ROLE OF STATE AND LOCAL GOVERNMENTS IN SIMPLIFYING THE MAKE-READY PROCESS FOR POLE ATTACHMENTS

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EXECUTIVE SUMMARY

Competition in broadband and video programming brings consumers better service at lower prices. Competition, in turn, comes from service providers deploying communications networks. Like any other major construction project, however, the process of deploying new broadband facilities on utility poles can be disruptive. The flow of both sidewalk and road traffic can be disturbed, work can be noisy, and construction equipment can be an eyesore.

Existing federal and state laws and regulations give certain communications service providers the right to attach their network lines to existing poles owned by electric utilities and incumbent local telephone companies.[1] These laws and regulations govern the access rights and obligations of pole owners on the one hand, and communications attachers such as cable operators, competitive carriers, and broadband providers on the other. But they do not address a concern that arises in just about every community—how to effectively, efficiently, and safely manage use of the public rights-of-way.

One way for municipalities to reduce the inconveniences that accompany deployment of modern broadband networks is to adopt "one touch" make-ready policies. "Make-ready" is the process by which a pole owner and communications attachers prepare a utility pole for a new attachment of fiber, cable, or other equipment. Traditionally, each communications attacher comes to the site with a construction crew and relocates its own attachment on a pole to make room for the new attacher. This results in a utility pole and its surrounding area becoming a construction site several times over, just for the deployment of a single new broadband or video programming network.

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[1] 47 U.S.C. § 224; 47 C.F.R. § 1.1400; *see, e.g.*, WASH. REV. CODE § 80.54.020; UTAH ADMIN. CODE § R746-345. The recent *Open Internet Order* of the Federal Communications Commission (FCC) ensures the application to broadband providers of the Pole Attachment Act, 47 U.S.C. § 224, and the FCC's pole attachment rules. This guarantees access by broadband providers to poles owned by investor-owned utilities. See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶ 56 (2015) ("*Open Internet Order*").

One touch make-ready policies are an effective and equitable way to reduce the disruption and inconvenience that come from work by multiple pole construction crews. One touch policies allow any communications service provider putting new attachments on a pole to perform all make-ready work that does not result in a customer outage, using contractors from a list approved by the utility pole owner. One touch is efficient because a single construction crew —a crew with enough skill and experience to be approved by the pole owner itself—is all that is needed to complete pole make-ready to deploy new broadband facilities. One touch also is equitable, because all communications attachers have the same right to use a one touch process, and are equally subject to another attacher's use of a one touch process.

One touch make-ready is conceptually similar to existing "dig once" or joint trench mandates. Dig once policies have been adopted successfully in many communities across the country to reduce the disruption, inconvenience, and aesthetic impact that arise when multiple service providers do not work together. One touch make-ready for aerial pole attachments will likewise bring similar benefits.

I. ONE TOUCH POLICIES BENEFIT THE COMMUNITY.

One touch make-ready minimizes disruption in the public rights-of-way and protects public safety and aesthetics. It reduces the burdens on government to provide oversight of multiple construction projects and improves the reliability of consumer services. One touch make-ready policies also speed broadband deployment. With one touch make-ready, the community benefits from faster, safer construction and quicker access to new services.

A. One Touch Make-Ready Reduces Disruption and Increases Safety.

In most markets, utility poles host attachments by at least two incumbents in the communications space—the incumbent telephone company (ILEC) and the local cable provider. In some markets, additional attachers also may be on a pole, such as a second cable company, a competitive local exchange provider (CLEC), or a city communications network. When a new broadband provider seeks to deploy its equipment on utility poles, those poles must first be prepared for the additional attachment in the communications space—so-called "make-ready" work. That process begins with verifying that the pole can accommodate the increased load of an additional attachment and determining whether existing attachments must be moved or rearranged to make space. Then, existing attachments are relocated on the pole as needed to make room for the new attachment.[2]

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[2] Where a utility determines that a given pole cannot accommodate a new attachment, it may offer the new attacher the opportunity to pay to replace that the pole with a

Make-ready work traditionally has been performed separately by the owner of each existing communications attachment—the cable operators, telecommunications providers, and others with facilities attached to utility pole.[3] Accordingly, make-ready construction often will require independent work by several entities before a new broadband provider even can begin installing its equipment. Existing attachers may need to relocate attachments in the communications space consistent with safety and electric utility rules. The electric utility itself may need to attach more efficiently to increase the size of the communications space.[4]

During the make-ready process, construction crews may need to detour or block traffic. Each job on a pole also entails risk to property, such as structures and landscaping in the public rights-of-way and on adjacent private property. The presence of live electric wires also involves risk for the work crew and public. Sending multiple construction crews out to a pole is also inefficient and expensive—for the service providers and their customers, as well as for local governments. Indeed, multi-party construction projects make for logistical headaches for municipal governments, which usually require permits or authorization to impede the public rights-of-way.[5]

One touch make-ready minimizes these community impacts by reducing the number of times work crews must enter a neighborhood, street, or yard, and tie up traffic

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taller or stronger pole. This also requires moving or rearranging existing attachments after the utility replaces the pole.

[3] Generally, each attacher on a pole leases one foot of space from the pole owner. In most cases, existing attachments do not take up more than that one foot. However, because of gaps on the pole between attachments, the attachments nevertheless must be rearranged to allow sufficient space for a new attachment.

