Preserving the Municipal Exemption From Federal Pole Attachment Regulations

Summary
On two separate occasions since 2010, the Federal Communications Commission (FCC or Commission) has recommended that Congress consider eliminating the exemption public power and rural electric cooperative utilities have from FCC jurisdiction on pole attachments under the guise of facilitating broadband deployment. Draft legislation in the House of Representatives in the 114th Congress would have made changes to federal pole attachment law that would have impacted public power utilities and potentially laid the groundwork for future repeal. In addition, recent FCC notices of proposed rulemaking (NPRM) and notices of inquiry (NOI) reflect the FCC’s desire to regulate public power utility poles in contravention of the well-established statutory “municipal exemption” from federal pole attachment regulations.

The American Public Power Association (Association or APPA) opposes any efforts by Congress to remove the municipal exemption for public power entities from federal pole attachment regulations; by the FCC to circumvent well established federal law that precludes it from regulating public power utility poles; or by the FCC or Congress to impose a one-size-fits-all approach to the make-ready process for attaching to poles.

Background
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 and rural electric cooperative utilities were exempted from this requirement “because the pole attachment rate charged by municipally owned and cooperative utilities [were] already subject to a decision-making process based upon constituent needs and interests.” This exemption has continued through multiple telecommunications reform efforts, including enactment of the Telecommunications Act of 1996, because Congress has maintained that the existing process is appropriate and adequate. Attachment rates are determined at the local level and, if an entity is seeking excessive pole-attachment rates, the affected operator has the remedy of taking the issue to the local government and community to challenge that rate.

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 making this recommendation, the FCC singled out the exception 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.”

On April 7, 2011, the FCC approved its pole attachment order. While most public power utilities are not directly impacted by the order because their pole attachments are not subject to the FCC’s jurisdiction, many are indirectly affected because the FCC’s revised telecom formula and make-ready provisions provide a benchmark for pole attachment rates and access.1 APPA was highly disappointed that the FCC ignored the serious concerns of utilities about the impact that reducing the telecom rate for attachments down to the cable rate would have on cost recovery. The FCC also ignored other important concerns, including those regarding wireless attachments above the communications space. The Association believes the FCC’s order 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.”

1 “Make-ready” policies govern the process for accessing and preparing utility poles for attachments.
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 that rebutted 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 right-of-way management. The text of Section 224 is very clear—the FCC does not have statutory authority to regulate public power poles.

On April 21, 2017 the FCC issued two NPRMs and NOIs, both referencing the Mobilitie petition, intended to remove barriers to wireless and wireline broadband deployment. Among other things, the NPRMs and NOIs propose 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 seek comment on whether the FCC can preempt state and local laws that the Commission perceives as creating barriers to deployment. The Commission specifically calls for comment on whether it can 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. The FCC has not taken final action on these proposals, but APPA is concerned that the Commission may seek to circumvent Section 224 to regulate public power utility poles, an authority it clearly lacks under the Communications Act.

**Congressional Action**

In December 2015, the House Energy & Commerce Committee’s Communications & Technology Subcommittee marked up legislation that sought to improve broadband deployment through streamlining the requirements for obtaining rights of way on federal lands and creating a database of federal real property that may be used for deploying broadband communications facilities. The legislation also included language that would have made changes to federal pole attachment law. The legislation did not repeal the municipal/cooperative exemption in Section 224(a)(1). However, it would have subjected all pole owners, including public power and electric cooperative utilities, to a non-discriminatory access requirement that would have prevented such an owner from denying access to a pole based on the type of attacher. APPA had no concerns with this provision. However, the draft bill also included language that could have laid the future groundwork for repeal of the municipal/cooperative exemption through the imposition of reporting requirements on an annual basis to the FCC on the location of all poles, ducts, conduits, and rights-of-way, as well as the rates charged for such attachments. The Association strongly opposed these provisions, which would have created a huge regulatory burden on public power utilities and raised security concerns. The Full Energy & Commerce Committee did not mark up the legislation; nor was it formally introduced.

A similar draft bill was examined in a legislative hearing by the House Communications & Technology Subcommittee earlier this year. The draft legislation did not include any language regarding pole attachments. However, given recent statements about wireless siting concerns made by representatives of the wireless industry at broadband deployment hearings in the House and Senate, APPA remains vigilant with respect to future broadband or infrastructure legislation to ensure that Congress does not attempt to repeal the municipal exemption from federal regulation of pole attachments.

**American Public Power Association Position**

The Association strongly supports the FCC’s goal of ensuring every American has access to broadband capability. However, we strongly disagree with the FCC’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 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 municipally owned and cooperative utilities are reasonable because they are “subject to a decision-making process based upon constituent needs and interests.” The Association also disagrees with the wireless industry’s assertion to the FCC that the Commission should regulate public power utilities under a broad provision of the Communications Act pertaining to government-owned right-of-way.

APPA would oppose any effort in Congress to remove the exemption for public power entities from federal pole attachment regulations or to make changes to the Communications Act that weaken or gut the exemption. APPA would also oppose any assertion of authority by the FCC over public power utility poles.
poles in contravention of the explicit municipal exemption in Section 224 of the Communications Act. Public power utilities are owned by and accountable to their customers. They have a responsibility to ensure their customers are not subsidizing communications attachers or that safety is not compromised by unauthorized or improper attachments.

American Public Power Association Contact
Andrew Wills, Government Relations Director & Counsel, 202-467-2959 / awills@publicpower.org

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.