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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
AT PORTLAND

TIME WARNER TELECOM OF OREGON, LLC, an Oregon Limited Liability Company; and QWEST COMMUNICATIONS CORPORATION, a Delaware corporation,

PLAINTIFFS,

v.

THE CITY OF PORTLAND, an Oregon municipal corporation,

DEFENDANT.

Case No. 04-CV-1393-MO

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT (First)

**Violation of 47 U.S.C. § 253
Violation of 42 U.S.C. § 1983
Declaratory Judgment Damages**

For their complaint against the City of Portland (“City”), plaintiffs, Time Warner Telecom of Oregon, LLC, an Oregon limited liability company, (“Time Warner Telecom”) and Qwest Communications Corporation, a Delaware corporation (“QCC”) (collectively referred to as the “Carriers”) allege as follows:

INTRODUCTION

The Carriers are telecommunications providers competing to serve governmental, quasi-governmental and educational entities, as well as consumers and businesses, in the Portland metropolitan area. The Carriers require access to public rights-of-way (“ROWs”) where they deploy telecommunications facilities and related equipment used to provide their services.

In this case, the public ROWs at issue are under the exclusive control of the City of Portland, which permits access only pursuant to City-issued franchises. The City, however, has unlawfully abused the ROW franchise process to impose unreasonable and discriminatory access conditions. Most notably, as a condition to using the public ROWs, the City has

improperly required the Carriers to provide the City with free or below cost use of conduit, fiber, and related equipment and facilities. The City in turn is using these same valuable network assets to operate its own telecommunications company in competition with the Carriers -- acting through a City entity known as the Integrated Regional Network Enterprise (“IRNE”). The City also obtains valuable network assets from other government and quasi-government entities essentially for free, or in exchange for the provision of discounted telecommunications services, and uses those assets to compete with the Carriers through IRNE. Put simply, the City is exploiting its exclusive monopoly control over public ROWs to force its competitors to unfairly subsidize IRNE. The City obtains a valuable telecommunications network far below its actual cost, while artificially inflating the costs of other service providers that compete with IRNE. In addition, the City arbitrarily imposes on the Carriers, and its other competitors, disparate in-kind requirements. As a result, carriers that wish to provide service in the City are subject to different ROW compensation schemes based purely on the needs of IRNE. Such disparate treatment is plainly not “competitively neutral and nondiscriminatory”.

The City’s systematic and anticompetitive abuse of its power over access to ROWs is prohibited by Section 253 of the Federal Telecommunications Act of 1996. That statute forbids municipalities, such as the City, from burdening access to their ROWs in a manner that prohibits or may have the effect of prohibiting the ability of carriers to provide telecommunications service. Section 253 is aimed at limiting the compensation a governmental entity can obtain for use of its ROWs, as well as prohibiting actions favoring one service provider over another. However, the violation is particularly egregious where, as here, the municipality is using its control over access to ROWs to unfairly advantage *itself* in its role as a telecommunications provider. Moreover, the City’s use of valuable network assets provided by other government and quasi-government entities in its operation of IRNE for the benefit of IRNE’s third-party customers, not merely the City itself, violates both the letter and the spirit of

Section 253.

In addition to violating federal law by imposing unlawful franchise conditions, the City also is breaching the very terms of its franchises with the Carriers. Those franchises prohibit the City's use of the facilities provided by the Carriers for the sale or leasing of telecommunications services to third parties, yet IRNE is doing precisely that.

JURISDICTION AND VENUE

1. This case arises under the Constitution and laws of the United States, including, in particular, the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended by the Telecommunications Act of 1996, the Supremacy Clause, U.S. Const. Art. VI, cl. 2, and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1337. Additionally, this Court has jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202 as the Carriers seek a declaration that the illegal provisions in the franchises the Carriers have been required to sign in order to use the public rights-of-way violate the Constitution and laws of the United States.

2. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) as the defendant resides in this District and the events giving rise to this action occurred within this District.

THE PARTIES

3. Time Warner Telecom is an Oregon limited liability company. Time Warner Telecom provides telecommunications services in competition with the City of Portland and its IRNE entity.

4. QCC is a telecommunications corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Denver, Colorado. QCC provides telecommunications services in competition with the City of Portland and its IRNE

entity.

