BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of AT&T Ohio,	)	
Complainant,	)	
v.	)	Case No. 17-0291-AU-PWC
City of Springfield, Ohio,	)	
Respondent.	)	

AT&T OHIO'S MEMORANDUM CONTRA
THE CITY OF SPRINGFIELD OHIO'S MOTION TO DISMISS COMPLAINT

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1. Introduction

Complainant AT&T Ohio, by its attorneys and pursuant to section 4901-1-12(B) of the Commission's rules, opposes the Respondent City of Springfield, Ohio's motion to dismiss, filed on March 8, 2017. The City asserts that AT&T Ohio's complaint was not timely filed and that the provisions in Chapter 4939 of the Revised Code on which the complaint is based are unconstitutional. Motion, p. 1. The City is wrong on both points.

2. The Complaint Was Timely Filed

The City claims that AT&T's complaint is untimely because the Company was first apprised of the enactment of the ordinance by the City's published legal notice or by an e-mail sent by its City Engineer. Motion, pp. 1-3. AT&T Ohio stands by the allegations of its complaint. The City's proffer of its affidavits and other documents in this regard can be

examined at the hearing in this case. The Commission does not entertain such evidentiary matters at this stage of the proceeding.

In addition, the City's argument must fail because ***it failed*** to file the requisite notice of its consideration of a public way ordinance under R. C. §4905.05(E), thus depriving AT&T Ohio and other parties of any advance notice of the consideration of the ordinance. As a "general law" under the Home Rule amendment, R. C. § 4939.05(E) clearly prevails over a local provision, charter or otherwise, that is silent on the subject matter. The City simply dismisses this statutory requirement. Motion, p. 6. The City should not be heard to challenge the timeliness of the filing of the Complaint when it failed, in the first instance, to give the statutorily-required notice of its consideration of the very ordinance in question.

Even if the City's allegations were true, and AT&T Ohio is found to have failed to file its complaint within 30 days after the date it first became subject to the new ordinance, the matter does not end there. This is because R. C. §4939.06(B) clearly contemplates the filing of a complaint ***more than*** 30 days after the effective date of an ordinance:

> 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.

R. C. §4939.06(B) (emphasis added).

The Commission has properly recognized the distinction between the breadth of the suspensions that can be ordered under this provision. In *Embarq v. Village of Jefferson*, Case No. 08-616-AU-PWC, it was held that:

> The standard under Section 4939.06, Revised Code, is not whether an ordinance is reasonable but, rather, whether reasonable grounds are stated for a complaint under Section 4939.06(A), Revised Code. Embarq brought this action based on the amount of the public way fees imposed by the ordinance, the related classification of public way occupants or users, and the assignment or allocation of costs to the public way fee, all issues which are covered by Section 4939.06(A), Revised Code. Embarq has raised substantial arguments with regard to those issues. The Commission therefore finds that reasonable grounds for the complaint have been stated. Based on those findings, Section 4939.06(B), Revised Code, requires that the Commission suspend the public way fee provisions established by the ordinance as applied to Embarq for the duration of the Commission's consideration of the complaint. ***The public way fees established by the ordinance as applied to Embarq shall therefore be suspended and this matter should proceed to hearing. The public way fees under the ordinance will not be suspended as to any other occupancy of the public ways, as the complaint was not filed within 30 days after the ordinance first took effect***.

Entry, July 16, 2008, pp. 3-4 (emphasis added).

3. Chapter 4939 Of The Revised Code Is Constitutional

The Respondent also argues that the Chapter 4939 provisions on which the Complaint is based are unconstitutional under the Home Rule amendment. The City quotes that amendment but ignores its pivotal, final clause: ". . . as are not in conflict with general laws." Motion, p. 3.

