

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

Comcast of Nashville I, LLC,

Plaintiff,

v.

Metropolitan Government of Nashville and
Davidson County; Megan Barry, in her official
capacity as Mayor; and Mark Sturtevant, in his
official capacity as Transitional Interim
Director of Public Works,

Defendants.

Case No. _____

COMPLAINT

Plaintiff Comcast of Nashville I, LLC (“Comcast”) makes this Complaint for declaratory judgment and injunctive relief against defendants Metropolitan Government of Nashville and Davidson County (“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 Public Works for Metro Nashville), stating as follows:

Nature of the Case

1. Comcast seeks this Court’s protection from Metro Nashville’s attempt to enforce an invalid and unconstitutional ordinance (Ordinance No. BL2016-343, hereinafter the “Ordinance”) that permits third parties to move, alter, or rearrange components of Comcast’s communications network attached to utility poles without Comcast’s consent, authorization, or oversight, and with far less notice than is required by federal law and by an existing Comcast contract with Metro Nashville.

2. Cable and telecommunications service providers such as Comcast commonly attach their equipment and facilities to utility poles—some owned by municipalities and some owned by private utility companies—located in the public rights-of-way. In most cases, several service providers share space on a single pole, and they typically work cooperatively with each other and the pole owner to move or rearrange their equipment, as necessary, in order to make room for any new providers wishing to attach equipment to a pole. This process, commonly referred to as the “make-ready” process, is the subject of contractual obligations and longstanding federal regulations, both of which seek to ensure that all providers can share available pole space cooperatively and safely, without interfering with or damaging any provider’s equipment or services. Comcast itself has adhered to this comprehensive regime as it has attached its own equipment to utility-owned poles in the Nashville area (and throughout the country) to support its communications services.

3. The new Ordinance upsets the existing, carefully designed make-ready process by authorizing new users of utility poles to interfere *unilaterally* with an existing provider’s equipment without that provider’s authorization. Specifically, it allows new, intervening providers seeking to attach their own equipment to poles to move aside Comcast’s equipment on their own, without Comcast’s consent or oversight, with only 15 days’ notice to Comcast in many instances, and using contractors not approved by Comcast or subject to its required standards. Indeed, the Ordinance allows these encroaching attachers to do so even in cases in which the make-ready work is reasonably expected to cause service outages for Comcast’s customers—and still without Comcast’s consent, still without approved contractors or approved standards, and with the only caveat being that the encroaching attacher must give Comcast 30 rather than 15 days’ notice. The procedures authorized by the Ordinance are so intrusive that,

tellingly, Metro Nashville has wholly exempted its *own* utility pole attachments from the Ordinance's coverage.

4. The attachment procedures set forth in Metro Nashville's Ordinance are squarely inconsistent with the comprehensive federal scheme covering private pole attachments, and they unlawfully impair vested rights that Comcast possesses under a contract with Metro Nashville itself. Accordingly, the Ordinance is preempted by federal law and violates the Contract Clauses of the U.S. and Tennessee Constitutions. Metro Nashville's enactment of the Ordinance also exceeds its authority under the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro Nashville Charter").

5. On these grounds, Comcast requests that this Court declare the Ordinance invalid and enjoin its enforcement. Absent such relief, Comcast will suffer significant, irreparable injury to its property, operations, and customer relationships. By departing from the carefully balanced approach to the make-ready process embraced by Comcast's contract with Metro Nashville and the comprehensive Federal Communications Commission ("FCC") regulatory framework, Metro Nashville's Ordinance exposes Comcast's network equipment to serious risk. It permits third parties to encroach upon, move, and potentially damage Comcast's equipment, thereby imposing significant costs on Comcast and threatening interference with customers' services and emergency communications—while offering Comcast no way to protect against these harms or even seek recourse after the fact.

Jurisdiction and Venue

6. This Court has federal question jurisdiction over this action, pursuant to 28 U.S.C. § 1331, because Comcast's claims arise under the laws of the United States, including 47 U.S.C. § 224, 42 U.S.C. § 1983, and the Supremacy and Contract Clauses of the U.S.

