the massive conflicting overhead wires which must be undergrounded in order for the City to proceed with its comprehensive streetscape program” (Id. at 3b).

-“the massive overhead wires will be undergrounded into a concrete duct band to be located along the northern curb line of Main Street\*\*\*.” (Id.).

As found by the Commission and supported by the record, Reynoldsburg ordered CSP to move its facilities into the underground duct bank. Reynoldsburg provided correspondence to CSP to do so and sought assistance in advance from County grants representing its intent to do so. Any other position ignores the record.

A review of the record shows that Reynoldsburg’s argument that there is no competent evidence that Reynoldsburg either required or specified CSP to underground is the only assertion without competent evidence. Reynoldsburg spends a lot of time

discussing the alleged lack of evidence regarding how much time it would have taken CSP to do an appropriations outside the right-of-way (Motion, ¶ 9, 10, 11, and 12), but because the Commission found that CSP was ordered to move its functioning and active above ground facilities underground to Reynoldsburg's underground duct bank, that discussion is irrelevant. This is a factual finding made by the Commission and supported by record evidence. Rehearing should be denied.

#### **IV. Reynoldsburg Assignment of Error 4**

Reynoldsburg asks for a rehearing because it disagrees with the Commission's decision that CSP's tariff requires a municipality that requires CSP to relocate its lines pays for the cost of that relocation. The Commission reviewed CSP's tariff, the objective of rate recovery, and the principal that "the cost causer is the cost payer," and came to the conclusion that the tariff should be interpreted so that Reynoldsburg has to pay for the costs it required of CSP (Order, ¶ 25). Reynoldsburg asks that the Commission revisit this issue, saying that "Why the Commission must satisfy the stated objective of the tariff provision is not clear to Reynoldsburg." (Motion, ¶14). Despite the Commission and its staff approving the tariff originally to protect customers from the local decisions of other municipalities, Reynoldsburg still wants the Commission to read the tariff to require others to pay for local preferences.

CSP already provided the standard facilities for this area and was providing service on the distribution lines when ordered underground at the will of Reynoldsburg. If there is a difference in costs in an area where standard facilities were not already in service then Reynoldsburg would only need to pay the difference. But that is not the case here. Reynoldsburg's reading of the tariff would contradict the basis of the approval of



the tariff originally. Regardless of the outcome the finding a finding in favor or Reynoldsburg would only serve to show that the tariff should be discontinued or modified as unjust, unreasonable, or unlawful prospectively. The tariff provision is a Commission order that under R.C. 4903.13, is valid and enforceable unless overturned by the Supreme Court of Ohio. The Commission should deny rehearing while again clarifying the proper reading of the tariff it approved and the scope of Reynoldsburg's request.

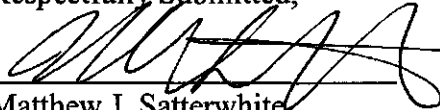
#### **V. Reynoldsburg's Request for Oral Argument**

The Commission already denied the need for an oral argument and should do so again on rehearing. The Commission clearly stated, "Reynoldsburg has failed to set forth reasonable grounds as to any new issues that have arisen that would necessitate the holding of an oral argument." (Order at 28). Reynoldsburg's disagreement with the Commission's decision does not create new grounds for oral argument. The Commission determined it had the record it needed to make its decision and it did so. The request for oral argument should be denied, again.

## VI. Conclusion

Reynoldsburg has decided that it will never be satisfied with any decision by the Commission that does not abrogate CSP's tariff and much of Title 49. The Commission has provided a detailed Order, laying forth the evidence and arguments it heard and which it found credible. There are no grounds for a rehearing, or in having an oral argument (as Reynoldsburg requests in its Motion), as the issues have been fully briefed, evidence has been introduced—much of which by stipulation, the witnesses have testified and the Commission has appropriated ruled.

Respectfully Submitted,



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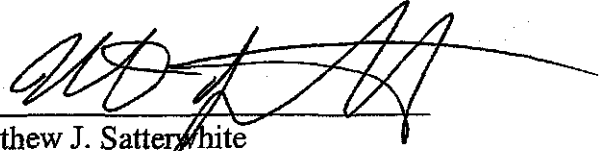
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## PROOF OF SERVICE

Columbus Southern Power Company's Post Hearing Brief was served by First-Class U.S. Mail upon counsel identified below for all party of record this 13<sup>th</sup> day of May, 2011.



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