BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the City of Reynoldsburg, Ohio,	)	
Complainant,	)	
v.	)	Case No. 08-846-EL-CSS
Columbus Southern Power Company,	)	
Respondent.	)	

ENTRY ON REHEARING

The Commission finds:

(1) On April 5, 2011, the Commission issued its Opinion and Order in this case. The Commission found that, based on the record in this matter, ¶17 of Columbus Southern Power Company's (CSP) tariff applies to the facts of this case and that ¶17 is not unjust, unreasonable, or unlawful. Additionally, the Commission determined that it does not have the requisite jurisdiction to adjudicate if ¶17 of CSP's tariff violates Article XVIII, Section 4 of the Ohio Constitution. Further, the Commission found that it does not have the requisite jurisdiction to adjudicate whether the city of Reynoldsburg's (Reynoldsburg, complainant, or city) home rule powers or its ordinance supersede CSP's tariff. Finally, the Commission concluded that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.

(2) On May 4, 2011, Reynoldsburg filed an application for rehearing of the Commission's April 5, 2011, Opinion and Order. Reynoldsburg asserts that the Opinion and Order, was unjust and unreasonable based on the following assignments of error:

(a) The Commission erred in finding that ¶17 of CSP's tariff is not unjust, unreasonable, or unlawful.

(b) The Commission erred in finding that it cannot rule on the constitutionality of ¶17 of CSP's tariff.

(c) The Commission erred in finding that Paragraph 17 of CSP's tariff applies to the facts of this case.

(d) The Commission erred in finding that CSP properly applied its tariff and appropriately charged Reynoldsburg for the relocation expenses.

(e) The Commission erred in denying Reynoldsburg's request for oral argument.

(3) On May 13, 2011, CSP filed its memorandum contra Reynoldsburg's application for rehearing.

(4) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a proceeding may apply for rehearing with respect to any matter determined in the proceeding by filing an application within 30 days of the entry of the Order in the Commission's journal. The Commission may grant and hold rehearing on the matters specified in the application if, in its judgment, sufficient reason appears to exist.

(5) Reynoldsburg's application for rehearing has been timely filed as required by Section 4903.10, Revised Code.

(6) In support of its first assignment of error, Reynoldsburg focuses on the Commission's discussion regarding the cost causer being the cost payer and the fact that Reynoldsburg did not seek intervention in the proceeding in which CSP's tariff was originally approved. (Application for Rehearing Memorandum at 1). Specifically, Reynoldsburg opines that the goal of the tariff provision and consideration of whether the cost-causer is the cost-payer are irrelevant and have no bearing on whether a utility can alter or eliminate a municipality's power over its rights-of-way powers. According to Reynoldsburg, this power is granted by the Ohio Constitution (i.e., Article XVIII, Sections 3, 4) and state statutes [Sections 4939.01, 4939.02(A)(4), 4939.03,(C)(1), 723.01, 4905.65, Revised Code]. Therefore, Reynoldsburg concludes that the tariff conflicts with state statutory law. Reynoldsburg asserts that the Commission and CSP have failed to cite to any authority for the proposition that a utility can alter or eliminate a municipality's power over its rights-of-way. Reynoldsburg questions why the Commission would fail to address the city's statutory arguments, especially in light of the fact that the Commission frequently interprets and construes statutes.

Reynoldsburg asserts that ¶17 is not presumptively valid simply because the Commission approved CSP's tariff, which was only a small part of a very complex rate proceeding. Additionally, Reynoldsburg submits that ¶17 does not describe a rate or charge for a service furnished by the utility. Therefore, Reynoldsburg argues that, pursuant to Section 4905.30(A), Revised Code, the Commission has no jurisdiction to approve such a tariff provision. Reynoldsburg argues that, if the approval of a tariff, regardless of the language in the tariff, means that every approved tariff provision is forever lawful, then the Commission is assuming powers never granted to it by the legislature.

With respect to the Commission's consideration of the principle of "cost-causer, cost-payer," Reynoldsburg asserts that CSP is the entity actually causing the cost in this matter because it desires to operate in the public right-of-way since it is less expensive to do so. Reynoldsburg avers that CSP is actually attempting to shift the cost of its operations in the public right-of-way onto the taxpayers of Reynoldsburg. The city does not believe that its residents should have to shoulder the burden of paying for CSP's decision, especially in light of the fact that CSP makes a substantial profit from its business.