Constitution. This Court has equitable jurisdiction to enjoin unconstitutional action. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

7. This Court also has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332. Comcast is a citizen of Pennsylvania because all of its members are citizens of Pennsylvania. Defendants are citizens of Tennessee. Complete diversity therefore exists between the parties. The amount in controversy exceeds \$75,000 because, as described below, the economic value of the rights Comcast seeks to enforce is greater than \$75,000; if Comcast does not prevail in this action, it is likely to suffer more than \$75,000 in losses.

8. The Court also has supplemental jurisdiction over Comcast's state law claims, pursuant to 28 U.S.C. § 1367, because the state law claims form part of the same case or controversy as the federal law claims.

9. Because an actual controversy within the Court's jurisdiction exists, this Court may grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

10. Venue is proper in the Middle District of Tennessee, pursuant to 28 U.S.C. § 1391(b), because the events and omissions giving rise to Comcast's claims occurred in Nashville, which is located within the Middle District. The Ordinance was passed by the Metro Nashville Council in Nashville, and it will be enforced by Defendants and cause injury to Comcast in Nashville.

Parties

11. Plaintiff Comcast of Nashville I, LLC is a limited liability company. All of its members are citizens of Pennsylvania. At all relevant times, Comcast has been and is qualified to do business in Tennessee.

12. Defendant Metro Nashville is a public corporation and consolidated local government organized pursuant to Article XI, Section 9 of the Tennessee Constitution and Section 7-1-101 *et seq.* of the Tennessee Code.

13. Defendant Megan Barry is the Mayor of Metro Nashville. Pursuant to the Metro Nashville Charter and Tennessee Code § 7-2-108, Mayor Barry is vested with all executive and administrative power of Metro Nashville and is responsible for law enforcement within its boundaries. Defendant Barry is sued in her official capacity only.

14. Defendant Mark Sturtevant is the Transitional Interim Director of Public Works for Metro Nashville. Pursuant to the Metro Nashville Charter and Chapter 6.26 of the Metro Nashville Code, Defendant Sturtevant and the Department of Public Works are charged with executing and overseeing regulation of the public rights-of-way, including the erection, removal, use, and adjustment of utility facilities located in the public rights-of-way. Defendant Sturtevant is sued in his official capacity only.

Statement of Facts

Comcast's Network

15. Comcast is a provider of communications services—including cable television, broadband Internet access, and telephone services—in Nashville and Davidson County, Tennessee. In the Nashville area, Comcast serves well over 100,000 customers.

16. Comcast provides communications services to its customers through an extensive network of fiber optic and coaxial cable and other communications equipment and facilities. Many components of this network are attached to utility poles located in the public rights-of-way.

17. Comcast has attached components of its network to more than 120,000 utility poles located within Nashville and Davidson County. Approximately 80 percent of these utility poles are owned by the Nashville Electric Service (“NES”)—a municipal public utility managed and controlled by the Electric Power Board of Nashville, which in turn is an organ of Metro Nashville. As discussed below, the Metro Nashville Charter grants the Electric Power Board “full” and “exclusive” authority over the regulation of attachments on NES-owned poles.

18. The remaining poles are owned by BellSouth Telecommunications, LLC, d/b/a AT&T Tennessee (“AT&T”), a private utility, and in many instances Comcast’s equipment is attached to these AT&T poles in Nashville and Davidson County. As explained further below, federal law grants the FCC expansive authority to regulate attachments on such private utility-owned poles. The FCC, in turn, has used that authority to establish a comprehensive regulatory regime for such attachments. Among other things, these federal rules set forth an orderly process through which a pole’s owner and service providers with existing attachments on the pole can coordinate with service providers that wish to install new equipment on that pole. This FCC-mandated process includes detailed “make-ready” procedures whereby service providers with existing attachments may rearrange their equipment to accommodate new service providers. *See* 47 C.F.R. § 1.1420(e). The FCC’s rules strike a careful “balance between encouraging deployment of facilities and safeguarding the network” of existing providers—by providing workable and fair procedures enabling new service providers to add their equipment to poles while minimizing disruption to and protecting the security of existing providers’ networks. *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 ¶ 61 (2011) (“2011 Pole Attachment Order”).

19. Comcast does not own any of the utility poles within Nashville and Davidson County to which components of its network are attached.