[4] Communications attachments are made in the communications space, which is the area on the utility pole located below the power space. Electric distribution facilities are attached to poles in the power space, which is also called the supply space. There is a safety zone between electric and communications attachments.

[5] *See, e.g.*, BOULDER COUNTY, CO., *Boulder County Util. Constr. Permit Requirements*, Exhibit A at 3 §1.2 (May 30, 1995) (requiring a construction permit except for "routine maintenance which does not entail the disturbance of the right of way"); MONTGOMERY COUNTY, MD., *Montgomery County Specifications for Util. Constr. Permit*, at 6, § (3)(D)(b) (July 2015) (requiring a construction permit for all construction in the public rights-of-way, including "[a]erial work such as removing/installing of overhead cable and attaching/detaching equipment on existing pole"). *See also, e.g.*, KENAI PENINSULA BOROUGH, AK. CODE OF ORDINANCE § 14.40.050; THORNTON, CO. CODE OF ORDINANCES § 2-272; COCONUT CREEK, FL. CODE OF ORDINANCES § 22-93; MONROE, OH. CODE OF ORDINANCES § 1020.15; ROUND ROCK, TX. CODE OF ORDINANCES § 44-273.

or detour pedestrians, and limiting the need for municipal oversight of repetitive construction projects. Communities that adopt one touch make-ready policies ultimately will reduce costs for consumers, competitors, and municipalities. And, of course, one touch make-ready will help facilitate faster deployments of broadband networks by reducing how long it takes a new attacher to install its facilities and begin serving customers.

B. One Touch Make-Ready Resembles Dig Once Policies Already Adopted by Many Municipalities.

One touch make-ready resembles dig once policies adopted by many municipalities across the country to minimize disruption and damage caused by excavations. Dig once policies require utilities and communications providers to coordinate and cooperate in trench and conduit construction. These policies commonly mandate the use of joint trench agreements. Joint trench agreements require communications providers to install their infrastructure at the same time, in the same trench, or in the same conduit as public utilities—and to share the costs of the construction.[6]

Dig once ordinances have been widely adopted. For example, Austin, Texas encourages coordination among parties for excavation activities in the downtown area, and, in fact, may mandate such coordination as a condition of granting a construction

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[6] *See, e.g.*, ORANGE BEACH, AL. CODE OF ORDINANCES § 66-115; GLENDALE, AZ. CODE OF ORDINANCES § 10-57; BOULDER, CO. MUN. CODE § 8-5-15; BROOMFIELD, CO. CODE OF ORDINANCES § 14-10-130 (A); FULTON COUNTY, GA. CODE OF ORDINANCES § 62-96(b); DES MOINES, IA. CODE OF ORDINANCES § 102-720; MINNEAPOLIS, MN. CODE OF ORDINANCES § 430.80; WATERTOWN, MN. CODE OF ORDINANCES § 51-39; OXFORD, MS. CODE OF ORDINANCES § 98-159; JERSEY CITY, N.J. CODE OF ORDINANCES § 296-25; AUSTIN, TX. CODE OF ORDINANCES § 14-11-167(C-E); PLANO, TX. CODE OF ORDINANCES § 19-74; RICHMOND, VA. CODE OF ORDINANCES § 90-466(a); DUVAL, WA. CODE OF ORDINANCES § 5.17.060. *See also* CITY OF MOUNTAIN VIEW, CA., *Excavation Permit Application*, at 5 (revised Aug. 17, 2013), *available at* http://mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=12003; CITY OF SAN MATEO, CA., *Recommendation for Draper University Row Encroachment License Agreement*, Attachment 2, at 8 (Mar. 17, 2014) ("Licensee agrees to cooperate in the planning, locating and constructing of its Telecommunications Conduit Facilities in joint utility trenches or common duct banks with other similar utilities and to participate in cost-sharing for the joint trench and ducts when such joint utility installations are being planned for or such opportunities exist in any area; provided that such activities do not unreasonably impair or disrupt Proprietary Telecommunications Services of Licensee.").

permit.[7] Englewood, Colorado specifies that because "[e]xcavations in City rights-of-way disrupt and interfere with the public use of City streets and damage the pavement and landscaping," joint coordination of excavations is required to reduce this disruption.[8] And, Plano, Texas, observes that "coordination will assist in minimizing the number of excavations being made wherever feasible and will ensure the excavations in city rights-of-way are, to the maximum extent possible, performed before, rather than after, the reconstruction of the streets by the city."[9]

Dig once policies are also in use on the federal level. President Obama has issued an Executive Order adopting a dig once policy for Department of Transportation projects, calling it "an approach that can reduce network deployment costs along Federal roadways by up to 90 percent."[10] Even more recently, the Broadband Opportunity Council called for expansion of this federal policy to projects supported by numerous other federal agencies, including the EPA, USDA, and HUD.[11] Like dig once, one touch pole make-ready policies similarly would mitigate the disruption and costs that accompany the deployment of new broadband networks.

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7 AUSTIN, TX. CODE OF ORDINANCES § 14-11-167 ("The director shall review all project descriptions and identify opportunities for joint trenching or other coordinated excavation activity between permit applicants....The director may order two or more permit applicants to jointly excavate a specific site as a condition for receiving an excavation permit....").

