

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

<b>BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&amp;T TENNESSEE,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. 3:16-CV-2509</b>
	)	
<b>v.</b>	)	<b>Judge Sharp</b>
	)	<b>Magistrate Judge Holmes</b>
	)	
<b>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

<b>COMCAST OF NASHVILLE I, LLC,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. 3:16-cv-2794</b>
	)	
<b>v.</b>	)	<b>Judge Sharp</b>
	)	<b>Magistrate Judge Holmes</b>
	)	
<b>THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS PLAINTIFF COMCAST’S COMPLAINT**<sup>1</sup>

Comcast’s Complaint should be dismissed in its entirety as it fails to state a claim for relief under Rule 12(b)(6). Comcast’s first claim is that Climb Once is preempted by the FCC’s regulations on pole attachments. That claim should be dismissed for the reasons articulated in Defendants’ brief in support of its Motion to Dismiss Plaintiff AT&T’s Complaint (herein,

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<sup>1</sup> Defendants hereby incorporate the arguments contained in Defendants’ Memorandum of Law in Support of Motion to Dismiss Plaintiff AT&T’s Complaint. (Doc. #24.) To avoid unnecessary repetition, this brief will only address issues unique to Comcast’s Complaint.

“Defendants’ AT&T Brief”): First, NES is exempt from FCC pole attachment regulation as a public pole owner. Second, as to private utility poles, there is no preemption. The FCC and Climb Once timelines apply to different circumstances and do not overlap with each other. Moreover, as the FCC stated recently, Climb Once ordinances are consonant with FCC pole attachment policy. Third, Climb Once is a legitimate exercise of the Metropolitan Government’s police powers to regulate public rights-of-way, not an attempt to invade the province of the FCC regarding pole attachments.

Additionally, to the extent that Comcast—as a 3rd party attacher on a pole subject to FCC regulation—claims Executive Order 13636 as a separate basis for preemption, that claim should also be dismissed. It 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. Comcast does not, and cannot, plausibly argue that the executive order prohibits utility pole owners (or attachers) from using approved contractors.

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

Comcast’s second claim for relief is that Climb Once violates the Metropolitan Charter and state law. That claim should also be dismissed for the reasons articulated in Defendants’ AT&T Brief: First, Comcast does not have standing to bring this claim on NES’s behalf. Second, NES is an indispensable party to this lawsuit as to this claim, and they have not been added as a defendant. Third, there is no private right of action available to enforce this claim. Fourth, to the

extent that the claim is properly before the Court at all, it fails substantively, as the Metropolitan Government is empowered through its own charter to govern its public rights-of-way.

Comcast's third claim for relief is that Climb Once violates the federal and state Contracts Clauses. Although, NES's agreement with Comcast is different from its agreement with AT&T, both claims should be dismissed for the same reasons. Comcast cannot demonstrate any impairment of its agreement with NES that has been created by Climb Once, much less the "substantial impairment" necessary to demonstrate 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 Metropolitan Government.

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.

**I. CLIMB ONCE IS AN EXERCISE OF MUNICIPAL RIGHTS-OF-WAY MANAGEMENT AUTHORITY THAT IS CONSONANT WITH FEDERAL LAW.**

Defendants' position regarding why Climb Once is not preempted by federal law is addressed in Defendants' AT&T Brief. (Doc. #24 at PageID # 284-88, 291-302.)

Additionally, Comcast's assertion that Climb Once "run[s] afoul of federal cybersecurity guidelines" is nonsense. First, as Comcast itself admits, Executive Order 13636, the NIST Framework, and the CSRIC Report cited by Comcast establish guidelines directed at

*unauthorized* access to certain physical assets and facilities. (Case No. 3:16-cv-2794, Doc. #1, Comcast Compl. at ¶ 40.) Climb Once, however, does not facilitate unauthorized access. To the contrary, it permits only contractors authorized by the pole owner to perform any make-ready work to attachments on a pole. Contractors that have been authorized by the pole owner cannot be “unauthorized.”

Second, access to aerial cable does not implicate cybersecurity issues. Cybersecurity is the “act of protecting [information and communications technology] systems and their contents.” Eric A. Fischer, Cybersecurity Issues and Challenges: In Brief, Congressional Research Service, at 1 (Aug. 12, 2016), <https://www.fas.org/sgp/crs/misc/R43831.pdf>. While the Executive Order, the NIST Framework, and the CSRIC Working Group 4 report all correctly note that companies must appropriately manage access to certain physical assets as part of a “holistic approach to cybersecurity,” (CSRIC Report at 9), that approach is still centered on risks to “computers, computer networks, related hardware and devices software and the information they contain and communicate, including software and data, as well as other elements of cyberspace,” (Fischer at 1), not outside distribution above city streets. To be sure, a holistic approach requires “an enterprise-wide, strategic risk management” approach, one that ensures that cybersecurity is not relegated to the “information technology (IT) or network management domain.” *Id.* But making cybersecurity an enterprise-wide priority does not bring all physical assets of an enterprise within the scope of such cybersecurity policies and goals. Expanding the NIST Framework to distribution lines—lines which are visible and, indeed, accessible to any person walking down a street—would introduce unwieldy and unworkable procedures. Comcast does not, and cannot, suggest, for instance, that the NIST Framework (or, for that matter, any other federal

cybersecurity or security guidelines) prohibits the use of pole owner-approved contractors. And that is all that Climb Once entails.