Comcast's Contract with NES

20. Comcast has attached its network components to utility poles owned by NES pursuant to a contract with NES that remains in effect (the "NES Agreement"). The NES Agreement provides Comcast with the right and authority to move, alter, maintain, and repair all or any part of its equipment located on NES-owned utility poles, while significantly limiting the right or authority of NES or any third party to do so. Such provisions and third-party restrictions are commonplace in the industry in order to minimize service interruptions to existing customers or other harms to the provider's network. A copy of the NES Agreement is attached to this Complaint as Exhibit A.

21. Article 12.1 of the NES Agreement governs the "rearrangement or transfer" of Comcast's attachments in order "to accommodate another user's attachment" to an NES-owned utility pole. Article 12.1 provides that, in such circumstances, Comcast may perform any "make-ready" work on its attachments without penalty "within thirty (30) days after receiving notice" from NES. While Article 24 of the NES Agreement contemplates potential penalties if Comcast does not perform the make-ready work within that initial 30-day period, Article 12.1 makes clear that a third party may not alter, transfer, or rearrange Comcast's equipment until "sixty (60) days after [Comcast's] receipt of original notification." Thus, consistent with the FCC's regime for private utility-owned poles, in no event may any third party move or interfere with Comcast's network equipment until at least 60 days after that third party has provided notice to Comcast of its need to do so.

The Metro Nashville Ordinance

22. On September 20, 2016, the Metro Nashville Council enacted Ordinance No. BL2016-343. Defendant Barry, in her official capacity as mayor, signed the Ordinance into law on September 21, 2016, and it took effect immediately. A copy of the Ordinance is attached hereto as Exhibit B.

23. The Ordinance amends Title 13 of the Metro Nashville Code by adding a new chapter regulating the terms and procedures through which parties may attach their communications lines and equipment to other parties' utility poles located in the public rights-of-way. The Ordinance purports to authorize new "[a]ttachers"—that is, intervening third parties that wish to add their lines or equipment to a pole—to alter, relocate, or rearrange preexisting attachments owned by other users of utility poles, including Comcast, with only limited notice to those existing users, without the existing users' consent or authorization, and without advance payment for associated costs.

24. Specifically, the Ordinance provides that preexisting users of utility poles "shall allow" an encroaching attacher to perform "Make Ready" work on the preexisting user's attachments, which the Ordinance defines as the "transfer, relocation, rearrangement, or alteration" of the preexisting user's "communications equipment, antenna, line or facility of any kind necessary to provide space for [the new] Attacher to install an Attachment."

25. In most cases, the Ordinance authorizes the encroaching attacher to perform make-ready work after providing *only 15 days'* notice to the relevant preexisting user. The Ordinance does not expressly indicate that the preexisting user may perform its own make-ready work during that abbreviated period. And even if the Ordinance permitted the preexisting user to do so, the 15-day period would provide insufficient time in most cases for Comcast to perform

the necessary work itself using its own contractors. Indeed, make-ready work is rarely limited to a single pole; rather, Comcast may receive notice of the need for such work to be performed *simultaneously* on a substantial number of the more than 120,000 poles to which its network components are attached in Nashville and Davidson County. That reality will make it impossible in most cases for Comcast to perform all of the requested make-ready work within the abbreviated time period provided by the Ordinance, especially in light of the substantial resources that make-ready work may require in some cases and the difficulties inherent in redirecting Comcast's finite resources to such work (on only a few days' notice) from other projects and obligations.

26. Moreover, in cases where the encroaching attacher's actions are reasonably expected to cause a customer outage (so-called "Complex Make Ready" work), the only nod the Ordinance makes to that concern is to require that the encroaching attacher provide all of 30 days' notice before it can touch and rearrange Comcast's equipment. The Ordinance appears to grant the encroaching attacher—rather than the relevant preexisting user—sole discretion to determine whether any make-ready work is reasonably expected to cause a customer outage in a manner that would trigger the 30-day notice period. While the Ordinance's provision on "Complex Make Ready"—unlike the provision on ordinary "Make Ready"—nominally contemplates that preexisting users could perform the necessary work during the 30-day notice period, that window similarly would provide substantially less time than federal regulations contemplate and than Comcast's NES contract requires.

