Case Nos. 18-72689 & 19-70123 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CITY OF PORTLAND, OREGON,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

SPRINT CORPORATION *et al.*,
Petitioners
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents

On Petitions for Review of an Order of the
Federal Communications Commission

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AMERICAN MUNICIPAL POWER, INC. IN SUPPORT OF MUNICIPAL PETITIONERS

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June 17, 2019

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AMERICAN MUNICIPAL POWER, INC.

Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* American Municipal Power, Inc. ("AMP") hereby submits this Motion for Leave to File Brief in Support of Municipal Petitioners ("Motion").[1]

INTEREST OF *AMICUS CURIAE* AND REASONS WHY THE MOTION SHOULD BE GRANTED

American Municipal Power, Inc. is a non-profit wholesale power supplier and service provider for 135 members, including 134 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with nine members headquartered in Smyrna, Delaware. AMP's members collectively serve more than 650,000 residential, commercial, and industrial customers and have a system peak of more than 3,400 megawatts. AMP's core mission is to be public power's leader in wholesale energy supply and value-added member services and offers its members the benefits of scale and expertise in providing and managing energy services.

[1] Counsel for AMP endeavored to obtain the consent of counsel for all of the parties in case Nos. 18-72689 and 19-70123, and the twelve other cases separately consolidated with these two lead cases. Counsel for a number of these parties, but not all parties, have consented to the filing of the proposed Brief of *Amicus Curiae* that is being filed concurrently with this Motion. As of the date of filing, no party has indicated that it will withhold consent. Cir. R. 29-3.

AMP's members own and operate municipal electric distribution utilities and are affected by the rules and regulations governing attachments to their electric utility poles. AMP submits this brief in support of the municipal petitioners in this matter in order to protect the public interest by ensuring a proper understanding of the laws and principles relevant to attachments to municipal electric utilities' poles.

CONCLUSION

For these reasons, the Court should grant this Motion and permit AMP to file its concurrently submitted Brief of *Amicus Curiae* in Support of Municipal Petitioners.

Respectfully submitted,

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Dated: June 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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June 17, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, American Municipal Power, Inc. ("AMP") hereby submits this Corporate Disclosure Statement.

AMP is a non-profit service organization representing the interests of municipal electric utilities in a nine-state footprint. AMP issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus American Municipal Power, Inc. ("AMP") is a non-profit wholesale power supplier and service provider for 135 members, including 134 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with nine members headquartered in Smyrna, Delaware. AMP's members collectively serve more than 650,000 residential, commercial, and industrial customers and have a system peak of more than 3,400 megawatts. AMP's core mission is to be public power's leader in wholesale energy supply and value-added member services and offers its members the benefits of scale and expertise in providing and managing energy services.

AMP's members own and operate municipal electric distribution utilities and are affected by the rules and regulations governing attachments to their electric utility poles. AMP submits this brief in support of the municipal petitioners in this matter in order to protect the public interest by ensuring a proper understanding of the laws and principles relevant to attachments to municipal electric utilities' poles.

[1] No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

ARGUMENT

This Court should reverse the Commission's *Order*,[2] at least with respect to its application to municipal electric utility poles. The Commission does not have authority over municipal electric utility poles under Section 224 of the Communications Act and the Commission's contrary interpretation of Section 224 is not entitled to deference because the statute unambiguously precludes the Commission from regulating attachments to municipal utility poles. Municipal utilities are properly regulated under state law.

Sections 253 and 332 of the Communications Act only apply to regulatory activities and do not apply to municipal electric utilities acting in a proprietary capacity. Municipal electric utilities indisputably act in a proprietary capacity when entering into agreements regarding the price, terms and conditions for use of their property. The Commission incorrectly concluded that its jurisdiction extends to proprietary activities of municipal utilities because neither Section 253 nor Section 332 contains an express or implied prohibition on states' proprietary interests.

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 and WC Docket No. 17-84, FCC 18-133 (September 27, 2018) ("*Order*").

I. THE COMMISSION DOES NOT HAVE AUTHORITY OVER MUNICIPAL ELECTRIC UTILITY POLES UNDER SECTION 224 OF THE COMMUNICATIONS ACT

The Federal Communications Commission ("FCC" or "Commission") has only the authority that was expressly granted to it by Congress. *E.g., Am. Library Ass'n. v. F.C.C.*, 406 F.3d 689, 698 (D.C. Cir. 2005). While the Commission has authority pursuant to Section 224 of the Communications Act (47 U.S.C. §224) to regulate the rates, terms and conditions for pole attachments, Congress has expressly limited the Commission's authority with regard to municipal electric utility poles. The Commission's *Order* exceeded that authority.