Moreover, by Comcast's logic, the FCC's own regulations would violate the Executive Order. Under the Commission's rules, as with Climb-Once, make-ready work may be performed by any approved, qualified contractor. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, 16071 ¶ 1150 (1996); Id. 14 FCC Rcd. 18049, 18079 ¶ 86 (1999). If Comcast's strained reading of Executive Order 13636 is to be believed, then the FCC itself would be in violation, underscoring the fact that Comcast's argument is untenable.

**II. THE METROPOLITAN GOVERNMENT HAS NOT INFRINGED ON NES'S POWERS BY ENACTING CLIMB ONCE, NOR DOES COMCAST HAVE THE RIGHT TO BRING THIS CLAIM.**

Defendants' position regarding why only NES has standing to bring this claim, why NES is an indispensable party, and why the Metropolitan Government has not infringed upon the rights of NES is fully addressed in Defendants' AT&T Brief. (Doc. #24 at PageID # 302-310.)

**III. CLIMB ONCE DOES NOT VIOLATE THE FEDERAL OR TENNESSEE CONTRACTS CLAUSES AS TO COMCAST'S AGREEMENT WITH NES.**

Comcast's claim that Climb Once violates the federal and state Contracts Clauses also fails as a matter of law. Climb Once does not *actually* impair Comcast's contract with NES, much less *substantially* impair it, which is the standard that Comcast must demonstrate. Also, the enactment of Climb Once was a proper municipal function which was exercised reasonably and for a significant and legitimate public purpose. For the reasons explained below, the Court should dismiss Comcast's third claim for relief.

**A. Comcast's Agreement With NES is Subject to Regulation by Local Ordinance.**

As described in Defendants' AT&T Brief, the federal and state Contracts Clauses do not foreclose the government's use of its inherent police powers to regulate public rights-of-way. The restrictions created by these clauses "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410 (1983) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934)). Additionally, as with AT&T, Comcast cannot simply opt-out of municipal regulation simply by virtue of limiting those individuals who can move their attachments through their contract with NES. Contracts are always subject to governance by municipal ordinances, even if this is not expressly spelled out in the contract. Blaisdell, 290 U.S. at 435-36.

In this case, the NES agreement with Comcast is explicitly subject to local regulation that affects third-party attachers. The fifth recital to the agreement states: "Whereas, NES is responsible for . . . insuring the compliance with all applicable . . . local laws, rules and regulations, ordinances . . ." (Case No. 3:16-cv-2794, Doc. #1-1, Comcast Compl. at PageID #26.) The seventh recital states: "Whereas, NES is willing to permit the placement of [Comcast's] facilities and equipment on or in NES's infrastructure where such use will not interfere with . . . the *lawful* use of NES's facilities by others . . ." (Id. (emphasis added).) Article 7.1 of the agreement states that "the use of [Comcast's] Attachments and facilities must comply with all applicable federal, state, and local laws." (Id. at PageID #38.)

**B. Comcast's Agreement With NES Does Not Govern the Rights and Responsibilities of Third Parties.**

Climb Once does not impair Comcast's contract with NES for the same reasons as it does not impair AT&T's contract with NES: both contracts govern the rights of the contracting parties

vis-à-vis each other; they do not and cannot govern the contracting parties' rights vis-à-vis third parties. Climb Once governs all pole owners and attachers, regardless of contracts between and among them. If the pole owners and attachers voluntarily choose to eschew their rights under Climb Once to a more efficient make ready process because of their contractual agreements, this voluntary limitation of rights cannot be binding on third party attachers.

Moreover, in Comcast's agreement with NES, the rights and responsibilities *are expressly limited to the contracting parties* and expressly exclude third party rights and responsibilities. See PageID #31, Section 2.4 (“[Comcast] recognizes that NES has entered into, or may in the future enter into, agreements and arrangements with others not parties to this Agreement regarding the Infrastructure covered by this Agreement. Nothing herein contained shall be construed as a limitation, restriction, or prohibition against NES with respect to such other agreements and arrangements.”), PageID #66, Section 43.5 (“Except as otherwise expressly provided in this Agreement, this Agreement shall not inure to the benefit of, or be enforceable by, or create any right or cause of action to, any person or entity other than the parties hereto.”).

**C. Climb Once Does Not Actually Impair Comcast's Agreement With NES.**

Contrary to Comcast's assertions, there is no conflict between the Climb Once timeline and the timeline in Comcast's Agreement with NES. Comcast only identifies one contractual provision that is allegedly impaired by Climb Once. Section 12.1, titled “Required Transfers of [Comcast's] Attachments,” states, in pertinent part:

If NES reasonably determines that a Rearrangement or Transfer of [Comcast's] Attachments is necessary, including as part of Make Ready to accommodate another User's Attachment, NES will require [Comcast] to perform such Rearrangement or Transfer within thirty (30) days after receiving notice from NES . . . If [Comcast] fails to Rearrange or Transfer its Attachment within thirty (30) days after receiving such notice from NES, the provisions of Article 24 shall apply, including NES's right to Rearrange or Transfer [Comcast's] Attachments

sixty (60) days after [Comcast's] receipt of original notification of the need to Rearrange or Transfer its facilities.