27. In either case, once the applicable limited notice period has passed, the Ordinance authorizes the encroaching attacher to proceed with the work—without the preexisting user's consent or authorization—using a contractor approved only by the pole owner.

28. Upon completion of the make-ready work, the Ordinance requires that the encroaching attacher notify the affected preexisting user within 30 days and provide a report with basic information about the work conducted. Although the Ordinance purports to grant the affected preexisting user a right to inspect the third-party's work, it requires the encroaching attacher to pay for repairs or corrections related to the work *only if* the work fails to conform to standards or requirements established by the *pole owner*.

29. Thus, as applied to Comcast, the Ordinance permits encroaching attachers to move, rearrange, and alter components of Comcast's network without Comcast's consent or authorization and with only limited notice—even when such work is reasonably expected to cause customer outages on Comcast's network. Moreover, the Ordinance provides that such work may be performed by third-party contractors not approved by Comcast, and without any Comcast oversight. And the Ordinance offers Comcast (which owns no utility poles) essentially no remedy in the event that make-ready work performed by a third party damages or interferes with its equipment or inconveniences or damages Comcast's customers.

30. Meanwhile, Metro Nashville has wholly exempted its own attachments from the Ordinance. Section 2 of the Ordinance provides that it “shall not apply to [Metro Nashville's] Attachments on utility poles or other similar structures that consist of cameras, radios, or any equipment used for emergency communications, and facilities used for traffic signalization.” Through the Ordinance, Metro Nashville has forced Comcast to cede nearly all control over alterations and changes to Comcast's network components attached to utility poles, even though Metro Nashville is apparently unwilling to cede such control over its own attachments—a distinction that underscores the patent unreasonableness of the Ordinance as applied to Comcast.

Federal Law Governing Pole Attachments

31. Metro Nashville enacted the Ordinance despite the fact that federal law already establishes detailed and comprehensive procedures governing the pole “make-ready” process. Federal law grants the FCC broad authority 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)(1). Pursuant to that authority, the FCC has promulgated a thorough set of regulations that directly govern make-ready work on utility-owned poles.

32. Among other things, those regulations guarantee the owner of existing attachments at least a 60-day (and in some circumstances, up to a 105-day) time period for make-ready work—and allow the *equipment owner itself* to perform any make-ready work necessary to accommodate a new attacher. As long as any required work is performed within those time periods, the regulations would give the new attacher no right whatsoever to disturb the preexisting attacher’s equipment. 47 C.F.R. § 1.1420(e).

33. The FCC adopted this baseline 60-day period based on the voluminous evidence it compiled indicating that such a period is a “workable timeframe that many utilities can meet” and thus “furthers [the FCC’s] interest in dependability.” *2011 Pole Attachment Order* ¶ 32. The FCC pointed in particular to “[t]he successful experiences of several utilities *and* attachers” as support for “the pragmatism of selecting this [60-day] model,” and cited submissions showing that utilities and attachers typically “need 60 days to perform make-ready,” especially in situations where “multiple parties must be sequenced to perform make-ready.” *Id.* The agency also expressly rejected proposals to adopt a shorter 45-day period, finding that such a timeframe often is inadequate for fulfilling larger make-ready requests or requests involving “complicating factors.” *Id.* And the FCC cited its desire to “synchronize make-ready with the Commission’s

existing rules that give entities with existing attachments 60 days to move them before a pole owner modifies a pole.” *Id.* ¶ 31.

34. By imposing significantly curtailed notice periods—which provide no meaningful opportunity for a preexisting attacher like Comcast to perform necessary make-ready work itself—and by directly empowering new, intervening attachers to encroach upon other pole users’ property immediately after that brief period, the Ordinance squarely conflicts with the binding federal regulations and the FCC’s express policy choices. Moreover, by depriving preexisting attachers of significant control over their attachments, the Ordinance upsets the careful “balance between encouraging deployment of facilities and safeguarding the network” that the FCC’s regulations are designed to maintain. *Id.* ¶ 61.

35. While 47 U.S.C. § 224(c) authorizes states to adopt their own pole attachment regulations in lieu of the federal rules governing utility-owned poles, and establishes a process for a state to certify to the FCC that it has asserted authority over attachments on such poles, Tennessee has not made such a certification to the FCC (nor has the city of Nashville, for that matter).