A. The Commission's Interpretation of Section 224 is Not Entitled to Deference Because the Statute Unambiguously Precludes the Commission from Regulating Attachments to Municipal Utility Poles

The U.S. Supreme Court has found that the *Chevron* two-step analysis applies to the Commission's interpretation of the Communications Act. *NCTA v. Brand X*, 545 U.S. 967, 981 (2005) ("[W]e apply the *Chevron* framework to the Commission's interpretation of the Communications Act."). In step one of the *Chevron* framework, the Court must decide "whether Congress has directly spoken to the precise question at issue." *Chevron v. NRDC*, 467 U.S. 837, 842 (1984). Where "the intent of Congress is clear, that is the end of the matter" because the Courts and the Commission "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Only when the "the statute is silent or

ambiguous with respect to the specific issue," may the Court proceed to *Chevron* step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. There is no ambiguity in the Commission's authority with regard to pole attachments.

Section 224 of the Communications Act requires the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. §224(b). However, "pole attachment" is defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility" and "utility" specifically excludes "any person who is cooperatively organized, or any person owned by the Federal Government or any State." *Id.* § 224(a).

Municipal electric utilities are political subdivisions, agencies or instrumentalities of the state. For example, Ohio municipal electric utilities are political subdivisions that are authorized to provide electric service pursuant to, *inter alia*, the Ohio Constitution, Article XVIII, Sections 3, 4 and 6. Article XVIII, Sections 4 and 6 provide, in pertinent parts:

> §4 Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is

> to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service.
>
> . . .
>
> §6 Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality. . . .

B. Municipal Utilities are Properly Regulated under State Law

The states, as well as municipalities, share the FCC's goal of promoting construction of nationwide wireless networks by multiple carriers in order to improve service quality and achieve lower prices for consumers. Nonetheless, the states' legislative efforts to achieve those goals have recognized and honored the wisdom of retaining the autonomy that municipal electric utilities have to manage, administer and control the public way and the utility poles therein.

For example, in 2018 the Ohio General Assembly modified Ohio law governing wireless service and the placement of small cell wireless facilities in the

public way, but specifically carved out attachments to municipal electric utility poles in order to avoid impairing municipal electric utilities' ability to manage, administer and control the public way. Specifically, Ohio statutes define a "wireless support structure" to which a wireless facility may attach as a "pole, street light pole, traffic signal pole, a fifteen-foot or taller sign pole, or utility pole capable of supporting small cell facilities," but not a "utility pole or other facility owned or operated by a municipal electric utility. . . ." Ohio Rev. Code Ann. § 4939.01(V). This parallel demonstrates that it is possible to regulate wireless pole attachments in a manner that supports the goal of expanding nationwide wireless networks while respecting the exclusion of municipal electric utilities from such regulation.

In sharp contrast to the pragmatic approach taken by the states, the Commission has flouted the unambiguous language of Section 224 of the Communications Act that precludes applying its wireless attachment regulations to municipal electric utility poles. The Commission has exceeded its authority under Section 224 by attempting to impose regulations on municipal electric utility poles in order to facilitate the deployment of wireless broadband services. Accordingly, this Court should reverse the Commission's *Order*, at least with respect to its application to municipal electric utility poles.

II. SECTIONS 253 AND 332 OF THE COMMUNICATIONS ACT ONLY APPLY TO REGULATORY ACTIVITIES AND DO NOT APPLY TO MUNICIPAL ELECTRIC UTILITIES ACTING IN A PROPRIETARY CAPACITY

In spite of the clear prohibition against regulating pole attachments on municipal electric utility poles, in the *Order*, the Commission found that Section 253 and Section 332 of the Communications Act permit it to regulate government-owned property, including municipal electric utility poles. *Order* ¶ 92. The Commission held that its new regulations apply to "state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, *utility poles*, and similar property suitable for hosting Small Wireless Facilities." *Id.* (emphasis added).

A. The Commission Incorrectly Concluded that Its Jurisdiction Extends to Proprietary Activities of Municipal Utilities Because Neither Section 253 nor Section 332 Contain an Express or Implied Prohibition on States' Proprietary Interests

Notwithstanding the fact that the Commission ignored the exclusion of municipal electric utility poles from the Commission's jurisdiction under Section 224, the Commission's interpretations relying on Section 253 and Section 332 of the Communications Act for authority to impose its pole attachment regulations on

municipal electric utility poles are flawed and legally impermissible. This is true for two reasons:

1. The Commission incorrectly concluded that Section 253 and Section 332 of the Communications Act apply to governmental entities, including municipal electric utilities that are acting in a proprietary capacity and not just a regulatory capacity. *Order* ¶¶ 92-95.

