

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION**

INSIGHT KENTUCKY PARTNERS II, L.P.

Plaintiff,

vs.

LOUISVILLE/JEFFERSON COUNTY  
METRO GOVERNMENT,

LOUISVILLE METRO COUNCIL

Defendants.

Case No. 3:16-CV-625-CRS

**COMPLAINT**

Plaintiff Insight Kentucky Partners II, L.P. (“Insight”), now a subsidiary of Charter Communications, Inc., files this Complaint against Defendants Louisville/Jefferson County Metro Government (“Louisville Metro” or “Metro”) and the Louisville Metro Council (“Metro Council”) (collectively, “Louisville”), alleging as follows:

**PRELIMINARY STATEMENT**

A fundamental principle of our federal and state governmental system is that the government may not favor one similarly situated member of the press or other speaker over another without special justification. This principle is enshrined in the First and Fourteenth Amendments of the United States Constitution, as well as in similar constitutional provisions in the Commonwealth of Kentucky. In this case, without cause or justification, Louisville Metro has violated the principle by allowing Insight’s two wireline video competitors to operate and thereby communicate with the public under materially less burdensome regulations and franchise obligations. When requested by Insight to level the burdens and obligations among these similarly situated speakers by reducing Insight’s regulatory burdens to those imposed on its

direct competitors, Louisville Metro refused. Insight thus has no alternative but to seek judicial relief from this Court.

As it has advised Louisville Metro on more than one occasion, Insight does not oppose the entry of additional video competitors in Louisville—or indeed elsewhere. Understanding that the video market place is increasingly competitive, Insight does not shy from the challenges offered by additional competition and expects to be successful wherever it stands on an equal footing with its competitors. But fair competition requires that the government, whatever its motives, treat similarly situated speakers the same and not unfairly weight one side of the regulatory scale.

Insight, a long-time wireline video provider in Louisville, currently operates under a burdensome franchise and regulatory scheme. When BellSouth Telecommunications, LLC (“AT&T”) brought its directly competitive wireline video service to Louisville in 2009, Louisville Metro allowed it to operate without any local franchise or local regulation. And when Google Fiber Kentucky, LLC (“Google”) negotiated with Louisville Metro to offer its competitive video service in the Metro area this year, Louisville Metro allowed it to avoid almost all of the regulatory burdens under which Insight has been operating for decades without offering Insight the opportunity to operate on those same terms. When faced with the prospect of additional wireline video competition in the Metro area, Louisville Metro could have relaxed the regulatory burdens under which Insight operates to match those afforded to Google. It refused to do so. This stark difference in regulatory treatment among similarly situated communications providers, all transmitting video programming from their facilities to their customers over their networks, in effect means that it is less burdensome and expensive for Insight’s competitors to

speak in Louisville. The result is an unlevel playing field that undermines, rather than promotes, competition and consumer choice by distorting the marketplace for video services.

At the same time, in a further effort to encourage Google to build facilities in the Metro area, Louisville Metro passed an ordinance purporting to authorize new competitors—that is to say, Google—to take possession of the distribution wires and cables of existing communications companies—that is to say, Insight—and to move them to different locations on utility poles. This so-called “One-Touch” ordinance allows Google to take these actions without prior notice and puts strict limitations on Insight’s ability to uncover any possible damage caused to its plant by its competitor or even to assure that it is able to recover the costs of necessary cures. The One-Touch procedures also could allow Insight’s competitors (intentionally or unintentionally) to damage or disrupt Insight’s ability to serve its customers, creating an inaccurate perception in the market about Insight’s service quality and harming its goodwill. These procedures also threaten public safety as Insight is responsible for providing service to critical infrastructure in Louisville Metro, in addition to its customers’ access to 911 and other emergency services. And they intrude upon the exclusive jurisdiction of the Public Service Commission of Kentucky to regulate the use of privately-owned utility poles.

Therefore, Insight now requests this Court to require Louisville Metro to do what federal and state law requires: bring parity in regulation to Louisville by applying the same regulatory burdens on Insight that it applies to AT&T and Google so that all similarly situated speakers are treated equally in their ability to communicate with the public. Insight also requests the Court to disallow Louisville’s action allowing competitors to trespass on, convert, take possession of, and potentially damage, Insight’s property.

## **PARTIES**

1. On May 18, 2016, through a series of transactions, Charter Communications, Inc. became the ultimate parent of Insight Kentucky Partners II, L.P. (“Insight”).

2. Plaintiff Insight is a Delaware limited partnership with its principal place of business in Connecticut. None of Insight’s partners, or any corporations or members of limited liability companies within Insight’s ownership chain, are citizens of Kentucky.

3. Defendant Louisville Metro is a consolidated local government, consisting of the City of Louisville and Jefferson County, with the capacity to sue and be sued. It is organized pursuant to the provisions of Kentucky Revised Statutes Chapter 67C.

4. Defendant Louisville Metro Council is responsible for formulating and adopting policy for Louisville Metro. It is currently comprised of council members Jessica Green, Barbara Shanklin, Mary C. Woolridge, David Tandy, Cheri Bryant Hamilton, David James, Angela Leet, Tom Owen, Bill Hollander, Pat Mulvihill, Kevin Kramer, Rick Blackwell, Vicki Aubrey Welch, Cindi Fowler, Marianne Butler, Kelly Downard, Glen Stuckel, Marilyn Parker, Julie Denton, Stuart Benson, Dan Johnson, Robin Engel, James Peden, Madonna Flood, David Yates, and Brent Ackerson.

## **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Insight alleges violations of federal law. Specifically, this action arises under the First, Fifth, and Fourteenth Amendments and the Supremacy Clause of the Constitution of the United States, and 42 U.S.C. § 1983. The Court has supplemental jurisdiction over Insight’s state law claims pursuant to 28 U.S.C. § 1367.

6. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Complete diversity exists between the parties. Insight is a citizen of Delaware with a principal place of business in Connecticut. Louisville is a consolidated local government organized under the laws of the Commonwealth of Kentucky. The matter in controversy far exceeds the sum or value of \$75,000. Insight seeks to protect rights that are worth far more than the diversity threshold and is threatened with damage that also exceeds the threshold.

7. The Court's authority to grant declaratory relief is based upon 28 U.S.C. §§ 2201-2202 because an actual controversy exists.

8. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b) because the acts and omissions giving rise to Insight's claims occurred in this district.

### **GENERAL ALLEGATIONS**

#### **A. The Three Wireline Video Providers in Louisville Use the Public Rights of Way in the Same Way to Deliver the Same Types of Video Programming in Direct Competition with One Another.**

9. Wireline video providers use facilities placed in public rights-of-way to transmit video programming to their customers. To do so, the wireline providers require governmental consent to use the public rights-of-way. The existing wireline video providers in Louisville include Insight and BellSouth Telecommunications, LLC ("AT&T"). Google Fiber Kentucky, LLC ("Google"), has applied for, and has been granted, authority by Louisville Metro to become a wireline video provider in the Metro area by constructing its own wireline video network and providing services in Louisville that compete directly with video services offered by Insight and AT&T.

