Preserving the Municipal Exemption From Federal Pole Attachment Regulations

Summary
Several times since 2010, the Federal Communications Commission (FCC or Commission) has recommended that Congress eliminate the exemption public power utilities and rural electric cooperatives have from FCC regulation of pole attachments under the guise of facilitating broadband deployment. Since 2016, the FCC has opened four dockets that reflect its desire to regulate, either explicitly or implicitly, public power utility poles even though the Commission is barred from doing so under section 224 of the Communications Act. In June 2018, Senate Commerce Committee Chairman John Thune (R-SD) and Senator Brian Schatz (D-HI) introduced legislation that would effectively gut the exemption for public power and weaken states’ ability to reverse preempt federal pole attachment regulations. Soon thereafter, in September, the FCC issued a report and order asserting its authority to preempt state and local laws and agreements, including those related to pole attachments.

The American Public Power Association (APPA or Association) opposes any efforts by Congress to weaken or eliminate the municipal exemption public power utilities have from federal pole attachment regulations. The Association also opposes the FCC’s efforts to circumvent well-established federal law that precludes the Commission from regulating public power utility poles. In addition, APPA opposes any attempts by the FCC or Congress to impose a one-size-fits-all approach to the make-ready process for attaching to poles.

Background
The term pole attachment refers to the process by which communications companies can collocate communications infrastructure on existing electric utility poles. This reduces the number of poles that must be built to accommodate utility services, while reducing costs to users of both services by allowing providers to share costs. Rules governing pole attachments must balance the desire to maximize value for users of both electric and communications services with concerns unique to electric utility poles, such as safety and reliability.

In 1978, Congress passed the Pole Attachment Act, which added section 224 to the Communications Act of 1934, to require the FCC to establish subsidized rates for pole attachments for the then-new cable industry. Under the law, public power utilities and rural electric cooperatives were exempted from this requirement “because the pole attachment rates charged by municipally owned and cooperative utilities [were] already subject to a decision-making process based upon constituent needs and interests.” This exemption continued through multiple telecommunications reform efforts, including enactment of the Telecommunications Act of 1996, because Congress maintained that the existing process is appropriate and adequate. Attachment rates for public power utilities are usually determined at the local level and if a utility is seeking excessive pole-attachment rates, the affected attacher has the remedy of challenging the rate at the local level. (In a few states, public power attachment rates are governed by state law.)

In 2009, Congress directed the FCC, through the American Recovery and Reinvestment Act (ARRA), to develop and deliver to Congress within one year a National Broadband Plan (NBP) to ensure that every American has access to broadband capability. On March 16, 2010, the Commission released its NBP, which recommended, among other things, that “Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits, and rights-of-way.” In this recommendation, the FCC singled out the exemption of “poles owned by cooperatives, municipalities, and non-utilities,” and poles in states that have adopted their own system of regulation, noting that 85 million poles are not subject to its jurisdiction. However, the Commission cited no cases where the exemption proved to be an impediment to broadband deployment. In fact, the FCC provided no rationale for removing the exemption except to have a “uniform policy for broadband access to privately owned physical infrastructure.”
Regulatory Action
On April 7, 2011, the FCC approved a pole attachment order. While most public power utilities were not directly impacted by the order because their pole attachments are not subject to the FCC’s jurisdiction, many were indirectly affected because the FCC’s revised telecom formula and make-ready provisions provide a benchmark for pole attachment rates and access. The FCC ignored the serious concerns of utilities on the impact that reducing the telecom rate for attachments down to the cable rate would have on cost recovery. The Commission also ignored other important concerns, including those regarding wireless attachments above the communications space. The Association believes that, despite the stated goal of the order, it has done little to spur broadband deployment or adoption, which the FCC asserted would be aided by “streamlining access and reducing costs for attaching broadband lines and wireless antennas to utility poles.”

On December 22, 2016, the FCC issued a public notice seeking comment on a petition for a declaratory ruling submitted by Mobilitie, LLC, which asserted that local government right-of-way (ROW) regulations and zoning requirements impede the ability of wireless carriers to deploy small cell wireless facilities in a timely manner. In comments to that petition, various wireless companies requested that the Commission use section 253 of the Communications Act to override section 224, which exempts public power utility poles from regulation by the Commission. On April 7, 2017, APPA filed reply comments rebutting the assertions of wireless companies that the Commission can override section 224 using section 253, a provision which exempts public power utility poles from FCC regulation. In November 2018, the FCC preempted state and local laws and agreements, including those related to pole attachments, to “remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new [broadband] services.”

Congressional Action
In 2017, the Senate Commerce and House Energy & Commerce Committees held five FCC-related hearings. During those hearings, some witnesses and members of both committees claimed utility pole attachments are a barrier to the ubiquitous deployment of broadband technology. At several of those hearings, FCC Chairman Ajit Pai recommended that, to foster widespread broadband deployment, Congress should extend FCC jurisdiction to include public power pole attachments. At two hearings, representatives from local governments were invited to provide the municipal perspective on broadband siting, but neither of the towns represented were public power com-
The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.