2. The Commission incorrectly held that, if Section 253 and Section 332 are limited to application of governmental entities acting in their regulatory capacity, the control of access to their property located in the public rights-of-way amounts to governmental entities, including municipal electric utilities, acting in a regulatory capacity, rather than a proprietary capacity. *Order* ¶¶ 96-97.

In the *Order*, the Commission rejected arguments that governmental entities function solely as "market participants" whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7) and held that Section 253 and Section 332 apply to both governmental and proprietary activities, thereby allowing the Commission to regulate proprietary activities undertaken by government entities. *Order* ¶ 92. This conclusion is incorrect.

The U.S. Supreme Court has determined that "[i]n the absence of any express or implied indication by Congress that a State may not manage its own

property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 231 (1993). Neither Section 253 nor Section 332 contains such an express or implied prohibition on states' proprietary interest in management of property, namely municipal electric utility poles. The fact that "both Sections 253(a) and Section 332(c)(7)(B)(i)(II) expressly address preemption, and neither carves out an exception for proprietary conduct" is irrelevant, as that is not the standard. *Order* ¶ 93. Under the applicable standard—that a state may manage its property absent an express or implied indication by Congress—it is clear that neither Section 253 nor Section 332 apply to government entities engaged in proprietary activities. The Commission's finding otherwise should be overturned.

B. Municipal Electric Utilities Indisputably Act in a Proprietary Capacity When Entering Into Agreements Regarding the Price, Terms and Conditions for Use of Their Property

The Commission's conclusion that an effective prohibition against states and municipal electric utilities managing their property extends to all government-owned property in the public way is arbitrary and capricious. The Commission's determination directly contravenes long-standing recognition that the operation of public municipal electric utilities, although often operated and managed directly by

local governments, amounts to a proprietary business capacity. As a result, the Commission does not have authority to regulate municipal electric utilities.

The Supreme Court of Ohio, for example, has held that when a municipal corporation chooses to operate a public utility pursuant to its constitutional grant of authority, it functions in a proprietary capacity. *Orr Felt Co. v. City of Piqua*, 2 Ohio St.3d 166, 170 (1983). The court noted that the only restraints imposed by law upon a municipality's proprietary undertaking of providing electric energy are that rates charged must be reasonable and there be no unjust discrimination among customers served. *Id*. at 170-171. *See also City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F.Supp. 1303, 1304 (N.D. Ohio, 1980). The Supreme Court of Ohio has also held that a municipal electric utility, "no less than a private corporation engaged in the operation of a public utility, is entitled to a fair profit" because "[i]n the operation of a public utility, a municipality acts, *not in a governmental capacity as an arm or agency of the sovereignty of the state, but in a proprietary or business capacity*." *City of Niles v. Union Ice Corp*., 133 Ohio St. 169, 181 (1938) (emphasis added).

In fact, in their proprietary capacity, municipal electric utilities have negotiated pole attachment agreements that govern the terms and conditions and rates for *wireline* attachments to municipal electric utility poles since the early days of wireline communications. More recently, municipal electric utilities have

negotiated similar agreements with the major wireless service providers for wireless attachments to municipal electric utility poles. Such contractual agreements are not regulatory schemes that prohibit or have the effect of prohibiting entities from providing telecommunications. Rather, by entering into the pole attachment agreements municipal electric utilities, like private investor-owned utilities and cooperative utilities, seek to establish rates, terms, and conditions of access to their poles that will provide them with compensation for the use of their property and ensure that the attached facilities will not interfere with the operation of the utility's electric facilities or services. This is clearly a proprietary function that is analogous to a private function that would be permitted by private entities in the same circumstances and not preempted. Accordingly, the Commission's assertion of authority to regulate the proprietary function of municipal electric utility pole management is unlawful and should be reversed.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the Commission's *Order* as applied to municipal electric utilities.

Respectfully submitted,

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Dated: June 17, 2019

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G), 32(a)(5), and Ninth Circuit Rule 32-1, that the foregoing *amicus curiae* brief is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 2,353 words, excluding those sections identified in Fed. R. App. P. 32(f).

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