

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 2018, 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) 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.¹ 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. APPA 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 “streamlin[ing] access and reduc[ing] 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 that seeks to promote competition for telecommunications services by barring state and local barriers to entry and that also governs state and local ROW management. The text of section 224 is very clear—the FCC does not have statutory authority to regulate public power poles. Further, neither the FCC nor commenters offered any empirical evidence of public power utilities being a barrier to broadband deployment because of pole attachment rates or make-ready requirements.

On April 21, 2017, the FCC issued two notices of proposed rulemaking (NPRM) and two notices of inquiry (NOI) referencing the Mobilitie petition with the purported goals of removing barriers to wireless and wireline broadband deployment. Among other things, the NPRMs and NOIs proposed to implement shot clocks and “deemed granted” rules for siting applications and accelerate pole attachment processes, as well as reduce pole attachment fees and make-ready costs. They also sought comment on whether the FCC can preempt state and local laws that the Commission perceives as creating barriers

to deployment. The Commission asked whether it could use section 253 to regulate poles not subject to its jurisdiction under section 224. APPA submitted comments on the NPRMs and NOIs highlighting the statutory municipal exemption from federal regulation of pole attachments in section 224 and explaining why lower pole attachment fees and burdensome application processes are unnecessary.

Shortly after issuing the Public Notice on the Mobilitie Petition, FCC Chairman Ajit Pai convened the Broadband Deployment Advisory Committee (BDAC), comprised of various telecommunication company officials and only two locally-elected officials (one of whom later resigned from the BDAC) to “balance the expertise and viewpoints that are necessary to address” broadband deployment. Among other things, the BDAC began drafting state and municipal model codes for broadband siting. The model state and municipal codes filed by the BDAC with the FCC include problematic language regarding pole attachment rates and regulations. APPA filed a letter with the FCC objecting to the process by which the BDAC developed its regulations, and the substance of its model rules.

In four different orders issued between 2017 and 2018, the FCC addressed various parts of the April 2017 NPRMs and NOIs. In the first three FCC orders, the Commission excluded capital costs from pole attachment rates, set “shot clocks” on the time a utility has to respond to pole attachment complaints, and excluded certain utility pole replacements from historic preservation rules. In its final order, the Declaratory Ruling and Third Report and Order (R&O), issued on September 27, 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.” Citing several recommendations set forth in the BDAC model codes, the R&O set uniform rates and regulations on public power utilities’ pole attachments. This was done despite the clear language in section 224 that public power utility poles are exempt from FCC regulation. In November 2018, APPA filed a petition for review of the FCC’s R&O, challenging the Commission’s actions as unlawful. The U.S. Court of Appeals for the Ninth Circuit held oral argument on the case on February 10, 2020; a ruling is expected later this year.

Congressional Action

In 2017, the Senate Commerce and House Energy & Commerce Committees held five FCC-related hearings. During the 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 them, FCC Chairman Ajit Pai recommended that, to foster widespread

¹ “Make-ready” policies govern the process for accessing and preparing utility poles for attachments.

broadband deployment, Congress should extend FCC jurisdiction to include public power pole attachments. Representatives from local governments were invited to two hearings to provide the municipal perspective on broadband siting, but neither of the towns represented were public power communities. Public power representatives have never been invited to testify at these hearings on their perspectives regarding pole attachments and potential FCC regulation of such attachments.

Senators Thune and Schatz circulated a draft broadband deployment bill in the fall of 2017. The draft legislation did not explicitly repeal the municipal exemption in section 224 of the Communications Act, but instead would have revised sections 253 (related to barriers to entry) and 332 (related to mobile services) to clarify that those sections should apply to utility pole attachments. Public power opposed the bill because it would have effectively gutted the municipal exemption from FCC pole attachment regulations, as well as the ability of states to set their own pole attachment regulations in place of federal rules.

On June 29, 2018, Senators Thune and Schatz introduced S. 3157, the STREAMLINE Small Cell Deployment Act. Though the bill was substantially overhauled since it was circulated as a draft in 2017, S. 3157 still would have gutted public power's exemption in section 224 from federal pole attachment regulation and subjected public power to burdensome FCC oversight and unfair "one-size-fits-all" pole attachment rates and regulations, including unreasonable shot clocks and application "deemed granted" requirements, and federal pole attachment rates and fees. Public power strongly opposed this bill. The Senate Commerce Committee did not consider the legislation and it died at the end of the 115th Congress. On June 30, 2019, Senators Thune and Schatz reintroduced the legislation, which is now S. 1699.

On January 14, 2019, Representative Anna Eshoo (D-CA) introduced H.R. 530, the Accelerating Broadband Development by Empowering Local Communities Act of 2019, to overturn the FCC's September 2018 R&O that allows the FCC to preempt state and local pole attachments laws and agreements. APPA and over 130 public power entities sent a letter to Representative Eshoo in March 2019 expressing support for H.R. 530, which currently has 59 co-sponsors. Senator Dianne Feinstein (D-CA) introduced a Senate companion to H.R. 530, S. 2012, which APPA also supports.

American Public Power Association Position

APPA strongly supports the FCC's goal of ensuring every American has access to broadband capability. However, the association strongly disagrees with the Commission's assertion in the NBP that Congress should consider eliminating the municipal/cooperative exemption in section 224 of the Communications Act to "create a uniform policy for broadband access to privately

owned infrastructure." The FCC has provided no evidence that the exemption is an impediment to broadband deployment, and it has ignored Congress's long-held belief that the pole attachment rates charged by public power utilities and cooperatives are reasonable because they are "subject to a decision-making process based upon constituent needs and interests." APPA also disagrees with the wireless industry's assertion that the Commission should regulate public power utilities under a broad provision of the Communications Act pertaining to government-owned ROW.

APPA opposes any effort by Congress to weaken or gut the exemption for public power utilities from federal pole attachment regulations or eliminate it entirely. The association also opposes any assertion of authority by the FCC over public power utility poles, such as that in the R&O, in contravention of the explicit municipal exemption in section 224 of the Communications Act. In addition, APPA opposes any efforts to create model rules for pole attachments because one-size-fits-all, model pole attachment regulations are unworkable for public power utilities due to their diversity in size, operation, and governance structures. Public power utilities are owned by and accountable to their customers. They have a responsibility to ensure their customers are not subsidizing communications attachers and that safety and reliability are not compromised by unauthorized or improper attachments.

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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.