10. Each of the three wireline video providers that offer services in Louisville, or propose to, uses facilities that are placed in or along the municipal rights-of-way in essentially the same way. They each run a network of wires and cables, including fiber optic wires, from

central locations directly to their customers' businesses and residences. Most of the wires and cables are hung aerially on existing utility poles along the rights-of-way.

11. Insight, AT&T and Google will each provide video services in direct competition to one another. Like Insight and AT&T, Google proposes to provide video services that will transmit video programming from its network facilities to its customers.

12. Insight, AT&T, and Google will each transmit prescheduled video programming, including local broadcast stations, national non-broadcast programming services, and premium entertainment channels (i.e., ABC, CBS, ESPN, CNN, or HBO), at the same time and on the same schedule as the programming is being delivered from the programming provider. All three wireline video providers also will transmit on-demand and pay-per-view programming.

13. Video consumers in Louisville, for which Insight, AT&T and Google will compete, will access the programming provided by the three wireline video providers in the same way. A customer of any of these providers will use a remote control or other home equipment to call up and to change channels of prescheduled video programming, or to order on-demand content. When a customer of Insight, AT&T, or Google wants to watch video programming, he or she will interact in some way with the wireline video provider's network to select a particular stream of video programming that is delivered from the provider's network facilities to the customer's equipment.

14. To the customers, and potential customers, of each of these wireline video providers in Louisville, the three wireline providers' video services will be considered largely equivalent. Except to the extent that consumer decisions are influenced by how the disparate regulatory burdens placed on the providers impact their ability to provide services, customers will choose among the wireline video providers based on price and service, ease of use, and

individual special programming or types of programming that one competitor has developed or chosen to provide that is not offered by its competitors.

**B. Louisville Metro Has Imposed A Regulatory Regime on Insight That is Much More Onerous Than it has Imposed on its Direct Competitors.**

**i. Insight’s Wireline Video Service in Louisville.**

15. Insight provides a variety of communications services—including video programming, video-on-demand, high-speed Internet access, and digital phone service—to residents throughout Louisville and in the surrounding areas. Insight and its predecessor entities have served Louisville for decades.

16. Insight’s video programming includes hundreds of channels, including local broadcast stations, national cable channels (e.g., A&E, AMC, Animal Planet, BET, Bravo, CNN, Disney Channel, Discovery, ESPN, and more), and premium entertainment channels (e.g., HBO, Showtime). Insight also provides on-demand and pay-per-view programming. Among its video offerings, Insight carries exclusive programming that it has developed that is not available to its competitors, such as a channel of programming called “cn | 2” (standing for “Commonwealth Network” on Channel 2), which provides 24-hour weather, a specific forecast for Louisville delivered by meteorologists live, as well as local sports and political coverage. Insight also carries public, educational and governmental (“PEG”) programming that, on information and belief, is not carried by AT&T.

**ii. Insight’s Wireline Video Service is Subject to Onerous Regulation by Louisville Metro.**

17. Louisville Metro subjects Insight to stringent regulation as a “Cable Communications System” under Chapter 116 of the Louisville/Jefferson County Metro Government Code of Ordinances (“Metro Code”). A copy of Chapter 116 is attached to this Complaint as Exhibit (“Ex.”) 1.

18. Section 116.16 defines a “Cable Communications System” as “[a]ny facility that, in whole or in part, receives directly or indirectly, and amplifies or otherwise modifies signals which transmit non-broadcast services, and/or programming broadcast or furnished by one or more television or radio stations or similar facility and distributes such signals by wire or cable to subscribing members of the public who pay for such service.” Ex. 1. Insight does not dispute that it operates a “Cable Communications System” as defined by Section 116.16.

19. The regulatory provisions in Louisville Metro’s “Regulations for Cable Communications System” in Chapter 116.01-116.50 set forth basic requirements for all franchises to be awarded to cable communications providers, including extension of service requirements, customer service obligations, privacy regulations, performance measurements, interconnection requirements with other similar networks, rate regulation, requirements regarding street occupancy, reporting requirements, handling complaints, and the requirement to obtain a franchise from Louisville Metro, among others.

20. The extensive regulatory requirements in Chapter 116 exact a significant cost on Insight. Not only do some of these requirements exact a direct cost, but regulation in the form of reports, government review and requirements as to how Insight deals with its customers have a significant impact on Insight’s ability to operate its business efficiently and cost effectively.

21. In Louisville, Insight has been required to operate under a franchise agreement adopted via Ordinance No. 76, Series 1998 (as amended) (the “Franchise Agreement”), effective May 31, 1998. The Franchise Agreement is attached as Exhibit 2. The Franchise Agreement’s



initial term expired in 2010. Insight timely initiated franchise renewal negotiations under the Federal Cable Act, however, and the Franchise Agreement remains in full force and effect.<sup>1</sup>

22. The Franchise Agreement imposes substantial costs and other burdens on Insight that materially impact its ability to operate flexibly and cost effectively in delivering services to the subscribing public. Insight's franchise creates obligations related to system construction, system extension to serve new customers, customer service, an institutional network, PEG channels and a PEG studio, and more. It also authorizes extensive regulatory intrusion into Insight's affairs, including by imposing burdensome record-keeping and reporting requirements. Together, these franchise obligations impact the cost and flexibility of Insight's delivery of services.

**iii. AT&T's Wireline Video Service in Louisville.**

23. AT&T receives video programming and distributes it for pay to the subscribing public over a wired network in Louisville under its "U-verse" brand. AT&T's facilities, consisting of fiber optic and copper cables and associated equipment, use Metro's rights-of-ways in the same manner as Insight's facilities. AT&T serves its video customers via wires and cables that are largely strung on utility poles, and buried beneath the ground, along and in the rights-of-way in Louisville.

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<sup>1</sup> In 2015 Louisville adopted Resolution No. 107, Series 2015, authorizing Charter Communications, Inc. to become the ultimate parent company of Insight. The Resolution states: "The Metro Government confirms that the Franchise is valid and outstanding, in full force and effect." Resolution No. 107, Series 2015 § 2. Also, in a "Settlement Agreement" dated February 12, 2012, Louisville Metro and Charter agreed that Insight has a right to operate under the Franchise Agreement until the renewal process provided under federal law has been completed. Louisville Metro has indicated that it is not interested in negotiating a renewal franchise at this time.

