

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

BELLSOUTH TELECOMMUNICATIONS, LLC, D/B/A
AT&T TENNESSEE,

PLAINTIFF,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY, TENNESSEE; MEGAN
BARRY, IN HER OFFICIAL CAPACITY AS MAYOR;
AND MARK STURTEVANT, IN HIS OFFICIAL
CAPACITY AS TRANSITIONAL INTERIM DIRECTOR
OF THE DEPARTMENT OF PUBLIC WORKS,

DEFENDANTS.

CASE NO. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff BellSouth Telecommunications, LLC, doing business as AT&T Tennessee (“AT&T”), states as follows for its complaint against defendants Metropolitan Government of Nashville and Davidson County, Tennessee (“Metro Nashville”), Megan Barry (in her official capacity as Mayor of Metro Nashville), and Mark Sturtevant (in his official capacity as transitional interim Director of Metro Nashville’s Department of Public Works):

NATURE OF THE CASE

1. On September 20, 2016, Metro Nashville’s Council adopted an ordinance that purports to permit third parties to perform work on AT&T’s communications network. Under the new ordinance, where a third party seeks to attach equipment to an electric utility pole in the rights-of-way and AT&T already has lines or other equipment on the pole, the third party may remove, alter, and relocate AT&T’s facilities as it deems necessary, upon fifteen days’ notice. If

the work would cause or reasonably be expected to cause a customer outage, the third party may proceed after giving AT&T thirty days' notice.

2. AT&T seeks declaratory and permanent injunctive relief to restrain Defendants from enforcing this new ordinance. The ordinance conflicts with and is preempted by the pole attachment regulations of the Federal Communications Commission. Further, the ordinance is invalid as a matter of Tennessee law because it conflicts with Metro Nashville's Charter. In addition, the ordinance impairs AT&T's existing contract with Metro Nashville in violation of the Contracts Clause of the United States Constitution and Article I, § 20 of the Tennessee Constitution.

JURISDICTION AND VENUE

3. This action arises under the laws of the United States, including the Contracts Clause of the federal Constitution (U.S. Const., Art. I, § 10, cl. 1). The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. AT&T's Contracts Clause claim also is brought pursuant to 42 U.S.C. § 1983. The Court has supplemental jurisdiction over AT&T's state law claim pursuant to 28 U.S.C. § 1367.

4. The Court also has diversity jurisdiction under 28 U.S.C. § 1332. There is complete diversity between the parties, as AT&T is a citizen of Delaware and Texas, and Defendants are citizens of Tennessee.

5. The amount in controversy exceeds \$75,000. Among other things, as alleged further below, the economic value of the rights AT&T seeks to protect exceeds \$75,000, and if relief is denied AT&T will suffer losses in excess of \$75,000.

6. The Court's authority to grant declaratory relief and related injunctive relief is based upon 28 U.S.C. §§ 2201-2202 because an actual controversy exists.

7. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the Metro Nashville ordinance at issue was enacted and AT&T's claims arose in this judicial district.

PARTIES

8. Plaintiff BellSouth Telecommunications, LLC, doing business as AT&T Tennessee, is a limited liability company. At all times relevant, AT&T has been and is qualified to do business in Tennessee.

9. Defendant Metro Nashville is a consolidated city-county government organized pursuant to the provisions of Title 7 of the Tennessee Code, with the capacity to sue and be sued.

10. Defendant Megan Barry is the Mayor of Metro Nashville. Pursuant to Section 5.01 of Metro Nashville's Charter, all executive and administrative power of Metro Nashville is vested in the Office of the Mayor. Defendant Barry is sued in her official capacity only.

11. Defendant Mark Sturtevant is the transitional interim Director of Metro Nashville's Department of Public Works. Pursuant to Section 8.402 of Metro Nashville's Charter, the Department of Public Works is responsible for the administration and enforcement of all laws, ordinances and regulations relating to permits, which includes permits for encroachments placed in the public rights-of-way. Defendant Sturtevant is sued in his official capacity only.

STATEMENT OF FACTS

12. AT&T is a wireline telecommunications carrier that provides telephone and other communications services in Metro Nashville, using an extensive telecommunications network that it has invested hundreds of millions of dollars to construct, maintain, repair, replace, and operate.

13. Much of AT&T's network in Metro Nashville consists of aerial telephone lines and associated equipment placed upon utility poles, numbering approximately 104,000, the vast majority of which are in the public right-of-way. Approximately 80% of these poles are owned by Nashville's municipal electric utility, the Electric Power Board operating under the name Nashville Electric Service ("NES"). Most of the remaining poles upon which AT&T has facilities are owned by AT&T.

