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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

QWEST CORPORATION,

Plaintiff,

v.

UTAH TELECOMMUNICATIONS OPEN
INFRASTRUCTURE AGENCY, an interlocal
cooperative governmental agency; the CITY
OF RIVERTON, a Utah municipal
corporation.; and JOHN DOE
CONTRACTORS NO. 1 -- 10

Defendants.

Case No. 2:05CV00471 PGC
The Honorable Paul G. Cassell

**QWEST CORPORATION'S SECOND
AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF
AND DAMAGES**

Qwest Corporation ("Qwest"), by and through its attorneys, Stoel Rives LLP, files this Second Amended Complaint against the Utah Telecommunications Open Infrastructure Agency ("UTOPIA") the City of Riverton, Utah ("Riverton"), and John Doe Contractors No. 1 – 10 (the contractors with whom UTOPIA contracted for the construction and/or maintenance of its

SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF AND DAMAGES – Page 1

telecommunications network) alleging as follows:

I. INTRODUCTION

1. Qwest has provided telecommunications service to residents, businesses, and governmental, quasi-governmental, and educational entities in Utah for more than a century.

2. UTOPIA is an interlocal cooperative governmental agency whose members are various municipalities in the state of Utah, including, but not limited to, Riverton. UTOPIA was formed for the purpose of constructing, owning, and operating a telecommunications network to provide high-speed broadband voice, video, and data access on a wholesale basis to residential, commercial, and other customers within the boundaries of its member cities.

3. Due to its unique position as an interlocal cooperative governmental agency, UTOPIA takes advantage of financial benefits, such as exemptions from sales and property taxes, which enable it to construct and operate its network and offer its network services at below-market prices. These financial advantages, which are not available to Qwest or other private telecommunications companies that compete in the same wholesale and retail markets, provide UTOPIA with a distinct competitive advantage, which effectively prohibits other companies from competing with UTOPIA.

4. UTOPIA has entered into agreements with telecommunications service providers that allow the contracting companies to enjoy the use of UTOPIA's below-cost network and facilities. Only certain classes of companies may use UTOPIA's network.

5. Furthermore, the member cities' operation of UTOPIA creates an uneven telecommunications market that is neither fair and reasonable nor competitively neutral and nondiscriminatory, as required by section 253 of the Federal Telecommunications Act of 1996 (the "FTA"). For example, by requiring private parties to make in-kind contributions, the member cities force these private parties to subsidize the UTOPIA network. Riverton, for instance, is conditioning approval of new residential and commercial development activity on

developers providing and placing, at their own expense, underground conduit for communications services, and the conduit is deemed to be dedicated to the city. These mandated contributions, coupled with the other financial advantages available only to UTOPIA, enable UTOPIA to set below-market prices and compete unfairly against Qwest and other telecommunications providers.

6. Qwest seeks a declaration under the FTA, 47 U.S.C. § 151, *et seq.*, and the Utah Municipal Cable Television and Public Telecommunications Services Act, Utah Code Ann. § 10-18-101, *et seq.* (the “Utah Act”). Qwest seeks injunctive relief and damages related to unlawful pole attachments by UTOPIA and the John Doe Contractors No. 1 -- 10 resulting in injury to Qwest and a loss of service to Qwest’s customers. Qwest further seeks an award of attorneys’ fees under 42 U.S.C. § 1983.

II. JURISDICTION AND VENUE

7. This Court has “federal question” jurisdiction pursuant to 28 U.S.C. § 1331 because 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.* (the “TCA”), as amended by the FTA; the Supremacy Clause, U.S. Const. art. VI, cl. 2; and 42 U.S.C. § 1983. This Court also has federal question jurisdiction pursuant to 28 U.S.C. § 1337, because the FTA is an act of Congress regulating commerce.

8. This Court has “diversity” jurisdiction pursuant to 28 U.S.C. § 1332. Qwest is a Colorado corporation with its principal place of business in Denver, Colorado. UTOPIA and Riverton are not citizens of Colorado, and upon information and belief, the John Doe Contractors Nos. 1 – 10 are also not citizens of Colorado. The amount in controversy exceeds \$75,000.

9. This Court has supplemental jurisdiction over Qwest’s state law claims pursuant to 28 U.S.C. § 1367.

10. This Court has authority to issue declaratory judgment and other relief pursuant to 28 U.S.C. §§ 2201-02 because Qwest seeks a declaration that UTOPIA's exclusive financial advantages, other unique advantages, and sale, lease, or provision of its network on a wholesale basis at below-market prices violate the laws of the United States and the state of Utah.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b). UTOPIA and its member city, Riverton, are located in this District, and the majority of the events giving rise to this action occurred in this District.