24. Unlike its treatment of Insight, Louisville Metro does not regulate AT&T as a “Cable Communications System” under the Metro Code. AT&T takes the position that it operates under an historic state-issued telecommunications franchise and does not require a separate video franchise to operate in the Metro area.<sup>2</sup> As a result, although AT&T provides equivalent video services to its customers in the Metro area, Louisville Metro does not regulate AT&T’s video services or require AT&T to operate under a Metro franchise. Upon information and belief, AT&T is required by Louisville Metro only to comply with generally applicable permitting procedures for its work in the right-of-way. AT&T thus has avoided all of the burdensome regulation and franchise requirements under which Insight operates.<sup>3</sup>

**iv. Google’s Wireline Video Service in Louisville.**

25. Google intends to receive video programming and distribute it for pay to the subscribing public over a wired network in Louisville. Google is in the process of “build[ing] a fiber optic network in the public rights of way” in Louisville, “deploying both aerial and underground infrastructure.” *See* Ex. 3, Communications Franchise Application for Google Fiber Kentucky, LLC, at Ex. C. Upon completion of construction, Google “intends to offer video and Internet services for purchase” in Louisville. *See id.* at Ex. A.

26. Google’s video offering includes a full lineup of local broadcast and cable channels, including many of the same channels offered by Insight. Upon information and belief,

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<sup>2</sup> No court has entered a final judgment addressing AT&T’s position. Reversing on procedural grounds a district court’s ruling on the issue, the Sixth Circuit observed that “the video component of [AT&T’s service] may or may not fall within the rubric of AT&T’s perpetual telephone franchise.” *See Mediacom Se. LLC v. Bellsouth Telecomms., Inc.*, 672 F.3d 396 (6th Cir. 2012). Insight does not, in this lawsuit, take any position regarding the legality of AT&T’s position.

<sup>3</sup> Louisville Metro cannot simply choose not to regulate AT&T, while at the same time imposing and enforcing burdensome local regulations and franchise requirements on Insight.

Google’s video offering will include A&E, AMC, Animal Planet, CNN, Discovery, Disney Channel, ESPN and more, in addition to on-demand and pay-per-view offerings. *See* Ex. 4, Google’s Channel Guide for Nashville, Tennessee.<sup>4</sup>

27. Although Google intends to provide video services that will be functionally equivalent from a customer’s perspective to the video services offered by Insight and although Google’s system will use the rights-of-way in the same way as Insight’s system, Louisville Metro is not regulating Google as a “Cable Communications System” under its “Regulations for Cable Communications Systems” in Sections 116.01-116.50 of the Metro Code. Instead, Louisville Metro intends to treat Google as a “Communications Service” provider, subject to only minimal regulations in Sections 116.70-116.77 of the Metro Code, and not under the intrusive regulatory regime applied to Insight. *See* Ex. 5, Ordinance No. 88, Series 2016.

28. Section 116.70 defines a “Communications Service” as “the transmission via facilities, in whole or in part, of any writings, signs, signals, pictures, sounds or other forms of intelligence through wire, wireless or other means, including, but not limited to, and ‘telecommunications service,’ ‘enhanced service,’ ‘information service,’ or ‘Internet service,’ as such terms are now, or may in the future be, defined under federal law, and including all instrumentality, facilities, conduit, apparatus (‘Communications Facilities’), and services (among other things, the receipt, forwarding, and delivery of telecommunications) incidental to or designed to directly or indirectly facilitate or accept such transmission. This term does not include ‘Cable Service’<sup>5</sup> or ‘Open Video System Service,’ but ‘Cable Services’ and ‘Open Video

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<sup>4</sup> Upon information and belief, Google has not yet released a channel guide for Louisville.

<sup>5</sup> “Cable Service” is defined by reference to federal law, 47 U.S.C. § 522(6) (“[T]he term ‘cable service’ means—(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”).

System Service' shall be subject to separate franchising requirements and applications. This term does not include over-the-air radio or television broadcasts to the public at large licensed by the FCC or any successor thereto." Ex. 1.

29. On February 11, 2016, Louisville Metro approved an "Interlocal Cooperation Agreement" between Louisville Metro and the municipalities within Jefferson County with franchise authority. *See* Ex. 6. The Interlocal Agreement authorized Louisville Metro to advertise and process bids for a single, standard franchise agreement (the "Uniform Franchise") for communications infrastructure services providers seeking to serve Louisville Metro and the municipalities in Jefferson County. Louisville Metro and the other franchising authorities in Jefferson County agreed that the Uniform Franchise would be administered according to Metro Code Sections 116.70-116.77 and Louisville Metro's permitting process. Before the Uniform Franchise can take effect in a particular community, the applicable franchising authority must review and approve it.

30. On June 9, 2016, Louisville Metro awarded Google a Uniform Franchise under which Google will operate throughout Louisville Metro under Section 116.70 *et seq.* of the Metro Code.

31. Google's Uniform Franchise incorporates the minimal regulations contained in Sections 116.70-116.77. *See* Ex. 5, Uniform Franchise ¶¶ 2, 5, 7. Under the Uniform Franchise, Google must comply with the applicable requirements in the Louisville Metro Public Works & Assets Utility Policy, and with Louisville Metro's permitting and inspection requirements related to work in the right-of-way. *Id.* ¶¶ 4, 7-8. Google's Uniform Franchise also provides that, in the event Kentucky law changes to allow Louisville Metro to impose a franchise fee, Google's

franchise fee shall be calculated in accordance with Section 116.71(K) of the Metro Code. *Id.*

¶ 5.<sup>6</sup> Section 116.71(K) would require payment of a “Communications Franchise Fee” equal to “(1) \$100 per antenna in the rights-of-way; plus (2) [a] fee equal to the lessor of (i) \$50,000, or (ii) the sum of” various amounts charged on a per-foot basis for wires and bundles of wires in the rights-of-way.”

32. The Uniform Franchise and Metro Code combine to impose only the following limited requirements on Google:

- Indemnify Louisville Metro and maintain insurance and bonds for any damages that Louisville Metro might incur in connection with Google’s provision of service;
- Install conduit provided to Google by Louisville Metro; and
- Pay Louisville Metro an annual franchise fee in an amount not to exceed \$50,000, if state law is changed to permit such a fee.

33. In the Uniform Franchise, Louisville Metro also committed to act on applications submitted by Google for a right-of-way permit within 10 days, or else it would waive any concerns or objections and the permit would be deemed granted. *See* Ex. 5, Uniform Franchise ¶ 7. Louisville Metro also agreed to use its best efforts to notify Google of “any unique features and/or conditions . . . which could have the potential to hinder, delay or alter construction or significantly increase the cost thereof.” *Id.*

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<sup>6</sup> Kentucky law currently prohibits local franchise fees. *See* K.R.S. § 136.660. A challenge to the constitutionality of that law is pending before the Kentucky Supreme Court. *See Kentucky CATV Assoc. v. City of Florence, Kentucky*, Nos. 2015-SC-000178-D & 2015-SC-000181-D (Consolidated).

**C. Louisville Metro’s Regulatory Scheme Unlawfully Subjects Insight, AT&T, and Google—Wireline Providers of Substantially Equivalent Video Services—to Disparate and Discriminatory Obligations.**

34. When Google’s network is completed, Google, AT&T and Insight will compete as wireline video providers providing substantially equivalent video services using Louisville Metro’s rights-of-way.