Injury to Comcast

36. The Ordinance upsets Comcast’s settled expectations and conflicts with both federal law and Comcast’s vested rights and benefits under the NES Agreement. Although federal law and the NES Agreement already prescribe detailed procedures for the performance of make-ready work on Comcast’s network, the Ordinance purports to establish significantly different procedures that afford substantially less protection to Comcast and its customers.

37. Enforcement of the Ordinance will also inflict significant economic harm and other injuries on Comcast and its customers. Comcast depends on its network—including

network components attached to utility poles in Nashville and Davidson County—to provide contracted-for services to its customers. To ensure the quality of the services it provides, Comcast has invested tens of millions of dollars in the installation, testing, maintenance, and repair of its network components attached to utility poles within Nashville and Davidson County.

38. Any interruption or outages in Comcast’s services to its customers—including interruptions or outages caused by interference with components of Comcast’s network attached to utility poles—threatens the loss of a significant portion of Comcast’s revenue. Enforcement of the Ordinance will increase the risk of interruptions and outages in Comcast’s services because the Ordinance authorizes third-party contractors to perform make-ready work on Comcast’s network without Comcast’s authorization or oversight. Due to their lack of familiarity with Comcast’s equipment and standards, such third-party contractors are significantly more likely to damage Comcast’s equipment or interfere with its services. But for the Ordinance, Comcast could perform all or substantially all of any necessary make-ready work *itself* (or using its own contractors), thereby preventing any damage to its equipment and limiting any interruptions and outages for its services.

39. To minimize such losses, Comcast will be forced to commit significant resources in an effort to perform as much of the requested make-ready work as possible during the limited notice periods provided by the Ordinance—periods that are far shorter than the federal minimum period for such work established by the FCC. However, at least in the case of ordinary make-ready work, it is not clear whether the Ordinance even permits the existing user to perform such preemptive work in the first place. And even if such work is permitted, marshaling the necessary resources on an extraordinarily expedited basis—including personnel, equipment/supplies, and engineering expertise—will be extremely costly, to the extent it is

feasible at all. Given the number of utility poles within Nashville and Davidson County to which Comcast has attached components of its network (over 120,000), such costs will easily amount to millions of dollars. Absent the Ordinance, much of those costs would be avoided, as the federal regulations and Comcast's agreement with NES explicitly permit Comcast to perform any necessary make-ready work itself, on a much more reasonable timetable.

40. In most cases, however, it simply will not be feasible for Comcast to perform the requested make-ready work itself within the limited time periods provided by the Ordinance. Thus, encroaching attachers will perform the work without Comcast's authorization or oversight, using contractors and standards not approved by Comcast. The Ordinance's provisions allowing third parties to access Comcast's network equipment without authorization also will run afoul of federal cybersecurity guidelines concerning the need to prevent unauthorized access to and tampering with network equipment. *See, e.g.*, White House, Executive Order No. 13636, "Improving Critical Infrastructure Cybersecurity," § 4(c) (Feb. 12, 2013), *available at* <https://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity> (articulating the federal government's interest in ensuring that "owners and operators of critical infrastructure . . . protect[] their systems from unauthorized access, exploitation, or harm"); National Institute of Standards and Technology, "Framework for Improving Critical Infrastructure Cybersecurity," at 23 (Feb. 12, 2014), *available at* <https://www.nist.gov/sites/default/files/documents/cyberframework/cybersecurity-framework-021214.pdf> (indicating that "[a]ccess to assets and associated facilities [must be] limited to authorized users"); Communications Security, Reliability, and Interoperability Council, "Cybersecurity Risk Management and Best Practices Working Group 4: Final Report" (Mar. 2015), at 78, *available at*

https://transition.fcc.gov/pshs/advisory/csric4/CSRIC_IV_WG4_Final_Report_031815.pdf

(stating that “[p]hysical access to [network] assets” must be “managed and protected” by the network operator).