III. PARTIES

12. Qwest is a telecommunications corporation organized and existing under the laws of the state of Colorado, with its principal place of business in Denver, Colorado. Qwest is a telecommunications carrier as defined in the FTA. Qwest provides telecommunications services in the state of Utah as a local exchange carrier, and is therefore subject to the jurisdiction of the Public Service Commission of Utah (the "PSC").

13. UTOPIA is an interlocal cooperative governmental agency and political subdivision of the state whose members are various municipalities organized and existing under the laws of the state of Utah. UTOPIA was formed for the purpose of constructing, owning, and operating a telecommunications network to provide high-speed broadband voice, video, and data access on a wholesale basis within the boundaries of its members. UTOPIA's members are governed by an Interlocal Cooperative Agreement.

14. Riverton is a municipal corporation duly organized under the laws of the state of Utah.

15. The John Doe Contractors No. 1 – 10 ("Doe Contractors") are the contractors and subcontractors with whom UTOPIA contracted for the construction and/or maintenance of its telecommunications network. In its Answer to Qwest's Amended Complaint, UTOPIA identified the following contractors under Utah Code Annotated § 78-27-38: Terta Tech, Inc.;

Sorensen Construction; Wasatch Electric; and B. Jackson Construction. However, UTOPIA has not delineated the scope of each contractor's involvement in the construction of UTOPIA's network, and as such information is completely within the possession or control of UTOPIA, Qwest cannot know without additional discovery the identity of the contractors responsible for damages associated with the unlawful pole attachments. Accordingly, Qwest reserves the right to identify, by name, the contractors responsible for damages associated with the unlawful pole attachments once they become known through discovery or otherwise.

IV. THE REGULATORY FRAMEWORK

A. The FTA

16. The modern telecommunications industry has rapidly developed from a monopoly environment to an increasingly competitive market. In the past 20 years, the industry has experienced substantial deregulation and technological change. Customers can now choose from a variety of services, including wireless services, services through existing telephone and cable lines, and services through high-speed fiber-optic cables.

17. On February 8, 1996, Congress passed the FTA. The stated purpose of the FTA is to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” FTA, Pub. L. No. 104-104, pmb1., 110 Stat. 56 (1996). Congress sought to facilitate this reshaping of the telecommunications industry landscape by introducing sweeping changes to remove barriers to entry, eliminate local monopolies, and stimulate fair and nondiscriminatory competition among telecommunications service providers.

18. The FTA amended the TCA by adding new sections, including 47 U.S.C. §§ 251-72, which were designed to remove local barriers to entry and open local telecommunications markets to competition as a matter of federal law. To this end, Congress initially preempted all

local statutes, regulations, and other legal requirements that prohibit or have the “effect of prohibiting” any entity from providing 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).

19. Although in enacting the FTA Congress preserved some authority for state and local governments, it specifically limited the extent of this authority. Under the FTA, local governments are limited to exercising reasonable and competitively neutral management of the public rights-of-way; *i.e.*, to regulating the physical process of installing and maintaining facilities in the public rights-of-way, and to recovering actual costs for such management access. Specifically, section 253(c) states:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or 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).

20. This narrow clause grants states and local governments only limited authority to manage the rights-of-way and to recover actual costs related to the use of the rights-of-way, both on a competitively neutral and nondiscriminatory basis.

21. Courts have routinely held that local governments fail to fit within section 253(c)’s “safe harbor” when they stray beyond “traditional rights-of-way matters” and, for example, grant to a certain company or companies competitive advantages that create an uneven and inequitable playing field.

22. Most importantly for purposes of this action, the FTA prevents states and local governments from acting in a manner that creates unnecessary competitive inequities among

telecommunications providers. Legal requirements that give a clear competitive advantage to some telecommunications providers but are not available to all other providers are contrary to the language and purpose of the FTA.

B. The Utah Act

23. As with the federal government, the Utah state government has recognized that customers are best served by free and open competition in the provision of telecommunications services. Accordingly, Utah adopted the Utah Act, which provides in part that:

(2) The Legislature finds that it is the policy of this state to:

(a) ensure that cable television services and public telecommunications services are provided through *fair competition consistent with the federal Telecommunications Act of 1996*

. . . .

(e) ensure that cable television services and public telecommunications services are each provided within a *consistent, comprehensive, and nondiscriminatory federal, state, and local government framework*; and

(f) ensure that when a municipality provides to its inhabitants cable television services, public telecommunications services, or both, and competes with private providers whose activities are regulated by the municipality, the *municipality does not discriminate against the competing providers of the same services*.

Utah Code Ann. § 10-18-101 (emphasis added).

24. Utah Code Ann. § 10-18-303(4)(a) prevents a municipality from granting “any undue or unreasonable preference[s] or advantage[s] to itself or to any private [telecommunications] provider” and from applying any legal requirements in a discriminatory manner. Utah Code Ann. § 10-18-303(4)(b) requires a municipality to “apply without discrimination as to itself and to any private provider the municipality’s ordinances, rules, and policies.”