35. Insight understands that Louisville Metro takes the position that Google (like AT&T) uses Internet Protocol (“IP”) packets to deliver its digital video signals to customers and that somehow makes a difference in how Google and Insight should be treated by local government. Insight also delivers digital video signals to its customers, including by packetizing those signals using IP technology in parts of its network, although the signals are no longer in IP packets when they reach most customers’ homes. But whatever the differences in technology used in the delivery of video programming to customers via wires and cables installed in, over and along city streets, for purposes of the regulatory and franchise burdens imposed by Louisville Metro on Insight, any differences are immaterial and legally irrelevant. Both delivery systems use the rights-of-way in the same way. Both deliver the same types of video programming to their customers. And both services are functionally equivalent from a customer’s perspective.

36. The technology the companies use to transmit video programming to their customers—whether they use radio frequency signals, digital signals, or digital signals packetized with IP technology—does not create any meaningful differences justifying disparate regulatory treatment by Louisville Metro. Louisville Metro’s regulations governing Cable Communications Systems are indeed focused on the functional use of the system to deliver video services to the subscribing public and not keyed to the type of technology used in the delivery.

37. The contrast in regulatory burdens imposed by Louisville Metro on Insight on the one hand and Google and AT&T on the other is stark. Among other things, the applicable franchises and Metro Code provisions impose the following disparate regulatory burdens:

- Insight must provide three PEG channels, *see* Ex. 2, Franchise Agreement § 46(1), provide live coverage of council meetings, school board meetings, a schedule of events in the community, and other local programming on these channels, *see id.*, and maintain a public access studio, *see id.* § 46(2). Insight has shouldered the cost of constructing several public access studios over the years to comply with these requirements, including a new studio built four years ago. Google has no PEG obligations. Nor does AT&T.
- Insight must construct and maintain an institutional network (“I-Net”) for governmental uses and offer Louisville capacity on the I-Net for no charge. *See id.* § 47. The I-Net Insight maintains for Metro’s use is extensive, connecting scores of locations across the Metro area with Insight’s fiber. Google has no I-Net obligations. Nor does AT&T.
- Insight must maintain an office in Louisville and must maintain books, accounts, and records of any complaints that must be made available to Louisville. *See* Ex. 1, Metro Code §§ 116.46, 116.45. Google has no requirement to maintain an office or records for inspection. Nor does AT&T.
- Insight must maintain a repair and maintenance service capable of responding to complaints or requests within 24 hours. *See id.* §§ 116.29(D). Google has no obligation to maintain a repair and maintenance service, or respond to complaints within a specific time period. Nor does AT&T.
- Insight must offer subscribers a pro rata credit or rebate to compensate subscribers for any service interruptions. *See id.* § 116.29(E). Google has no obligation to compensate subscribers for service interruptions. Nor does AT&T.
- Insight must submit to system performance measurement tests. *See id.* § 116.32. Google has no such obligation. Nor does AT&T.
- Insight must file annually a full schedule of all subscriber and user rates with Louisville, *see id.* § 116.35, and must also provide an annual report regarding its activities over the preceding year, *see id.* § 116.41; Ex. 2, Franchise Agreement §§ 11, 12. Google has no annual reporting requirements. Nor does AT&T.

- Insight must notify customers periodically of their rights and responsibilities, *see* Ex. 2, Franchise Agreement §§ 13(1), 14, notify customers of any changes in billing or payment practices, *see id.* § 15(1), provide subscribers with credit for any service outages, *see id.* § 16, and comply with a number of additional requirements to communicate with customers regarding products, prices, channel positions, billing, refunds, and credits, among other things, *see id.* § 17(4). Google has no obligation to provide subscribers with notices about rights, billing and payment, or service outages. Nor does AT&T.
- Insight must maintain 24/7 customer telephone access lines, *see id.* § 17(2)(a), answer customer calls within 30 seconds, *see id.* § 17(2)(b), ensure that customers receive a busy signal less than 3% of the time, *see id.* § 17(2)(c), and provide a customer service center and bill payment location within Louisville Metro, *see id.* § 17(2)(d). Google has no obligation to provide customer access lines or a physical location for customer service and bill payment. Nor does AT&T.
- Insight must perform standard installations within seven days after an order has been placed, *see id.* § 17(3)(a), begin work on any service interruptions within 24 hours of receipt of notice of the interruption, *see id.* § 17(3)(b), provide a maximum four hour appointment window for any installation or customer call, *see id.* §§ 17(3)(c)-(e), and adhere to prescribed response times for any service requests, *see id.* § 19. Google's Uniform Franchise contains no timelines within which it must install service or repair any reported problems. Nor does AT&T have any such obligations.
- Insight must maintain service logs. *See id.* § 20. Google has no such obligation. Nor does AT&T.
- Insight must maintain sufficient repair parts and personnel. *See id.* § 23. Google has no such obligation. Nor does AT&T.
- Insight must adhere to a proscribed schedule for the imposition of late fees and collections on past due accounts. *See id.* § 25(2). Google has no such obligation. Nor does AT&T.
- Insight must allow customers to downgrade service, *see id.* § 26, and resolve customer complaints within 3 days, *see id.* § 27. Google has no such obligation. Nor does AT&T.
- Insight must follow a preventive maintenance program. *See id.* § 36. Google has no such obligation. Nor does AT&T.
- Insight must install and extend its communications service offerings to newly developed geographic areas within Louisville Metro. *See* Ex. 1,



Metro Code § 116.28. Insight also must extend service to any area within Louisville Metro that has a density of 25 home passings per aerial mile of wire, or 35 home passings per underground mile of wire. *See* Ex. 2, Franchise Agreement § 32. Google does not have any obligation to extend service. Nor does AT&T.

- If Kentucky law were changed to allow the collection of local franchise fees, Insight would be required to pay Louisville franchise fees in the amount of three percent of its total gross revenues derived from cable service in Louisville Metro. *See id.* § 39. Google's franchise fee would be capped at \$50,000 per year. *See* Ex. 5 ¶ 5; Ex. 1, Metro Code § 116.71(K).

38. Insight incurs substantial costs meeting these obligations each year. Google will not be required to incur any of these costs. Nor will AT&T.

39. The substantial costs incurred by Insight to comply with its burdensome regulatory requirements—which are avoided by Google and AT&T—have a material impact on Insight's ability to provide service and compete for customers. Metro's discriminatory regulatory treatment thus contravenes its stated goal of bringing competition to Louisville by distorting the market for video services and harming consumer choice.

40. In addition to disparate regulatory burdens, the Uniform Franchise also affords Google favorable permitting rules that are denied Insight. For example, Louisville Metro will use its best efforts to notify Google—in advance of its permit applications—of any unique conditions that could hinder its construction or increase its costs. And Metro will act on Google's permit applications within 10 days, or else those applications will be deemed granted. Insight is not afforded these benefits.