8 ENGLEWOOD, CO. CODE OF ORDINANCES § 11-7-16(a); *see also, e.g.*, BROOMFIELD, CO. CODE OF ORDINANCES § 14-10-130 (C-E); GREENWOOD VILLAGE, CO. MUN. CODE § 11-3-160(c); SUNSET HILLS, MO. CODE OF ORDINANCES § 1(4.9); ARLINGTON, WA. CODE OF ORDINANCES § 12.40.150; DUVAL, WA. CODE OF ORDINANCES § 5.17.060; STEVENSON, WA. CODE OF ORDINANCES § 12.02.200; WHITE SALMON, WA. CODE OF ORDINANCES § 10-02-020.

9 PLANO, TX. CODE OF ORDINANCES § 19-74(a).

10 Press Release, The White House – Office of the Press Secretary, *We Can't Wait: President Obama Signs Executive Order to Make Broadband Construction Faster and Cheaper* (June 13, 2012), *available at* https://www.whitehouse.gov/the-press-office/2012/06/13/we-can-t-wait-president-obama-signs-executive-order-make-broadband-const.

11 Broadband Opportunity Council, *Report and Recommendations Pursuant to the Presidential Memorandum on Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training*, at 16 (Aug. 20, 2015), https://www.whitehouse.gov/sites/default/files/broadband_opportunity_council_report_final.pdf.

II. MUNICIPAL ONE TOUCH POLICIES COMPLEMENT FEDERAL AND STATE POLE ATTACHMENT REGIMES.

Various federal and state laws require utilities to allow communications providers to attach to their poles. These laws (and associated regulations) are intended to encourage service competition through construction of communications networks. They do not, however, address—much less preempt—municipal efforts to ensure that public rights-of-way are used effectively, efficiently, and safely. Consistent with the existing federal and state pole attachment regimes, municipal one touch policies for make-ready work can play a critical role in rights-of-way management as new communications providers—including broadband providers—enter more communities.

A. Existing Federal and State Pole Attachment Rules Are Not Intended To Address Public Rights-of-Way Management.

The FCC has adopted rules governing the pole access rights of communications service providers, which apply in thirty states.[12] Twenty states and the District of Columbia have adopted their own regulations governing when a communications service provider is allowed to place its attachments on a utility pole and what the utility may charge the attacher.[13] These federal and state pole attachment regimes ensure that communications service providers may install their equipment on utility poles. However, these federal and state rules continue to look to local communities to manage the public rights-of-way on which utility poles are situated.

The FCC's rules (and rules in some states that have elected to replace the FCC rules with state requirements)[14] establish deadlines for a utility to complete make-ready construction for a communications attacher, with the goal of curtailing potentially anti-competitive behavior by incumbent communications attachers.[15] These rules create a timeline for make-ready work under certain circumstances and allow new attachers to do

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12 47 C.F.R. § 1.1403(a).

13 *States that Have Certified that they Regulate Pole Attachments*, Public Notice, DA 10-893, 25 FCC Rcd. 5541 (May 19, 2010) ("*Certified States List*").

14 *See, e.g.*, OHIO ADMIN. CODE 4901:1-3-03(B)(3)(a)(ii); UTAH ADMIN. CODE § R746-345-3(C); *Proceeding on Motion of Comm'n Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement On Pole Attachments, Case 03-M-0432 (N.Y. Pub. Serv. Comm'n) (Aug. 6, 2004) ("*New York Pole Attachment Order*") ("Make-ready work must be completed within 45 days of the date payment is received by the Owner."); *see also, e.g.*, *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 7792, ¶¶ 63-66 (2011) (citing state laws) ("*2011 Pole Attachment Order*").

15 *2011 Pole Attachment Order* ¶ 60.

the work themselves if existing attachers do not complete make-ready work within the deadlines.[16]

But the FCC and some states have not imposed deadlines for make-ready construction for very large pole attachment orders—which, under the FCC rules, are defined as those in which a new attacher submits, in one 30-day period, applications to place attachments on more than 3000 poles.[17] Instead, pole owners and attachers are expected to negotiate in good faith with respect to how quickly the utility will prepare the poles. Moreover, because existing attachers are likely to view such a large-scale attacher as a competitive threat, the existing communications providers have incentives to delay moving their attachments when requested to do so by the electric utility.[18]

With no deadlines at all in some states, and only limited protection in other states, and with existing service providers incentivized to stifle competition, the existing make-ready process fails to support adequately new broadband deployment. Moreover, the existing process all but ensures repetitive disruption in the public rights-of-way and little predictability as to the timing of such disruption. One touch make-ready policies can fill the gap left by the federal and state rules, ensuring not only that new broadband facilities are deployed more quickly, but also that such deployments have significantly less impact on city streets and residents.

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16 *See* 47 C.F.R. § 1.1420(g); *see, e.g.*, *Case 03-M-0432—Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, at 3–4 (New York Pub. Svc. Comm'n) (Aug. 6, 2004) (permitting self-help by attachers if the pole owner cannot meet deadlines).