25. Utah law therefore prevents UTOPIA from granting to itself or any other telecommunications providers unique advantages that are discriminatory and create competitive inequities in the telecommunications market.

V. THE FACTS

A. The Development of UTOPIA's Network

26. In 2002, several Utah municipalities entered into the Interlocal Cooperative Agreement to create UTOPIA. UTOPIA was created to build, own, and operate a fiber-to-the-home network to provide voice, video, and data services to the member cities and the residents and businesses within the boundaries of the member cities. UTOPIA provides its network services to retail customers by selling those services on a wholesale basis to other telecommunications providers that, in turn, deliver services to individual retail customers.

27. UTOPIA conducted a study to determine the feasibility of the network. The study concluded that the project's feasibility is tied directly to UTOPIA's ability to contract with a particular kind of service provider: "A tier-one service provider—one with national and international recognition and an extended track record of success." DynamicCity Metronet Advisors, *UTOPIA Feasibility Study, Part II: Financial Analysis* at 7 (2003). The study also noted UTOPIA's plan to enter into an initial contract with a specific service provider:

Prior to securing bonds, and prior to finalizing the architectural details of the network, UTOPIA will enter into a contract with a service provider to deliver a triple play service package across the Metronet. This contract is critical in securing the first bond.

Id. at 30.

28. On December 31, 2003, UTOPIA entered into a contract with AT&T Corporation ("AT&T"). The agreement memorializes a long-term relationship in which UTOPIA will rely on AT&T to actively market to potential subscribers and provide retail services, and AT&T will rely on UTOPIA to build and operate a state-of-the-art network that supports AT&T's retail

services. (*See* Non-Exclusive Network Access and Use Agreement Between UTOPIA and AT&T Corp. at 2.) UTOPIA has refused to disclose the financial details of its agreement with AT&T on the basis that public disclosure of these details “can reasonably be expected to result in unfair competitive injury” to AT&T. (*Id.* at 12.)

29. On information and belief, UTOPIA has also entered into agreements with at least two other service providers that are not considered “tier-one” providers and do not have “national and international recognition” but will be given access to the UTOPIA network for the purpose of providing services to retail customers.

30. On information and belief, UTOPIA has concluded that it will not enter into negotiations with other service providers at the present time unless potential service providers meet certain criteria dictated by UTOPIA such as enhancing UTOPIA’s ability to attract further funding.

31. UTOPIA, as a political subdivision of Utah, is eligible for certain sales and property tax exemptions that are not available to private telecommunications service providers such as Qwest. The sales tax exemption is available pursuant to Utah Code Ann. § 59-12-104(2). The property tax exemption is available pursuant to article XIII, § 3 of the Utah Constitution. These exemptions substantially reduce the costs of UTOPIA’s network as compared with the networks of other providers, such as Qwest, that are required to pay state sales and property taxes.

32. UTOPIA is constructing its network based on the foregoing financial advantages, which create gross competitive inequities. In the wholesale markets, Qwest and other telecommunications providers cannot offer their network services at the same below-market prices, because they are not able to obtain the same financial advantages.

33. On information and belief, UTOPIA offers its network services at below-market prices, thereby permitting the service providers with which it contracts to offer retail services at

below-market prices. UTOPIA is able to do so because of its position as an interlocal cooperative governmental agency with unique tax benefits that are not available to private service providers.

34. On information and belief, UTOPIA is also granted special treatment by its member cities, allowing it to, among other things, attach facilities to poles in a different manner than other telecommunications entities do. This preferential treatment further creates competitive inequities in violation of the FTA and Utah state law.

B. Discrimination

35. UTOPIA's exclusive and unique financial privileges, the benefits of which are also conferred on those service providers with which it contracts, discriminate against Qwest and other telecommunications providers in violation of the FTA and Utah law.

36. UTOPIA's unique financial advantages allow it to offer its services at below-market prices. These financial advantages unique to UTOPIA discriminate against Qwest and other telecommunications providers and are not competitively neutral. Only those companies that are willing and able to negotiate an agreement with UTOPIA are permitted to reap the benefits of UTOPIA's distinct financial advantages.

37. Because UTOPIA and the service providers that contract with UTOPIA have the advantage of providing service on a network offered at below-market prices, Qwest and other telecommunications providers are effectively prohibited from competing with them in the retail market.

38. Similarly, Qwest cannot compete for wholesale customers such as AT&T. UTOPIA can sell its network services to wholesale customers at below-market prices because of its unique financial advantages. In contrast, most of Qwest's wholesale prices are set by the PSC at cost-based Total Element Long Run Incremental Cost ("TELRIC") rates.

