

### Commonwealth Court of Pennsylvania Reverses the PUC and Upholds Certain Municipal Permitting Fees

In February 2021, the Pennsylvania Public Utility Commission (PUC) issued a declaratory order finding that a utility did not need to pay certain municipal permitting fees because those fees were preempted by the Pennsylvania Public Utility Code (Code).<sup>1</sup> The Commonwealth Court of Pennsylvania (Commonwealth Court) reversed that decision in April 2022.<sup>2</sup> The key to the Commonwealth Court's analysis was that the permitting fees were permissible because they do not "constitute utility regulation."

#### Background

In a long line of cases, the Supreme Court of Pennsylvania (Supreme Court) has held that the Code generally preempts the field of public utility regulation. According to the Supreme Court: "If each county were to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state."<sup>3</sup> Consequently, the Supreme Court has held that municipalities have very limited authority to regulate public utilities.<sup>4</sup>

The seminal case involving the preemption of municipal permitting fees is *PPL Electric Utilities Corp. v. City of Lancaster*<sup>5</sup> (*City of Lancaster*). There, the City of Lancaster (City) enacted a comprehensive program for managing public rights-of-way (ROWs). The City argued that the Supreme Court should employ a conflict preemption analysis rather than a field preemption analysis because Section 1511(e) of the Business Corporation Law<sup>6</sup> gave the City explicit authority to issue permits for utilities to enter ROWs. The Supreme Court rejected that argument, finding that the tribunal only needs to determine whether the municipal ordinance intrudes upon the field that the General Assembly entrusted to state-wide regulation.

The Supreme Court reviewed the City's ordinance in detail and found that it was preempted. According to the Supreme Court, the municipal ordinance provisions made the City a co-regulator of public utilities with the PUC. For example, the municipal ordinance provided that the City would inspect public utility facilities for compliance with PUC standards, but compliance and enforcement of those standards was previously entrusted to the PUC. The Supreme Court found the City's annual maintenance fee was preempted because it regulated utilities; the fee covered the City's regulatory expenses (including inspection and enforcement). The Supreme Court found this fee "materially congruent" with the state-level costs included in the assessment that the PUC annually charges utilities. The Supreme Court reasoned that the PUC assessment is a utility regulation; therefore, the municipal maintenance fee is also a utility regulation. As such, the municipal fee was preempted.

#### The PUC Decision

Armstrong Telecommunications Inc. (Armstrong) asked the PUC to issue a declaratory order that Armstrong need not pay certain permitting fees that Waterford Township, Erie County (Waterford), charged utilities installing utility facilities in the ROW.<sup>7</sup> Armstrong argued that the Code preempts the fees, whereas Waterford countered that the permitting fees were explicitly authorized by state law (Section 1511(e) of the Pennsylvania Business Corporation Law and Section 67322 of Pennsylvania's Second Class Township Code). Both parties argued that *City of Lancaster* supported their position.

The PUC's decision focused on Waterford's inspection fees. The PUC concluded that Waterford's inspection fees were preempted because the PUC has exclusive jurisdiction to inspect the



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locations and installation of public utility facilities (the PUC explicitly distinguished inspections relating to roadway disturbances from inspections of public utility facilities).<sup>8</sup> The PUC was also concerned that allowing municipalities to charge public utility inspection fees would give rise to a patchwork of municipal fees, undermining the goal of a uniform regulatory framework for utilities.

## The Commonwealth Court Decision

Waterford appealed the PUC's decision. According to the Commonwealth Court, Waterford characterized its permitting fees as incidental to the application process, whereas the PUC characterized the fees as an attempt to regulate public utility facilities. The Commonwealth Court reviewed the *City of Lancaster* decision and concluded that the regulatory purpose or effect of the permitting fee is the determining factor in the field preemption analysis: "[I]f a local governmental authority is preempted from enacting any ordinance that purports to regulate a public utility, it matters not at all if that ordinance authorizes fees that recur periodically, at the discretion of the local authority, or merely once. Those fees are preempted by the Code."

The Commonwealth Court found that Waterford's permitting ordinances do not regulate public utilities. Rather, they regulate the time and manner for utilities to enter a public ROW. The Commonwealth Court reviewed the terms and conditions set forth in Waterford's permits and concluded that they "merely require that a permittee timely commence and complete its work or be subject to further fees." The Commonwealth Court rejected the PUC's argument that Waterford impermissibly required the inspection of public utility facilities. Instead, the Commonwealth Court found that the inspection merely confirmed that the utility acted in conformity with its application for access to the ROW.

## Conclusion

In *City of Lancaster*, the Commonwealth Court found that a City permitting fee was not preempted, but, on review, the Supreme Court disagreed. The time for appealing the Commonwealth Court's decision in *Waterford* has not yet run, so it is possible that the Supreme Court will be asked to again review a Commonwealth Court decision upholding a municipal permitting fee. Municipal solicitors and public utility advocates should watch to see if an appeal is filed and, if so, whether the Supreme Court decides to hear the case. In the meantime, it seems clear that advocates arguing for or against the preemption of a municipal permitting fee need to focus on the purpose of the fee in order to persuade the tribunal that the fee does or does not regulate public utilities.

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<sup>1</sup> *Armstrong Telecommunications Inc. Petition for Declaratory Order*, Docket No. P-2019-3014239 (Order entered February 19, 2021).

<sup>2</sup> *Waterford Township v. Pa. Pub. Util. Comm'n*, 306 C.D. 2021 (April 21, 2022) (*Waterford*).

<sup>3</sup> *Einhorn v. Phil. Elec. Co.*, 410 Pa. 630, 190 A.2d 569 (1063).

<sup>4</sup> For an example of a case permitting municipalities to regulate public utilities, see, *Duquesne Light Co. v. Borough of Monroeville*, 449 Pa. 573, 298 A.2d 252 (1972) (in which the Supreme Court gave effect to both the Code and a Pennsylvania Borough Code provision specifically allowing boroughs to define reasonable underground wiring districts).

<sup>5</sup> 654 Pa. 203, 214 A.3d 639 (2019).

<sup>6</sup> 15 Pa. C.S. § 1511(e).

<sup>7</sup> For a more detailed discussion of the PUC's decision, please see a previous client alert: *Pennsylvania Public Utility Commission Rules Two Municipal Permitting Fees are Preempted by State Law* (February 24, 2021).

<sup>8</sup> The Commonwealth Court's decision notes "The Commission clarifies that it did not preempt the Township fees by equating them to the maintenance fees at issue in *City of Lancaster* but rather because they were imposed specifically for the purpose of inspecting public utility facilities."

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