17 47 C.F.R. § 1.1420(g)(4) (providing that a utility "shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state"). Thus, in some cases, the "very large order" procedures will be used when fewer than 3000 poles are affected. States have different triggers for determining when a make-ready work order is subject to specific time frames. *See, e.g.*, OHIO ADMIN. CODE 4901:1-3-03(B)(6)(d); UTAH ADMIN. CODE § R746-345-3(C); *Petition to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code s 1708.5*, Order Instituting Rulemaking Regarding the Applicability of the Commission's Right-of-Way Rules to Commercial Mobile Radio Serv. Carriers., Rulemaking 14-05-001, at 25 (Cal. Pub. Util. Comm'n) (May 1, 2014) ("If the work involves more than 500 poles or 5 miles of conduit, the parties will negotiate a mutually satisfactory longer time frame to complete such make ready work.").

18 The FCC recognized this anticompetitive potential when it adopted new pole attachment rules in 2011. *See 2011 Pole Attachment Order* ¶ 60.

B. One Touch Make-Ready Policies Are Consistent With Existing Federal and State Pole Attachment Policies.

One touch make-ready policies would dramatically simplify the broadband deployment process without risk to electrical service or to existing communications services on a pole. This is because the construction crews performing one touch make ready are required to be contractors the utility already has authorized to work on its poles. These contractors have met the pole owner's own standards for skill, experience, and safety.

The use of authorized contractors for all make-ready work was suggested in the FCC's National Broadband Plan (NBP). The NBP called for "allow[ing] prospective attachers to use independent, utility approved and certified contractors to perform all engineering assessments and communications make-ready work...under the joint direction and supervision of the pole owner and the new attacher."[19] States also allow attachers to use authorized contractors. For instance, Louisiana allows attachers to "select an outside contractor to perform the make-ready work. The outside contractor must be selected from a list of contractors that has been pre-approved by the pole owner."[20]

The FCC has observed that the use of authorized contractors can speed deployment, noting that "contractors already work for utilities to perform surveys and make-ready work in the communications space on a regular and professional basis, and presumably can perform the same activities for attachers."[21] Indeed, the FCC's rules permit the use of authorized contractors by a new attacher as a means for the new attacher to perform make-ready work itself after existing attachers have failed to perform needed

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19 FCC, *Connecting America: The National Broadband Plan*, at 111 (Mar. 16, 2010) ("*National Broadband Plan*").

20 *See, e.g.*, LA. PUB. SERV. COMM., *Review of the General Order Dated March 12, 1999*, General Order, Docket No. R-26968 (Aug. 6, 2014); OHIO ADMIN. CODE 4901:1-3-03(C); *New York Pole Attachment Order* at 3 ("[I]t is reasonable...to allow Attachers to hire approved outside contractors."). Other states have permitted the use of authorized contractors in response to pole attachment complaints. *Oxford Networks*, Order, Docket No. 2005-486 (Me. Pub. Utils. Comm'n) (Oct. 26, 2006) ("Verizon will complete all make-ready work within 45 calendar days and, if not completed within the timeframe, Oxford or its contractor may perform the work without interference form Verizon."); *SBC*, Opinion and Order, Case No. U-12320, (Mich. Pub. Serv. Comm'n) (Jan. 13, 2003) ("The requesting carrier, as a qualified contractor, or a mutually approved qualified contractor will be permitted to perform make-ready work when SBC cannot perform the work quickly enough to meet the requesting carrier's needs").

21 *2011 Pole Attachment Order* ¶ 51.

make-ready work. The rules allowing use of authorized contractors as a back-stop may help to address some of the worst competitive abuses by incumbents. A municipal one touch make-ready regime, by contrast, would establish utility-approved contractors as the *primary* means to perform simple make-ready construction on a pole, enabling a new attacher to quickly, efficiently, and safely perform nearly all of the necessary make-ready in the minimum amount of time, and thus minimizing burdens on public rights-of-way, on other users of those rights of way, and on residents.

One touch make-ready can also benefit pole owners because a more efficient construction process helps preserve the integrity of their poles by minimizing the number of times a construction crew must work on a pole. One touch can also reduce administrative costs—for instance, because new attachers already are obligated to pay for make-ready construction, the use of authorized contractors can eliminate the need for the utility and the existing attachers to each invoice the new attacher for the costs of performing make-ready.[22]

To be sure, one-touch make-ready may not be appropriate in every situation. Some pole work may be so sensitive that the facility owner can rightly insist on doing the work itself. For instance, one touch make-ready might be restricted to simple make-ready construction (SMRC), where no customer outage is anticipated. SMRC would include attachment transfers and relocations in the communications space—including straight or curved cable locations—involving installation or use of clamps, down guys, anchors, guy guards, extension arms, verticals, and bonds. Make-ready work requiring customer outages might be considered "complex make-ready construction" (CMRC), and would be performed by either the pole owner or the owner of an attachment already on a pole. Likewise, any make-ready work in the power supply space, where dangerous electrical lines run, would be deemed CMRC and would be performed by the electric utility.[23]

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[22] Utilities have also indicated their discomfort with bearing the responsibility of coordinating make-ready in the communications space. For instance, when the FCC considered modifying its pole attachment rules, a group of investor-owned utilities urged the FCC to make communications attachers responsible for coordinating make-ready in the communications space, rather than burdening utilities with "new responsibilities in the make-ready process that exceed the scope of rates, terms, and conditions subject to Commission review." Comments of the Alliance for Fair Pole Attachment Rules ("AFPAR"), WC Docket No. 07-245, at 28 (Aug. 16, 2010), http://apps.fcc.gov/ecfs/document/view?id=7020708177 ("*AFPAR Comments*"). AFPAR comprised American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Progress Energy, and Southern Company.