14. AT&T attached facilities to NES poles pursuant to a 1958 contract with the City of Nashville, by and through the Electric Power Board. This contract, which remains in effect today, sets forth the terms and conditions under which AT&T and NES may attach utility facilities to poles owned by the other party. A copy of this contract is attached hereto as Exhibit A.

15. Article VI(B) of the 1958 agreement states in part that "[e]xcept as herein otherwise expressly provided, each party shall place, maintain, rearrange, transfer and remove its own attachments."

16. On September 20, 2016, Metro Nashville adopted Ordinance No. BL2016-343 (the "Ordinance"), a copy of which is attached hereto as Exhibit B. The Ordinance amends Title 13 of the Metro Nashville Code of Laws, by adding new Chapter 13.18 titled "Management of Public Rights-of-Way for Make Ready Work." Notwithstanding its title, the new Chapter does not address management of the public rights-of-way; rather, it purports to regulate the terms and conditions upon which a person can move or rearrange existing communications lines or equipment owned by a third party on existing utility poles, in order to accommodate that person's attachment of new communications lines or equipment.

17. The Ordinance grants an “Attacher” the right to perform all of the “make-ready work” required to rearrange or relocate the pre-existing physical facilities and pole attachments of other communications providers (including AT&T). Under the Ordinance, upon the pole owner’s approval of an attachment application, the Attacher is authorized to “perform Make Ready by transferring, relocating, rearranging, or altering the Attachments of any Pre-Existing Third Party User,” using contractors approved by the pole owner if so required by the pole owner. Thus, once a new Attacher has received NES approval to attach its facilities to an NES pole, the new Attacher is permitted to transfer, relocate, rearrange, or alter AT&T’s facilities to accommodate the Attacher’s facilities, without AT&T’s consent.

18. Further, the Ordinance requires the Attacher to provide the pre-existing user just fifteen days’ prior notice of the Attacher’s work. If the Attacher concludes its work would cause, or would reasonably be expected to cause, a customer outage (what the Ordinance calls “Complex Make Ready” work), the pre-existing user has thirty days to perform the necessary work, and if it does not complete the work within thirty days the Attacher may perform the work, even if it requires disrupting service.

19. The Ordinance thus purports to permit a third party (the Attacher) to temporarily seize AT&T’s property, and to alter or relocate AT&T’s property, without AT&T’s consent and with little notice. AT&T would be deprived of an adequate opportunity to assess the potential for network disruption caused by the alteration or relocation, and to specify and oversee the work on AT&T’s own facilities to ensure any potential for harm to its network, including harm to the continuity and quality of service to its customers, is minimized.

20. The Ordinance also permits an Attacher to rearrange AT&T facilities on NES poles without regard to AT&T’s standards for work on its facilities. Within thirty days after

completing the work, the Attacher must notify AT&T of the work on AT&T's facilities. AT&T then has sixty days to inspect the work, and if it does not meet NES standards, AT&T can demand the work be corrected at the Attacher's expense. Further, the Attacher must indemnify NES for any claims made by AT&T, but it is not required to indemnify AT&T for any harm resulting from the work on AT&T's facilities.

21. The pole attachment rights and obligations created by the Ordinance are a drastic departure from, and conflict with, those set forth in federal regulations promulgated by the Federal Communications Commission ("FCC"). The federal Communications Act authorizes the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable," and it directs the FCC to "prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b)(1), (2).

22. Under the FCC's regulations, an entity with existing attachments, including AT&T, is entitled to prior written notice in the event any make-ready work would affect the entity's facilities. 47 C.F.R. § 1.1420(e). Under the FCC's regulations, the entity with existing attachments, including AT&T, has up to 60 days (and potentially more, depending upon the type of facilities and size of the order) to modify its attachments to accommodate a new attacher. 47 C.F.R. § 1.1420(e). Further, under the FCC's regulation, a new attacher may hire a contractor to complete the make-ready work itself only if the work has not been completed by the specified deadline. 47 C.F.R. § 1.1420(i).

23. The value of AT&T's right to maintain and operate its plant and conduct its business in Metro Nashville free from wrongful interference easily exceeds \$75,000. AT&T has facilities on approximately 104,000 poles in the Metro Nashville area, and it has invested hundreds of millions of dollars in deploying, maintaining, and upgrading these facilities. AT&T

has a significant interest in controlling and overseeing its telecommunications network, including work done on its aerial facilities such as moving those to accommodate another attacher.

