Local Street Opening Fees Preempted by the Public Utility Code

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The use of street opening ordinances to regulate and maintain public rights-of-way has increased in popularity over the past few years, with many of the local municipalities having adopted some form of a model ordinance. These ordinances commonly include references to fees for permitting and inspection, and in many cases provide for the use of a variable fee based on the linear footage of the proposed opening into the public right-of-way. The goal of this variable fee is to provide for flexibility, as a street opening can be minor, requiring very little review, or involve significant linear footage, requiring longer inspections and/or additional engineer review. The Commonwealth Court's recent decision in *Columbia Gas of Pennsylvania, Inc. v. Menallen Township*, 351 A.3d 326 (Pa. Cmwlth. 2026), impacts the interpretation of those street opening ordinances and their variable fees when applied to public utilities, such as water, gas, and electric companies.

From 2016 to 2022, Columbia Gas of Pennsylvania, Inc. ("Columbia Gas"), a public utility regulated by the Pennsylvania Public Utility Code, 66 Pa.C.S. § 101 et seq., ("PUC"), performed three infrastructure expansion projects in Menallen Township ("Township"), including the installation of approximately 1,700 linear feet of pipe in public rights-of-way. Columbia Gas paid $14,259 in fees to the Township for that infrastructure work, and in order to begin construction on a new project within the Township in 2023, requiring the addition/replacement of approximately 7,000 linear feet of pipe, Columbia Gas paid, under protest, $42,542.08 in fees to the Township. The Township charged these fees via its street opening ordinance ("Ordinance"), which imposes fees on anyone seeking to excavate or open a public roadway. The ordinance included a flat application fee of $150 for all applications. It also imposed variable inspection fees calculated on a per hour and per square foot basis, intended to fund the Township's inspection of the utility's pipe installation work and its monitoring of road conditions following the restoration.

Columbia Gas filed a petition for review in the Commonwealth Court's original jurisdiction challenging the Township's Ordinance Sections 13-16 which limit the locations where excavation can occur, such as by limiting removal of trees or shrubs, prohibiting excavation of recent paving, and regulating the depth of facilities ("Location Provisions"), Section 20 which set the following fees: a permit fee of $150 ("Application Fee"); inspection and supervision fees of $18-25 per hour for the Township's engineer to supervise the work, plus $3.67 per square foot of opening/excavation ("Inspection Fees") and a bond amount of $25 per linear foot, and Section 21 which imposes a civil penalty of $600 per day on any entity that violates the provisions of the Township's street opening ordinance ("Violation Provision"). Columbia Gas also challenged the Township's fee resolution, which raised the per-hour Inspection Fee to a minimum of $75 per hour, arguing that the Inspection Fee is preempted under the field preemption doctrine established by the Pennsylvania Supreme Court in *PPL Electric Utilities Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019).

Before further analysis, the Commonwealth Court dismissed Columbia Gas's challenges to the Location Provisions and the Violation Provisions as unripe for review since the Township had not enforced those provisions of the Ordinance against Columbia Gas.

Upon further analysis, the Commonwealth Court upheld the $150 flat Application Fee but found that the variable Inspection Fees crossed the line from permissible management of rights-of-way into impermissible regulation of utility facilities and operations. The court's reasoning followed the analytical framework set out in *Waterford Township v. PUC*, 276 A.3d 301 (Pa. Cmwlth. 2022), which distinguished between two categories of municipal fees. On one side of the line are fees that regulate access to the right-of-way — permit fees, application fees, and similar charges that control when and how an applicant may open a street. Those remain permissible, even as applied to public utilities. The $150 flat Application Fee in this instance regulated access to public rights-of-way rather than regulating utility operations and did not infringe on preempted utility regulation.

However, fees that regulate the quality of the utility's work — charges tied to the scope of inspection, the duration of monitoring, or the method of installation — fall within the PUC's exclusive regulatory field and are preempted. The Commonwealth Court found that the Township's per hour and per square foot Inspection Fees were designed to fund

the Township's own heightened inspection of the utility's construction methods and to monitor the utility's restoration work over time. That purpose, the Court concluded, placed the fees squarely within the preempted field. The Court noted that the dollar amount of the fees alone was not dispositive. The *regulatory purpose* the fees were designed to serve was the critical determination.

The key takeaways from the Commonwealth Court's holding in *Columbia Gas* for municipalities are as follows:

1. **Flat permit or application fees remain on solid ground.**

   Municipalities own their roads and retain authority over their streets and rights-of-way. A municipality may charge a reasonable flat fee to process an application, issue a permit, and manage access to the right-of-way. The fee must relate to the administrative cost of regulating right-of-way access, not to the scope or duration of the utility's construction activity. This distinction is necessary to avoid allegations of preempted regulations.

2. **Variable fees related to the size of the excavation, the number of inspection hours, or the length of a monitoring period are vulnerable to preemption challenge when applied to PUC regulated utilities.**

   A municipality that calculates its fee based on the square footage of the cut or the hours its inspector spends watching and monitoring the utility's crew is, in the Commonwealth Court's view, regulating the utility's work — not managing access to the roadway. Such regulation impermissibly treads on the PUC's preemptive regulation of public utilities.Despite this decision, municipalities still retain their authority as road owners. The right to define the condition in which a road must be returned after an opening — through restoration standards set as conditions of right-of-way access — is grounded in the municipality's property interest in its own infrastructure, not in the regulation of utility operations. Assessing street opening fees in the wake of *Columbia Gas* requires careful structuring, but a municipality that works with its solicitor to think creatively about its ordinance and fee structure is not without recourse.

3. **Municipalities may still impose the full range of their existing fee structures on** ***non-utility*** **applicants — private contractors, developers, cable providers that are not certificated public utilities, and others.**

   The preemption doctrine applies only where the fee functions as a regulation of a PUC jurisdictional utility. The Commonwealth Court's decision does not apply to non-utility applicants, as the Code and its preemption do not apply to them. A two-tiered fee structure that distinguishes between utility and non-utility applicants is one way to preserve existing revenue from non-utility work while complying with the court's holding.

Municipalities that currently impose variable inspection or restoration monitoring fees on public utilities should review their street opening ordinances and fee resolutions promptly. In particular, a governing body should work with its solicitor to determine whether its fee structure, as applied to utilities, can withstand scrutiny under the *Columbia Gas* framework. Where variable fees are assessed against utilities, the municipality should consider whether an amendment to its fee resolution, its street opening ordinance, or both would better align with current law while still protecting the municipality's infrastructure investment. A municipality that has already reviewed its ordinance and, if necessary, adopted a compliant approach, will be better positioned to respond to inquiries and challenges from a position of strength.

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