41. Neither federal nor state law authorizes Louisville Metro to establish two different regulatory regimes for entities that are providing substantially equivalent services using substantially similar equipment placed in the public rights-of-way.

**D. Louisville Metro Refused to Level the Playing Field for Insight on the One Hand and Google and AT&T on the Other.**

42. Prior to and after Louisville Metro granted Google its Uniform Franchise, Insight requested that Metro afford Insight similar regulatory treatment to that afforded Google.

43. Insight sent its first letter on June 9, 2016, prior to Louisville Metro's vote on Google's Uniform Franchise. Insight's letter explained its position that it would be inappropriate and unlawful for Metro to require Insight to operate under more burdensome and less favorable obligations than Google. If Louisville proceeded to award the Uniform Franchise, Insight indicated it would seek comparable regulatory treatment.

44. After Louisville Metro awarded the Uniform Franchise, Insight sent a letter on July 28, 2016, formally requesting that Metro and its member governments reduce the regulatory burdens on Insight to mirror those allowed for Google.

45. Louisville Metro could have extended to Insight the same relaxed regulatory framework it developed for Google or the total lack of regulations Metro allows AT&T. Even after Metro awarded Google its more favorable franchise and decided to regulate Google under the light-touch of its Communications Ordinance, Metro could have achieved parity by agreeing to subject Insight to the same relaxed regulation with similar light franchise obligations. Metro chose instead to keep Insight under the yoke of an extensive and burdensome regulatory regime while allowing Google and AT&T to provide the same video services with virtually no regulatory burdens or intrusion.

46. In its August 19, 2016 response to Insight's two letters, Metro "politely" declined to treat Insight equivalently to the regulatory treatment it has allowed for Google.

**E. Louisville Metro’s Regulatory Actions Also Favor Google’s Access to “Essential” Infrastructure At Insight’s Expense.**

47. In addition to imposing greater obligations and burdens on Insight relative to Google and AT&T, Metro has conferred additional benefits and privileges on Google at Insight’s direct expense. On February 11, 2016, Metro adopted its so-called “One-Touch Ordinance,” codified at Metro Code § 116.72(D), to streamline and reduce the cost to Google of completing a competitive video network. The One-Touch Ordinance allows Google to rearrange or relocate Insight’s wires and facilities, without providing advance notice or adequate assurance that it will cure problems its tampering creates. *See id.* The Ordinance is designed to reduce Google’s costs of constructing its network and speed time to market for delivery of its services to the subscribing public.

**i. Wireline Video Providers Rely On Essential Infrastructure Owned By Utilities.**

48. Owing to economic, environmental, aesthetic, local zoning and rights-of-way restrictions, wireline video providers do not have a practical alternative to relying on existing utility pole and conduit networks owned and maintained by electric power and telephone utilities to construct their networks. Courts, legislative bodies, and administrative agencies have recognized this reality. The United States Supreme Court has observed that “[c]able television operators, in order to deliver television signals to their subscribers, must have a physical carrier for the cable; in most instances, underground installation of the necessary cables is impossible and impractical. Utility compan[ies’] poles provide, under such circumstances, virtually the only practical medium for the installation of television cables.” *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987).

49. The United States Congress and state legislatures have taken steps to ensure wireline providers are able to access this “essential” facility on just and reasonable terms.

Kentucky confers exclusive jurisdiction on the Kentucky Public Service Commission (the “Commission”) to regulate the rates and services of regulated utilities. K.R.S. § 278.040(2). That jurisdiction extends to the use of the facilities of all utilities. K.R.S. § 278.280. And it includes authority to regulate the rates, terms, and conditions as well as safety and engineering issues applicable to pole attachments made by wireline providers. *See, e.g., In re CATV Pole Attachment Tariff of Gen. Tel. Co. of Ky.*, Admin. Case 251-8, Order ¶¶ 9(e)-(h) (Ky. PSC May 31, 1983).<sup>7</sup> It is settled law that providing attachment to utility poles is a “service” subject to regulation by the Commission. *Ky. CATV Assoc. v. Volz*, 675 S.W.2d 393 (Ky. Ct. App. 1983).

50. The Commission has the authority to “investigate any practice or act affecting or relating to the service of the utility or any service in connection therewith,” including practices that involve pole attachments, “which may be unreasonable, unsafe, insufficient, or unjustly discriminatory.” K.R.S. § 278.260.

51. The Commission has required utility pole owners within its regulatory jurisdiction to establish the terms and condition of attachment in tariffs that are approved by the Commission. The two primary pole owners in Louisville are AT&T and Louisville Gas & Electric Company (“LG&E”). AT&T’s tariff provides that the person seeking adjustments to existing facilities on AT&T’s poles must negotiate with the owners of those facilities for the rearrangement of their facilities and structures. LG&E’s pole attachment tariff similarly provides that the responsibility for adjusting the facilities on LG&E’s poles lies with the owner of the facilities. Both the pole owners and those parties that make attachment to the poles are required by law to observe the requirements in these tariffs. The Commission’s regulation of

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<sup>7</sup> Kentucky has “reverse preempted” the FCC’s regulation of pole attachments since 1981. *See, e.g., Re Cable Television Pole Attachments*, Admin. Case No. 251, Order (Ky. PSC Sept. 17, 1982).

pole attachment service and the pole owners' tariffs has preemptive effect. No municipal government has authority to impose inconsistent obligations that interfere with Commission jurisdiction over utility service. *Peoples Gas Co. of Kentucky, Inc. v. City of Corbin*, 625 S.W.2d 848 (Ky. 1981).

52. These state requirements ensure uniform, fair, and reasonable access to rights-of-way and existing infrastructure. They also establish reasonable, investment-backed expectations for attaching entities related to the movement of their facilities. And their consistent application allows wireline video service providers to compete on a level playing field in the market for video services.

**ii. Insight's Services Depend On the Reliability of its Network Infrastructure In Louisville.**

53. To construct and operate its communications system in the Louisville area, Insight has invested millions of dollars to attach its wires and facilities to utility poles there. Insight made this investment in reliance on its contractual agreements with pole owners, and its state and federal law rights to reasonable and nondiscriminatory access to the rights-of-way. *See* K.R.S. § 278.260; 47 U.S.C. § 224.

