



Federal Communications Commission

Office Of General Counsel

445 12th Street S.W. • Washington, DC 20554

Tel: (202) 418-1740 • Fax: (202) 418-2819

October 31, 2016

Benjamin C. Mizer
Principal Deputy Assistant Attorney General
Civil Division, U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *BellSouth Telecommunications, LLC v. Louisville/Jefferson County Metro Government*, No. 3:16-cv-00124 (W.D. Ky.)

Dear Mr. Mizer:

The Federal Communications Commission respectfully requests that the Department of Justice file a Statement of Interest in *BellSouth Telecommunications, LLC v. Louisville/Jefferson County Metro Government*, No. 3:16-cv-00124 (W.D. Ky.), attaching this letter addressing whether Louisville's one-touch make-ready ordinance conflicts with the federal pole-attachment regulations administered by the Commission. As we explain below, it does not. Thus, we believe BellSouth's claim of federal preemption in this case is misplaced.¹

BACKGROUND

1. Section 224 of the Communications Act of 1934, 47 U.S.C. § 224, empowers the Commission 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). Although Section 224 was originally aimed at pole attachments by cable companies, the Telecommunications Act of 1996 expanded the range of pole attachments covered under Section 224 to include attachments by providers of telecommunications services, *see id.* § 224(a)(4), (e), (f)—which now include broadband Internet access providers²—and granted cable companies and telecommunications providers an affirmative right of nondiscriminatory access to utility poles, *id.* § 224(f); *Southern Co. v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002).

¹ This letter takes no position on any state-law issues raised in the case.

² *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5733–804 ¶¶ 306–433 (2015) (*Open Internet Order*), *pets. for review denied*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pets. for reh'g pending*.

Benjamin C. Mizer

October 31, 2016

Page 2 of 7

Historically, restrictions on access to utility poles have been a significant impediment to the deployment of competitive telecommunications services. The Commission has repeatedly recognized that “lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 26 FCC Rcd. 5240, 5241 ¶ 3 (2011) (*2011 Pole Attachment Order*), *pet. for review denied*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).³ As recently as 2011, the Commission found “pervasive and widespread problems of delays in survey work, delays in make-ready performance, delays caused by a lack of coordination among existing attachers, and other issues” that create significant obstacles for new attachers. *Id.* at 5250–51 ¶ 21 (footnotes omitted).

One frequent source of delay in deploying new pole attachments involves “make-ready” work, which generally consists of moving or rearranging existing wires and attachments to make space for new attachments.⁴ These delays can be caused not only by pole owners, but also by “existing attachers’ action (or

³ See also, e.g., *Open Internet Order*, 30 FCC Rcd. at 5831 ¶ 478 (“The Commission has recognized repeatedly the importance of pole attachments to the deployment of communications networks Leveling the pole attachment playing field for new entrants . . . removes barriers to deployment and fosters additional broadband competition.”).

⁴ See *2011 Pole Attachment Order*, 26 FCC Rcd. at 5248 n.42 (“‘Make-ready’ generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities.”); FCC, *Connecting America: The National Broadband Plan* 111 (2010) (“Make-ready work frequently involves moving wires or other equipment attached to a pole to ensure proper spacing between equipment and compliance with electric and safety codes.”). Under the Commission’s rules, make-ready work may be performed by any qualified contractor selected from a list provided by the utility, and a utility may not limit new attachers’ access by requiring that make-ready work be performed only by the utility’s own workers. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16071 ¶ 1150 (1996); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd. 18049, 18079 ¶ 86 (1999); see also *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) (denying petitions for review in relevant part).

Benjamin C. Mizer

October 31, 2016

Page 3 of 7

inaction) to move equipment to accommodate a new attachers, potentially a competitor.” *Implementation of Section 224 of the Act*, 25 FCC Rcd. 11864, 11883–84 ¶ 41 (2010) (*2010 Pole Attachment Order*) (quoting FCC, *Connecting America: The National Broadband Plan* 111 (2010) (*National Broadband Plan*)). “[E]xisting attachers . . . have little incentive to cooperate, especially if the applicant will be a competitor, and this constrains the[] ability to provide timely pole access to new attachers.” *Ibid.* And in many cases, the pole owner is itself a telecommunications provider that competes with—and therefore has incentive to impede or discriminate against—new attachers seeking access to the pole. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16071 ¶ 1150 (1996) (*Local Competition Order*), *pets. for review granted in part and denied in part, Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

