



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  
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R. Alex Dickerson