C. Advantages Bestowed by UTOPIA Member Cities

39. In addition to the unique financial advantages that UTOPIA enjoys because it is a political subdivision of the state and is able to secure financial advantages, certain member cities have chosen to further enhance the competitive position of UTOPIA and the private companies with which it contracts, by misusing their governmental authority in order to secure free or below-cost facilities and property rights and provide them to UTOPIA.

40. As a condition of granting access to the public rights-of-way, Riverton requires private land developers to provide the city with free conduit for future use by UTOPIA. Securing free or below-cost conduit for UTOPIA before UTOPIA constructs a fiber-optic network in Riverton will reduce UTOPIA's costs and speed its entry into the telecommunications market in that city, to the competitive disadvantage of Qwest and other telecommunications providers.

D. The Construction of UTOPIA's Network

41. Despite its unique financial and other advantages, the construction practices and procedures adopted by UTOPIA and/or used by the Doe Contractors are substandard, unlawful, dangerous, and destructive to the property of Qwest and others.

42. UTOPIA and/or the Doe Contractors have placed attachments and fiber-optic facilities on utility poles owned by Qwest without Qwest's permission, without compensating Qwest, without following the required application procedures, and without a pole attachment agreement covering the construction requirements, rental fees, and standards and limitations for use of Qwest's property. Qwest has engaged in negotiations with UTOPIA to enter into a pole attachment agreement. However, UTOPIA has not yet executed Qwest's pole attachment agreement and, as of the date of filing, has not removed its facilities from Qwest's poles.

43. All utility pole owners, including Qwest, require the signing of pole attachment agreements and collect prepaid annual rental fees from every entity that attaches facilities to their

utility poles. Pole attachment agreements specify construction and safety standards, allow for make-ready work, and require that subsequent attachments be placed in conformity with industry-standard separation guidelines so that the new attachments do not interfere with the rights or facilities of prior attaching entities.

44. Where Qwest has not installed its own poles, Qwest has placed its facilities on utility poles owned by other utilities. In each case, Qwest has entered into a pole attachment agreement with the pole owner, which agreement provides that other attaching entities will not interfere with Qwest's facilities.

45. UTOPIA has also executed pole attachment agreements with utilities other than Qwest, containing language prohibiting interference with the rights and facilities of prior attaching entities.

46. As it began constructing its network, UTOPIA and/or the Doe Contractors attached UTOPIA's facilities to poles that are also occupied by Qwest. In making these attachments, UTOPIA and/or the Doe Contractors frequently and repeatedly interfered with Qwest's preexisting facilities in various ways, including encroaching on Qwest's facilities in violation of minimum separation standards, moving Qwest facilities, removing facilities or structures installed by Qwest, and installing facilities in such a manner that they either touch or cross Qwest's facilities and cause midspan interference. These interferences can damage Qwest's telecommunications facilities and cause service outages.

47. In addition, UTOPIA and/or the Doe Contractors have created dangerous conditions through construction practices, including, but not limited to, failing to adhere to minimum clearance standards for separation with existing power facilities; leaving poles in an unsafe condition that is likely to injure technicians who may be required to climb poles to perform their duties; failing to protect the structural integrity of poles; failing to erect appropriate supports to keep poles upright while supporting the additional burden of UTOPIA's facilities;

and failing to meet the requirements of the National Electrical Safety Code (the “NESC”) by, among other things, creating midspan interference.

48. UTOPIA’s and/or the Doe Contractors’ hazardous construction practices are not limited to its pole attachments. While installing its facilities, UTOPIA and/or the Doe Contractors have negligently and repeatedly cut Qwest’s cables and service wires in multiple cities across the state during the last year. These cable cuts resulted in service outages to numerous residences, businesses and essential services, thereby causing damage to Qwest and Qwest’s customers, and endangering the public safety.

49. The most recent example of UTOPIA’s and/or the Doe Contractors’ negligence occurred on or about May 24, 2005 when UTOPIA and/or the Doe Contractors caused a major cable cut in Murray City. UTOPIA’s and/or the Doe Contractors’ negligence disabled multiple cables, including a 2100 pair cable and sheath damage to a second 2100 pair cable, two 1800 pair cables, a 900 pair cable, and a 600 pair cable that provided telecommunications services to a hospital, shopping mall, and numerous other businesses in Murray City. The damages caused by this one negligent act are still being calculated, but could be in excess of \$400,000.

50. Further exemplifying UTOPIA’s and/or the Doe Contractors’ reckless construction practices and behavior, UTOPIA’s contractor failed to accept the services of the locate company who offered, free of charge to UTOPIA and its contractors, to be on site during construction to aid UTOPIA and/or its contractor in identifying Qwest’s facilities for the purposes of preventing damage to those facilities. UTOPIA’s and/or the Doe Contractors’ behavior is negligent, and some of these unlawful cuts could have been prevented if UTOPIA’s contractor had accepted these services which were offered at no cost to UTOPIA and/or the Doe Contractors.

