

## Local Control of Pole Attachments March 2022

### Need

Recognition that Section 224 of the 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 long history of congressional support for maintaining local control, in or around 2010, the FCC began recommending to Congress that the Communications Act be amended to repeal or at least limit the exemption for municipal utilities. After Congress repeatedly refused to adopt the FCC's recommendations, 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 was challenged in the courts, but the restrictions were upheld by the U.S. Court of Appeals for the Ninth Circuit.

The new FCC regulations prescribe the type of small cell antennae equipment cities must allow in their ROWs and on their 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 several 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 and adopts the posture 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 reverse the FCC's order and reaffirm the former exemption from FCC jurisdiction, municipal utilities are at risk of having their fees and pole access regulations repeatedly challenged as unreasonable and in violation of the FCC order. Pole warranties may be voided, and poles may be subject to extra weight and wind resistance damage which could render them unsafe. In addition, line crews working on the power lines may face greater risks trying to work around the attachments allowed by the FCC.

#### **MMUA Position**

MMUA believes in local control. There is insufficient evidence to demonstrate that local restrictions and fees relating to access and use of municipal power poles serve as primary barriers to the continued rollout of highspeed broadband service. Congress should monitor the implementation of the FCC's restrictions on local control and should take the necessary action to restore and maintain local control over pole attachments.