Recent Legislation: Public Utilities--Decreased Municipal Power to Regulate

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PUBLIC UTILITIES — DECREASED MUNICIPAL POWER TO REGULATE

OHIO REVISED CODE SECTION 4905.65

The recent enactment of section 4905.65 of the Ohio Revised Code\(^1\) impliedly overrules \textit{State ex rel. Cleveland Elec. Illuminating Co. v. City of Euclid},\(^2\) which upheld the right of a municipality to compel underground installation of high tension wires. A result of the so-called "hot wires" controversy, section 4905.65 permits local regulation of construction, location, or use of a public utility facility \textit{unless} the facility:

1. Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulation; and
2. Is to be constructed in accordance with generally accepted safety standards; and
3. Does not unreasonably affect the welfare of the general public.\(^3\)

Two important points of conflict exist between the language of this section and the \textit{Cleveland Elec. Illuminating} case, relative to the tenets of Ohio home rule\(^4\) and the role of the Public Utilities Commission in underground wiring suits.\(^5\)

The question raised in the \textit{Cleveland Elec. Illuminating} case involved the city's adoption of an ordinance\(^6\) requiring that electric power lines carrying more than 33,000 volts be placed underground. There, plaintiff contended that the requirement was unrelated to the health, safety, and welfare of the community and was, therefore, unconstitutional. The Court of Appeals of Ohio, Cuyahoga County, adopting \textit{in toto} a master's findings, held the ordinance unconstitutional,\(^7\) but was reversed by the Ohio Supreme Court in a four to three decision which held that

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4. OHIO CONST. art. XVIII, § 3 provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
5. To date no cases have arisen to demonstrate precisely what this role is. Ohio is apparently the first state to grant its public utilities commission the power to wield a presumption in favor of the reasonableness of utilities' plans. Compare OHIO REV. CODE § 4905.65 (Supp. 1963), \textit{with} MASS. ANN. LAWS. ch. 166, § 22A (1953).
7. A writ of mandamus requesting the court to require the issuance of a permit for the overhead construction of a 132,000 volt steel tower electric transmission line was granted.
existing code sections were sufficient to support municipal regulation of such facilities.

Thus, in light of the supreme court's holding in the Cleveland Elec. Illuminating case, judicial interpretation by that court may well find Ohio Revised Code section 4905.65 to be an unconstitutional limitation on municipal home rule. Furthermore, under the criteria set forth in the statute, municipal power to compel underground installation is in effect destroyed. The three exceptions listed in the statute are practically all inclusive. For example, it would seem that the first exception in the statute, which precludes municipal regulation where "one or more political subdivisions" are involved, will inevitably bar almost all municipal regulation of high tension wires for such lines commonly traverse several communities. The language of the second exception, which frees utilities from municipal regulation if the facility is "to be constructed in accordance with generally accepted safety standards," is a similar bar to the type of reasonable exercise of police power which the Ohio Supreme Court supported in the Cleveland Elec. Illuminating case. Finally, since the last exception allows municipal regulation only where the "welfare of the general public" is unreasonably affected, it may be expected that the Ohio Supreme Court will not be favorably disposed toward upholding this much more limited grant of power in view of its decision in the Cleveland Elec. Illuminating case which supported broad municipal power to regulate utilities.

A determination of what is best for the public interest should rest with the local communities, not the electric utilities. However, this is not to

8. The three code sections cited by the supreme court are: (1) OHIO REV. CODE § 715.27 which provides: "Any municipal corporation may: . . . (B) Regulate the construction and repair of wires, poles, plants . . . ."; (2) OHIO REV. CODE § 4933.13 which provides: "With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity . . . ."; and (3) OHIO REV. CODE § 4933.16 which provides: "No person or company shall . . . construct, or maintain a line, wire, fixture, or appliance of any kind to conduct electricity . . . without the consent of such municipal corporation . . . ."