5. Defendant City of Portland is a municipal corporation.

FACTUAL BACKGROUND

The Federal Telecommunications Act

6. In February 1996, Congress amended the Communications Act of 1934 by enacting the Telecommunications Act of 1996 (“the Act”), Pub. L. No. 104, 110 Stat. 56. Prior to the passage of the Act local telephone services typically were provided by state protected monopolies who had preferential access to necessary rights associated with this utility service, including access to public ROWs. In a dramatic departure, however, the Act created a new federal scheme to implement broad competition in the provision of local telephone services. As the Supreme Court has noted: “The question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.” *AT&T Corp. v. Iowa Util. Board*, 525 U.S. 366, 379 n.6 (1999). More generally, the Act contemplated elimination of barriers to competition in the provision of all telecommunications services, both local and long distance, recognizing the developing convergence of these services.

7. To implement this new policy Congress, through Section 253(a) of the Act, preempted all local statutes, regulations and other legal requirements that “may prohibit *or have the effect of prohibiting* the ability of any entity to provide any” telecommunications service:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. 47 U.S.C. § 253(a).

This provision was intended to eliminate both absolute legal prohibitions to new

telecommunications competition, as well as any other legal provisions that had the effect of preventing vigorous competition in practice. *Qwest Corp. v. City of Santa Fe, New Mexico*, 2004 WL 1879940 (10th Cir. August 24, 2004) (“...an absolute bar on provision of services is not required...it is enough that the Ordinance would ‘materially inhibit’ the provision of services.”)

8. For example, Congress recognized that historical local telephone monopolies had enjoyed access to public ROWs, and that other telecommunications service providers would similarly require reasonable and non-discriminatory access to the same ROWs in order to compete. Congress, therefore, narrowly bounded the state and local governmental role with respect to ROWs used by telecommunications companies. Congress preserved a limited ROW management function for governmental entities while preventing such entities from imposing legal requirements or financial burdens on telecommunications companies -- particularly discriminatory ones -- that could circumvent the Act’s sweeping competitive goals.

Section 253(c) states:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
47 U.S.C. § 253(c).

Pursuant to Section 253(c), which acts as a narrow savings clause, municipalities such as the City retain limited authority to manage the public rights-of-way but are prohibited from encumbering or regulating telecommunications services. *City of Auburn, et al. v. Qwest Corp.*, 247 F. 3d 966 (9th Cir. 2001), is the authoritative decision in this Circuit interpreting Section 253 of the Act. The *Auburn* court emphasized that Section 253 allows cities only a very “limited and circumscribed role in the regulation of telecommunications.” *Auburn*, 247 F. 3d at 980.

The ROW Franchises

9. The Carriers require access to public ROWs controlled by the City in

order to provide telecommunications services in the metropolitan area. However, the City has disregarded and violated the limitations on its authority set forth in Section 253. Most notably, the City has conditioned access to its ROWs through franchises that require, among other terms, that the Carriers construct and hand over to the City various valuable “in-kind” telecommunications facilities either for free or at minimal compensation. The City entered into such franchises with Nextlink Oregon, Inc. in 2000 (Nextlink Oregon, Inc. subsequently changed its name to XO Oregon, Inc.)(attached as Exhibit A), with GST Telecom Oregon, Inc. in 1997 (Time Warner Telecom assumed the franchise in 2001 in conjunction with a purchase of GST assets) (attached as Exhibit B) and with QCC in 1998 (attached as Exhibit C).¹

10. More specifically, the City also conditioned Time Warner Telecom’s access to public ROWs on conveyance to the City of “one duct for each duct that [Time Warner Telecom] installs up to four ducts, or one single four inch (4”) duct ***. The cost of such ducts may not be deducted from Franchise fees payable to the City, or otherwise charged to the City.” (See Ex. B - Time Warner Telecom Franchise at 9.2 (A).) The City similarly obligated QCC to build conduit ducts in City streets and dedicate those facilities to the City for free, as well as build the City conduit across the Ross Island Bridge at minimal payment. (See Ex. C - QCC Franchise at 9.1 and 9.2.) The one time payment for the Ross Island Bridge conduit was a credit that applied to the franchise fee, the legality of which is before the courts in other cases. (*Id.* at 9.2.) As such, even the one conduit for which QCC received “payment” actually cost the City nothing given that this payment was offset against fees to which the City is not lawfully entitled.