[23] Indeed, the Pole Attachment Act requires utilities to notify attachers before modifying or altering a pole—work that is likely to cause a customer outage and therefore to be

C. One Touch Policies Enhance Efforts to Simplify the Make-Ready Process through Adoption of a Single Pole Administrator.

One touch make-ready policies would complement recent efforts to create state "single pole administrator" regimes under which pole construction, maintenance, and attachment relocation are overseen by a single entity. Single pole administrator programs consolidate pole oversight; such programs could be made even more effective by the adoption of one touch make-ready to consolidate responsibility for construction as well.

The single pole administrator approach is exemplified by the regime adopted by the Connecticut Public Utility Regulatory Authority (PURA). The state's two main electric utilities proposed sharing management of all utility poles in the state. Previously, utility poles in Connecticut were managed by the respective owners of the poles, including various electric utilities and the statewide ILEC. The Single Pole Administrator was intended to reduce "confusion and delay in repairs, replacement of poles, and re-attachments" caused by the "ad hoc management of utility poles and wires…by multiple Pole Owners on each pole."[24]

Without a one touch make-ready process, though, the Connecticut solution generally does not simplify the actual construction process. For instance, under the Connecticut program, the Single Pole Administrator only has authority to use "pre-qualified and approved telecommunications contractors … as a 'back stop' in the event

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CMRC—in order to provide those attachers with time to modify their attachments. 47 U.S.C. § 224(h). Section 224(h), though, does not apply in the case of SMRC. As AFPAR noted, "only when the [pole] owner intends to modify or alter its own pole, duct, conduit, or right-of-way does the owner have an obligation to provide notice.... [I]f the make-ready work needed to make room for a new attacher involves only rearrangement of existing communications facilities, but not pole replacement or other new construction by the utility, the utility would not be obliged to provide notice." AFPAR Comments at 28, 36-37; *cf. Implementation of Section 224 of the Act*, Further Notice of Proposed Rulemaking, 25 FCC Rcd 11,864, ¶ 54 (2010) (noting that pole "modification *may* be required during make-ready when, for example, a pole that has been grandfathered to a prior standard must be brought into compliance with current standards when a new attachment is added" or where "a utility may have been unaware of a safety violation until make-ready is performed." (emphasis added)).

[24] State of Connecticut News Release, Consumer Counsel Elin Swanson Katz, *Consumer Counsel Gives Opening Statement in Single Pole Administrator Proceeding Before PURA* (Dec. 2, 2013), *available at* http://www.ct.gov/occ/lib/occ/12.2.2013singlepolefinal.pdf.

make-ready work is not completed in the time frame mandated by the PURA."[25] In addition, while the Connecticut system requires the creation of a centralized database of attachment information to "provide notice to all attachers of the progress of work performed and when each of them must perform their own work,"[26] the cost of that database is borne by all attachers and may not result in any real simplification of make-ready coordination.

The addition of a statewide one touch make-ready policy in states with a single pole administrator program would reduce, if not nearly eliminate, any added costs while also streamlining the make-ready construction process for all attachers on all poles. An "umbrella" make-ready policy that adopts a single pole administrator as well as one touch make-ready would facilitate a smooth, efficient, and highly equitable process that would reduce disruption and increase public safety while also speeding the availability of new services to residents.

III. MUNICIPALITIES HAVE CLEAR AUTHORITY TO ADOPT ONE TOUCH POLICIES.

The federal Pole Attachment Act does not preempt municipal authority to manage public rights-of-way or to improve the pole attachment process. Municipalities, as well as appropriate state administrative agencies,[27] can continue to exercise their authority

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25 CONN. PUB. UTILS. REGULATORY AUTH., *DPUC Investigation into the Appointment of a Third Party Statewide Utility Pole Administrator for the State of Connecticut*, Final Order, Docket No. 11-03-07, at 13 (Oct. 8, 2014). Connecticut imposes a 90-day time frame for make-ready—45 days to provide a cost estimate and 45 days to complete construction. CONN. PUB. UTILS. REGULATORY AUTH., *DPUC Review Of The State's Public Service Company Utility Pole Make-Ready Procedures – Phase I*, Docket No. 07-02-13, at 1 (Apr. 30, 2008). That timeframe applies to pole orders of any size, although the PURA noted it expected work to be completed in a substantially shorter time frame for very small orders (four or fewer attachments). *Id.* at 20.

26 Press Release, State of Connecticut – Office of Consumer Counsel, *OCC Files Testimony in PURA Single Pole Administrator Docket* (Dec. 2, 2013).

27 Rights-of-way outside of municipalities and along highways and other roads are often overseen by state Departments of Transportation, Public Service Commissions, and other similar entities. *See, e.g.*, IDAHO CODE § 62-701A(2) (2002) ("With respect to the installation of its facilities within public rights-of-way, the telecommunications provider shall at all times be subject to the authority of a city, county or highway district."); LA. REV. STAT. ANN. § 48:381.1(C) (2002) (providers seeking access to state highways must apply for a right-of-way access permit with the Public Service Commission); *see also* NTIA, *50-State Survey of Rights-of-Way Statutes* (last updated

under state law to regulate the use of public rights-of-way, including use by electric utilities and communications service providers. As described above, many communities already do so with respect to access to underground conduit and trenching, and the same authority applies to regulating rights-of-way for pole attachments. Finally, municipal regulation of pole make-ready does not constitute an uncompensated "taking" or deprive pole owners or communications attachers of any other rights.