Recognizing the critical importance of timely access to utility poles for new attachers, the Commission held in the *2010 Pole Attachment Order* that “access to poles, including the preparation of poles for attachment, commonly termed ‘make-ready,’ must be timely in order to constitute just and reasonable access. . . . Make-ready or other pole access delays not warranted by the circumstances thus are unjust and unreasonable under section 224.” 25 FCC Rcd. at 11873–74 ¶ 17. In 2011, the Commission promulgated a rule “set[ting] a date for completion of make-ready that is no later than 60 days after” a request for attachment is accepted and payment received (subject to certain exceptions). 47 C.F.R. § 1.1420(e)(1)(ii); *2011 Pole Attachment Order*, 26 FCC Rcd. at 5256 ¶ 29; *see also id.* at 5256–61 ¶¶ 29–39.

2. Congress has authorized individual states that have adopted their own state pole-attachment regulations to opt out of the federal pole-attachment rules by invoking Section 224(c), commonly known as the “reverse-preemption” provision. *See* 47 U.S.C. § 224(c); *2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 ¶ 7. To invoke that provision, a state must certify to the Commission that it “regulates rates, terms, and conditions for pole attachments” and that, in doing so, the state “consider[s] the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.” 47 U.S.C. § 224(c)(2); *see* 47 C.F.R. § 1.1414.

As the Commission has explained, the experience of states that have opted out of the federal scheme and experimented with their own pole-attachment rules “provides an invaluable opportunity for the FCC to observe what works and what does not work to achieve policy goals.” *2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 ¶ 7. Indeed, the Commission has found that “[s]tate efforts to

Benjamin C. Mizer

October 31, 2016

Page 4 of 7

date on establishing fair access rules—including timelines—have been particularly instructive.” *Ibid.* Twenty states (including Kentucky) and the District of Columbia have certified to the Commission that they regulate rates, terms and conditions for pole attachments as provided in Section 224(c) and thereby opted out of the federal pole-attachment rules. *See id.* at 5243 n.14; *id.* at 5371 (Appendix C).

3. Seeking “to facilitate new and additional technology and infrastructure for the benefit of its citizens,” the Louisville/Jefferson County Metro Government recently enacted a “one-touch make-ready” ordinance for new pole attachment requests, which is the subject of this litigation. *See* Louisville, Ky., Ordinance No. 21 (2016) (to be codified at Louisville, Ky., Code § 116.72(D)(2)). One-touch make-ready policies—sometimes referred to as “climb once” policies—seek to alleviate the make-ready delays discussed above by having all make-ready work (such as rearranging several existing attachments) performed at the same time by a single crew. *See, e.g.,* Next Century Cities, “One Touch” Make-Ready Policies: The “Dig Once” of Pole Attachments (Jan. 6, 2016), <http://nextcenturycities.org/2016/01/06/one-touch-make-ready-policies-the-dig-once-of-pole-attachments/>; *National Broadband Plan* 111 (Recommendation 6.2) (recommending that new attachers be allowed to have “certified contractors . . . perform all . . . make-ready work . . . under the joint direction and supervision of the pole owner and the new attacher”). This reduces the cost and increases the speed of deploying competitive services, and it prevents pole owners or existing attachers from needlessly delaying or impeding the deployment of new competitors. *Ibid.*

DISCUSSION

A. The Federal Pole-Attachment Regulations Do Not Apply Here Because Kentucky Is A Reverse-Preemption State.

BellSouth maintains in its motion for summary judgment that the Louisville Ordinance conflicts with, and is therefore preempted by, the federal pole-attachment rules promulgated by the Commission under Section 224. That argument is wrong as a matter of law. The federal pole-attachment regulations do not apply in Kentucky because Kentucky has filed a certification invoking reverse-preemption under Section 224(c) and has thereby opted out of the federal pole-attachment rules. *See 2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 n.14; *id.* at 5371 (Appendix C). No party has filed a complaint with the Commission challenging the sufficiency of Kentucky’s certification or asking the Commission to revoke that certification. *Cf. Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18637, 18657 ¶ 143 (1985)

Benjamin C. Mizer

October 31, 2016

Page 5 of 7

(explaining that state certifications may be presumed valid unless and until a party files a complaint with the FCC challenging the sufficiency of the state's rules and regulations). Kentucky's certification thus remains in full effect today.