AT&T's aerial facilities in the Metro Nashville area include major fiber transport and copper feeder cables that serve large numbers of customers and carry large volumes of communications traffic. If a copper feeder cable were damaged, 1,000 or more residential customers could lose service, and business customers without redundant service would also lose service. Some of AT&T's aerial fiber facilities are used to provide high-capacity switched Ethernet services to various customers including police and fire stations, and to wireless carriers that use the fiber to carry wireless traffic to and from their cell towers. Damage to these facilities could knock out service to emergency responders, and take a cell tower out of service.

24. Even one instance of improper work on aerial facilities can easily cost AT&T more than \$75,000. AT&T has been sued on multiple occasions for personal injuries and property damage related to the placement and maintenance of its aerial facilities, and has resolved other such claims short of litigation. Some such claims have been resolved for more than \$75,000.

25. Similarly, wholly apart from litigation costs and resulting damages, AT&T would incur significant service restoration costs in the event of a service outage resulting from a third party's work. For example, it could cost well in excess of \$75,000 to replace one fiber optic cable. In addition, under the Ordinance AT&T could bear the costs of correcting the Attacher's work where it meets NES standards but does not meet AT&T's standards.

26. Further, AT&T estimates that its costs merely of administering the ordinance would exceed \$75,000. In particular, in order to oversee, manage, and conduct the inspections contemplated by the Ordinance, if a high-volume attacher were to invoke the Ordinance to

deploy a communications network AT&T would incur additional labor and associated costs in excess of \$75,000.

27. The Ordinance also deprives AT&T of the benefits of its 1958 agreement with Metro Nashville, under which AT&T “shall place, maintain, rearrange, transfer and remove its own attachments” on NES poles. Nothing in this contract permits Metro Nashville to rearrange or transfer AT&T’s facilities (except in the event of an emergency) or to grant third parties such rights.

FIRST CLAIM FOR RELIEF
The Ordinance Is Inconsistent With And Preempted By Federal Law

28. AT&T hereby incorporates by reference the allegations of paragraphs 1 through 27, inclusive, as though fully set forth herein.

29. In adopting its pole attachment regulations, the FCC acted upon a developed record and made findings regarding the reasonableness and appropriateness of its mandated procedures and timelines. In doing so, the FCC drew specific lines to weigh and balance various competing interests, including the public interest in giving utilities and telecommunications carriers sufficient time to perform make-ready work to ensure safety and reliability.

30. The Ordinance conflicts with the procedures created by the FCC, and upsets the careful balances struck by the FCC in crafting its pole attachment regulations.

31. The Ordinance is inconsistent with federal law, including 47 U.S.C. § 224 and the pole attachment regulations promulgated by the FCC, and thus is preempted by and rendered invalid and unenforceable by Article VI, Section 2 of the Constitution of the United States.

32. Unless the Court declares the Ordinance invalid and permanently enjoins Defendants from enforcing it, AT&T will suffer irreparable harm that cannot be redressed by recovery of damages. For example, AT&T will be forced to comply with a preempted

ordinance, will be improperly subjected to regulators at multiple levels of government, and will suffer a loss of customer goodwill. A permanent injunction will advance the public interest as defined by Congress and the FCC.

33. AT&T is entitled to a judgment declaring the Ordinance invalid and unenforceable, and a permanent injunction restraining Defendants from enforcing, or authorizing any third-parties from acting pursuant to, the Ordinance.

SECOND CLAIM FOR RELIEF
The Ordinance Contravenes Metro Nashville's Charter In Violation Of State Law

34. AT&T hereby incorporates by reference the allegations of paragraphs 1 through 33, inclusive, as though fully set forth herein.

35. As a matter of Tennessee law, the provisions of a municipal charter are mandatory and must be obeyed. A municipal action is unlawful and *ultra vires* where it is outside the scope of the city's authority under its charter, or where it was not undertaken consistent with mandatory provisions of its charter.

36. Under Metro Nashville's Charter, the Electric Power Board exercises certain municipal authority separate and apart from the Metro Council. Appendix Three (Article 42), § 1 of Metro Nashville's Charter authorizes the Nashville government to acquire, "maintain, improve, operate and regulate . . . an electric system, including distribution system and substations, together with all necessary or appropriate equipment, appliances and appurtenances." Under § 15, the Electric Power Board "shall have full control over the erection, construction, maintenance and operation of said plants and properties, with full power to make rules for the control and maintenance of said plants and properties, [and] the manner of operation." Section 18 further provides that the Board "shall have exclusive management and control of the operation of said electric power plant and/or distribution system."