Additionally, Reynoldsburg argues that the fact that it did not intervene in CSP's tariff proceeding in which ¶17 was approved is not dispositive of the issue of whether CSP's tariff is unjust, unreasonable, or unlawful. Regardless of whether it has pursued intervention in the prior CSP rate case, Reynoldsburg avers that it has the constitutional and express authority to regulate its public rights-of–way in a reasonable manner. In particular, Reynoldsburg contends that the Ohio Supreme Court has recognized that Section 4905.26, Revised Code, may be used to investigate the reasonableness of rate schedules previously approved by the Commission [Application for Rehearing at 6 citing *Office of Consumers' Counsel v. Pub. Util. Comm.* (1982), 1 Ohio St.3d 22, 24]. Therefore, Reynoldsburg asserts that, if Section 4905.26, Revised Code, can be used as a collateral attack on a prior Commission proceeding, then the complainant can use this case to challenge the Commission's 1992 approval of CSP's tariff. Finally, Reynoldsburg posits that there would be no reason for Section 4905.26, Revised Code to exist if the Commission can simply conclude that failure to intervene in a tariff case precludes any late challenge to that tariff.

(7) In response to the first assignment of error, CSP asserts that the authority of the Commission over rates and services of public utilities is not trumped by the city's right-of-way authority. CSP opines that the Commission properly considered the question of how CSP's tariff conflicts with Reynoldsburg's constitutional and statutory authority to regulate its public rights-of-way and found that 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 directive concerning its rights-of-way" (Memorandum Contra at 2 citing Opinion and Order at Finding 15). CSP also notes that, pursuant to its jurisdiction, the Commission found that the tariff is consistent with Section 4905.30 and 4909.18, Revised Code, and that the tariff provision is not unjust or unreasonable.

CSP considers the Commission's decision with respect to this issue to be appropriate in order to ensure that a local decision by a municipality for aesthetic reasons does not result in harm to the larger customer base of the public utility. Rather than the Commission simply deferring to the company's stated intent of the tariff in question, CSP notes that the appropriateness of the tariff provision was actually addressed in the context of the CSP rate case (Memorandum Contra at 3). In support of its position, CSP states that the Commission's decision properly leaves in place the procedures set forth pursuant to Title 49 whereby a tariff is approved by the Commission and then utility consumers are put on notice of the applicable charges if they request a different service. CSP submits that, since the Commission correctly declined to find its own Title 49 procedures to be unconstitutional, Reynoldsburg is free to make its arguments directly to the Ohio Supreme Court (*Id.* at 4).

(8) With respect to Reynoldsburg's first assignment of error, the application for rehearing is denied. The Commission notes, as discussed in the April 5, 2011, Opinion and Order, that ¶17 of CSP's tariff was approved pursuant to the May 12, 1992, Opinion and Order in Case No. 91-418-EL-AIR, *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service.* This consideration and approval was appropriate inasmuch as, consistent with Section 4905.30, Revised Code, ¶17 pertains to ". . . classifications, and charges for service furnished by it [CSP], and all rules and regulations affecting them."

Additionally, the Supreme Court of Ohio determined that the issue of the reasonableness of ¶17 should be brought before the Commission in accordance with Sections 4905.22 and 4905.26, Revised Code. See *State, ex rel. Columbus Southern Power Co. v. Fais* (2008), 117 Ohio St.3d 340. 884 N.E.2d 1.

The Commission highlights the fact that, pursuant to the allegations set forth in the complaint, the Commission held a hearing pursuant to Section 4905.26, Revised Code, with one of the stated purposes being consideration of the reasonableness of ¶17. Based on its review of the record in this case, the Commission determined that, consistent with its regulatory authority, the specified tariff provision is reasonable. Contrary to Reynoldsburg's assertions, this decision does not signify that "every approved tariff provision is forever lawful." Rather, to the extent that a complaint is appropriately brought before the Commission, each applicable tariff provision will be reviewed on an individual case basis consistent with the Commission's jurisdiction.

The Commission emphasizes that this case is not a "Home Rule" proceeding but, rather, centers on the issue of ratemaking and the ultimate determination of who should be financially responsible for Reynoldsburg's decision to require the undergrounding of facilities. The Commission notes that, pursuant to its April 5, 2011, decision, we clearly recognized that CSP cannot dictate a municipality's power over its rights-of-way. See Opinion and Order at 15. Consistent with this determination, the Commission clarifies that its Opinion and Order does not stand for the proposition that Reynoldsburg does not have the ability to exercise authority over its rights-of-way. Rather, Reynoldsburg was specifically able to require that CSP remove its above ground facilities in the public right-of-way and place them underground.