11. The City similarly has required such “in-kind” dedications of network facilities assets from other telecommunications companies as a condition of their obtaining access to the public ROWs in Portland. For example, Level 3 Communications, LLC was

¹ Full copies of all Franchise agreements referenced herein can be found at <http://www.portlandonline.com/index.cfm?c=33150>.

required to construct segments 1-4 of the City's Wide Area Network at no cost to the City, and to give the City free access to its network up to an OC-3 level. Metromedia Fiber Network, Inc. was required to give the City free use of its network up to an OC-3 level.² Electric Lightwave, Inc. was required to install two pair of optical fibers for the City and a single pair of optical fiber within ELI's existing fiber optic loop in the City's downtown core. The City required MCI to build for it, at no cost, two conduit ducts as part of MCI's metropolitan network system, as well as to install and hand over a 24 optical fiber bundle in one of the two conduits. (MCI Franchise at 9.1(A) and 9.1(B)). Moreover, MFS Communications, a MCI subsidiary, was required to give the City two pairs of fiber in each installation plus one pair in its existing loop at no charge. In addition to providing free conduit, McLeodUSA Telecommunications was required to build a segment of the IRNE network at no cost or expense to the City. (Section 9 of the McLeod Franchise).

12. The City considers the "in-kind" provisions and the 5% franchise fee it imposes on telecommunication carriers to be the total compensation package carriers pay the City for use of the ROWs. However, this compensation is not tied to the carriers' use of the ROWs and is applied in a discriminatory manner. Moreover, this compensation is discriminatory and competitively biased because the City favors itself by charging itself (i.e., IRNE) less compensation than that it charges other Carriers.

IRNE

13. The City has obtained necessary authority under federal law from the Federal Communications Commission to provide competing telecommunications services to the public through its IRNE entity. *See* 47 U.S.C. § 214 and associated regulations. The City also has obtained a certificate of authority from the Oregon Public Utility Commission to operate,

² "OC-3" refers to one of seven levels of fiber optic transmission speed. Level OC-3 is 155.52 Mbps.

through IRNE, as a competitive telecommunications provider. *See* City of Portland d/b/a Integrated Regional Network Enterprise, OPUC Order No. 01-609. Thus, the City has established itself as a competitor to the Carriers and other telecommunications service providers within and beyond the city limits of Portland.

14. The City has used and continues to use the conduit, fiber and other facilities obtained under ROW franchises with the Carriers and other telecommunications companies to provide telecommunications services through IRNE. The City also continues to use valuable network assets provided by other government and quasi-government entities through inter-government agreements (“IGAs”) with those entities in the City’s operation of IRNE for the benefit of IRNE’s third-party customers, not merely the City itself.

15. The City, through IRNE, offers telecommunications services for sale to third parties and non-inhabitants of the City. IRNE is currently providing telecommunications services to the City and other governmental, quasi-governmental and educational entities in the Portland region. The IRNE website lists the following customers of the City: TriMet (Tri-County Metropolitan Transportation Agency, ODOT (Oregon’s Department of Transportation), State of Oregon DAS (Department of Administrative Services), Multnomah County, Multnomah Education Service District, Portland Community College, Portland State University, Portland Public Schools and City of Gresham. The City is actively marketing telecommunications services through IRNE to other third party entities.

16. The City does not impose the same ROW terms and conditions on its affiliate IRNE that it does on other telecommunications providers. IRNE is not required to compensate the general public for IRNE’s share of the cost of managing the City’s ROWs or bear the same burdens associated with ROW use that the City has imposed on IRNE’s competitors. IRNE is also able to make use of valuable network assets provided by other government and quasi-government entities in its provision of telecommunications services to

third-party customers, whereas IRNE's competitors – such as the Carriers – must invest in and use their own assets.

