

Ky. Utility Pole Case Defines FCC Jurisdiction Boundaries

By **Charles Zdebski**

Law360, New York (September 6, 2017, 3:05 PM EDT) -- After approximately 40 years of differences between owners of utility poles, communication companies with existing attachments to those poles and would-be attachers over the process for making new pole attachments, a U.S. district court in Kentucky found a Louisville, Kentucky, ordinance mandating a streamlined attachment process lawful. The so-called "one-touch make-ready" approach requires the new attacher to employ contractors approved by the pole owner to relocate or alter existing pole attachments and then make the attachments for the new attaching communications company. The process of altering, moving, relocating or reconfiguring existing attachments on a pole to accommodate new attachments is known in the industry as "make-ready." The U.S. District Court for the Western District of Kentucky, Louisville Division, approved the Louisville Ordinance mandating "one-touch make-ready" on Aug. 16, 2017, in the case *Bellsouth Telecommunications LLC v Louisville/Jefferson County Metro Gov't et al.*, CA No. 3:16-cv-124-DJH. The Memorandum Opinion and Order of U.S. District Judge David J. Hale can be found [here](#).



Charles Zdebski

The decision is significant for two reasons. First, the decision defined and limited the reach of the Federal Communications Commission's jurisdiction pursuant to 47 U.S.C. § 224, the "Pole Attachments Act," at least in a state that has certified it regulates pole attachments under the reverse preemption provision of Section 224(c). The reverse preemption provision in the Pole Attachments Act is an interesting twist on the typical approach to preemption law. Rather than federal law preempting state law, Section 224(c) allows state law to preempt federal law under defined circumstances.

Section 224(c)(1) provides: "Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State." A state can regulate "such matters" by certifying to the FCC that it regulates the "rates, terms, and conditions" of pole attachments and that in doing so it both has the authority to consider and actually does consider the interests of customers of both communications services and utility services. See 47 U.S.C. § 224(c)(2). In addition, despite purporting to regulate pole attachments, a state will not be considered to do so unless it has issued and made effective pole attachment regulations and, in any individual pole attachment matter, actually takes action in the statutorily prescribed time limits.

In the Louisville/Jefferson County case, Kentucky had asserted jurisdiction over and

certified to the FCC that it regulated pole attachments. The key question was the extent of the state's jurisdiction. The court held that once a state certifies that it regulates pole attachments, it has completely reverse preempted the FCC so that the agency is deprived of any regulatory authority over pole attachments in that state. In the court's view, there is no "gap" jurisdiction that defaults to the FCC should some aspect of pole attachment regulation by a reverse preemption state such as Kentucky arguably be improper or overlooked.

The court's conclusion is contrary to the view long held by many practitioners in this regulatory field and, of course, by AT&T. In other words, the conventional wisdom held that in states that certified they had reverse preempted the FCC, but only issued regulations addressing a portion of the field of pole attachments, the remainder of the pole attachment regulatory field in that state "reverted" to the FCC's jurisdiction.

The second reason the Louisville/Jefferson County decision is important is its practicality. The case provides the judicial imprimatur for one specific legislated solution to the longstanding issue of coordinating make-ready work on the interstices of the nation's information superhighway. Communications companies looking to deploy new attachments are typically focused on deploying their fiber or cable as quickly as possible. Those communications companies with pre-existing attachments are focused on maintaining the integrity and operability of their existing network while minimizing disruptions, distractions and unnecessary costs. And the utilities owning the poles are often straddling the middle, concerned with the safety, reliability and capacity of their existing infrastructure in service of their core business while meeting any legal requirements to facilitate access to and ongoing use of their poles.

Despite the two novel issues the Louisville/Jefferson County case addresses, there are at least two other important issues that the case does not address. It does not address whether jurisdiction over pole attachments remains with or reverts to the FCC, or how that process would work, where a state has certified that it has reverse preempted the FCC, but done so unlawfully or inadequately. For example, where a state asserts jurisdiction over pole attachments but has not certified that it considers the interests of communications service subscribers, whether state jurisdiction would be upheld is an open question. The case also does not address the issue of whether the FCC's jurisdiction would preempt that of a locality in a state that has not reverse preempted the FCC when the locality enacts an ordinance that both relies on its police power to manage its rights of way and also addresses some aspect of the terms and conditions of pole attachments.

Nonetheless, the ordinance and decision may provide a roadmap for other interested parties as they consider the pros and cons and the lawfulness of one-touch make-ready solutions. The Louisville ordinance, passed in 2016, requires the new attacher to use contractors approved by the pole owner to do both the make-ready and new attachment work using just one crew (thus, the "one-touch"), without prior notice to the communications company owning pre-existing attachments if the make-ready will not cause or "reasonably be expected to cause a customer outage." Once the make-ready work is completed, the new attacher must notify the pre-existing attacher within 30 days of completion, after which the pre-existing attacher and pole owner have 14 days to inspect, at the new attacher's expense, the work done.

AT&T challenged the ordinance on the grounds that it infringed upon the exclusive jurisdiction of the Kentucky Public Service Commission over pole attachments under state law, exceeded the Louisville Metro Council's authority under Kentucky law and was preempted by federal law. Finding that the ordinance was a proper exercise of a city's police power as to the management of its public rights-of-way, the court granted summary judgment to Louisville.

Finally, the timing of the Louisville/Jefferson County decision is an interesting coincidence.

The FCC is currently conducting a rulemaking that, among other things, considers both the advisability and contours of proposed one-touch make-ready approaches as well as the agency's approach to certain state and local pole attachment engineering and permitting issues. See *In the Matter of Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, 32 FCC Rcd 3260 (Apr. 21, 2017). The Louisville/Jefferson County will prove relevant to both the FCC in its current proceeding, and also to states and localities that address whether and how to regulate pole attachments.

Charles A. Zdebski is a member with Eckert Seamans Cherin & Mellott LLC in Washington, D.C.

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