51. UTOPIA and/or the Doe Contractors negligently cut Qwest cables and/or service wires on many other occasions as well, each time causing damages to Qwest.

52. These safety hazards created by UTOPIA and/or the Doe Contractors pose an immediate danger of injury to utility workers, including Qwest’s technicians, to the property of Qwest and the other attaching entities, and to the public in general.

53. UTOPIA’s and/or the Doe Contractors’ construction practices violate the NESC, the requirements of local ordinances, industry construction standards (as reflected in the terms of pole attachment agreements executed by utilities and other attaching entities in the state of Utah), and other industry standards.

54. UTOPIA’s and/or the Doe Contractors’ construction practices have caused damage to Qwest’s telecommunications facilities. Qwest has been required to dispatch personnel and purchase materials to repair Qwest facilities and reattach Qwest facilities on a number of poles, and has thereby incurred damages in an amount to be proven at trial.

E. Notice and Complaint Provisions

55. Pursuant to an agreed stipulation filed with this Court, the parties acknowledge that had Qwest filed the notice required by U.C.A. § 63-30d-401 and the complaint required by U.C.A. § 10-18-306, such notice and complaint would have been denied, and UTOPIA thereby waives Qwest’s compliance with the notice and complaint provisions set forth in these code sections.

VI. CLAIMS AGAINST UTOPIA (ALL CLAIMS) AND THE DOE CONTRACTORS (SIXTH AND SEVENTH CLAIMS ONLY)

**A. FIRST CLAIM FOR RELIEF
(Federal Preemption)**

56. Qwest realleges and incorporates herein all preceding paragraphs.

57. Article VI, clause 2, of the U.S. 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 any State to the Contrary notwithstanding.”

58. UTOPIA’s abuse of its governmental status to advantage itself through the application of Utah Code Ann. § 59-12-104(2) and article XIII, § 3 of the Utah Constitution, its contracts with AT&T and other service providers, which confer UTOPIA’s exclusive and unique financial advantages on those private companies, and several of the regulations under which UTOPIA acts that provide it unique competitive advantages based upon its position as a governmental entity such as Resolution Nos. 03-04 and 04-09, constitute “State or local statute[s] or regulation[s], or . . . State or local legal requirement[s]” that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” within the meaning of section 253(a) of the FTA. 47 U.S.C. § 253(a).

59. For example, UTOPIA is using its unique governmental status to advantage itself in the marketplace by taking advantage of Utah Code Ann. § 59-12-104(2) and article XIII, § 3 of the Utah Constitution to avoid paying sales and property taxes. Other private carriers cannot take advantage of these tax exemptions. The tax exemptions create an inequitable telecommunications marketplace that materially inhibits the provision of telecommunications services in Utah.

60. UTOPIA’s service provider contracts have the effect of prohibiting Qwest and other telecommunications carriers from offering the same services and competing for the same customers as companies that are willing and able to contract with UTOPIA. As a result of unique financial advantages bestowed on UTOPIA by state and local statutes, regulations, and legal requirements, UTOPIA and its contract service providers are able to offer their services at artificially reduced costs, which grants them a distinct competitive market advantage.

61. Furthermore, UTOPIA has used its governmental power to enter into an Interlocal Cooperative Agreement with member city Riverton that provides financial benefits to UTOPIA in the form of in-kind contributions from the city. These in-kind contributions are obtained from residential and commercial developers who are required to provide underground conduit for communications services as a condition for approval of new development activity within the city. Riverton Ordinance No. 11-19-02-3.010. This underground conduit is placed at the developer's expense but is deemed to belong to the city.

62. The FTA does not allow local governments to impose legal requirements that are competitively nonneutral and discriminatory.

63. UTOPIA should be enjoined from offering its services at below-market prices, and should be required to either pay the applicable taxes or impute the amount of taxes into its rates.

B. SECOND CLAIM FOR RELIEF
(Declaratory Relief—Federal)

64. Qwest realleges and incorporates herein all preceding paragraphs.

65. Qwest brings this cause of action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, to obtain a declaration of its rights with respect to UTOPIA's exclusive financial privileges and service provider contracts, which confer those privileges on private companies and put Qwest and other telecommunications providers at an unfair competitive disadvantage.

66. As alleged above, an actual justiciable controversy has arisen and now exists within the meaning of 28 U.S.C. § 2201 as to whether these agreements and privileges are preempted by section 253 of the FTA under the Supremacy Clause of the U.S. Constitution and whether they violate 42 U.S.C. § 1983. Accordingly, declaratory relief is appropriate and necessary to determine the extent of Qwest's rights and UTOPIA's duties and authority.