17. The City, through its IRNE affiliate, is using the in-kind facilities and valuable network assets provided by other government and quasi-government entities to sell telecommunication services to third parties at sharply discounted rates in direct competition with the carriers that were forced to give the City the facilities as a condition of obtaining necessary ROWs. More specifically, the Carriers are damaged in at least four respects: (a) by the unreasonable additional costs they must incur in order to use the City's ROWs; (b) by the City's discriminatory use of the Carrier-constructed facilities and valuable network assets provided by other government and quasi-government entities to compete against the Carriers; (c) by the City's additional use in competition against the Carriers of other facilities it unlawfully demanded from third party providers as a condition of their ROW access; and (d) by the City's discriminatory failure to make its own affiliate bear its fair share of the cost of use of the public ROWs.

18. More generally, the City's actions also harm the public interest in telecommunications competition in the Portland metropolitan area. The City is exploiting its monopoly control over public ROWs to effectively prohibit normal competition in the markets that the City serves through IRNE.

The City's Violation of the Act

19. The City is violating Section 253 in four major respects. First, Section 253 prohibits the City from using its power over ROWs to compel telecommunications companies to provide it with telecommunications facilities as a condition of ROW access. This principle would apply even if the City was only using the facilities for its own internal communications purposes and did not also serve third parties through IRNE. The Ninth Circuit specifically prohibits such "in kind" requirements. *See City of Auburn*, 260 F. 3d at 1179. The

Ninth Circuit held: “[O]rdinance requirements that companies provide free or excess capacity for the use of the cities or other users go beyond management of the rights-of-way.” *Id.* (emphasis added). *Accord*, *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (“dedications of ducts and fiber optic strands to the City’s exclusive use ... are totally unrelated to use of the City’s rights-of-way, and thus beyond the scope of the City’s authority.”); *Qwest Corp. v. City of Santa Fe*, 2004 WL 1879940 (10th Cir. August 24, 2004) (holding that a municipal ordinance requiring carriers to build and dedicate conduit was preempted by Section 253).

20. Second, the violation of Section 253 is particularly egregious here because the City itself is acting as a competitor to the Carriers. Thus, this is not a typical case where the issue is whether the City simply is unduly restricting or burdening use of its ROWs. The City has taken the unusual step of creating IRNE as a direct competitor to the Carriers. Section 253 prohibits the City from discriminating in favor of IRNE in any respect. Yet the City has done just that. It has used its monopoly control of ROWs to extort facilities from IRNE’s competitors for IRNE’s use. It has not required IRNE itself to compensate the public for IRNE’s use of the ROWs. It has charged competing carriers more compensation than it charges to IRNE. Collectively, these and related franchise terms have had the effect of unlawfully interfering with the ability of the Carriers to provide telecommunications services to the third party customers in competition with IRNE. The City’s ROW franchising actions are the very opposite of the “reasonable * * *, competitively neutral and non-discriminatory” management permitted by Section 253(c) of the Act.

21. Third, the City’s application of in-kind compensation has been far from neutral. To the contrary, the City’s disparate treatment of franchisees, who are also the City’s competitors, runs afoul of the Act’s competitive neutrality and nondiscrimination requirements.

22. The Carriers and the City discussed the impermissible terms during their

respective negotiations. However, the City refused to remove any of the terms and permit access to its ROWs on a basis that complies with Section 253.

23. Finally, the City does not merely use valuable network assets provided by other public entities for free or in trade in order to satisfy the City's own telecommunications needs. The City uses these valuable public assets in its operation of IRNE to competing directly with the Carriers for third-party customers. This is competitively unfair and a further violation of the Section 253(a) of the Act.

The City's Breach of the ROW Franchises

24. The City also has breached its franchises with the Carriers, even leaving aside the unlawfulness of those franchises under the Act. Under those franchises the City represented and agreed that the "in-kind" facilities demanded of the Carriers would be used only for "municipal purposes" of the City itself. (*See* Ex. A - XO Franchise at 9.1 and 9.2(A); Ex. B - Time Warner Telecom Franchise at 9.2(A); Ex. C - QCC Franchise at 9.1.) The City's ROW franchises with other third parties providers such as Level 3 and Metromedia Fiber also purport to limit the City's use of "in-kind" facilities dedicated to the City "for municipal purposes" *only*.

