

# Louisville One-Touch Make-Ready Ordinance Survives AT&T's Challenge in Federal District Court

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On August 16, 2017, the U.S. District Court for the Western District of Kentucky granted summary judgment in favor of the Louisville Metro Council to uphold the city's recently-enacted ordinance amendments providing for "one-touch make-ready" ("OTMR") on poles in the City's public rights-of-way. The ordinance had been challenged by AT&T, which alleged that in enacting it, the Louisville Metro Council exceeded its authority under state and federal law. The victory is a win for providers seeking faster access to poles when facing routine and other make-ready work because it obviates the need for a number of procedural steps that many see engendering delays and thwarting new attachers' desire to build out or augment their networks promptly to provide customer services. The decision is the first in the country to review an OTMR ordinance, although other challenges to OTMR ordinances are pending.

The Louisville OTMR ordinance provides in part that a new "Attacher may relocate or alter the attachments or facilities of any Pre-Existing Third Party User as may be necessary to accommodate [the] Attacher's Attachment using Pole Owner approved contractors." If the relocation is not reasonably likely to result in a customer outage, the new attacher under the ordinance does not need to provide existing attachers notice before undertaking the work. Existing attachers and pole owners have fourteen days after the work is completed to inspect the work at the new attacher's expense. The Metro Council adopted the ordinance to minimize traffic disruptions and other encumbrances that result from pole attachment make-ready work.

In upholding the ordinance and finding that the City acted within its jurisdictional authority, the court rejected three main arguments proffered by AT&T. First, AT&T claimed that the ordinance was adopted in violation of a state statute that vests exclusive authority in the Kentucky Public Service Commission to regulate the "rates and services of utilities." The court found that the ordinance was enacted pursuant to a carve-out in the statute which allows cities to retain police powers because, rather than regulating pole attachments, the ordinance "prescribes the 'method or manner of encumbering or placing burdens on' public rights-of-way" and was justified by a desire to minimize traffic burdens. The court justified its characterization of the city's activity because "Louisville Metro has an important interest in managing its public rights-of-way to maximize efficiency and enhance public safety."

Second, AT&T claimed that the Louisville Metro Council, by modifying existing ordinance language, violated its own procedures for amending the municipal code because it failed to "specifically repeal[]" an existing code chapter or section. The court was unpersuaded, finding that the Metro

Council's "strike-through and underscoring method" was a reasonable approach that complied with the city's procedural requirement.

Finally, AT&T asserted that the ordinance was preempted by federal law and regulations pertaining to access to pole attachments. The court rejected this argument, observing simply that federal pole attachment requirements are not applicable in Kentucky because the state's notice to the Federal Communications Commission that it had "reverse preempted" the federal pole attachment statute under Section 224 of the Communications Act of 1934, as amended, extended even to pole access matters that the State commission does not directly regulate.

We expect that AT&T will file an appeal with the Sixth Circuit Court of Appeals.