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

C. THIRD CLAIM FOR RELIEF
(Violation of the Utah Act)

68. Qwest realleges and incorporates herein all preceding paragraphs.

69. For purposes of the Utah Act, Qwest is a private provider of public telecommunications services.

70. For purposes of the Utah Act, AT&T is a private provider of public telecommunications services.

71. On information and belief, for purposes of the Utah Act, the other service providers with which UTOPIA has contracted to allow use of the UTOPIA network are private providers of public telecommunications services.

72. Pursuant to Utah Code Ann. §§ 10-18-101 and 10-18-303, UTOPIA may neither act in a discriminatory manner nor grant any undue or unreasonable preference or advantage to itself or any private provider of public telecommunications services.

73. UTOPIA's abuse of its governmental status to obtain exclusive and unique financial and other advantages and UTOPIA's agreements with AT&T and other service providers, to the extent that they bestow the benefits of UTOPIA's exclusive financial privileges as a political subdivision of the state, grant UTOPIA and its contracted private service providers unfair competitive advantages and thereby discriminate against Qwest and other telecommunications providers, in violation of the Utah Act.

D. FOURTH CLAIM FOR RELIEF
(Violation of State and Local Laws—Industry and Safety Standards)

74. Qwest realleges and incorporates herein all preceding paragraphs.

75. UTOPIA's facilities installations on utility poles shared by Qwest fail to meet industry standards, violate the municipal codes of member cities and similar standards, violate the pole attachment agreements to which UTOPIA is a party, and violate the NESC.

76. Industry standards, municipal codes, pole attachment agreements, and, most particularly, the NESC are all designed to preserve and enhance the safety of installations on utility poles in order to protect the physical safety of utility personnel, utility and attaching-entity property, and the general public. These standards are also designed to ensure that the telecommunications and other services that are relied on by the public are not unnecessarily disrupted.

77. UTOPIA's failure to adhere to relevant standards and safety requirements in the construction and installation of its network facilities places Qwest personnel and others who work on utility poles and in the vicinity of UTOPIA's network in danger of injury. As UTOPIA continues with its construction, each additional pole installation that fails to adhere to safety and construction standards increases the danger of injury to Qwest technicians and the public.

78. UTOPIA's failure to adhere to relevant standards and safety requirements in the construction and installation of its network facilities has damaged, and will continue to damage, Qwest's property, and increases the likelihood that the telecommunications services that Qwest provides to its customers will be unnecessarily disrupted. In addition, with each new UTOPIA installation that violates relevant standards and safety requirements, the damage to Qwest's facilities mounts and the likelihood of unnecessary service disruptions increases.

79. Qwest is entitled to injunctive relief to prevent further substandard and dangerous installations of facilities by UTOPIA, protect Qwest personnel from injury, protect its property from physical damage, and avoid the disruption of its telecommunications services to the public.

80. Qwest is also entitled to an injunction requiring UTOPIA to bring all of its existing facilities into compliance with the NESC, industry standards, the municipal codes of

cities in which the facilities are located and similar standards, and the pole attachment agreements to which UTOPIA is a party.

E. FIFTH CLAIM FOR RELIEF
(Trespass and Conversion)

81. Qwest realleges and incorporates herein all preceding paragraphs.

82. UTOPIA has attached its facilities to utility poles owned by Qwest without Qwest's permission, without compensating Qwest, without allowing Qwest to perform any necessary make-ready work, without having followed the required application procedures, and without having an executed pole attachment agreement covering construction requirements, rental fees, and the standards and limitations for use of Qwest's property.

83. Although Qwest is required to offer other telecommunications carriers "nondiscriminatory access" to its poles, ducts, and rights-of-way under the FTA, federal and state law entitle Qwest to collect "just and reasonable rates" for the use of its poles and infrastructure. 47 U.S.C. §§ 224(f), 271(c)(2)(B)(iii); Utah Code Ann. § 54-4-13(1). UTOPIA's actions violate federal and state law. Unlike UTOPIA, other entities attaching to Qwest's utility poles have executed pole attachment agreements and are paying for their use of Qwest's property. UTOPIA has also failed to adhere to the appropriate attachment order on Qwest's poles.

84. UTOPIA's use of Qwest's poles without permission and without compensation amounts to trespass on Qwest's poles and conversion of Qwest's valuable pole space for UTOPIA's use.

85. Qwest is entitled to injunctive relief requiring UTOPIA to immediately refrain from attaching UTOPIA facilities to any Qwest pole, requiring UTOPIA to remove all of its facilities presently attached to Qwest's poles until such time as it executes a pole attachment agreement with Qwest, and requiring UTOPIA to pay Qwest, at the time a pole attachment

agreement is signed, the annual attachment fee along with any interest or fines assessed for unauthorized pole attachments.