25. "Municipal purposes" does not include the sale of "Telecommunication Services" to third parties. Section 9.4 of the QCC and Time Warner Telecom Franchises provides:

[T]he term "municipal purposes" includes but is not limited to the use of the structures and installations for City fire, police, traffic, water, telephone, and/or signal systems. **The term "municipal purposes" does not include: (1) the sale or lease of Telecommunications Services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers; or (3) the transportation of water or wastewater.**

(Emphasis added.) Through its IRNE affiliate, the City is using facilities obtained from the Carriers unlawfully to sell or lease "telecommunications services" to third parties, in violation of

the franchises.

FIRST CLAIM FOR RELIEF

Violation of 47 U.S.C. § 253

26. Plaintiffs incorporate all preceding paragraphs.

27. Article VI, Clause 2 of the United States Constitution, commonly known as the Supremacy Clause, provides, in relevant part, that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of the State to the Contrary notwithstanding.”

28. The franchises, including those the Carriers were forced to sign, violate Section 253(a) and (c) of the Act in that they impose onerous requirements on the Carriers that “have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.”

29. Among other things, the franchises expressly prohibit the Carriers from using the City’s public rights-of-way without unqualifiedly accepting the franchises’ unlawful terms. The City’s refusal to grant the Carriers access to the public rights-of-way unless the Carriers’ agreed to comply with its unlawful franchises is a barrier to entry that is preempted by Section 253(a).

30. The provisions at issue, including but not limited to the compensation provisions, do not constitute the proper management of ROWs and are not competitively neutral and nondiscriminatory. Moreover, the City’s disparate application of the illegal provisions--including the City’s disparate compensation scheme that allows IRNE to pay less compensation for use of the ROWs-s not competitively neutral and nondiscriminatory. The City is using its market power over public ROWs to favor its IRNE affiliate over other competing service providers.

31. The City's use of valuable network assets provided by other government and quasi-government entities in its operation of IRNE for the benefit of third-party customers, not merely itself, has the further "effect of prohibiting" the Carriers from competing in the local marketplace. Use of these public assets in this manner is a barrier to entry that is preempted by Section 253(a).

32. Accordingly, the illegal franchise provisions should be declared null and void because they are preempted by the Act under the Supremacy Clause, and they should be set aside by the Court. The City should also be enjoined from using public assets provided by other government and quasi-government assets through IGAs in its operation of IRNE for the benefit of IRNE's third-party customers, not merely to satisfy the City's own telecommunications needs.

SECOND CLAIM FOR RELIEF

Violation of 42 U.S.C. §1983

33. Plaintiffs incorporate all preceding paragraphs.

34. 42 U.S.C. § 1983 provides in relevant part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

35. The City is a "person" within the meaning of 42 U.S.C. § 1983.

36. The United States Constitution gives Congress the power "to regulate Commerce with Foreign Nations, and among the several states . . ." U.S. Const. Art. I, § 8.

37. The Commerce Clause confers "rights, privileges, or immunities" within the meaning of 42 U.S.C. § 1983.

38. The City's franchises and use of valuable network assets provided by

other government and quasi-government entities for the benefit of IRNE's third-party customers imposes an incidental burden on interstate commerce. That burden clearly outweighs their benefits, if any, to the public.

39. Amendment V to the Constitution of the United States provides, in pertinent part, that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . .”

40. Amendment XIV to the Constitution of the United States provides, in pertinent part, that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law. . . .”

41. The Carriers are entitled to enjoy the rights, privileges, and immunities secured to each of them under the Due Process Clause of the Fifth and Fourteenth Amendments.

42. The Carriers are also entitled to enjoy the rights and privileges secured to each of them under the Act, 47 U.S.C. § 253, against preempted and impermissible local and state laws and regulations.

43. At all times relevant to this action, the City has acted under color of state and local law.

44. The City's imposition and enforcement of the franchises, and local and state regulations upon which they are based, have deprived, and will continue to deprive, the Carriers of their vested property rights without due process of law. These actions have also deprived the Carriers of the rights, privileges, and immunities secured to each of them under the Commerce Clause, the Due Process Clause, and the Act.

45. As a result, the Carriers will be impeded in each of their ability to provide telecommunications services to the public and will suffer irreparable damage to each of their goodwill and reputation. In addition, the Carriers will lose customers and income as a direct and

proximate result of the City's enforcement of its invalid and impermissible franchises.

