

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>CITY OF BRISTOL, VIRGINIA, d/b/a</b>	)	
<b>BRISTOL VIRGINIA UTILITIES BOARD</b>	)	
	)	
<b>PLAINTIFF,</b>	)	
	)	
v.	)	<b>Civil Action No.1:00CV00173</b>
	)	
	)	
<b>MARK L. EARLEY, ATTORNEY GENERAL</b>	)	
	)	
<b>AND</b>	)	
	)	
<b>COMMONWEALTH OF VIRGINIA</b>	)	
	)	
<b>DEFENDANTS</b>	)	

**BRIEF OF BRISTOL VIRGINIA UTILITIES BOARD  
IN OPPOSITION TO ATTORNEY GENERAL EARLEY’S AND THE  
COMMONWEALTH OF VIRGINIA’S MOTION TO DISMISS**

Plaintiff, the City of Bristol, Virginia, d/b/a Bristol Virginia Utilities Board (“BVUB”), has filed a complaint with this Court seeking a declaratory judgment that Attorney General Earley and the Commonwealth cannot lawfully enforce §§ 15.2-1500B and 56-484.7:1 of the Virginia Code against BVUB because these provisions are preempted by federal law, 47 U.S.C. 253, and Article VI, Section 2, of the U.S. Constitution. In response, the Defendants have moved to dismiss the City’s Complaint on multiple grounds.

Under Federal Rule 12(b)(6), the Court must deny the Defendants’ motion to dismiss unless the Defendants demonstrate “beyond doubt that the [City] can prove no set of facts in support of [its] claim that would entitle [it] to relief.” *Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir.1997). In making this determination, the Court must also “accept the factual

allegations in the [City's] complaint and must construe those facts in the light most favorable to the City.” *Id.* As demonstrated below, the Defendants’ motion cannot survive the application of these standards.

### STATEMENT OF THE CASE

Through BVUB, the City of Bristol seeks to enable its citizens to obtain access to advanced telecommunications capabilities on a par with those that are readily available in the more populated northern portions of the Commonwealth. Having constructed a sophisticated fiber optic communications network for its own internal utility requirements, BVUB stands ready, willing, and able to facilitate the provision of advanced services and capabilities to the citizens and businesses of Bristol. BVUB cannot move forward to achieve its goals, however, because §§ 15.2-1500B and 56-484.7:1 of the Code of Virginia block its path. Specifically, §15.2-1500B states in relevant part that:

Notwithstanding any other provisions of law, general or special, no locality shall establish any department . . . or entity which has authority to offer telecommunications equipment, infrastructure . . . or services . . .

Section 56-484.7:1 allows BVUB to lease “dark fiber” – i.e., unpowered fiber optic cable – but only under such onerous terms and conditions that this option is illusory.

Sections 15.2-1500B and 56-484.7:1 are inconsistent with both the letter and the spirit of the federal Telecommunications Act of 1996, and in particular with § 253(a) of the Act which provides:

No state or local statute, regulation or other 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) (emphasis added). The City seeks a declaration that §253(a) preempts the enforcement of the above cited portions of the Virginia Code.

In their motion to dismiss, the Defendants claim that BVUP is not covered by the term “any entity” in Section 253(a) of the Telecommunications Act and therefore lacks standing to bring this action. They also claim that BVUB’s attack on the Virginia laws in issue is baseless because BVUB would lack authority to provide telecommunications services even if these laws did not exist. The Defendants also assert that federal preemption of the §§ 15.2-1500B and 56-484.7:1 would intrude upon the Commonwealth’s rights under the Tenth Amendment of the United States Constitution, that allowing BVUB to continue to prosecute this action would violate the Commonwealth’s sovereign immunity under the Eleventh Amendment, and that Attorney General Early lacks a sufficient connection to the matters in issue to be an appropriate defendant under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

## **ARGUMENT**

### **I. BVUB IS AN “ENTITY” WITHIN THE MEANING OF LANGUAGE IN 47 U.S.C. § 253(a).**

The Defendant’s first claim goes to the ultimate merits of BVUB’s assertion that it is an “entity” for the purposes of Section 253(a). BVUB has discussed this issue in detail in its accompanying motion for summary judgment and supporting papers. Rather than burden the Court with unnecessary repetition, BVUB incorporates that discussion by reference here and urges the Court to read it first. BVUB will address the Defendants’ other arguments in the remainder of this brief.