F. SIXTH CLAIM FOR RELIEF
(Trespass to Chattels)

86. Qwest realleges and incorporates herein all preceding paragraphs.

87. UTOPIA's and/or the Doe Contractors' substandard and unsafe construction practices with regard to the installation of its fiber-optic network on utility poles owned by Qwest and those occupied by Qwest but owned by others amount to trespass on Qwest's telecommunications facilities and infrastructure that has resulted in physical damage to said facilities and infrastructure.

88. The physical damage includes compromising the structural integrity of Qwest's poles; encroaching on and moving Qwest facilities, thereby causing damage to cables; removing facilities or structures installed by Qwest; exposing Qwest's facilities to damage from the elements; and installing facilities in a manner that results in midspan interference. This physical damage, in turn, causes damage to Qwest's telecommunications facilities and creates service outages affecting Qwest's customers.

89. As a direct result of UTOPIA's and/or the Doe Contractors' trespass on Qwest's facilities and infrastructure, Qwest has been forced to dispatch service technicians to repair and reinstall Qwest's telecommunications facilities, resulting in personnel and material costs in an amount to be proven at trial.

G. SEVENTH CLAIM FOR RELIEF
(Negligence)

90. Qwest realleges and incorporates herein all preceding paragraphs.

91. During installation of telecommunications facilities, providers have a duty to exercise reasonable care to avoid damaging existing facilities. UTOPIA and/or the Doe Contractors breached that duty and caused excessive damage to Qwest and its customers.

92. UTOPIA's and/or the Doe Contractors' negligence in attaching facilities to existing poles damaged Qwest's telecommunications facilities and compromised Qwest's network.

93. As a direct result of UTOPIA's and/or the Doe Contractors' negligence, Qwest has been forced to dispatch service technicians to repair and reinstall Qwest's telecommunications facilities, resulting in personnel and material costs in an amount to be proven at trial. This claim does not include damages directly related to the cable cuts, as that claim was dismissed without prejudice pursuant to a stipulation between UTOPIA and Qwest.

H. EIGHTH CLAIM FOR RELIEF
(42 U.S.C. § 1983)

94. Qwest realleges and incorporates herein all preceding paragraphs.

95. 42 U.S.C. § 1983 provides, in relevant part, that

[e]very 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

96. UTOPIA is a "person" within the meaning of 42 U.S.C. § 1983.

97. The U.S. Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8.

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

99. UTOPIA's unique financial privileges, which it confers on certain private companies through its service provider contracts, impose a burden on interstate commerce. That burden clearly outweighs those privileges' benefits, if any, to the public.

100. The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”

101. Section 1 of the Fourteenth Amendment to the U.S. Constitution 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”

102. Qwest is entitled to enjoy the rights, privileges, and immunities secured to it under the Due Process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

103. Qwest has spent billions of dollars building its telecommunications facilities in Utah, and is providing services to the citizens of Utah. Qwest has to compete on a competitively neutral basis for customers within the borders of UTOPIA’s member cities. The Due Process clauses of the U.S. Constitution prohibit UTOPIA from depriving Qwest of its vested property rights in pursuing its proper business interests, without due process of law.

104. Qwest is also entitled to enjoy its rights and privileges under the FTA, 47 U.S.C. § 253, *et seq.*, which secures against preempted and impermissible state and local laws and regulations.

105. At all times relevant to this action, UTOPIA has acted under color of state and local law.

106. UTOPIA’s exclusive financial benefits, which it has conferred on private companies through its service provider contracts, have deprived, and will continue to deprive, Qwest of its vested property rights, without due process of law. These actions have also deprived Qwest of the rights, privileges, and immunities secured to it under section 253 of the FTA, the Commerce Clause, and the Due Process clauses.

107. As a result of UTOPIA’s conduct, Qwest has been and will be impeded in its ability to provide telecommunications services to the public, and has suffered and will suffer

irreparable damage to its goodwill and reputation. In addition, Qwest will continue to lose customers and income in an amount that exceeds \$75,000 as a direct and proximate result of UTOPIA's unfair financial advantages and enforcement of its unlawful and invalid telecommunications contracts.

VII. CLAIM AGAINST RIVERTON

A. Violation of the FTA

108. Qwest realleges and incorporates herein all preceding paragraphs.

109. Riverton's practice of securing free or below-cost conduit for the future use of UTOPIA amounts to abuse of that city's regulatory authority and unique governmental position in favor of UTOPIA, to the disadvantage of other competing network and telecommunications service providers. For example, Riverton has entered into an Interlocal Cooperative Agreement with UTOPIA in anticipation of a fiber-optic cable network within the city. Riverton Ordinance No. 11-19-02-3. The ordinance requires developers to provide underground conduit for the city as a condition for approval of new development activity within the city. Riverton Ordinance No. 11-19-02-3.010. "All costs of the underground conduit shall be the responsibility of the developer[,]" and the conduit "shall be deemed to be dedicated to the City to accommodate the provision of communications services." *Id.*

110. Riverton's discriminatory action will permit UTOPIA and its contractors to offer services to customers at below-market rates, which will give UTOPIA and its contractors an unfair competitive advantage.