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. Therefore, determinations such as these fall directly within the Commission's jurisdiction pursuant to Title 49, Revised Code.

Additionally, the Commission notes that, with respect to CSP's assertions regarding the applicability of Chapter 4939, the statutory provisions are not applicable here inasmuch as the issue in this case pertains to expenses related to a mandated relocation of facilities within a public right-of-way, rather than a fee charged by the municipality to use its public right-of-way.

(9) In support of its second assignment of error, Reynoldsburg asserts that, while the Commission indicates that it does not have the requisite jurisdiction to adjudicate whether ¶17 violates particular sections of the Ohio Constitution, the Commission has addressed constitutional issues in prior cases. Additionally, Reynoldsburg, argues that the Commission's reliance on the *Panhandle East Pipeline* and *Fais* cases are misplaced. Specifically, Reynoldsburg opines that, while the holding in *Panhandle* may stand for the proposition that administrative agencies have no authority to declare a statute unconstitutional, the issue before the Commission in the current case pertains to the constitutionality of a tariff provision and not a statute. In support of its position, Reynoldsburg notes that Section 4905.26, Revised Code, provides the Commission with the authority to declare a utility rate or practice to be unlawful. Consistent with this designated authority, Reynoldsburg opines that the Commission must consider court decisions, statutes, as well as the Ohio Constitution. In regard to the Commission's reliance of the holding in *Fais*, Reynoldsburg believes that, pursuant to that decision, the Commission can make its initial findings subject to the ultimate review of the Supreme Court of Ohio.

(10) In response to the second assignment of error, CSP responds that 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 submits that Reynoldsburg is now asking that the Commission find that the procedures and findings it adopted as part of CSP's tariff approval are unconstitutional. In support of its position, CSP's references the Supreme Court of Ohio's determination that the issue of the payment of costs to relocate electrical lines in a Reynoldsburg right-of-way to underground does involve rates and charges for

service that are within the exclusive jurisdiction of the Commission pursuant to Section 4905.22, Revised Code (Memorandum Contra at 5 citing *Fais*, 117 Ohio St. 3d, 343).

CSP asserts that Reynoldsburg' argument that a tariff is not a law and can, therefore, be usurped by local ordinance is contrary to the Supreme Court's holding in *Fais*. To the extent that Reynoldsburg seeks to have the Commission rule on constitutional claims, CSP avers that such a request is not appropriate grounds for rehearing.

(11) With respect to Reynoldsburg's second assignment of error, the application for rehearing is denied inasmuch as the city has failed to raise any new arguments for the Commission's consideration. Additionally, as noted in our April 5, 2011, Opinion and Order, in considering the question of whether Reynoldsburg's "Home Rule" authority under the Ohio Constitution supersedes CSP's tariff or whether the terms of Reynoldsburg's ordinance override CSP's tariff, the Commission is constrained by its delegated authority to defer questions of constitutionality for determination by the courts. While Reynoldsburg is correct that the Commission may have previously addressed constitutionality issues in prior cases, those decisions are distinguishable from the question raised in this case.

(12) In support of its third assignment of error, Reynoldsburg asserts that the only utility facilities that are at issue in this care are CSP's utility facilities located in the public right-of-way. Reynoldsburg avers that occupying the public right-of-way was not the only way for CSP to provide service to customers. For example, the complainant notes that CSP could have appropriated private property for the placement of its distribution facilities. To illustrate this point, Reynoldsburg references CSP's own witness's admission that the respondent currently owns and uses facilities located in private easements (Application for Rehearing at 9). Reynoldsburg asserts that by CSP simply choosing to remain in the public right-of-way and incurring additional expenses as a result of the need for additional work does not signify that no choice existed.

According to Reynoldsburg, CSP failed to meet its burden of refuting the complainant's allegations that the respondent could have placed its lines in private utility easements rather than moving its overhead line underground in the public right-of-way. Additionally, Reynoldsburg asserts that there is no evidence to support the Commission's finding that there was insufficient time

for CSP to do anything other than relocate the distribution lines to the duct banks. In regard to the July 8, 2005, letter from then Safety Director Sharon Reichard to CSP, Reynoldsburg asserts that the only requirement was for CSP to underground any overhead utility lines within 60 days of receiving written notice from the city that the duct bank construction was complete and available for installation.