54. "Make-ready" is the term used where work is required on utility poles to accommodate a new attachment.<sup>8</sup> Until the adoption of Metro's One-Touch Ordinance, parties in Louisville accommodated new attachment requests in an orderly manner according to the terms of their pole attachment agreements with LG&E and other pole-owners. No parties in Louisville had the right to touch, take temporary possession of, or move property belonging to

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<sup>8</sup> "Make-ready" work involves rearranging the utility's and other attachers' existing facilities on the pole and, in some cases, installing a new, taller or stronger pole and transferring existing facilities to the new pole. The entity requesting the new attachment usually must pay for the work necessary to accommodate its requested attachment.

other communications providers without consent or at the very least ample advance notice and an opportunity for the existing attaching parties to move their own facilities. When Insight made attachments to utility poles in Louisville, it understood and expected that it had the responsibility and the right to alter or modify its own facilities, the same as other attaching entities. Insight's agreements, for example, required that it pay for the costs incurred by pre-existing attachers when they were required to move their facilities to accommodate Insight's attachments.

55. Insight's distribution facilities, including its fiber optic cable, are subject to severe damage when mishandled, and that damage is not always immediately apparent, either externally or as measured by the electronic pathways that can be affected over time.

56. Insight depends on its wires and facilities to provide video and other communications services to its customers in Louisville, including links to critical 911 emergency service. Interference, kinks, dings, or other damage to Insight's facilities by a competitor or another third party would affect the reliability of the delivery of its services to its customers, and its relationships with its customers.

57. To ensure the reliability of its network, Insight invests substantial resources vetting and approving contractors who are responsible for performing installation, repairs, and maintenance on its attachments. Insight's contractors understand Insight's communications network, they have contractual privity with Insight, and they are able (and obligated) to follow procedures and take the steps necessary to minimize the possibility that their work on Insight's facilities will interfere with Insight's ability to provide services to its customers.

58. Recognizing the importance of Insight's control over its wires and facilities, Insight's Franchise Agreement with Louisville requires that Louisville Metro provide advance

notice if Insight will be required to alter or relocate its facilities in the rights-of-way. *See* Ex. 2, Franchise Agreement § 30.

**iii. Louisville Metro’s “One-Touch” Regulations Exceed Its Authority and Threaten to Disrupt Insight’s Services.**

59. On February 11, 2016, Metro adopted the One-Touch Ordinance, amending § 116.72 of the Metro Code governing communications service providers’ access to and use of utility poles in the public rights-of-way. On information and belief, the One-Touch Ordinance was proposed to give Google special rights in the construction of its communications network in Louisville vis-à-vis competitors who have already constructed their communications networks.<sup>9</sup> The Ordinance was adopted by the Metro Council over Insight’s objection.

60. The One-Touch Ordinance purports to allow a communications service provider seeking to make a new pole attachment to “relocate or alter attachments or facilities of any Pre-Existing Third Party User as may be necessary to accommodate Attacher’s Attachment using Pole Owner approved contractors.” Ex. 7, Ordinance No. 021, Series 2016 § 2(D)(2) (adding Metro Code § 116.72(D)(2)).

61. The entity seeking a new attachment is not required to provide advance notice prior to moving or altering a pre-existing third party user’s facilities unless the new attacher understands that the work it plans to undertake will “cause[] or would reasonably be expected to cause a customer outage.” *Id.* It is unclear how a new attacher could reliably make this determination without consulting the third party to understand the likely effect of its work on the

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<sup>9</sup> Although the Ordinance would ostensibly apply to any “attacher,” including Insight, it was conceived and adopted to attract Google to Louisville and to assist Google’s network construction. In practice, Google will be able to take advantage of the One-Touch procedures to tamper with tens of thousands of Insight’s attachments, while Insight will use it sparingly, if at all, given that its network is already constructed.

third party's network. If the new attacher is wrong, moreover, the resulting customer outages would cause severe damage to the third-party's reputation and customer goodwill, for which the third party is not provided recourse against the new attacher. The One-Touch Ordinance thus shifts all of the risk of a wrong decision by the new attacher to third parties with existing facilities. And it creates incentives for a new attacher to make close calls against providing advance notice, putting the third-party's network and customer relationships at risk, particularly where the new attacher intends to compete against the third party.

62. Where it has not provided advance notice, the new attacher must give notice that it has relocated or altered a pre-existing third party user's attachments within 30 days *after* performing that work. The pre-existing third party attacher is then given only 14 days to inspect the relocation or alteration of its facilities by the provider and make any claim of damage or other complaint. *Id.*

63. The new attacher is not required to use contractors that have been vetted and approved by the pre-existing third party attachers.

64. While new attachers must indemnify the pole owners for any damages caused, they are not required to indemnify pre-existing third party attachers for any damages that result from the new attacher's interference with, relocation of, and alteration to the third party's facilities. *Id.*

65. The One-Touch Ordinance invades the province of the Commission to regulate pole attachments, including the tariffs of the pole owners that have been approved by the Commission through established procedures. The Commission, not Louisville Metro, has exclusive authority to regulate the use of utility facilities by wireline providers. *See* K.R.S. § 278.040(2). And the Commission's regulation of pole attachments—including practices



related to the safe and reasonable use of utility poles by third-party wireline providers—leaves no room for Louisville’s One-Touch Ordinance.

66. The One-Touch Ordinance also violates Insight’s right to maintain its exclusive control over its property and not to give up that right in the absence of the payment of just compensation. The One-Touch Ordinance purports to give new attachers who compete directly with Insight, like Google, a government-sanctioned license physically to invade, take possession of, move, and interfere with Insight’s property. The Ordinance gives Insight no opportunity to object to its competitor’s invasion of or tampering with its facilities, to approve the contractors who are allowed to take possession of its property, or to perform the work itself.

67. And the One-Touch Ordinance effectively insulates Google from responsibility for negligent work on or damage to Insight’s network and facilities. The Ordinance prescribes an unworkable inspection period that affords insufficient time for Insight to inspect Google’s work. Indeed, the Ordinance gives Google more than twice as much time to notify Insight of work Google has already performed (30 days), than it gives Insight to inspect that work (14 days). This means Google could batch 30 days’ worth of work into a single notice—potentially implicating work on hundreds or thousands of Insight’s attachments located all across town—and making it practically impossible for Insight to inspect and document any problems. Even if Insight could inspect all of that work in a mere 14 days, it would require Insight to allocate substantial resources away from its own projects to make sure that Google’s work has not damaged its network, giving Google a competitive advantage. And, even if Insight were to inspect the work and find safety or other problems that need to be addressed, the One-Touch Ordinance does not require Google to promptly cure the problem or provide an enforcement mechanism to assure that it will.

68. Damage to Insight's network that is not discovered or timely corrected, moreover, could result in service outages affecting Insight's customers. Insight's customers would inaccurately attribute these service outages to Insight—not Google—harming Insight's customer relationships and goodwill. And under its Franchise Agreement and the Metro Code, Insight would be required to compensate its customers for outages caused by Google. *See* Ex. 1, Metro Code § 116.29(E); Ex. 2, Franchise Agreement § 16. They also would create a skewed perception in the marketplace of Insight's service quality compared to that of other providers. In addition, these outages threaten public safety as Insight is responsible for providing service to critical infrastructure in Louisville Metro and customers' access to 911 and other emergency services.