37. In addition, § 24 makes clear that “neither the mayor, [nor] the metropolitan council . . . shall have or exercise any authority whatsoever over the electric power board . . . other and except to the extent herein expressly provided, and the provisions of this article shall prevail over any conflicting provisions appearing in any other article in this Charter.”

38. NES poles are part of the NES electric system and properties. Under the Charter the regulation of the manner of attachments to NES poles is part of the “management” and “control” over the “operation” of its properties, as well as “rules” for the “control” and “manner of operation” of its properties. Such matters are committed exclusively to the Board’s authority.

39. The Mayor and Council of Metro Nashville thus lack authority under the Charter to regulate the terms and conditions of attachments to the Board’s poles. As a result, the Ordinance is invalid and *ultra vires*, to the extent it purports to apply to NES poles.

40. Unless the Court declares the Ordinance invalid and permanently enjoins Defendants from enforcing it, AT&T will suffer irreparable harm that cannot be redressed by recovery of damages. For example, AT&T will be forced to comply with an unlawful ordinance, will be improperly subjected to interference with its property, network, and ongoing business, and could suffer a loss of customer goodwill. A permanent injunction will advance the public interest as defined by Tennessee law.

41. AT&T is entitled to a judgment declaring the Ordinance invalid and unenforceable, and a permanent injunction restraining Defendants from enforcing, or authorizing any third-parties from acting pursuant to, the Ordinance.

THIRD CLAIM FOR RELIEF
The Ordinance Violates the Federal and State Contracts Clauses

42. AT&T hereby incorporates by reference the allegations of paragraphs 1 through 41, inclusive, as though fully set forth herein.

43. AT&T has an existing contractual relationship with Metro Nashville that governs AT&T's placement and maintenance of its facilities on NES poles located in the public rights-of-way.

44. Under that contract, AT&T maintains responsibility for placing, maintaining, rearranging, transferring, and removing its attachments on NES poles. Nothing in the contract permits Metro Nashville to rearrange or transfer AT&T's facilities (except in the event of an emergency) or to grant third parties such rights.

45. This contract is protected against impairment by the federal and Tennessee constitutions.

46. Acting under color of law, Metro Nashville has caused AT&T to suffer a substantial deprivation of its contract rights in violation of the federal and Tennessee constitutions. The Ordinance, by purporting to permit third parties to rearrange and transfer AT&T's facilities on NES poles, constitutes a substantial and unconstitutional impairment of AT&T's contract with Metro Nashville. The Ordinance effectively nullifies important provisions of the existing contract and imposes new and unexpected limitations and conditions upon AT&T's use of NES poles.

47. By enacting the Ordinance, Metro Nashville has interfered with and impaired its own contract, subjecting its actions to heightened scrutiny and a more stringent examination under the Contracts Clause than laws affecting contractual relationships between private parties. The Ordinance is neither reasonable nor necessary to accomplish Metro Nashville's purported public purpose. The Ordinance's attachment measures are not necessary because there are existing procedures in place for AT&T to move or rearrange its own facilities where necessary to accommodate a new attacher. The Ordinance's attachment measures are not reasonable for the

same reason, and because circumstances have not changed substantially since the time Metro Nashville entered into its contract with AT&T. At that time, it was recognized that AT&T may from time to time need to move or rearrange its facilities.

48. AT&T is entitled to a judgment declaring the Ordinance unconstitutional and unenforceable, and a permanent injunction restraining Defendants from enforcing, or authorizing any third-parties from acting pursuant to, the Ordinance.

49. AT&T has incurred and will continue to incur attorneys' fees and costs because of this proceeding, in amounts that cannot yet be ascertained. These fees and costs are recoverable in this action under the provisions of 42 U.S.C. § 1988(b).

PRAYER FOR RELIEF

WHEREFORE, AT&T prays for relief against Defendants as follows:

1. For a declaration and judgment that the Ordinance conflicts with and is preempted by federal law;
2. For a declaration and judgment that the Ordinance is unlawful and *ultra vires* under Tennessee law, because it was not adopted in accordance the Metro Nashville's Charter and exceeds the Council's authority under that Charter;
3. For a declaration and judgment that the Ordinance violates the Contracts Clause of the federal and Tennessee Constitutions;
4. For a permanent injunction restraining Defendants from enforcing, or authorizing any third-parties from acting pursuant to, the Ordinance;
5. For an award of AT&T's costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and any other applicable law; and
6. For such other and further relief as the Court may deem just and proper.

Dated: September 22, 2016

Respectfully submitted,

/s/ William L. Harbison

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