A. Municipalities Have Authority To Decide Whether and How To Regulate Public Rights-of-Way.

Regulation of the use of streets and other public rights-of-way is a core municipal function "clearly within the jurisdiction of the states and their political subdivisions."[28] Numerous municipalities currently exercise this authority to require coordination of excavations.[29] Other municipalities require such coordination for all activities in the public rights-of-way that might cause disruption, damage, or other interference with the ordinary use of those rights-of-way.[30]

May 21, 2003), available at http://www.ntia.doc.gov/legacy/ntiahome/staterow/rowtable.pdf.

[28] *Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television*, Report and Order, 54 F.C.C.2d 855, ¶ 21 (1975).

[29] *See, e.g.*, ORANGE BEACH, AL. CODE OF ORDINANCES § 66-115; GLENDALE, AZ. CODE OF ORDINANCES § 10-57; BOULDER, CO. MUN. CODE § 8-5-15; BROOMFIELD, CO. CODE OF ORDINANCES § 14-10-130(A); FULTON COUNTY, GA. CODE OF ORDINANCES § 62-96(b); DES MOINES, IA. CODE OF ORDINANCES § 102-720; MINNEAPOLIS, MN. CODE OF ORDINANCES § 430.80; WATERTOWN, MN. CODE OF ORDINANCES § 51-39; OXFORD, MS. CODE OF ORDINANCES § 98-159; JERSEY CITY, N.J. CODE OF ORDINANCES § 296-25; AUSTIN, TX. CODE OF ORDINANCES § 14-11-167(C-E); PLANO, TX. CODE OF ORDINANCES § 19-74; RICHMOND, VA. CODE OF ORDINANCES § 90-466(a); DUVAL, WA. CODE OF ORDINANCES § 5.17.060. *See also, e.g.*, CITY OF MOUNTAIN VIEW, CA., *Excavation Permit Application*, at 5 (revised Aug. 17, 2013), *available at* http://mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=12003; CITY OF SAN MATEO, CA., *Recommendation for Draper University Row Encroachment License Agreement*, Attachment 2 at 8 (Mar. 17, 2014).

[30] *See, e.g.*, BROOMFIELD, CO. CODE OF ORDINANCES § 14-10-130(A); ENGLEWOOD, CO. CODE OF ORDINANCES § 11-7-16(a); FULTON COUNTY, GA. CODE OF ORDINANCES § 62-96(b); CINCINNATI, OH. CODE OF ORDINANCES § 722-3; DUVAL, WA. CODE OF ORDINANCES § 5.17.060.

1. ***Municipal Authority over Rights-of-Way Extends to Poles.***

Home-rule municipalities have broad authority to govern as they see fit. Their power is limited only where a state legislature affirmatively has appropriated authority for itself—or by federal preemption, which has no application here.[31] These home-rule local governments generally have power to regulate public rights-of-way and pole attachments unless the state legislature expressly prohibits such regulation.

Local governments in "Dillon's Rule" states also have authority to regulate pole attachments in the public rights-of-way. Dillon's Rule is the principle that "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature."[32] Accordingly, where a state observes Dillon's Rule, municipal power must be expressly or impliedly delegated by the state legislature. Municipalities in Dillon's Rule states may regulate pole attachments because they have "express power to regulate public property and public rights-of-way" or because their "declared objects and purposes" include (however described) regulation of public property and public rights-of-way.[33]

As a practical matter, whether municipalities are governed by home rule or by Dillon's Rule, their authority *necessarily* encompasses the ability to regulate access to rights-of-way, including access to utility poles in the rights-of-way. If municipalities could not require one touch construction on poles located in the public rights-of-way,

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[31] *See* further discussion below at Part III.B.

[32] *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (Iowa 1868).

[33] Courts have confirmed this understanding, noting, for instance, that "[w]here the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable." *Arlington Cnty. v. White*, 528 S.E.2d 706, 708 (Va. 2000) (citing *City of Virginia Beach v. Hay*, 518 S.E.2d 314, 316 (Va. 1999)); *see also, e.g.*, *Haugland v. City of Bismarck*, 818 N.W.2d 660, 678 (N.D. 2012) ("Once a municipality's powers have been determined," the "manner and means of exercising those powers where not prescribed by the Legislature are left to the discretion of the municipal authorities.") (internal quotation marks and citations omitted); *Zack v. Marin Emergency Radio Auth.*, 13 Cal. Rptr. 3d 323, 336 (Cal. Ct. App. 2004) ("[T]he delegation of power to municipal corporations . . . impliedly gives them the right to select lawful and reasonable means whereby that power is to be carried out.") (internal citations omitted); *Branson v. Port of Seattle*, 101 P.3d 67, 71 (Wash. 2004) (en banc) ("[I]f the method for exercising a municipal power is not specifically prescribed, the mode or means by which a municipality may exercise powers granted by the legislature will not be strictly construed.").

they would be unable to fulfill their mandate to hold the public rights-of-way in trust for citizens and businesses.