69. Indeed, the One-Touch Ordinance effectively shifts responsibility for negligent work from Google, the entity performing the work, to Insight. The One-Touch Ordinance does not require Google to indemnify Insight (only pole-owners). And there is no privity of contract between Insight and Google, or between Insight and the contractors Google hires to work on Insight's facilities. As a result, Insight cannot contractually allocate risk and responsibility between it, Google, and Google's contractors. If Google's contractors created a dangerous condition that resulted in injury—for example, by hanging Insight's existing wires too low across a street, causing a traffic accident—Google would have no contractual obligation to defend or offset the costs incurred by Insight in defending and/or resolving a claim arising from the condition Google created. This would be the case even if Insight inspected the facility within 14 days and notified Google of the danger, and Google failed to remedy it.

70. The One-Touch Ordinance thus compounds and expands on the disparate regulatory regime established under Metro's franchises and Metro Code.

**COUNT I**

**Violation of First and Fourteenth Amendments to U.S. Constitution (42 U.S.C. § 1983) and Section 8 of the Kentucky Constitution**

71. Insight incorporates by reference the allegations contained in Paragraphs 1-70 as if fully restated herein.

72. The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech or of the press . . . .” U.S. Const. Amend. I.

73. Section 8 of the Kentucky Constitution provides that “[e]very person may freely and fully speak, write and print on any subject . . . .”

74. Insight “engages in and transmit[s] speech,” and is “entitled to the protection of the speech and press provisions of the First Amendment.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)). Insight is entitled to engage in speech activity free from discriminatory and unwarranted interference by any government entity.

75. Louisville Metro is a state actor.

76. Louisville Metro has allowed AT&T to operate in the Metro area without accepting any of the burdens or regulatory treatment imposed on Insight.

77. Louisville Metro granted Google a Uniform Franchise on terms materially more favorable and less burdensome and regulatory than the Franchise Agreement it required Insight to accept.

78. Louisville Metro allows Google to operate under the minimal regulations found under Metro Code §§ 116.70-116.77, while it requires Insight to operate under the extensive and burdensome regulations found under Metro Code §§ 116.01-116.50.

79. Louisville Metro acted under color of law when it allowed Google and AT&T to operate under favorable terms and less burdensome regulatory treatment, while imposing more burdensome terms and regulatory treatment on Insight and then refusing to offer similar favorable terms and regulatory treatment to Insight.

80. Louisville Metro's favorable treatment of Google and AT&T and its more burdensome treatment of Insight (as compared to Google and AT&T) does not serve a compelling government interest. Nor does it advance an important government interest unrelated to the suppression of free speech.

81. Louisville Metro's more burdensome treatment of Insight is not narrowly tailored. And, even if Metro had an important government interest, its discriminatory treatment of Insight burdens substantially more speech than necessary to advance that interest.

82. Louisville Metro's favorable treatment of Google and AT&T and more burdensome treatment of Insight (as compared to Google and AT&T) is state action that favors one group of speakers (Google and AT&T) over another (Insight).

83. Louisville Metro's more burdensome treatment of Insight impairs Insight's ability to speak relative to Google's and AT&T's ability to speak.

84. Louisville Metro's actions infringe upon Insight's freedom of speech.

85. Insight has been and will continue to be harmed by Louisville Metro's violation of Insight's freedom of speech.

86. Insight is entitled to declaratory relief and other appropriate relief under 42 U.S.C. § 1983 to remedy Louisville Metro's constitutional violations.

**COUNT II**

**Violation of Fourteenth Amendment to the U.S. Constitution (42 U.S.C. § 1983) and  
Section 2 of the Kentucky Constitution**

87. Insight incorporates by reference the allegations contained in Paragraphs 1-86 as if fully restated herein.

88. The Fourteenth Amendment to the United States Constitution provides “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction equal protection of the laws.” U.S. Const. Amend. XIV, § 1.

89. Section 2 of the Kentucky Constitution provides that the state shall not exercise “[a]bsolute and arbitrary power over the lives, liberty and property of freemen.”

90. Insight has a vested property interest in its network in Louisville, including its wires, equipment, and other facilities placed in the rights-of-way.

91. Insight, AT&T and Google will provide video services in Louisville in competition with one another.

92. Insight, AT&T and Google all will use similar facilities placed in or along public rights-of-way in Louisville, including cables and fiber-optic wires, to transmit video programming from their facilities to their customers.

93. Insight, AT&T and Google all will transmit prescheduled video programming, including local broadcast stations, national non-broadcast programming services, and premium entertainment channels, at the same time and on the same schedule as the programming is being delivered from the programming provider. Each of these video providers also will transmit on-demand and pay-per-view programming.

94. Video customers in Louisville will access the programming provided by Insight, AT&T or Google in the same way, by interacting with equipment to select and change channels of video programming.

95. The video programming services offered by Insight, AT&T and Google will be viewed by their customers in Louisville as functionally equivalent.

96. AT&T, Google and Insight own and operate businesses that are similar in all respects in how they use the rights-of-way in Louisville.

97. Louisville Metro granted Google a Uniform Franchise on terms more favorable and less regulatory than the Franchise Agreement it imposed on Insight and which it continues to enforce.

98. On information and belief, Louisville Metro allows AT&T to operate in Louisville without regulating it either as a Cable Communications System under Sections 116.01-116.50 of the Metro Code or as a Communications Service Provider under Sections 116.70-116-77 of the Code.

99. Louisville Metro allows Google to operate under the minimal regulations found under Metro Code §§ 116.70-116.77, while it requires Insight to operate under the extensive and burdensome regulations found under Metro Code §§ 116.01-116.50.

100. Louisville Metro's disparate treatment affords AT&T and Google numerous rights and privileges it denies Insight and imposes fewer obligations on AT&T and Google relative to Insight.

101. There is no justifiable basis for Louisville Metro's preferential treatment of AT&T and Google over Insight.

102. Louisville Metro's preferential treatment of AT&T and Google denies Insight equal protection of the laws.

103. Louisville Metro acted under color of law when it denied Insight equal protection of the laws.

104. Insight has been and will continue to be harmed by Louisville Metro's violation of Insight's right to equal protection of the laws.

105. Insight is entitled to declaratory relief and other appropriate relief under 42 U.S.C. § 1983 to remedy Louisville Metro's constitutional violation.

### **COUNT III**

#### **Preemption by K.R.S. § 278.010 *et seq.***

106. Insight incorporates by reference the allegations contained in Paragraphs 1-105 as if fully restated herein.

107. Kentucky law vests the Commission with exclusive authority over the regulation of rates and service of regulated utilities, *see* K.R.S. §§ 278.040(2) & 278.260.

108. Pole attachments made by operators of cable television systems are facilities of the utilities, and the Commission regulates the rates, terms, and conditions as well as safety and engineering issues applicable to pole attachments. *See, e.g., In re CATV Pole Attachment Tariff of Gen. Tel. Co. of Ky.*, Admin. Case 251-8, Order ¶¶ 9(e)-(h) (Ky. PSC May 31, 1983).

