

Bond Case Briefs

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Pennsylvania Public Utility Commission Rules Two Municipal Permitting Fees Are Preempted by State Law.

The Pennsylvania Public Utility Code (Code) gives the Pennsylvania Public Utility Commission (PUC) extensive authority to regulate public utilities in Pennsylvania. The Supreme Court of Pennsylvania has held that the General Assembly intended that the Code would create a uniform, statewide regulatory scheme.¹ To avoid overlaying this statewide scheme with a crazy quilt of local regulations, municipalities are generally preempted from regulating public utilities.

Nevertheless, disputes frequently arise between public utilities and municipalities over the authority of municipalities to regulate public utility facilities in public rights-of-way (ROWs). This is partly because the Pennsylvania Business Corporations Law of 1988 states that public utilities have the right to enter into and occupy ROWs, but “[b]efore entering upon any street, highway, or other public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the governmental authority having responsibility for the maintenance thereof.”²

A recent PUC proceeding involved a dispute over a municipality’s authority to charge permitting fees for placing public utility facilities in a municipal ROW.³ Armstrong Telecommunications Inc. (Armstrong), a certificated telecommunications utility, asked the PUC to issue a declaratory order that Armstrong did not need to pay certain permitting fees levied on it by Waterford Township, Erie County (Waterford).⁴ A divided PUC⁵ resolved only some of the issues in the case. Additional litigation (possibly in a civil court) will be needed to answer the remaining issues.

FACTS

When deciding a petition for declaratory order, the PUC accepts the facts as described by the parties.⁶ Armstrong explained that it was installing fiber optic cable in public ROWs inside and outside the municipal boundaries of Waterford. That cable will be used to provide telecommunications services subject to the PUC’s jurisdiction.

Waterford imposed the following permitting fees on Armstrong: (1) inspection fees (including a “location site inspection fee,” a “utility pole inspection fee” and an “outside of shoulder and pavement inspection fee”), (2) application fees, and (3) refundable and non-refundable bonding fees. Waterford noted that it had amended its ordinance, at Armstrong’s request, to eliminate a fee per linear foot, reducing the nonrefundable permit fees to be charged.

POSITIONS OF THE PARTIES

Armstrong requested a broad ruling that a municipality cannot charge a public utility any fees for placing public utility facilities in a municipal ROW. According to Armstrong, Waterford’s imposition of multiple permitting fees was burdensome,⁷ effectively denying the utility its right to occupy the municipal ROW. If every municipality would charge similar fees, it argued, fiber optic projects would not be undertaken, to the detriment of the commonwealth. Armstrong also argued that the fees charged were unreasonably high.

Waterford argued that 15 Pa. C.S. § 1511(e) gives it the right to charge fees for a public utility to enter into a municipal ROW. It distinguished its permitting fees from the continuing maintenance fees that were struck down in *City of Lancaster*. Waterford argued that the fees charged are reasonable because they are consistent with similar fees charged by the Pennsylvania Department of Transportation and because the fees defray the municipality's costs to inspect the site of the facilities.

DISPOSITION

The PUC analyzed each municipal permitting fee separately. With respect to the "location site inspection fee" and the "pole inspection fee," based on *City of Lancaster*, the PUC found that the inspection of public utilities is subject to the PUC's exclusive jurisdiction. The PUC reasoned that fees related to the inspection of such facilities are also within the PUC's exclusive jurisdiction.⁸ The PUC wanted to avoid a patchwork of municipal inspection fees for public utilities, which would run contrary to the goal of providing a uniform statewide regulatory framework for public utilities. Consequently, the PUC ruled that municipal inspection fees relating to the inspection of public utility facilities are preempted by the Code.

The PUC explicitly distinguished municipal inspections related to roadway disturbances (e.g., inspections to determine compliance with municipal backfill and road re-surfacing requirements) from municipal inspections relating to public utility facilities (e.g., inspections to determine the safety of public utility facilities). The PUC did not address whether the PUC has jurisdiction over inspections or fees related to roadway disturbances.

Similarly, the PUC did not address the reasonableness of the amounts that Waterford charged for municipal inspections. According to the PUC, jurisdiction over the reasonableness of fees lies with a court of competent jurisdiction.

For the same reason, the PUC refused to address Waterford's "application fee." The PUC determined that Armstrong solely challenged this fee based on the amount of the fee, not the imposition of the fee itself. The PUC concluded that it does not have jurisdiction to determine the reasonableness of a municipal permitting fee.

The PUC concluded that it did not have sufficient facts to determine whether the "outside of shoulder and pavement inspection fee" involves an inspection of a public utility facility, so it did not rule on whether that fee is preempted. Similarly, the PUC concluded that it did not have sufficient information regarding the purpose of the bonding fee and the conditions under which it is refundable. Consequently, it refused to determine whether the refundable bonding fees are preempted by the Code. Finally, the PUC did not discuss the non-refundable bonding fees charged by Waterford. Apparently, the PUC concluded that Armstrong was not contesting these fees.

FUTURE LITIGATION

The PUC's decision was entered on February 19, 2021. Consequently, the 15-day period for Waterford to file a petition for reconsideration⁹ has not yet expired. Similarly, the period for filing an appeal with the Commonwealth Court of Pennsylvania has not yet expired. Consequently, it is too soon to determine if additional proceedings will be necessary in this case. Even if the PUC's February 19, 2021, declaratory order is the final order in this proceeding, it is clear that additional litigation will be needed to resolve some of the issues raised in this case. As the chairman recognized in her concurring and dissenting statement, "this matter is complex and will have long-ranging impacts."¹⁰

1 See, PPL Elect. Util. Corp. v. City of Lancaster, 214 A.3d 639 (Pa. 2019) (City of Lancaster) and cases cited therein.

2 15 Pa. C.S. § 1511(e).

3 Armstrong Telecommunications Inc. Petition for Declaratory Order, Docket No. P-2019-3014239 (Order entered Feb. 19, 2021).

4 The PUC has authority to issue declaratory orders to terminate controversies or remove uncertainty. 66 Pa. C.S. § 331(f) and 52 Pa. Code § 5.42.

5 The PUC is composed of five commissioners. Three commissioners voted in favor of the ruling. The chairman of the PUC voted to concur in part and dissent in part, indicating that she would have denied the petition and remanded the matter for an investigation to get additional input from multiple affected stakeholders. One seat on the PUC is currently vacant.

6 The PUC has discretion to issue a declaratory order. It may exercise its discretion not to issue a declaratory order if there are material issues of fact in the case. In this case, the parties disputed some facts, but they were not material to the PUC's ultimate decision. For example, Waterford characterized its fees as "ordinary permitting fees" allowed by Section 1511(e), whereas Armstrong claimed this was the first time that these fees were imposed on a telecommunications utility.

7 Armstrong alleged that Waterford had advised it that the fees imposed would exceed \$200,000, but later provided Armstrong with permitting forms that appeared to charge a total of \$12,190. Armstrong averred that it was not certain of the amount of the disputed fees, but argued that even \$12,190 was excessive.

8 The PUC charges utilities an annual assessment for the costs of operating the PUC, including the cost of inspections.

9 52 Pa. Code § 5.572(c).

10 Armstrong Telecommunications Inc. Petition for Declaratory Order, Docket No. P-2019-3014239 (concurring and dissenting statement of Chairman Gladys Brown Dutrieuille) p. 1.

Cozen O'Connor - Jonathan Nase

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