2. *Municipalities Require Efficient Construction in the Public Rights-of-Way.*

Illustrating this authority, many cities, towns, and counties across the country have efficient-construction mandates that require any construction in the public rights-of-way to be done with the minimum of disruption.[34] These mandates are consistent with municipal police powers. As noted by the Metropolitan Transportation Commission of California, "[t]he power to deny a permit implies the power to place conditions on the issuance of that permit. Under its police power, the municipality may condition the issuance of the permit to address the public health, safety, and welfare issues that otherwise might cause the municipality to deny the permit."[35]

Of course, "[i]n order to impose a condition on the applicant, there needs to be a reasonable connection between the impact of the project and the conditions that are placed upon issuance of the permit."[36] As described above, having multiple crews performing pole attachment make-ready work—when the same work could be done as well or better by a single crew—is needlessly disruptive for citizens and excessively burdensome for local officials, and creates risks to property and people. Regulating access to the public rights-of-way by allowing new attachers to perform make-ready work using pole owners' authorized contractors would minimize the overall risks of disruption and damage, just as joint trenching/"dig once" policies have done on excavation projects.

B. Federal Law Permits Municipalities To Regulate Make-Ready on Poles Located in Public Rights-of-Way.

While the Pole Attachment Act grants the FCC authority to regulate the rates, terms, and conditions on which cable operators and telecommunications providers gain access to utilities' vacant pole space, it "in no way limits or restricts the powers of the several states to regulate pole attachments."[37] As a general matter, federal preemption applies only in three scenarios, none of which apply to municipal pole-attachment regulatory authority (including with respect to regulating the pole make-ready process): (1) "express preemption," where Congress expressly has preempted a state's authority in

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[34] *See supra* Part I.B.

[35] METRO. TRANSP. COMM'N, *Guide to the Legal Aspect of Trench Cuts*, at 5 (Sept. 1999), *available at* http://www.tellusventure.com/downloads/reference/LegalGuidetotrench_cuts.pdf.

[36] *Id.* at VI.

[37] S. REP. 95-580 at *2.

a certain area;[38] (2) "field preemption," where Congress's legislation in a particular area is so pervasive that there is simply no room left for a state to act;[39] or (3) "conflict preemption," where federal and state or local law conflict, such that compliance with the latter would cause a violation of federal law.[40] None of these preemption principles apply to a municipal one touch make-ready ordinance.

Express Preemption Does Not Apply. No federal statute expressly prohibits state or local governments from regulating any type of pole attachment or the pole make-ready process. To the contrary, the Pole Attachment Act includes an "opt-out" provision that allows a state to assume regulation of pole attachments from the FCC. Indeed, the Pole Attachment Act allows not only states, but also *municipalities* (consistent with state law)[41] to preempt the FCC's authority to regulate pole attachments by cable operators and telecommunications carriers.[42]

Field Preemption Does Not Apply. Congress likewise did not intend the federal government to occupy the field of pole attachment regulation, such that states are left without any room to act. Indeed, the Telecommunications Act of 1996 (which amended the Pole Attachment Act) states: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or *local law unless expressly so provided in such Act or amendments*."[43] In addition, by allowing "reverse

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38 *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (finding that Congress may preempt state law by expressly stating that preemption applies).

39 *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (federal law may preempt state law when "federal regulation may be so pervasive" that "Congress left no room for the states to supplement [an area of law]").

40 *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (holding that federal preemption also may apply "where compliance with both federal and state regulations is a physical impossibility").

41 Absent superseding federal or state rules, municipalities could regulate pole attachments of cable operators and telecommunications carriers to promote competitive entry, because both the Pole Attachment Act and subsequent FCC decisions define "States" to include any "political subdivision" thereof. *See* 47 U.S.C. § 224(a)(3); *United Cable Television of E. San Fernando Valley, Ltd.*, Memorandum Opinion and Order, 11 FCC Rcd. 2382, ¶ 8 (1996). Local control over use of public rights-of-way, however, is a distinct and independent source of authority.

42 *See* 47 U.S.C. §§ 224(c)(1)-(2) (divesting FCC of jurisdiction over pole attachments in any "State" that certifies that "it regulates" the "rates, terms, and conditions" of pole attachments).

43 47 U.S.C. § 152, note (c)(1) (emphasis added).

preemption" of the FCC's authority, the Pole Attachment Act specifically preserves the role of states and municipalities. Far from establishing federal preeminence in the field of pole-attachment regulation, this construct actually gives the federal government a backstop role to ensure that pole attachments do not become a bottleneck to facilities deployment.[44]

Conflict Preemption Does Not Apply. There is no conflict between federal law and state or local pole attachment regulation (including with respect to regulating the pole make-ready process). Municipal one touch policies or other ordinances mandating efficient construction on poles would not conflict with the rights of access granted under the Pole Attachment Act. To the contrary, local policies would simply establish parameters for construction to ensure the public safety and preservation of the public rights-of-way.

C. A One Touch Make-Ready Policy Does Not Implicate the Fifth Amendment Prohibition on Takings Without Just Compensation.