Because Kentucky has invoked the reverse-preemption provision by filing a certification under Section 224(c), Section 224 does not "apply to . . . or give the Commission jurisdiction with respect to rates, terms, and conditions . . . for pole attachments" within that state, 47 U.S.C. § 224(c)(1). Accordingly, the federal pole-attachment regulations enacted under Section 224 simply do not apply here. *See 2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 ¶ 7; *Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd. 7099, 7101 ¶ 11 (1991) (FCC pole-attachment regulations apply only "[i]n the absence of state regulation"), *pet. for review denied*, *Tex. Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). The FCC exercises jurisdiction over pole attachments under Section 224 "only in states that do not so certify" that they regulate pole attachments. *2011 Pole Attachment Order*, 26 FCC Rcd. at 5243 ¶ 7. BellSouth is thus wrong to assert a conflict with the federal pole attachment rules in these circumstances.⁵

B. One-Touch Make-Ready Laws Are Consonant With Federal Telecommunications Policy And The Federal Pole-Attachment Regulations.

As a general matter, promoting the deployment of competitive broadband infrastructure through one-touch make-ready policies is consonant with the goals of federal telecommunications policy, the Communications Act, and applicable FCC regulations.

Congress's stated goal in enacting the Telecommunications Act of 1996, which comprehensively reformed and amended the original Communications Act of 1934, was to establish a "national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. No. 104-230, at 1 (1996)

⁵ The FCC may in some circumstances have authority to address utility poles and pole attachments under provisions other than Section 224, and to do so even in states that have invoked the reverse-preemption provision, but the particular federal pole-attachment rules invoked here were promulgated solely under Section 224, *see 2011 Pole Attachment Order*, 26 FCC Rcd. at 5281–85 ¶¶ 90–96, and therefore do not apply in reverse-preemption states.

Benjamin C. Mizer

October 31, 2016

Page 6 of 7

(Conf. Rep.); *id.* at 113 (Joint House and Senate Managers' Statement); *see Local Competition Order*, 11 FCC Rcd. at 1505–07 ¶¶ 1–3, 1508–12 ¶¶ 10–20 (discussing the 1996 Act's goals of removing economic and operational barriers to entry, such as by facilitating access to utility poles and other rights of way).⁶ Consistent with this goal, Congress directed the Commission in Section 706 of the Telecommunications Act to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” and, if this goal is not being met, to “take immediate action to accelerate the deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” 47 U.S.C. § 1302.⁷

One-touch make-ready policies directly advance these goals. Ensuring “reliable, timely, and affordable access to physical infrastructure—particularly utility poles,” *2011 Pole Attachment Order*, 26 FCC Rcd. at 5241 ¶ 3, encourages the timely deployment of advanced telecommunications services to all Americans.⁸ As recognized in the *National Broadband Plan*,⁹ one-touch make-ready policies seek to alleviate “a significant source of costs and delay in building broadband networks” by “lower[ing] the cost of the make-ready process and speed[ing] it up.” *National Broadband Plan* 111 (Recommendation 6.2); *accord id.* at 109 (“The cost

⁶ *See also, e.g., Reno v. ACLU*, 521 U.S. 844, 857 (1997) (describing the 1996 Act as “an unusually important legislative enactment” with a “primary purpose” of “encourag[ing] ‘the rapid deployment of new telecommunications technologies’”); *Knology, Inc. v. Insight Commc’ns Co.*, 2011 WL 1750839, at *3 (W.D. Ky. 2001) (Russell, J.) (recognizing the pro-competitive aims of the 1996 Act).

⁷ *See also Nat’l Cable & Telecomm. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (explaining that the Commission may look to Section 706’s mandate to guide the exercise of its authority to regulate pole attachments under Section 224).

⁸ *See, e.g., Open Internet Order*, 30 FCC Rcd. at 5831 ¶ 478 (“Leveling the pole attachment playing field for new entrants . . . removes barriers to deployment and fosters additional broadband competition.”).

⁹ The *National Broadband Plan* was produced by FCC staff pursuant to a congressional mandate to develop a plan “to ensure that all people of the United States have access to broadband capability.” *See American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, § 6001(k), 123 Stat. 115, 515–16. The full *National Broadband Plan* is available online at <https://www.fcc.gov/general/national-broadband-plan>.

Benjamin C. Mizer

October 31, 2016

Page 7 of 7

of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way"). "These cost-saving steps can have an immediate impact on driving fiber deeper into networks, which will advance the deployment of both wireline and wireless broadband services," *id.* at 111, removing barriers to investment, promoting competition, and ensuring timely deployment of advanced telecommunications capability to all Americans. *Cf.* 47 U.S.C. § 1302.

CONCLUSION

For the reasons stated above, there is no conflict between the federal pole-attachment regulations and the Louisville Ordinance.

Respectfully submitted,

/s/ Howard J. Symons

Howard J. Symons

General Counsel

Federal Communications Commission