### **II. PREEMPTING THE VIRGINIA BARRIERS TO MUNICIPAL ENTRY WOULD NOT VIOLATE THE TENTH AMENDMENT**

The Defendants assert that, if the term “any entity” in Section 253(a) applied to BVUB and Section 253(a) could be read to authorize federal preemption of the Virginia laws in issue,

Section 253(a) would violate the Commonwealth's rights under Tenth Amendment.<sup>1</sup> Citing *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), the Defendants contend that requiring the Commonwealth to authorize its political subdivisions to engage in telecommunications activities would be tantamount to forcing the Commonwealth into enacting and enforcing a federal regulatory program against its wishes. *Memorandum in Support of Motion to Dismiss* at 5-6. These arguments are misplaced and overstated. Section 253(a) does not require states to enact and enforce a federal regulatory program. It does not require states to do anything. It simply prohibits states from barring entry into the telecommunications business.

First, the Supremacy Clause of the Constitution, Article VI, Clause 2, provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Thus, ever since the Supreme Court's decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that any state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). To be sure, there was a time when uncertainties existed about whether Congress could preempt state laws dealing with "fundamental" or "traditional" state functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), the Supreme Court laid these uncertainties to rest:

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles

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<sup>1</sup> The Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are - - we must look elsewhere to find them.

*Id.* at 546-47. *See also Alden v. Maine*, 527 U.S. 706, 806 (1999) (Souter, J, dissenting) (“The law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty.”)

The Supreme Court further concluded in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999), that the Telecommunications Act “fundamentally restructures local telephone markets,” in part by making clear that “States can no longer enforce laws that impede competition.” The Supreme Court considered the pro-competitive purposes of the Act to be so compelling, that it reversed a long-standing presumption in favor of state jurisdiction over intrastate communications that the Eighth Circuit had described as a fence that is ‘hog tight, horse high, and bull strong, preventing the FCC from intruding on the states’ intrastate turf,’” *id.*, quoting *Iowa Utilities Board v. Federal Communications Comm’n*, 120 F3d 753, 800 (8<sup>th</sup> Cir. 1997). Specifically, the Court found that that Congress had “unquestionably” preempted state regulation of local telecommunications services, stating:

[T]here is a “presumption against the pre-emption of state police power regulations,” . . . and that there must be “clear and manifest’ showing of congressional intent to supplant traditional state police powers” . . . . *But the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.*

*Id.*, at 378 n.6 (citations omitted) (emphasis added). In short, because the Telecommunications Act was promulgated under Congress’s Article I power to regulate interstate commerce, Congress had ample authority to preempt the Virginia laws in issue, and doing so would not upset the constitutional balance between state and federal powers.

Furthermore, the Federal Communications Commission (FCC) has expressly held that the Tenth Amendment is not a bar to federal preemption of state barriers to entry that violate Section 253.

We note that, contrary to Bogue's arguments, the Tenth Amendment of the U.S. Constitution is not offended by federal preemption pursuant to section 253. Section 253 explicitly preempts State and local legal requirements. In this situation, pursuant to the Supremacy Clause of Article VI of the Constitution, federal law governs.

*In Re: Classic Telephone, Inc., Memorandum Opinion and Order, 11 FCC 12,082 at ¶ 50 (1996).*

The issues in *New York* and *Printz* are also distinguishable from the present issue before the Court. In those cases, the Supreme Court found that the federal government would effectively have "commandeered" the states and their officials into service to enact and enforce federal regulatory programs. Here, federal preemption of the Virginia barriers to entry would not force anyone to do anything – it would merely preclude the Commonwealth from preventing the citizens of Bristol from *voluntarily* acting through their local government to achieve the Nation's pro-competitive goals embodied in the Telecommunications Act.

