

CASES

Supreme Court Rules City Must Pay for Moving Overhead Electric Lines in Public Right of Way Underground

By Dennis Whalen | November 15, 2012

The Supreme Court of Ohio ruled today that an electric rate tariff approved by the Public Utilities Commission of Ohio (PUCO) constitutes a "general law of the state" that takes precedence over a conflicting local ordinance. Based on that analysis, the court held that the city of Reynoldsburg must pay the costs incurred by the Columbus Southern Power Company (CSP) to comply with a city order requiring the utility to relocate its overhead electric lines in downtown Reynoldsburg to an underground utility duct.

The court's 7-0 decision, which affirmed an order of the PUCO, was written by Justice Terrence O'Donnell.

In May 2005, the Reynoldsburg City Council adopted an ordinance that authorized the city service director to order utility companies with facilities located in public rights of way within the city to relocate those facilities underground if that action was deemed necessary as part of a public improvement project. The ordinance specified that if underground relocation of utility equipment was ordered, the utility company would be solely responsible for all costs of the project.

Two months after the ordinance was enacted, the city sent a letter to CSP stating that the service director had determined that overhead power lines located in the public right of way along Main Street in downtown Reynoldsburg needed to be moved to an underground duct being constructed by the city as part of a civic redevelopment and beautification program. The letter noted that under the city's new right-of-way ordinance, the utility company was required to cover all costs of the relocation.

CSP responded that it would relocate the power lines underground, but only if the city covered all costs of the project as required under a specific provision addressing such relocations that was included in a CSP tariff (rate and service agreement) that had been approved by the PUCO in 1992.

The city and CSP subsequently entered into a letter of agreement in which Reynoldsburg agreed to pay the estimated costs of relocating the power lines up to a maximum of \$1.18 million and CSP agreed to go forward with the relocation project, and both parties agreed that the dispute over which party bore responsibility for which costs would be resolved in an appropriate legal forum.

Reynoldsburg filed suit in the Franklin County Court of Common Pleas seeking a declaratory judgment that its right-of-way ordinance was a lawful exercise of the city's local government powers under the "home rule" provision of the Ohio Constitution, and therefore superseded a conflicting provision in a PUCO tariff. CSP moved to dismiss, asserting that court lacked subject-matter jurisdiction to consider the case because it involved a dispute over utility rates and service, and therefore could only be resolved by the PUCO. The trial court denied CSP's motion to dismiss. CSP then sought and was granted a writ of prohibition in which the Supreme Court of Ohio held that the dispute fell within the exclusive jurisdiction of the PUCO.

The city then filed a complaint with the PUCO in which it asked the commission to 1) vacate the portion of the 1992 CSP tariff requiring municipalities to cover all costs of relocating utility lines that were located in public rights of way as unjust, unreasonable or unlawful; 2) find that the city ordinance superseded the tariff provision; and 3) find that the tariff violated the home rule provision of the state constitution by interfering with the city's ability to exercise its local government powers.

In 2011 the commission issued an order in which it held that the CSP tariff was applicable to Reynoldsburg



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under the facts of the case, and that under the tariff Reynoldsburg was responsible for the entire cost of the relocation project. In its decision, the PUCO held that the tariff was just and reasonable because it prevented the costs of power line relocations benefitting only one of the many municipalities within CSP's service area from being paid for by higher utility rates that would be borne by all of the utility's customers. The PUCO order did not address the "home rule" constitutional arguments raised by Reynoldsburg, stating that it lacked jurisdiction to consider such issues, which were appropriate for review and resolution by the Supreme Court on appeal.

Reynoldsburg exercised its right to appeal the PUCO's decision to the Supreme Court.

In today's unanimous decision, the court affirmed the PUCO's findings that, considered outside the context of a home rule challenge, the 1992 CSP tariff at issue is both lawful and reasonable. The court also agreed that Reynoldsburg's demand that CSP relocate its overhead power lines underground invoked the portion of the tariff that required a municipality making such a demand to pay all costs of the relocation project.

In addressing Reynoldsburg's constitutional claims, the court held that the right-of-way ordinance was not an exercise of the city's fundamental powers of local self-government, but was rather an exercise of its police powers intended to promote "the public health, safety and welfare." Because the ordinance was an exercise of police powers, the court held that it was unenforceable if it conflicted with a general law of the state.

Quoting from the Supreme Court of Ohio's 2002 decision in *Canton v. State*, Justice O'Donnell wrote: "'To constitute a general law, for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.'"

Finding that the state laws that authorize the PUCO to set utility rates through tariffs meet all four of the *Canton* criteria, Justice O'Donnell wrote: "The last part of the test calls for a determination of whether a conflict exists between state law and the local ordinance. ... Section 17 of CSP's tariff requires municipalities and other public authorities to pay the cost of requiring CSP to relocate overhead electric utility lines underground; and Reynoldsburg City Code 907.06(A)(4) requires public utilities to pay the cost to bury overhead power lines. Thus, a conflict exists between the tariff and the ordinance.

"Reynoldsburg's right-of-way ordinance is an exercise of the municipality's police power and the cost provision of the ordinance conflicts with CSP's commission-approved tariff, a general law. Thus, the cost provision of the tariff is constitutional and prevails over the conflicting ordinance."

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2011-1274. In re Complaint of Reynoldsburg, Slip Opinion No. 2012-Ohio-5270.

Public Utilities Commission, No. 08-0846-EL-CSS. Orders affirmed.

O'Connor, C.J., and Lundberg Stratton, O'Donnell, Lanzinger, Cupp, and McGee Brown, JJ., concur.

Pfeifer, J., concurs in judgment only.

Opinion: <http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2012/2012-Ohio-5270.pdf>

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