109. State law does not permit local authorities to establish a regulatory scheme for pole attachments that is different than the regulations that apply to the pole attachments made by all attachers, as Louisville Metro has attempted to do.

110. The Commission also has exclusive jurisdiction to investigate unreasonable, unsafe, and unjustly discriminatory practices that involve and relate to pole attachments. K.R.S. § 278.260.

111. State law does not permit local authorities to establish a regulatory scheme for pole attachments that is unreasonable, unsafe, and discriminatory, as Louisville Metro has attempted to do.

112. The One-Touch Ordinance allows Google to interfere with and damage Insight's communications network with impunity, and creates a number of engineering and public safety hazards.

113. The One-Touch Ordinance violates and exceeds Louisville Metro's authority under state law by creating a new regulatory scheme not authorized by statute.

114. Insight has been harmed, and will continue to be harmed, by Louisville Metro's attempt to create and enforce an unreasonable, unsafe, and discriminatory regulatory regime through its One-Touch Ordinance.

115. Accordingly, Insight seeks a declaration that Louisville Metro's One-Touch Ordinance violates and is preempted by the K.R.S. § 278.010 *et seq.* and the Commission's regulatory authority.

#### **COUNT IV**

#### **Violation of Fifth and Fourteenth Amendments to U.S. Constitution (42 U.S.C. § 1983) and Section 13 of the Kentucky Constitution**

116. Insight incorporates by reference the allegations contained in Paragraphs 1-115 as if fully restated herein.

117. The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides: "No person shall be . . . deprived of life,



liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”

118. Section 13 of the Kentucky Constitution provides: “[N]or shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.”

119. Insight has a vested property interest in its physical network in Louisville, including its wires, equipment, and other facilities attached to utility poles in Louisville.

120. The One-Touch Ordinance purports to allow Insight’s competitor, Google, to repeatedly handle, move, interfere with, and potentially damage Insight’s wires, equipment, and other facilities attached to utility poles in the right-of-way, which threatens to destroy Insight’s investment in and ability to use its facilities to provide service to its customers.

121. The One-Touch Ordinance constitutes an unlawful taking of Insight’s property, by the state action of a municipal ordinance that allows a competitor repeatedly to trespass upon, take possession of, move and potentially damage its facilities, for a private use, without just compensation in violation of the Fifth Amendment.

122. Louisville Metro acted under color of law when it adopted the One-Touch Ordinance and authorized an unlawful taking of Insight’s property.

123. Insight has been and will continue to be harmed by the One-Touch Ordinance and Louisville Metro’s violation of Insight’s constitutionally protected property rights.

124. Insight is entitled to declaratory relief and other appropriate relief under 42 U.S.C. § 1983 to remedy Louisville’s constitutional violation.

**COUNT V**

**Violation of 42 U.S.C. §§ 1983 and 1988**

125. Insight incorporates by reference the allegations contained in Paragraphs 1-124 as if fully restated herein.

126. Insight has rights, privileges, and immunities secured by the United States Constitution and laws of the United States, including under the First, Fifth, and Fourteenth Amendments.

127. Louisville Metro's discriminatory regulatory treatment of Insight, AT&T and Google confers preferential status on AT&T's and Google's ability to engage in and transmit speech relative to Insight's ability to engage in and transmit speech, in violation of the First Amendment.

128. Louisville Metro's discriminatory regulatory treatment of Insight, AT&T and Google, who are similarly situated competitors providing video services, denies Insight equal protection under the laws by conferring additional rights and privileges on AT&T and Google, and by imposing minimal or no regulatory burdens on AT&T and Google, which it denies Insight, in violation of the Fourteenth Amendment.

129. Louisville Metro's One-Touch Ordinance authorizes an unlawful taking of Insight's property, by a competitor, for a private use, without just compensation in violation of the Fifth Amendment.

130. Louisville Metro acted under color of law when it denied Insight's rights, privileges and immunities granted by the United States Constitution.

131. As a direct and proximate result of Louisville Metro's violations of the United States Constitution, Insight has suffered harm that cannot be remediated at law, including deprivation of rights.

132. Accordingly, Insight is entitled to declaratory relief to remedy Louisville Metro's constitutional violations, and its attorneys' fees under 42 U.S.C. § 1988.

### **COUNT VI**

#### **Declaratory Judgment Under 28 U.S.C. §§ 2201 & 2202**

133. Insight incorporates by reference the allegations contained in Paragraphs 1-132 as if fully restated herein.

134. An actual controversy has arisen and now exists between Insight and Louisville Metro with respect to Louisville Metro's violation of Insight's federal and state constitutional rights and compliance with state law.

135. Insight disputes the lawfulness of Louisville Metro's preferential treatment of AT&T and Google by affording AT&T and Google greater rights and privileges than Insight and subjecting AT&T and Google to less onerous obligations and regulatory burdens. Insight also disputes the lawfulness of AT&T's One-Touch Ordinance, which authorizes an unlawful taking of Insight's property by Insight's competitor, Google, for a private use, without just compensation.

136. Pursuant to 28 U.S.C. §§ 2201 and 2202, a judicial determination of the respective rights of the parties is necessary and appropriate under the circumstances, in addition to such further necessary or proper relief the Court deems appropriate.

**PRAYER FOR RELIEF**

With respect to its Complaint, and based on the foregoing, Insight prays for the following relief:

1. Declare that Louisville Metro violated the First Amendment of the United States Constitution and Section 8 of the Kentucky Constitution because its discriminatory treatment of Insight relative to AT&T and Google impairs Insight's ability to engage in and transmit speech.

2. Declare that Louisville Metro violated the Fourteenth Amendment of the United States Constitution and Section 2 of the Kentucky Constitution by denying Insight equal treatment under the law relative to its direct competitors, Google and AT&T.

3. Declare that Louisville Metro must treat similarly situated competitors in the market of wireline video services with parity, and that it cannot afford preferential regulatory treatment (whether through its franchises or Metro Code) to AT&T and Google that it denies Insight.

4. Order Louisville Metro to afford Insight the same regulatory treatment that it affords to Google.

5. Declare that the One-Touch Ordinance violates and is preempted by Kentucky state law delegating to the Commission the exclusive authority to regulate pole attachments and ensure the safe, reliable, and nondiscriminatory use of poles for the attachment of communications facilities.

6. Declare that the One-Touch Ordinance violates the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution by purporting to authorize an unconstitutional taking of Insight's property.

7. Award Insight the costs of this action to the fullest extent permitted by law, including but not limited to costs and attorneys' fees recoverable under 42 U.S.C. §§ 1983 and 1988.

8. Award Insight any and all additional relief as the Court deems just and proper.

This 30<sup>th</sup> day of September, 2016.

/s/ Michael W. Oyler

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