Id. at PageID #49. Essentially, this provision prohibits NES from moving Comcast's attachments for sixty days after the Make Ready attachment application is approved. However, nothing in the Agreement *requires* NES to move Comcast's attachments after sixty days.

Neither timeline impairs the other; the timelines actually work in tandem to provide more options for an expedient process. If a third party attacher initiates an attachment application with NES, there are a number of possible scenarios that would result in moving the attachment: In Scenario 1, Comcast moves its own attachments within fifteen days of the approved attachment application. That act forecloses the need for (1) the third party attacher to utilize its enforcement rights under Climb Once and (2) NES to utilize its enforcement rights under the contract. In Scenario 2, if Comcast has not moved its attachments within fifteen days, the third party attacher can initiate its rights under Climb Once to move Comcast's attachments. This would foreclose the need for NES to utilize its rights under the contract. In Scenario 3, if Comcast has not moved its attachments within thirty days and Climb Once rights have not been utilized by the third party attacher, NES may initiate its procedures under the Agreement to enforce Comcast's compliance. There are a variety of other scenarios, of course, such as if Comcast chose to move its own attachments after fifteen days or if neither NES nor the third party attacher chose to exercise its contractual/legislative rights, but none of these scenarios create an impairment between Climb Once and the contract. Comcast can comply with both timelines and, indeed, is obligated to do so.

**D. Climb Once Does Not Substantially Impair Comcast's Agreement With NES.**

Even if Climb Once impaired Comcast's Agreement with NES, it is not a substantial impairment, which is the standard necessary to strike down an ordinance under the state and



federal Contracts Clauses. First, for the reasons explained in Defendants' AT&T Brief, Comcast's claim of substantial impairment is significantly undermined by the fact that it operates in the heavily-regulated telecommunications industry, and thus Comcast should have foreseen that the Metropolitan Government would enact rights-of-way ordinances that would affect it. As described above, this expectation is further underscored by the terms of Comcast's agreement with NES, which expressly contemplated local regulation. Second, as with AT&T, for Comcast to suggest that its 46-page contract with NES has been rendered substantially impaired by affecting a single provision is a gross exaggeration. Substantial impairment requires more than just the "[m]inimal alteration of contractual obligations" that might flow from actions affecting this single sentence, the significance of which is arguable at best. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

**E. Climb Once is Reasonable and Necessary to Serve an Important Public Purpose.**

Defendants' position regarding Climb Once as a reasonable exercise for a significant and legitimate public purpose is fully addressed in Defendants' AT&T Brief. (Doc. #24 at PageID # 284-288, 317-320.)

**F. Likewise, the Metropolitan Government's Enactment of Climb Once Does Not Violate the Contracts Clause of the Tennessee Constitution.**

Defendants' position regarding why Climb Once does not violate the Contracts Clause of the Tennessee Constitution is fully addressed in Defendants' AT&T Brief. (Doc. #24 at PageID # 320-323.)

**IV. SUING THE METROPOLITAN GOVERNMENT AND MAYOR BARRY AND ACTING DIRECTOR STURTEVANT IN THEIR OFFICIAL CAPACITIES' IS REDUNDANT.**

Defendants' position regarding why the official capacity claims against Defendants Barry and Sturtevant should be dismissed is fully addressed in Defendants' AT&T Brief. (Doc. #24 at PageID # 323.)

**CONCLUSION**

Defendants request that the Court dismiss Comcast's Complaint in its entirety. As to Comcast's first claim, Climb Once is not preempted by the FCC's regulations on pole attachments. Indeed, 80% of the poles in Nashville are NES-owned and are thus exempt from FCC regulation. As to privately-owned own poles, the FCC timeline does not conflict with Climb Once and the ordinance is consonant with FCC pole attachment policy. Accordingly, Climb Once is a legitimate exercise of the Metropolitan Government's police powers to regulate public rights-of-way. Moreover, to the extent that Comcast claims Executive Order 13636 as a basis for preemption, that claim should also be dismissed. It does not limit the Metropolitan Government's ability to enact Climb Once because 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 & wires.

As to Comcast's second claim, Comcast can't bring a claim on behalf of NES, which is an indispensable party to this case. Moreover, there is no private right of action to enforce the Metropolitan Charter. Finally, the claim fails substantively, as the Metropolitan Charter grants Metro authority to enact Climb Once to govern its rights-of-way.

As to Comcast's third claim, Climb Once does not violate the Contracts Clause of either the United States or Tennessee Constitutions. Comcast cannot demonstrate any impairment to the agreement between it and NES, much less the "substantial impairment" necessary to

demonstrate a constitutional conflict, and 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 Metropolitan Government.

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.

Respectfully Submitted,

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**Certificate of Service**

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

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on this the 30th day of November, 2016.

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