Kentucky District Court Upholds Louisville Metro's One-Touch Make-Ready Ordinance against AT&T's State and Federal Law Challenge

August 16, 2017 | *Jeffrey M. Bayne, Peter J. Hopkins*

On August 16, the U.S. District Court for the Western District of Kentucky upheld Louisville Metro's one-touch, make-ready (OTMR) ordinance against a challenge by AT&T. The OTMR ordinance requires that, in most circumstances, all make-ready work on existing pole attachments to accommodate a new pole attacher must be carried out at one time by a single contractor approved by the pole owner.

AT&T argued that the OTMR ordinance is preempted by Kentucky law and by the FCC's pole attachment rules. On the Kentucky law issue, the court rejected AT&T's argument that the OTMR ordinance is preempted by a provision of Kentucky law giving exclusive jurisdiction over utility rates and services to the Kentucky PSC. The court found that the ordinance falls within Louisville Metro's right-of-way management authority and does not intrude on the Kentucky PSC's jurisdiction over pole attachment services or rates.

On the federal law issue, the court rejected AT&T's argument that the OTMR ordinance is preempted by the FCC's pole attachment rules. The reason: Kentucky is a "reverse preemption" state under the federal Pole Attachment Act (47 USC § 224). As a result, the FCC's pole attachment rules do not apply in Kentucky.

The decision is significant as the first court decision ruling on the legality of OTMR ordinances under state and federal law. Due to Kentucky's status as a "reverse preemption" state, the decision deals mostly with Kentucky law, but the court's discussion, and explicit recognition, of the important right-of-way management interests served by OTMR should have more general applicability:

[A] one-touch make-ready approach inherently regulates public rights-of-way because it reduces the number of encumbrances or burdens placed on public rights-of-way. …. It is undisputed that make-ready work can require blocking traffic and sidewalks multiple times to permit multiple crews to perform the same work on the same utility pole. …. The one-touch make-ready ordinance requires that all necessary make-ready work be performed by a single crew, lessening the impact of make-ready work on public rights-of-way. …. Louisville Metro has an important interest in managing its public rights-of-way to maximize efficiency and enhance public safety.

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AT&T has not yet announced whether it will appeal the district court's ruling to the 6th Circuit.

Insight (Louisville Metro's incumbent cable operator) also has a pending lawsuit against Louisville Metro in the W.D. Ky. challenging, among other things, the OTMR ordinance. And AT&T and Comcast have sued Metro Nashville in the M. D. Tenn. challenging its OTMR ordinance. All three of those cases remain pending in district court.

Spiegel & McDiarmid attorneys Tim Lay, Peter Hopkins, Amber Martin and Jeff Bayne represented Louisville Metro in the case. A link to the court's decision is below.

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