41. Many of the encroaching attachers—to which the Ordinance grants nearly unfettered access to Comcast’s network—will be competitors of Comcast. Thus, the entity supervising the make-ready work will have very little incentive to avoid damaging Comcast’s equipment. It is for precisely this reason that the carefully balanced federal pole attachment regulations provide preexisting users a reasonable opportunity to perform any necessary make-ready work *themselves*. Indeed, such damage is likely to result from work performed even by *well-intentioned* new attachers, given that third-party contractors will not have any familiarity or expertise with Comcast’s network or quality standards.

42. Repairing any damage to Comcast’s equipment will be costly and disruptive to other work, requiring a significant commitment of resources that could be avoided if Comcast were afforded reasonable oversight of work performed on its network. Making repairs to attachments on even a single utility pole can cost tens of thousands of dollars. If enforcement of the Ordinance were enjoined, such repairs would not be necessary, thereby eliminating those costs.

43. Damage caused to Comcast’s equipment by encroaching attachers also likely will lead to a significant number of service outages for Comcast’s customers, and frequent service outages will cause significant damage to customer goodwill and to Comcast’s reputation. Repeated service outages may even lead Comcast customers to cancel their services, threatening additional harm to Comcast’s business and revenues. These risks are only heightened by the fact that damage to Comcast’s attachments *on even a single utility pole* can potentially cause service

outages for *thousands* of Comcast's customers, including customers throughout middle Tennessee.

44. Service outages also may cause interruptions to emergency communications within Nashville and Davidson County—for example, 911 calls—which frequently travel over Comcast's network. In addition, signal leakage caused by damage to Comcast's equipment could interfere with aviation communications. Such interruptions and interference may endanger the public and expose Comcast to millions of dollars in potential liability, as well as FCC penalties. Again, by significantly expanding the authorization of third-party contractors not approved by Comcast to perform make-ready work on its network, the Ordinance substantially increases the likelihood that such problems will occur.

45. The Ordinance offers Comcast little recourse against these potential injuries. Although the Ordinance does provide Comcast with a limited right to inspect make-ready work performed on its network by a third party weeks *after* the work is completed, the Ordinance does not entitle Comcast to reimbursement for any necessary corrections to such work, or any other meaningful remedy, unless the work fails to comply with standards or requirements imposed *by the pole owner*.

46. Because Comcast does not own any utility poles in Nashville or Davidson County, the Ordinance does nothing to ensure that third-party make-ready work on components of Comcast's network will comply with Comcast's *own* robust safety and engineering standards. Comcast thus will bear the often-substantial costs of bringing such work into compliance with its standards after the fact. Such costs, including labor and supply costs among others, likely will far exceed \$75,000. Such failures to adhere to Comcast's standards are likely to occur

frequently, as contractors retained by third parties to perform make-ready work on Comcast's network will not be familiar with Comcast's standards and requirements.

47. In sum, enforcement of the Ordinance with respect to Comcast's network within Nashville and Davidson County will cause immediate and irreparable injury to Comcast, including by causing interference with its property and disruptions to its services, as well as imposing non-reimbursable costs far in excess of \$75,000.

Claims for Relief

Count I: The Ordinance is Preempted by Federal Law

48. The allegations of paragraphs 1 through 47 above are incorporated as though fully set forth herein.

49. As applied to private utility-owned poles (such as the poles in Nashville and Davidson County owned by AT&T to which Comcast has attached its equipment), the Ordinance squarely conflicts with federal law. As noted above, the FCC's pole attachment rules provide that once an entity with existing attachments on a utility-owned pole has received notice that another telecommunications provider wishes to attach equipment to that pole, the existing user has up to 60 days (and in some cases up to 105 days) to relocate its attachments to accommodate the new attacher. 47 C.F.R. § 1.1420(e).

50. The procedures and requirements set out by the Ordinance plainly conflict with those procedures. The Ordinance gives existing users *no* meaningful opportunity in most instances to perform make-ready work on their own equipment after receiving notice. Instead, whenever an encroaching attacher determines that make-ready work would not reasonably be expected to cause a service outage, the Ordinance authorizes the encroaching attacher to perform make-ready work and to relocate any existing user's equipment on 15 days' notice (as opposed

to the federally mandated 60-105 day notice period). Moreover, while the Ordinance nominally gives an existing user a 30-day period to perform its own make-ready work when the encroaching attacher concludes that such work likely *would* cause an outage—in so-called “Complex Make Ready” scenarios—that window also is significantly shorter than the minimum notice period of 60 days set forth in the FCC’s rules (and far shorter than the maximum 105 days).