THIRD CLAIM FOR RELIEF

Breach of Franchises

46. Plaintiffs incorporate all preceding paragraphs.

47. The City agreed in the franchises that it would use the conduit and fiber that it received through franchises for "municipal purposes." "Municipal purposes" does not include the sale of Telecommunication Services to third parties.

48. The Carriers installed the conduit and fiber as required by the franchises.

49. The City is breaching the franchises by using the conduit and fiber to sell Telecommunication Services to third parties.

50. As a result of the City's breaches, Plaintiffs have sustained actual damages, including direct, incidental, and consequential damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

Unjust Enrichment

51. Plaintiffs incorporate all preceding Paragraphs.

52. The City, through its control of public ROWs, has extracted free or below cost conduit and fiber from the Carriers and used those facilities to subsidize the construction and operation of its IRNE network.

53. The Carriers provided the conduit and fiber to the City.

54. The Carriers performed a substantial amount of work installing the conduit and fiber and incurred costs associated with that effort.

55. The City received the benefits of those services and payment of expenses.

56. Defendant has been unjustly enriched at the Carriers' expense in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF

Declaratory Relief

57. The Carriers allege and incorporate herein all preceding paragraphs.

58. The Carriers bring this cause of action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, to obtain a declaration of their rights with respect to Section 253 of the Federal Telecommunications Act, 47 U.S.C. § 253, ORS 225.110 and the franchises.

59. An actual controversy exists between the Carriers and the City involving substantial questions relating to the legal rights and duties of the Carriers and the City within the meaning of 28 U.S.C. § 2201 as to whether the City's franchises violate the Act, the Supremacy Clause and 42 U.S.C. § 1983, and are preempted. Accordingly, declaratory relief is appropriate and necessary to determine the extent of the Carriers' rights and the City's duties and authority.

60. The Court has the power to adjudicate the rights of the parties with respect to this controversy and should grant declaratory relief under 28 U.S.C. § 2201.

PRAYER FOR RELIEF

WHEREFORE, the Carriers respectfully request that this Court issue an Order and Judgment:

(i) Declaring that illegal franchise terms and/or the City's disparate application of these franchise terms violate and are preempted by Section 253 of the Act and under the Supremacy Clause of the United States Constitution, and are therefore null and void and declaring that the City has breached its franchises;

(ii) Declaring that the Defendant's adoption and enforcement of the franchises violate 42 U.S.C. § 1983 by depriving the Carriers of their rights, privileges, and immunities afforded them by the Commerce Clause and the Due Process Clause of the United States

Constitution and that the unlawful provisions are therefore null and void;

(iii) Declaring the City's use of valuable network assets provided by other government and quasi-government entities in its operation of IRNE for the benefit of IRNE's third-party customers, not merely the City itself, is preempted by Section 253 of the Act and under the Supremacy Clause of the United States Constitution, and therefore illegal;

(iv) Ordering the City to return the in-kind facilities to the Carriers and compensate the Carriers for the construction and use of such facilities;

(v) Enjoining the City from using valuable network assets provided by other government and quasi-government entities in its operation of IRNE for the benefit of IRNE's third-party customers, not merely the City itself;

(vi) In the event the City is allowed to retain the facilities, enjoining the City from using the facilities for non-"municipal purposes" within the meaning of the franchises;

(v) Awarding the Carriers damages they have incurred as a result of the City's actions;

(vi) Awarding the Carriers the costs, disbursements and attorneys' fees incurred in connection with this action pursuant to 42 U.S.C. §1983 and this Court's inherent equitable authority arising under Oregon common law in actions that protect the rights of others; and

(vii) Granting such other relief as this Court considers just and proper.

DATED this 31st day of May, 2005.

QWEST COMMUNICATIONS CORPORATION

By: s/Cynthia A. Mitchell
Cynthia A. Mitchell
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Qwest Communications Corporation

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By: s/ Arthur A. Butler
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Time Warner Telecom of Oregon, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2005, a true and correct copy of the foregoing FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT (FIRST) was served on the following via electronic mail and to the City of Portland by U.S.Mail:

Terence Thatcher
Benjamin Walters
Deputy City Attorney
City of Portland
1221 SW 4th Ave., Rm, 430
Portland, OR 97204


