

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

BELLSOUTH TELECOMMUNICATIONS,)
LLC d/b/a AT&T TENNESSEE,)
)
Plaintiff,)
)
v.)
)
THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY, TENNESSEE, et al.,)
)
Defendants.)

Case No. 3:16-CV-2509

**Judge Sharp
Magistrate Judge Holmes**

COMCAST OF NASHVILLE I, LLC,)
)
Plaintiff,)
)
v.)
)
THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY, TENNESSEE, et al.,)
)
Defendants.)

Case No. 3:16-cv-2794

**Judge Sharp
Magistrate Judge Holmes**

DEFENDANTS’ MOTION TO DISMISS PLAINTIFF COMCAST’S COMPLAINT

Defendants Metropolitan Government of Nashville and Davidson County Tennessee, Megan Barry, in her official capacity as Mayor (“Mayor Berry”), and Mark Sturtevant, in his official capacity as Transitional Interim Director of the Department of Public Works (“Mr. Sturtevant”) (collectively “the Metropolitan Government”) hereby file this Motion to Dismiss Plaintiff Comcast of Nashville I, LLC’s (“Comcast’s”) Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Comcast's Complaint should be dismissed because it fails to state a claim upon which relief can be granted. First, Comcast has not demonstrated that the Metropolitan Government's Climb Once ordinance is preempted by federal law. The enactment of Climb Once was a legitimate exercise of police powers to manage public rights-of-way. As it affects poles owned by the Nashville Electric Service ("NES"), federal pole attachment law is inapplicable to those poles, so preemption does not apply. As it affects privately-owned poles, there is no preemption because the FCC timeline does not conflict with Climb Once ordinances—a position espoused by the FCC, itself. Additionally, Executive Order 13636 does not limit the Metropolitan Government's ability to enact Climb Once because—by Comcast's own admission—the Executive Order is intended to prevent "unauthorized" access, and by its terms, Climb Once only permits contractors that are approved (i.e., authorized) by the pole owner to access the poles & attachments.

To the extent that the Court finds that Climb Once may conflict with the FCC regulations, however, the Metropolitan Government asks that the Court refer primary jurisdiction over this issue to the FCC.

Second, Comcast has not demonstrated that it may bring a state law claim for allegedly encroaching on NES's powers: (1) Comcast does not have standing to bring this claim on NES's behalf; (2) NES is an indispensable party to this lawsuit; (3) there is no private right of action available to Comcast to enforce this claim. To the extent that Comcast is empowered to bring this claim at all, it also fails substantively, as the Metropolitan Government is empowered through its Charter to govern its public rights-of-way.

Third, Comcast has not demonstrated any impairment to its agreement with NES, much less the "substantial impairment" necessary to establish a constitutional conflict. Moreover, even

if a substantial impairment existed, Climb Once constitutes reasonable legislation directed to a “significant and legitimate” public purpose.

Finally, the official capacity claims against Defendants Barry and Sturtevant should be dismissed since these claims are duplicative of the claims against the Metro.

For these reasons, the Metropolitan Government requests that this Court dismiss Comcast’s Complaint in its entirety and enter judgment declaring the Climb Once ordinance constitutional. Alternatively, to the extent that the Court believes that Climb Once may conflict with federal law, the Metropolitan Government requests that this Court designate primary jurisdiction over that question to the FCC while ruling on the other claims presented in this motion.

The Metropolitan Government invites the Court to consider its contemporaneously filed memorandum of law, the Statement of Interest filed by the FCC (Doc. #23-1) and the relevant Metropolitan Charter provisions attached to Defendants’ Motion to Dismiss Plaintiff AT&T’s Complaint (Doc. #23-2 through 23-6).

Respectfully Submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER (#23571)
DIRECTOR OF LAW

/s/ R. Alex Dickerson
Jeff Campbell (#22455)
R. Alex Dickerson (#27184)
Christopher M. Lackey (#26419)
Assistant Metropolitan Attorneys
P.O. Box 196300
Nashville, TN 37219
(615) 862-6341
*Counsel for the Metropolitan Government,
Mayor Megan Barry, and Mark Sturtevant*

Certificate of Service

This is to certify that a copy of the foregoing has been forwarded via the court's ECF/CM system to:

William L. Harbison
John L. Farringer IV
Sherrard Roe Voigt Harbison, PLC
150 3rd Avenue South, Suite 1100
Nashville, TN 37201
*Counsel of BellSouth Telecommunications,
LLC*

Christian F. Binnig
Hans J. Germann
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
*Counsel of BellSouth Telecommunications,
LLC*

Kevin T. Elkins
Robb S. Harvey
Waller, Lansden, Dortch & Davis, LLP
Nashville City Center
511 Union Street, Suite 2700
Nashville, TN 37219
Counsel for Comcast of Nashville I, LLC

Matthew A. Brill
Matthew T. Murchison
Melissa Arbus Sherry
Scott D. Gallisdorfer
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
Counsel for Comcast of Nashville I, LLC

on this the 30th day of November, 2016.

/s/ R. Alex Dickerson

R. Alex Dickerson