51. By directly conflicting with FCC regulations and by upsetting the careful balance struck by the FCC between encouraging development of facilities and safeguarding communications, the Ordinance interferes with binding federal policy choices—which reflect an extensive process of deliberation, including the consideration of numerous competing interests and collaboration with a wide range of stakeholders and constituencies.

52. Under the Supremacy Clause of the Constitution (U.S. Const. art. VI, cl. 2), local laws that conflict with validly enacted federal laws are *ultra vires* and void. For that reason, the Ordinance is invalid.

53. Unless the Court declares that the Ordinance is invalid and permanently enjoins Defendants from enforcing it, Comcast will suffer irreparable injury that cannot be redressed by recovery of damages. Among other injuries, Comcast will be forced to comply with and acquiesce to an unconstitutional Ordinance, will suffer reputational injury and a loss of customer goodwill, and will be subjected to extensive potential liability and litigation risk resulting from the effects of the Ordinance’s enforcement. Comcast will also be subjected to improper interference with its business, operations, and property. A permanent injunction will advance the public interest by giving effect to policy choices validly enacted by Congress and implemented by the FCC, and by preventing Metro Nashville from illegally interfering with those choices.

54. Comcast is entitled to a judgment declaring the Ordinance invalid and unenforceable. Comcast also is entitled to a permanent injunction restraining the Defendants from enforcing the Ordinance.

Count II: The Ordinance Violates the Metro Nashville Charter and State Law

55. The allegations of paragraphs 1 through 54 above are incorporated as though fully set forth herein.

56. The Metro Nashville Charter authorizes Metro Nashville to “maintain, improve, operate and regulate . . . an electric system, including distribution system and substations, together with all necessary or appropriate equipment, appliances and appurtenances.” Metro Nashville Charter, Appendix Three (Article 42), § 1. However, the Charter grants the Electric Power Board “*full* control over the erection, construction, maintenance and operation of [electric system] plants and properties, with *full* power to make rules for the control and maintenance of said plants and properties, the manner of operation, and the employment of officials and employees of every kind.” *Id.* § 15 (emphases added).

57. The Metro Nashville Charter provides that the Electric Power Board “shall have *exclusive* management and control of the operation of said electronic power plant and/or distribution system.” *Id.* § 18 (emphasis added). It further provides that “neither the mayor, [nor] the metropolitan council . . . shall have or exercise any authority whatsoever over the electric power board created under the terms and provisions of this Charter, other [than] and except to the extent herein expressly provided.” *Id.* § 24.

58. NES-owned utility poles are components of Metro Nashville’s electric system and electric distribution system, over which the Metro Nashville Charter grants the Electric Power Board full and exclusive authority. Thus, under the terms of the Metro Nashville Charter,

neither the Mayor nor the Metro Nashville Council has any authority to regulate attachments to NES-owned utility poles.

59. Despite this clear prohibition in the Metro Nashville Charter, the Ordinance purports to regulate attachments to NES-owned utility poles. The Ordinance was enacted by the Metro Nashville Council and signed into law by the Mayor, without any involvement by the Electric Power Board. The Ordinance thus is *ultra vires*, as it directly and impermissibly infringes upon the authority granted to the Electric Power Board by the Metro Nashville Charter and constitutes a clear violation of the Metro Nashville Charter.

60. Unless the Court declares that the Ordinance is invalid and permanently enjoins Defendants from enforcing it, Comcast will suffer irreparable injury that cannot be redressed by recovery of damages. Among other injuries, Comcast will be forced to comply with and acquiesce to an invalid and *ultra vires* Ordinance, will suffer reputational injury and a loss of customer goodwill, and will be subjected to extensive potential liability and litigation risk resulting from the effects of the Ordinance's enforcement. Comcast will also be subjected to improper interference with its business, operations, and property. A permanent injunction will advance the public interest by giving effect to the terms of the Metro Nashville Charter and Tennessee law, and by preventing Metro Nashville from illegally interfering with these terms.