111. This discriminatory action destroys the level playing field of competition and has "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," in violation of section 253 of the FTA.

112. The FTA does not allow local governments to create legal requirements that are competitively nonneutral and discriminatory.

113. Accordingly, Riverton's practice of securing free or below-cost facilities from private contractors for the benefit of UTOPIA should be declared unlawful, as preempted by the FTA under the Supremacy Clause of the U.S. Constitution, as violating the Utah Act, and Riverton should be enjoined from taking such actions in the future.

VIII. REQUEST FOR RELIEF

WHEREFORE, Qwest respectfully requests that this Court issue an Order and Judgment:

1. Declaring that henceforth UTOPIA must not use its unique position as an interlocal cooperative governmental agency and political subdivision of the state to advantage itself or its customers, but rather must operate in a competitively neutral manner;
2. Declaring that UTOPIA's exclusive financial advantages and anticompetitive contracts with its service providers, which allow private parties to reap the benefits of UTOPIA's financial advantages, have the effect of prohibiting Qwest's ability to provide interstate or intrastate telecommunications services and are therefore preempted by section 253 of the FTA under the Supremacy Clause of the U.S. Constitution, and that henceforth UTOPIA may no longer advantage itself or its customers through its unique and exclusive financial advantages, but must pay sales and property taxes or impute the amount of the taxes into its rates;
3. Declaring that UTOPIA's exclusive financial advantages and its anticompetitive contracts with its service providers violate the Utah Act, and that henceforth UTOPIA may no longer advantage itself or its customers through its unique and exclusive financial advantages, but must pay sales and property taxes or impute the amount of the taxes into its rates;
4. Declaring that Riverton's abuse of its regulatory authority and unique governmental position in securing free or below-cost facilities from private contractors or other persons or entities for the benefit of UTOPIA violates section 253 of the FTA and is preempted under the Supremacy Clause of the U.S. Constitution and violates the Utah Act, and enjoining

Riverton from henceforth requiring private contractors or other persons or entities to provide in-kind facilities for the benefit of UTOPIA;

5. Enjoining UTOPIA from violating the NESC, industry standards, the municipal codes of cities in which it is located and similar standards, and the pole attachment agreements to which UTOPIA is a party in any future construction of its fiber-optic network, and requiring UTOPIA to bring all existing installations into compliance with said standards, codes, and agreements;

6. Enjoining UTOPIA from attaching to any Qwest-owned pole until such time as it negotiates and executes a pole attachment agreement that is also executed by Qwest, and requiring UTOPIA to remove all of its facilities presently attached to Qwest's poles;

7. Awarding Qwest damages against UTOPIA and the Doe Contractors in an amount to be proven at trial for the removal of, or damage sustained to, Qwest's telecommunications facilities as a result of UTOPIA's and/or the Doe Contractors' unpermitted, substandard, and unsafe attachments, and for conversion of Qwest's pole space;

8. Awarding Qwest damages against UTOPIA and the Doe Contractors in an amount to be proven at trial for the damage caused by UTOPIA's and/or the Doe Contractors' negligence in installing UTOPIA's facilities;

9. Awarding Qwest its costs, disbursements, and attorneys' fees incurred in connection with this action, pursuant to 42 U.S.C. § 1983; and

10. Awarding Qwest such other relief as this Court considers just and proper.

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Dated this 23rd day of January, 2006 at Seattle, Washington.

Respectfully submitted,

/s/ John H. Ridge

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES** on the named persons indicated below by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by facsimile or electronic mail), to be sent by the following method(s), on the date set forth below:

- mailing with postage prepaid
- hand delivery
- facsimile
- e-mail transmission via CM/ECF:

Attorneys for Utah Telecommunications Open Infrastructure Agency	Steven W. Allred 1007 E. North Bonneville Dr. Salt Lake City, UT 84103	swallred@hotmail.com
	David J. Shaw UTOPIA 1385 West 2200 South Building F, Suite 302 West Valley City, UT 84119	dshaw@utopianet.org
Attorney for the City of Riverton	David L. Church Blaisdell and Church 5995 South Redwood Road Salt Lake City, UT 84123	bclaw@xmission.com

DATED this 23rd day of January, 2006.

STOEL RIVES LLP

By: /s/ John H. Ridge

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