It is also worth noting that other provisions of the Act that are arguably far more invasive of state sovereign authority have been upheld without question in the Fourth Circuit and throughout the country. For example, the combination of §§ 253(a) and 253(c) require state and local governments to provide nondiscriminatory access to public rights of way and imposes conditions on the compensation that they may obtain for such use. Similarly, Section 704 of the Act places restrictions on state and local governmental zoning authority with respect to wireless tower siting. In both instances, the federal law has imposed substantive limitations on inherent state police powers. Right-of-way and zoning issues arise far more frequently than the issues

that are before this court. Yet, there is no suggestion that these substantive limitations impermissibly interfere with the states' sovereign authority under the Tenth Amendment.

### **III. BRISTOL HAS STANDING TO BRING THIS ACTION**

The Defendants maintain that the City of Bristol lacks standing to bring this suit. The Defendants reasoning runs as follows: (1) Virginia municipalities are subject to the so-called "Dillon Rule," which allows municipalities to exercise only those powers that are "expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable." *Defendants' Motion To Dismiss* at 6, quoting *City of Richmond v. Confrere Club*, 239 Va 77 (1990); (2) Virginia municipalities can sue only "in relation to 'matters connected with [their] duties,'" *id.*, at 7, quoting VA Code § 15.2-1404; and (3) Virginia municipalities have no authority under Virginia law, much less a duty, to provide telecommunications services. Ergo, the Defendants conclude, Virginia municipalities cannot sue the Commonwealth for a declaration of their right to provide telecommunications services free of state barriers to entry.

The Defendant's argument is flawed at every step. At the outset, the Supreme Court of Virginia has recently characterized the Dillon Rule substantially less restrictively than the Defendants suggest:

Under Dillon's Rule, [local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable. *Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable. Any doubt in the reasonableness of the method selected is resolved in favor of the locality.*

*Arlington County v. White*, 528 S.E.2d 706, 708 (Va. 2000) (emphasis added), quoting *City of Virginia Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (citations omitted).

While it is true that no general or special law of Virginia expressly authorizes localities to provide telecommunications services, such authority, in the absence of the Virginia laws at issue in this case, could reasonably and fairly be inferred from Virginia's laws of general applicability and from the Bristol Charter.

In Section 15.2-1100 of the Virginia Code, the Virginia legislature has given localities “any or all powers set forth in this article, regardless of whether such powers are set out or incorporated by reference in a municipal charter.” In Section 15.2-1102, the legislature has gone on to grant all localities broad powers:

A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth *and all other powers pertinent to the conduct of the affairs and functions of the municipal government*, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, *and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power*, but shall be construed and held to be in addition to any general grant of power. The exercise of the powers conferred under this section is specifically limited to the area within the corporate limits of the municipality, unless otherwise conferred in the applicable sections of the Constitution and general laws, as amended, of the Commonwealth.

Section 15.2-1102 of the Virginia Code (emphasis added).

In addition, in Section 15.2-2109(A), the legislature has conferred upon all localities the power to acquire and operate “public utilities”:

Any locality may (i) acquire or otherwise obtain control of or (ii) establish, maintain, operate, extend and enlarge: waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems *and other public utilities* within or outside the limits of the

locality and may acquire within or outside its limits in accordance with § 15.2-1800 whatever land may be necessary for acquiring, locating, establishing, maintaining, operating, extending or enlarging waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems *and other public utilities*, and the rights-of-way, rails, pipes, poles, conduits or wires connected therewith, or any of the fixtures or appurtenances thereof.

*Id.* (emphasis added).