61. Comcast is entitled to a judgment declaring the Ordinance invalid and unenforceable. Comcast is also entitled to a permanent injunction restraining the Defendants from enforcing the Ordinance.

Count III: The Ordinance Violates the Contract Clauses of the U.S. and Tennessee Constitutions

62. The allegations of paragraphs 1 through 61 above are incorporated as if fully set forth herein.

63. Comcast has an existing contractual relationship with NES, which governs Comcast's attachments to NES-owned utility poles located within Nashville and Davidson County.

64. Comcast's contract with NES vests Comcast with various rights and benefits, including by specifying procedures through which Comcast's attachments to NES-owned utility poles within Nashville and Davidson County may be altered, moved, relocated, or rearranged to accommodate new attachments.

65. Comcast's contract with NES is protected against impairment by the Contract Clauses of the U.S. and Tennessee Constitutions (U.S. Const. art. I, § 10, cl. 1 and Tenn. Const. art. I, § 20).

66. The Ordinance substantially impairs Comcast's contract with NES by authorizing third parties to perform make-ready work on Comcast's attachments to utility poles and by specifying procedures for such work that are inconsistent with the procedures established by the contract. For example, the NES Agreement authorizes Comcast to perform make-ready work on its own equipment and precludes third parties from rearranging or transferring Comcast's pole attachments until 60 days after notice is provided. Thus, the Ordinance effectively nullifies material terms of the contract, including Comcast's vested rights and benefits, and imposes new and prejudicial conditions and limitations on Comcast's use of NES-owned utility poles, undercutting Comcast's reasonable expectations under the NES Agreement.

67. Defendants have enacted and are enforcing the Ordinance under color of state law. The Ordinance is neither reasonable nor necessary to promote any public purpose, as both federal law and Comcast's contract with NES already provide reasonable and effective methods and procedures for the performance of make-ready work on existing attachments to utility poles.

Moreover, any number of alternative procedures—including various measures proposed by Comcast to streamline the pole attachment process—could have served Metro Nashville’s policy goals equally effectively, while also avoiding the substantial conflict with federal law and impairment of the NES Agreement.

68. Because the Ordinance impairs Comcast’s rights and benefits under Metro Nashville’s *own* contract—specifically, the NES Agreement—it is subject to heightened scrutiny under the Contract Clauses of the U.S. and Tennessee Constitutions.

69. Unless the Court declares that the Ordinance violates the Contract Clauses of the U.S. and Tennessee Constitutions and permanently enjoins Defendants from enforcing it, Comcast will suffer irreparable injury that cannot be redressed by recovery of damages. Among other injuries, Comcast will lose vested rights and benefits under its contract with NES, will suffer reputational injury and a loss of customer goodwill, and will be subjected to extensive potential liability and litigation risk resulting from the effects of the Ordinance’s enforcement. Comcast will also be subjected to improper interference with its business, operations, and property. A permanent injunction will advance the public interest by giving effect to the terms of the valid contract entered by Metro Nashville with Comcast on behalf of the public.

70. Comcast is entitled to a judgment declaring that the Ordinance violates the Contract Clauses of the U.S. and Tennessee Constitutions. Comcast also is entitled to a permanent injunction restraining the Defendants from enforcing the Ordinance.

71. Comcast has incurred and will incur attorneys’ fees and costs in connection with this proceeding, in amounts that cannot yet be ascertained. These fees and costs are recoverable in this action pursuant to 42 U.S.C. § 1988(b).

Prayer for Relief

WHEREFORE, Comcast respectfully requests that this Court provide the following relief:

- a. A declaration and judgment that the Ordinance is invalid because it conflicts with and is preempted by federal law.
- b. A declaration and judgment that the Ordinance is invalid and *ultra vires* because it exceeds Metro Nashville's authority under the Metro Nashville Charter and Tennessee state law.
- c. A declaration and judgment that the Ordinance is invalid because it violates the Contract Clauses of the U.S. and Tennessee Constitutions.
- d. An order permanently enjoining the Defendants from enforcing the Ordinance.
- e. An award of reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988(b) and any other applicable law.
- f. Such further relief as the Court deems just and equitable.

Dated: October 25, 2016

Respectfully submitted,

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