The Fifth Amendment to the United States Constitution (which applies to states and localities under the Fourteenth Amendment) prohibits the taking of private property for public use without just compensation. But requiring a pole owner to allow a pole owner's own authorized contractors to perform simple make-ready construction on its poles is not a taking of the pole owner's property. Likewise, requiring an incumbent attacher to allow a pole owner's authorized contractors to perform simple make-ready on its attachments is not a taking of the communications attacher's property. Utility pole owners do not give incumbent attachers a property right to any specific space on a pole; rather, the pole owners remain free to require communications attachers to move to another space on the same pole, provided the pole continues to accommodate the attachers.

D. One Touch Policies Are Not Vulnerable to Contract or Contract-like Claims.

Requiring one touch construction on poles in municipal rights-of-way does not breach any municipal contract with pole owners. Generally applicable legislation, as opposed to repudiation of a specific agreement or deliberate failure to perform, is analyzed under the Contracts Clause of the U.S. Constitution,[45] not contract law.[46] So,

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[44] *See, e.g., Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275 (11th Cir. 2000) (stating that the goal of the Pole Attachment Act and 1996 amendments thereto was "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities").

[45] U.S. CONST., ART. I, §10, Cl. 1. Most state constitutions also contain contracts clauses, but courts generally have construed these clauses as identical in effect to the

for example, a claim by a pole owner that a one touch ordinance violates the terms of its existing municipal permits would be analyzed under the Contracts Clause and not as a claim for breach of contract.

A Contracts Clause challenge to a one touch make-ready ordinance almost certainly would fail.[47] To prevail under the Contracts Clause, the plaintiff would have to demonstrate that: (1) the legislation substantially impairs a specific contractual right and (2) either the law does not serve a legitimate public purpose or the means chosen to accomplish that purpose are not reasonable and necessary.[48] Both prongs would present insurmountable hurdles to pole owners.

First, requiring a pole owner to minimize the number of entities performing make-ready work during a specific period of time on a given pole would not impact the pole owner's ability to use the right-of-way as permitted by the municipality or state agency. As before, the pole owner's facilities would continue to run across its pole. Indeed, the pole owner would not even incur uncompensated costs, as all costs of make-ready work are borne by the new attacher, no matter what process is followed. In any event, permits

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federal Contracts Clause. *See, e.g.*, 628 AM. JUR. 2D *Constitutional Law* § 753 ("Generally, the federal and state constitutional guarantees against the impairment of contractual obligations are interpreted essentially identically and given the same effect. They offer equivalent protections, and courts apply the same analysis[.]").

46 *See, e.g.*, *Cherry v. Mayor & City Council of Baltimore City*, No. 10-cv-1447, 2011 WL 11027560, at *6 (D. Md. Sept. 6, 2011) (There is a "difference between a state's refusing to do something it is obligated to do under a public contract and a state's utilizing legislation to eliminate its obligations under a public contract, the former being a breach of contract claim and the latter being a Contract Clause claim.") (citing *Crosby v. City of Gastonia*, 635 F.3d 634 (4th Cir. 2011)).

47 *See, e.g.*, *Bhalerao v. Ill. Dep't of Fin. & Prof'l Regulations*, No. 11-CV-7558, 2012 WL 5560887, at *6 (N.D. Ill. Nov. 15, 2012) (analyzing revocation of license under contracts clause and explaining that "even if Plaintiff had a contract containing a promise by the IDFRP never to revoke his license under new statutes—and he does not—§ 2105-165 does not run afoul of the Contracts Clause because . . . it is a valid use of the state's police power to protect the public . . . '[o]ne whose rights, such as they are, are subject to state restriction cannot remove them from the power of the State by making a contract about them.'") (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241-242 (1978) ("It is to be accepted as a commonplace that the Contracts Clause does not operate to obliterate the policy power of the States[.]")).

48 *See, e.g.*, *Buffalo Teachers Fed'n. v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).

to use public rights-of-way often are made expressly subject to future municipal ordinances.[49]

Second, ordinances mandating one touch construction serve a legitimate public purpose by increasing public safety and reducing disruption to residents, as described above.[50] The ideal way to reduce or eliminate the need for disruptive new installations is to facilitate efficient construction processes.

CONCLUSION

Municipalities can protect public safety, minimize disruption in the public rights-of-way, and bring competition for broadband and other communications services to residents by adopting a one touch make-ready regime for simple make-ready construction. One touch make-ready would be available to all communications attachers equally. One touch make-ready regimes are akin to existing "dig once" laws that have been implemented successfully for safe and efficient construction. A new attacher's use of contractors authorized by the electric utility to perform one touch make-ready would protect the utility and other existing communications attachers. Municipalities face no legal impediment to implementing one touch make-ready ordinances or policies. In the long run, moreover, municipalities with one touch make-ready will be best positioned to see the rapid installation of broadband and other new communications networks.

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[49] *See United Auto., Aerospace, Agric. Implement Workers of Am. Int'l Union v. Fortuno*, 633 F.3d 37, 44 (1st Cir. 2011) ("[E]ven when the state impairs its own contractual obligations, the state's judgment that the impairment was justified is afforded meaningful deference.").

[50] *See, e.g., Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410, 412 (1983) (the Contract Clause "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people;'" the problem need not be temporary or an emergency but can simply remedy "a broad and general social or economic problem"); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1051 n.9 (9th Cir. 2004) ("[W]e have no doubt that the amended ESSA reflects significant and legitimate public purposes: . . . the avoiding of wasteful duplication of electrical suppliers[.]").

Attachment C