Section 56-265(1) of the Virginia Code defines “public utility” as:

[A]ny company which owns or operates facilities within the Commonwealth of Virginia for the generation, transmission or distribution of electric energy for sale, for the production, storage, transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas or geothermal resources for sale for heat, light or power, *or for the furnishing of telephone service*, sewerage facilities or water . . .<sup>2</sup>

Section 56-265(1) (emphasis added). While this definition is aimed at describing the types of services that are subject to regulation by the State when provided by non-public entities, it is nevertheless instructive as to the range of utility services that a locality can provide pursuant to Section 15.2-2109(A). Based on this definition, the term “other public utilities” can fairly be read to include telecommunications services. Certainly telephone services are traditionally viewed as a type of public utility. Moreover, given the ever-increasing importance of advanced telecommunications capabilities to the educational and economic development of a community, it is entirely reasonable for a locality such as Bristol to consider the provision of telecommunications services and/or infrastructure to be “*necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants.*” The key point is that even under Virginia’s version of the Dillon Rule, it is the

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<sup>2</sup> The same provision also defines the imbedded term “company” as excluding “a municipal corporation or a county.” Section 56-265(1).

municipality, not the Commonwealth, that has the power to decide what is reasonable for the community.

Moreover, the Charter of the City of Bristol, approved and enacted by the General Assembly, gives the City additional authority to provide telecommunications services.

Specifically, Section 2.01 of Bristol's Charter<sup>3</sup> provides that:

The City of Bristol shall have and may exercise all powers which are now or hereafter may be conferred upon or delegated to municipal corporations under the Constitution and laws of the Commonwealth of Virginia as fully and completely as though such powers were specifically enumerated herein. The City shall have as well any powers expressly set forth herein, nor shall any enumeration of powers in this Charter be exclusive or otherwise be construed to limit the powers of the City.

Section 2.04 further provides:

The City shall have the power to acquire, construct, own, maintain, regulate, operate, hold, improve, manage, sell, encumber, donate or otherwise dispose of any property, real or personal, or any estate or interest therein, and any structure or improvement thereon, within or without the City and within or without the Commonwealth of Virginia for:

8. Waterworks, gas plants and electric plants, water supply and pipe and transmission lines for water, electricity and gas supplies and *any other utility or utilities* within and without the City.

*Id.* (emphasis added).

Although the term "other utilities" is not defined in the Virginia code or cases, this term is broader in scope than the statutory term "public utilities." Stated somewhat differently, the term "public utilities" is a subset of the more encompassing term "utilities," which includes undertakings that are included within the statutory definition of "public utilities" but are not subject to the limitations that the Virginia Code places on "public utilities." That the term "any other utility or utilities" in the Bristol Charter is conspicuously different from and broader than

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<sup>3</sup> A copy of the relevant provisions of the City's Charter is appended as Attachment A.

the statutory term “public utilities” indicates that the Virginia legislature intended to give Bristol powers that went beyond those provided by § 15.2-2109. Accordingly, in the absence of §§ 15.2-1500B and 56-484.7:1, Bristol would have ample authority under both § 15.2-2109 and the City’s Charter to determine that it is in the best interest of the City and the community to have BVUB actively engaged in providing or facilitating the provision of advanced telecommunications services. Bristol therefore has the capacity to bring this suit, as it is in “relation to matters connected with its duties.”

#### **IV. BRISTOL’S STANDING IS FEDERALLY PROTECTED**

Even though challenges to state or local barriers to entry under Section 253 have specifically been held to present federal question jurisdiction under the Supremacy Clause,<sup>4</sup> the Defendants argue that BVUB, as a creature of state government, lacks standing to raise such a claim. In support of this contention, the Defendants assert that “[i]t is well established that creatures of state government, such as cities, have ‘no federally protected rights whatsoever under the Constitution or the laws of the United States.’” *Memorandum In Support of Motion to Dismiss* at 8, quoting a portion of *United States v. Alabama*, 791 F.2d 1450 (11<sup>th</sup> Cir. 1986). The Defendants quote only a fragment of what the *Alabama* court said. The full text of the statement is as follows:

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, *we cannot accept appellant’s broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.* A line of Supreme Court cases including, e.g., *Coleman v. Miller* [citations omitted], stands

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<sup>4</sup> E.g., *See, AT&T Communications v. Austin, Texas*, 975 F. Supp. 928 (W.D. Tex. 1997); *see also Boston Cable Vision v. Public Improvement Commission of Boston*, 38 F. Supp. 2d 46 (D. Mass. 1999), *aff’d*, 184 F.3d 88 (1<sup>st</sup> Cir. 1999) (cable television operator had standing under the Supremacy Clause to challenge a city ordinance that allegedly violated Section 253 of the Telecommunications Act).

generally for the proposition that creatures of the state have no standing to invoke *certain constitutional provisions* in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that “public entities which are political subdivisions of a state” are “creatures of the state, and possess no rights privileges or immunities independently of those expressly conferred upon them by the state.” *City of Safety Harbor v. Birchfield* [citation omitted]. *However, the latter interpretation -- which would bar any suit by a creature of the state against its creator -- has not prevailed in this Court. A subsequent Fifth Circuit decision binding on this Circuit has reviewed the Hunter line -- including Safety Harbor, supra -- and concluded that “these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state.” Rogers v. Brockette, [citation omitted].*

*Alabama*, at 1454, 1455 (emphasis added). Thus, contrary to the Defendants’ suggestion, *Alabama* actually stands for the proposition that there is “no per se rule” on the ability of local governments to bring constitutional challenges to state laws. *Id.* The Fourth Circuit read *Alabama* this way in *City of Charleston v. Public Service Commission of West Virginia*, 57 F.3d 385 (4<sup>th</sup> Cir. 1995), where it quoted *Alabama* as part of a string cite of multiple cases supporting the Fourth Circuit’s statement that “doubts have been expressed as to whether the ‘broad dicta’ that ‘a political subdivision may never sue its maker on constitutional grounds’ is really ‘the rule.’” *Charleston*, at 388.

*Alabama* holds that when a court is determining whether a unit of local government has standing to sue, the court should not merely rely on overly broad (and “waning” *Amato v. Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991)) dicta but should ask “whether any given constitutional provision or law protects the interests of the body in question.” *Alabama*, at 1455. Such a determination is entirely consistent with the BVUB’s main substantive argument here -- that Congress intended the term “any entity” in Section 253(a) to cover public entities as well as private entities. Indeed, since the question whether the City, acting through BVUB, is an “entity” for purposes of Section 253(a) is the central issue before the Court, a motion to dismiss

for lack of standing based on the argument that the City is not an “entity” whose rights are protected under the Supremacy Clause and Section 253, entirely begs the question and does not satisfy the Rule 12(b)(6) federal standard for granting a motion to dismiss.

Such a finding is buttressed by decisions from other circuits. For example, in *Rogers v. Brockette*, 588 F. 2d 1057 (5<sup>th</sup> Cir. 1979), the Fifth Circuit held that a school district may bring a claim in federal court against the state when the claim is based on a federal law that is asserted to be controlling and where the political subdivision claims to be a beneficiary of that federal law. The *Rogers* Court distinguished its holding from the line of cases stemming from *Williams v. Mayor & City Council of Baltimore*, 289 U.S.36 (1933), on which the Defendants rely, noting that those cases do not deal with “standing” as a that term is utilized today but instead go back to an obsolete conception of that term:

They [the *Williams* line of cases] adhere to the substantive principle that the Constitution does not interfere with a state’s internal political organization. This principle is not relevant to the case before us. [The plaintiff’s] claim is that Congress, exercising its power under Article I, has interfered with Texas’s internal political organization, at least to the extent of allowing a school district to ignore the state’s mandate and to decide for itself whether to accept the breakfast program. There is every reason to think that Congress may interfere with a state’s internal political organization in ways that the Constitution itself does not interfere; the Supreme Court has never said otherwise.

*Rogers*, at 1070.