Chapter 4939 of the Revised Code, a "general law" enacted in 2002, almost fifteen years ago, has been followed (for the most part) by municipalities, utilities, and the Commission since its adoption. The City's argument is unavailing. While the City can raise its constitutional challenge at the Commission, the Commission is not a court and cannot decide the issue. *See, e.g.*, *Reading v. Pub. Util. Comm.*, 109 Ohio St3d 193, 846 N.E.2d 840, 2006-Ohio-2181 (2006). It is also the case that "a statute that limits the municipality's power is not unconstitutional if the purpose of the statute is an exercise of the state's police powers and is not a substantial infringement upon the municipality's authority." *Ottawa Cty. Bd. of Commrs. v. Marblehead* (1999), 86 Ohio St.3d 43 at 44-45, 711 N.E.2d 663. *See, also*, *Columbus v. Teater* (1978), 53 Ohio St.2d 253, 260-261, 7 O.O.3d 410, 374 N.E.2d 154, and *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 68, 73 O.O.2d 285, 337 N.E.2d 766. The purpose of the entire Chapter 4939 of the Revised Code is the exercise of the ***state's*** police powers over the matters it covers. The detailed expression of the ***state's*** policy in R. C. § 4939.02 confirms this.[1] Moreover, Chapter 4939 is not a substantial infringement upon the City's authority here.

[1] R. C. § 4939.02 provides as follows:
(A) It is the public policy of this state to do all of the following:
(1) Promote the public health, safety, and welfare regarding access to and the occupancy or use of public ways, to protect public and private property, and to promote economic development in this state;
(2) Promote the availability of a wide range of utility, communication, and other services to residents of this state at reasonable costs, including the rapid implementation of new technologies and innovative services;
(3) Ensure that access to and occupancy or use of public ways advances the state policies specified in sections 4927.02, 4928.02, and 4929.02 of the Revised Code;
(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, and to receive cost recovery for the occupancy or use of public ways in accordance with law;
(5) Ensure in accordance with law the recovery by a public utility of public way fees and related costs;
(6) Promote coordination and standardization of municipal management of the occupancy or use of public ways, to enable efficient placement and operation of structures, appurtenances, or facilities necessary for the delivery of public utility or cable services;
(7) Encourage agreement among parties regarding public way fees and regarding terms and conditions pertaining to access to and the occupancy or use of public ways, and to facilitate the resolution of disputes regarding public way fees;

The City is simply wrong in its claim that control of the City's right-of-way is an exercise of "local self-government." Motion, p. 4. Under the modern precedents, it is the exercise of the police power and is subject to the "not in conflict with general laws" limitation on local authority in the Home Rule amendment. *See*, *In re Complaint of Reynoldsburg*, 134 Ohio St.3d 29, 2012-Ohio-5270.[2]

The *Reynoldsburg* case sets out a three-part test to determine whether a state law violates the Home Rule amendment:

1. Is the local law an exercise of "local self-government" or "police power"? Here, under the applicable, modern precedents, it is a police power.
2. Is the state statute a "general law" under the four-part test in *Canton*?[3] Here, yes.
3. Does Springfield's ordinance conflict with the state statute? Here, yes.

The City failed to conduct the required analysis under these precedents. AT&T offers this argument in light of the legal analysis vacuum the City has created. The City's constitutional challenge must, therefore, fail.

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(8) Expedite the installation and operation of micro, and smaller, wireless facilities in order to facilitate the deployment of advanced wireless service throughout the state.
(B) This policy establishes fair terms and conditions for the use of public ways and does not unduly burden persons occupying or using public ways or persons that benefit from the services provided by such occupants or users. (Version effective 3-21-17)

[2] In *Reynoldsburg*, the Court clarified its earlier precedent in *Vernon v. Warner Amex Cable Comm.*, 25 Ohio St.3d 117, 495 N.E.2d 374 (1986) as "actually stand[ing] for the proposition that regulation of a cable television company's distribution network is an exercise of the municipality's local police power, not its power of local self-government." *Reynoldsburg*, ¶ 32. The Court did not expressly overrule the 1923 *Perrysburg* case, relied on by the City here, but concluded that it was "irrelevant" to the issues before it in *Reynoldsburg*. *Id.*, ¶ 33.

[3] *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005.

4. Conclusion

For all of the foregoing reasons, the City's motion should, in all respects, be denied.

Respectfully submitted,

AT&T Ohio

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17-0291.memorandum contra

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U. S. Mail, postage prepaid, on the party listed below this 23rd day of March, 2017.

_____/s/ Jon F. Kelly__ _____

Jon F. Kelly

City of Springfield, Ohio

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17-0291.cs

Summary: Memorandum Contra The City of Springfield's motion to dismiss complaint electronically filed by Jon F Kelly on behalf of AT&T Ohio