

Restore and Preserve Local Control of Pole Attachments

Need

Recognition that Section 224 of the Federal Communications Act ensures local control over utility poles and related infrastructure within public rights-of-way, including the authority to impose reasonable fees.

Background

In recognition of a local jurisdiction's responsibility to protect the public interest in its public infrastructure assets, municipal utilities have historically been exempted from Federal Communications Commission (FCC) jurisdiction over utilities' rights-of-way (ROWs), pole attachments, and related fees. This exemption was codified in 1978 as Section 224 of the amended Communications Act of 1938. Congress again affirmatively upheld local control during debate of the 1996 Telecommunications Act, expressly finding that decisions about the use of ROWs and infrastructure are best left to the most local governing body.

Despite the clear benefits of, and congressional support for, maintaining this local accountability, in or around 2010, the FCC began recommending to Congress that municipal utilities' exempt status should be amended or repealed. After unsuccessfully pushing the telecommunications industry's stone uphill for nearly a decade, the FCC decided to act on its own.

On September 26, 2018, over the objection of hundreds of comments submitted by public utilities and their associations, including MMUA and the American Public Power Association (APPA), the FCC issued a *Declaratory Ruling and Third Report and Order* subjecting municipal utility poles and municipal rights-of-way to FCC jurisdiction for installation of small-cell telecommunications equipment. This order took effect January 14, 2019. The order is under legal challenge, a move supported by MMUA and APPA, but the legal issues could more efficiently and cost-effectively be dealt with by congressional action vacating the order and restoring local control.

The new FCC regulations prescribe what small cell antennae equipment cities must allow in their ROWs and on their infrastructure, such as utility poles. These regulations include tight timelines for processing applications, and fee limits that, if exceeded, are presumed to be excessive and thus an unlawful barrier to access.

The Minnesota legislature debated this issue in 2017. Legislation was developed that would have preempted local control on a number of issues related to the expansion of 5G service and "small cell" wireless, but in the end the legislature exempted municipal utilities from the new regulations.

The basis for the FCC's approach appears to be a new perspective that simply disregards the benefits of local accountability, combined with a suggestion that local governments may be creating a "barrier to service providers" seeking to establish their more profitable 5G networks via the use of small-cell equipment.

When establishing appropriate regulations and fees regarding pole attachments and public rights-of-way under their care, local governments and the publicly-owned utilities serving municipalities must have the authority to account for the safety and health of their communities as well as authority over technical and aesthetic considerations. They must also be able to impose fees that fully cover the costs associated with processing small cell installation applications and enforcing related local ordinances and regulations applicable to small-cell providers. This is the only way to fully ensure that the public not be forced to subsidize the protected private use of the public's assets.

Without Congressional action to undo the FCC's order, MMUA and its member utilities will be forced to continue seeking relief from the courts. Litigation is far more costly than reasonable legislation to restore long protected local control efforts. To minimize costs, MMUA is currently working with three other states to identify the best way to support and participate in current and possible future legal challenges to the FCC's order, but even shared efforts are expensive.

MMUA Position

MMUA supports the continued roll-out of broadband technology. However, there is no evidence that the reasonable exercise of local control over utility poles, related equipment, and public rights-of-way unreasonably interferes with such efforts. Therefore, MMUA urges Congress to take legislative action to overturn the FCC's jurisdictional overreach and restore local control over public rights-of-way, utility poles and attachments, and the fees which can be charged for providing access to them.