Reynoldsburg argues that the issue concerning viability of an option to occupy private easements is not germane to this proceeding inasmuch as it is not incumbent upon the taxpayers of Reynoldsburg to provide a private for-profit business with a viable and economically desirable location in which to place its facilities. Further, Reynoldsburg asserts that the mere fact that the city may have provided such an option in the past does not signify that it has granted CSP property rights in perpetuity relative to the publicly owned right-of-way. Reynoldsburg contends that CSP elected to maintain general distribution facilities in the city's public right-of-way knowing full well that in doing so the company would be subject to Reynoldsburg's constitutionally and statutorily authorized regulations governing access to use of its public rights-of-way. Finally, Reynoldsburg questions why the Commission's determination that CSP applied its tariff consistent with past applications has any relevancy to this proceeding. Specifically, Reynoldsburg asserts that CSP's opinion is no substitute for an examination of the facts, evidence, and legal arguments raised in this case.

(13) In response to the third assignment of error, CSP highlights the language contained in the Reynoldsburg July 5, 2005, letter to CSP stating that "the utility will be required to relocate their respective facilities within the public right-of-way of the project into the underground duct bank." (Memorandum Contra at 6 citing Reynoldsburg July 5, 2005, letter). Additionally, CSP references the fact that a number of activities (e.g., the planning, grant applications, artist renderings, development, engineering, budgeting etc.) were performed based on the expectation that CSP would underground its facilities in the city's right of way and more specifically in the "AEP duct bank." As further support of its assertion that Reynoldsburg required that the facilities be moved underground, CSP also references the grant application that Reynoldsburg filed with Franklin County (*Id.* at 7).

(14) With respect to Reynoldsburg's third assignment of error, the application for rehearing is denied inasmuch as the city has failed to raise any new arguments for the Commission's consideration. As determined in the Commission's April 5, 2011, Opinion and Order, the record [e.g., Joint Ex. 1, ¶¶ 16, 17, Ex. I (July 8, 2005, Letter)] is clear that the burial of existing overhead general distribution lines was required and specified by the municipality. Therefore, ¶17 of CSP's tariff applies to the facts of this case.

(15) In support of its fourth assignment of error, Reynoldsburg asserts that, even if the tariff provision is applicable to the current case, the city is only responsible for the cost of the relocation that exceeds CSP's costs to move the company's utility lines from one above ground location to another. In support of its position, Reynoldsburg relies on the following language of ¶17:

> The company shall not be required to construct general distribution lines underground unless the cost of such special construction for general distribution lines and/or the cost of any change of existing overhead general distribution lines to underground which is required or specified by a municipality or other public authority (to the extent that such cost exceeds the cost of construction of the Company's standard facilities) shall be paid for by that municipality or public authority.

Specifically, Reynoldsburg opines that, consistent with the rules of grammar and common sense, the above parenthetical language stands for the proposition that, to the extent that the municipality requires CSP to relocate overhead lines into an underground duct bank, the municipality will be responsible only for the cost of the undergrounding that exceeds what it would cost CSP to construct or relocate the lines above ground. As a result, Reynoldsburg submits that CSP has overcharged it for the cost of the relocation. In support of its position, Reynoldsburg states that ambiguities in are to be resolved in favor of the customer and not the utility (Application for Rehearing at 14 citing *Saalfield Pub. Co. v. Pub. Util. Comm.* (1948), 149 Ohio St. 113).

(16) With respect to Reynoldsburg's fourth assignment of error, CSP argues that, despite the Commission and its staff originally approving the tariff provision in question in order to protect customers from the local decisions of other municipalities,

Reynoldsburg is incorrectly requesting the Commission to read the tariff to require others to pay for local preferences. In support of its position, CSP asserts that, to the extent that there is a difference in costs in an area where standard facilities are not already in service, then Reynoldsburg would only be required to pay the difference in the costs. However, in the current case, CSP notes that it already provided standard facilities for this area at the time that Reynoldsburg ordered the undergrounding of facilities and, therefore, Reynoldsburg should pay the entire cost of the relocation.

Finally, CSP asserts that a finding in favor of Reynoldsburg would only serve to show that the tariff should be discontinued or modified on a prospective basis. According to CSP, the approved tariff provision is valid and enforceable unless overturned by the Supreme Court of Ohio.

(17) With respect to Reynoldsburg's fourth assignment of error, the application for rehearing is denied inasmuch as Reynoldsburg has failed to raise any new arguments for the Commission's consideration. Additionally, the Commission notes that Reynoldsburg has failed to demonstrate any record support for what it would cost CSP to construct or relocate the lines above ground in this case.

(18) Finally, Reynoldsburg requests that the Commission reconsider its denial of Reynoldsburg's request for oral argument in light of the fact that this matter involves a number of complex statutory, constitutional, and jurisdictional issues. In support of its request, Reynoldsburg believes that the Commission and the parties would benefit from an oral argument "to probe the contours of these important issues."