9. See note 4 supra.

10. The task of the Public Utilities Commission in prescribing generally accepted safety standards for Ohio in this area will be difficult. Witness, for example, the diametrically opposed views of the majority and minority in the Cleveland Elec. Illuminating case, and the voluminous information given the Special Master Commissioner. Brief for Relator-Appellant, appendix, p. 14, State ex rel. Cleveland Elec. Illuminating Co. v. City of Euclid, 362 U.S. 457 (1959).

11. In light of the four to three holding, quaere whether a slight change in the composition of the Ohio Supreme Court might result in sustention of § 4905.65, thereby assuring interpretive problems.

discount the importance of weighing both sides in underground installation cases. For example, the degree of danger from high voltage electricity has always been the ultimate issue in this area.\textsuperscript{13} Likewise, aesthetic and economic objectives are frequently brought into issue.\textsuperscript{14} On the other hand, public utility companies traditionally argue that the cost increase of placing wires underground would have to be borne by consumers.\textsuperscript{16} However, assessing the demands of public welfare should be a municipal function, unfettered by the burden of section 4905.65.

Placement of the new statute as an appendage to the chapter dealing with general powers of the Public Utilities Commission, heightens the confusion already existing between sections 4905.04, 4933.13, and 4933.16.\textsuperscript{18} The Public Utilities Commission was not involved in the \textit{Cleveland Elec. Illuminating} case. Nor does section 4905.65 expressly mention either the Commission or underground wiring.\textsuperscript{18} The role of the commission as an arbiter in underground installation suits is ill-defined. Yet, the Commission has been given this section to apply. It is inconceivable that the Public Utilities Commission is a necessary additional step in underground wiring litigation. The Commission is necessarily distant from the zoning and planning problems of the state's municipalities.\textsuperscript{19} Regulation of the dangers inherent in high tension wires by the exercise

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\item[13.] See Hooley, \textit{Compulsory Underground Wiring — A Battle Rejoined in Public Utility Law}, 5 VILL. L. REV. 80, 90 (1959). The plaintiff-electric company argued that in the past thirty years only four unusual accidents had occurred; namely, an oil pipeline leak near a tower was ignited by a locomotive's sparks; a conductor was hit by a rifle bullet; an aviator flew into a line; lines were dynamited by vandals. The majority in the \textit{Cleveland Elec. Illuminating} case sensed future dangers, while the minority minimized these few highly extraordinary accidents.
\item[14.] Generally, police power is not available to satisfy aesthetic objections to overhead wires, because no relation to public health, safety, or welfare can be shown. See Dobbins v. Los Angeles, 195 U.S. 223 (1904); Wondrak v. Kelley, 129 Ohio St. 268, 195 N.E. 65 (1935). \textit{Cf.} Reid v. Architectural Bd. of Review, 119 Ohio App. 67, 192 N.E.2d 74 (1963).
\item[15.] Hooley, \textit{supra} note 13, at 88, 93. Cost allocation technicalities stem from the question; "Who will consume electricity traveling an underground route?" Distinctions would exist between industrial and household users who need different voltages, and the new statute assures several municipalities being involved in any strictly geographical allocation.
\item[16.] \textit{Ohio Rev. Code} § 4905.04 provides: "The public utilities commission is hereby vested with the power and jurisdiction to supervise and regulate public utilities . . . ." Pertinent portions of §§ 4933.13 and 4933.16 are set out in note 8, \textit{supra}. Giving effect to the sense of these sections, as well as § 4905.65 and constitutional home rule, is an interesting interpretive dilemma which future cases will have to meet and resolve.
\item[18.] See note 3 \textit{supra} and accompanying text.
\item[19.] It would seem difficult for the commission to explore the many variables in all communities, such as different proposed locations and voltages, municipal rationales, and franchise histories, considering the volume of foreseeable litigation. Perhaps appeals could progress through the common pleas courts, as they would be more attuned to local situations than an agency with state-wide responsibilities.
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of police power ought to be an area in which home rule envisions local legislation, because the vital interests of individual communities, not the state, are involved.20

Ohio Revised Code section 4905.65 has the effect of negating fundamental aspects of home rule. It is an attempt to forestall what the Ohio Supreme Court has explicitly held to be within the power of a municipality. Future litigation developing the import of this legislation may see the statute fall as unconstitutional.

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