

Preserving the Municipal Exemption from Federal Pole Attachment Regulations

- The American Public Power Association (APPA) strongly supports the goal of ensuring every American has access to broadband service.
- Public power utilities have long been explicitly exempted from federal pole attachment regulations and APPA opposes any efforts by Congress or the Federal Communications Commission (FCC or Commission) to weaken or eliminate this exemption.
- There is no evidence that local regulation of public power pole attachments is a barrier to broadband expansion.
- One-size-fits-all pole attachment regulations or model rules are unworkable for public power utilities due to their diversity in size, operation, and governance structures.

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 law reform efforts, including the 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. 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.

Cable and telecommunications organizations have been working to convince the FCC and Congress that the municipal exemption from pole attachment rates and regulations should be eliminated. With no evidence, they claim that local control over rates and regulations are the major barriers to broadband deployment.

Regulatory Action

Several times since 2010, the FCC 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 opened four dockets that reflected its desire to explicitly or implicitly regulate public power utility poles even though the Commission is barred from doing so under section 224 of the Communications Act. APPA submitted comments in response, highlighting the clear statutory municipal exemption from federal regulation of pole attachments in section 224 and explaining that there is no evidence that the exemption is a barrier to broadband deployment. The FCC moved forward with orders throughout 2017

and 2018. In those orders, the Commission excluded capital costs from pole attachment rates, set “shot clocks” on the time a utility must respond to pole attachment complaints, and excluded certain utility pole replacements from historic preservation rules.

In a September 2018 Declaratory Ruling and Third Report and Order (Small Cell R&O), the FCC preempted state and local laws and agreements, including those related to pole attachments for the installation small cell wireless facilities, to “remove regulatory barriers that would unlawfully inhibit the deployment of infrastructure necessary to support these new [wireless] services.” The Small Cell R&O imposed rate and access regulations on public power utilities’ pole attachments for wireless devices despite the clear language in section 224 that public power utility poles are exempt from FCC regulation.

APPA challenged the Commission’s Small Cell R&O in federal court. The U.S. Court of Appeals for the Ninth Circuit upheld the FCC’s R&O stating the Commission could use section 253 to broadly prevent local governments from creating barriers to wireless small cell deployment, including access to public power utility poles. While APPA views the ruling as a further attempt to weaken the section 224 exemption, the court continued to uphold that the FCC could not use section 253 to regulate the specific rates, terms, or conditions of public power pole attachments. Notably, the Small Cell R&O and the Ninth Circuit’s decision are on their face limited to wireless pole attachments.

In December 2023, the Commission adopted a Fourth Report and Order, Declaratory Ruling, and Third Further Notice of Proposed Rulemaking (2023 R&O), establishing a “Rapid Broadband Assessment Team,” an intra-agency team charged with prioritizing and expediting resolution of disputes that impede or delay broadband deployment. It also requires utilities to provide pole attachment applicants with information about the status of their utility poles to aid communications providers in planning their build outs. The Commission also expanded upon its prior determination that a utility may not charge an attaching entity the costs of pole replacement if it is not “necessitated solely” by the attacher by clarifying and expanding its definition of a “red-tagged” pole. Finally, the FCC sought comments on the proper time frames for utilities to perform make-ready on large pole attachment orders, and whether to further revise the ability of attaching entities to engage in “self-help” when a utility fails to meet FCC deadlines. While public power utilities are not jurisdictional to these regulations, APPA continues to monitor the proceedings and will weigh in where appropriate, including possible efforts of the incoming FCC leadership to expand the scope of the Small Cell R&O and apply it to wireline facility attachments to public power poles.

Congressional Action

In 2021, there were unsuccessful efforts to include language in the Infrastructure Investment and Jobs Act (P.L. 117-58) that could have further weakened public power utilities’ exemption from federal pole attachment regulations. Under the false guise of “eliminating barriers to broadband deployment,” that effort tried to expand section 253 to allow attachers to challenge public power pole attachment rates, timelines for attachment, or legitimate denials.

In 2023, Republicans on the House Energy & Commerce Committee floated two draft bills aimed at weakening the municipal and cooperative exemption to federal pole attachment regulations. Draft legislation, the Fair Access to Internet Ready Poles (FAIR) Act, was briefly discussed at a subcommittee legislative hearing in April 2023. It would amend section 224 of the Communications Act to state that the current exemption public power utilities and electric cooperatives have from FCC regulation of pole attachments would not apply to entities that receive certain federal broadband assistance. If enacted into law, it would weaken the municipal exemption for public power utilities in section 224. APPA, the National Rural Electric Cooperative Association, and Utilities Technology Council sent a joint letter to the committee opposing the draft bill, which was not introduced. Late in 2023, Representative Gus Bilirakis (R-FL) circulated, but never formally introduced, a committee-drafted bill that would regulate attachments by broadband service providers to poles located in rights-of-way owned by utility pole owners, as well as impose “shot clocks” on utilities.

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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 and protect the interests of the more than 54 million people that public power utilities serve and the 96,000 people they employ.