(19) CSP submits that the Commission has already denied Reynoldsburg's request for oral argument and that Reynoldsburg's disagreement with the Commission decision does not create new grounds for oral argument (Memorandum Contra at 9).

(20) With respect to Reynoldsburg's fifth assignment of error, the application for rehearing is denied inasmuch as Reynoldsburg has failed to raise any new arguments for the Commission's consideration.

It is, therefore,

ORDERED, That Reynoldsburg's application for rehearing be denied in accordance with Findings (8), (11), (14), (17), and (20). It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

JSA/dah

Entered in the Journal
JUN 01 2011

Betty McCauley
Secretary

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Respondent.	)	

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

I concur that the City's application for rehearing should be denied as the City has failed to demonstrate that Columbus Southern Power Company's (CSP) tariff is inapplicable, unjust, unreasonable, or in conflict with the City's constitutional or statutory authority over public ways.

With respect to the City's first and second assignments of error, I do not find there to be any inherent conflict between the City's constitutional or statutory authority over public ways and CSP's tariff or the statute authorizing its approval. Recovery of the costs of placing CSP's lines underground is not a matter of only local concern. 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.

With respect to the City's third assignment of error, I do not agree with the City's position that the viability of the private easement option is not germane. CSP has a continuing obligation to provide affordable and reliable distribution service to consumers in its service territory. In the absence of evidence that obtaining private utility easements was a viable approach for serving CSP's customers, I remain persuaded that CSP's tariff is sufficiently broad to cover a de facto requirement that CSP underground its facilities.

In its fourth assignment of error, the City proposes an alternative reading of the tariff language. While it is possible to see how someone might read the tariff in the manner the City suggests and, in hindsight, to imagine ways in which the tariff might have been more clearly phrased, the City's reading of the language is not consistent with the purpose of and policies supporting this tariff provision.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Paul A. Centolella, Commissioner

Entered in the Journal

JUN 0 1 2011

Betty McCauley

Betty McCauley
Secretary

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DISSENTING OPINION OF COMMISSIONER CHERYL L. ROBERTO

For the reasons set forth in my Dissenting Opinion to the Opinion and Order in this proceeding, I dissent.

Cheryl L Roberto

Cheryl L. Roberto, Commissioner

Entered in the Journal

JUN 0 1 2011

Betty McCauley

Betty McCauley
Secretary

BEFORE

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CONCURRING OPINION OF COMMISSIONER ANDRE T. PORTER

My term as commissioner commenced subsequent to the issuance of the initial opinion and order in this proceeding which previously prevented me from analyzing the subject addressed herein. Along with the entry on rehearing, I submit the following concurrence at this time.

Chapter 4939 of the Revised Code provides a mechanism for the levying of "public way fees" by municipalities against a public utility. Specifically, "a municipal corporation may levy . . . public way fees based upon the amount of public ways occupied or used." Section 4939.05(B)(1), Revised Code. "Public way fee" is defined in the statute as "a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way." Section 4939.01(F), Revised Code. Additionally, upon request by a public utility, Chapter 4939 authorizes the Commission to declare a cost assessed to the utility as a regulatory asset. Section 4939.01(D), Revised Code.

Indeed, as pointed out in the dissenting opinion (issued along the April 5 majority opinion), the authority of a municipal corporation to manage access to and the occupancy or use of public ways and to receive cost recovery for such access and occupancy must be honored. However, any recovery of costs by a municipality for the occupancy or use of its rights of way must be consistent with Chapter 4939 of the Revised Code. Likewise, any application for by a public utility for costs to be declared a regulatory asset must be consistent with Chapter 4939.

In the case of a public way fee and for costs related to amounts declared to be regulatory assets, the Revised Code requires that each be related to the use and occupancy of a right of way. For example, a municipality must ensure the safety of its rights of way. Thus, undoubtedly a municipality incurs costs to inspect facilities in its rights of way to ensure the safety of its rights of way. In such cases, in order to allow continued occupancy

and use of a right of way by a public utility, the costs for safety inspections would be difficult to avoid and might be appropriate for cost recovery upon review by the Commission. Without evidence supporting the public necessity for undergrounding facilities and that such undergrounding is necessary in order for a public utility to continue its use and occupancy of a right of way, recovery under Chapter 4939 should be limited.

Andre T. Porter, Commissioner

Entered in the Journal
JUN 01 2011

Betty McCauley
Secretary