#### **V. THE CITY MAY BRING ITS COMPLAINT UNDER THE *EX PARTE YOUNG* EXCEPTION TO THE ELEVENTH AMENDMENT**

The final basis for dismissal asserted by the Defendants is that BVUB is barred from bringing this suit by the Eleventh Amendment, which provides that:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the Eleventh Amendment on its face refers only to suits by citizens of other states or of foreign states, the Supreme Court subsequently extended a state's sovereign immunity under the Eleventh Amendment to suits filed by a state's own citizens. *Hans v. Louisiana*, 134 U.S. 1, 20-21 (1890); *Lynn v. West*, 137 F.3d 582, (4<sup>th</sup> Cir. 1998). As a consequence, the Commonwealth is probably correct that it cannot be sued in a federal court – at least not alone. Nevertheless, the City may bring this complaint for declaratory and injunctive relief against Attorney General Earley in his official capacity as the chief executive officer of the Commonwealth's Department of Law, under the well recognized “*Ex parte Young*” exception to the Eleventh Amendment.

The exception derives its name from *Ex parte Young*, 209 U.S. 123 (1908), in which the Supreme Court held that the Eleventh Amendment does not bar a federal court from issuing a prospective injunction barring a state official from exercising his responsibilities in a manner that violates federal law. The exception embraces the legal fiction that a state would not grant its officers authority to violate federal law. The Supreme Court has also stated that the relief allowed in *Young* “is necessary to vindicate the federal interest in assuring the supremacy of that law” and “gives life to the Supremacy Clause.” *Green v. Mansour*, 474 U.S. 64, 69 (1985); *see also Alden v. Maine*, 527 U.S. 706, 747 (1999) (“Certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land”); *Waste Management Holdings, Inc. v. Gilmore*, 64 F. Supp.2d 537, 542 (E.D.Va. 1999) (“[N]otwithstanding the doctrine's theoretical difficulties, both the Supreme Court and the Fourth Circuit consistently have relied upon it to maintain federal jurisdiction over cases challenging the enforcement of allegedly invalid state laws.”).

The Fourth Circuit has recognized the continuing vitality of the exception. In *Lynn v. West*, 134 F.3d 582 (4<sup>th</sup> Cir. 1998), *cert. denied*, *West v. Lynn*, 525 U.S. 813 (1998), the plaintiff

claimed that a state tax on illegal drugs was in essence a criminal measure that did not afford him required procedural protections. He sought monetary damages under 28 U.S.C. § 1983 and prospective injunctive relief from both the State and various officials of the State.

Finding that the plaintiff had suggested no grounds for denying the State the benefit of the Eleventh Amendment, such as congressional abrogation or waiver by the State, the court dismissed the State from the action. As to the State officials, however, the court applied the *Ex parte Young* exception and ruled that the Eleventh Amendment did not bar the plaintiffs' claims for injunctive and declaratory relief:

As noted, Lynn also sued West and Faulkner in their official capacities. Under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), there is "federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73, 116 S.Ct. 1114, 1132, 134 L.Ed.2d 252 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 425-26, 88 L.Ed.2d 371 (1985))....

To the extent Lynn seeks a declaratory judgment and an injunction to block further enforcement of the Drug Tax, *Ex parte Young* does permit his action against West and Faulkner in their official capacities. In *Ex parte Young* the Supreme Court held that the Eleventh Amendment did not bar an action in federal court to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment. *See Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1908)...

The Eleventh Amendment therefore does not bar Lynn's official capacity claims for declaratory and injunctive relief. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985).

*Lynn*, 134 F.3d at 587-88.

In their Motion to Dismiss, the Defendants acknowledge the existence of the *Ex parte Young* exception to the Eleventh Amendment, but they argue that the complaint should be dismissed because BVUB does not seek injunctive relief against Attorney General Earley..

Contrary to the Defendants' claim, however, the *Ex parte Young* exception is not limited to suits for injunctive relief but also applies to suits for declaratory relief. The Supreme Court confirmed this in *Alden v. Maine*, 527 U.S. 706 (1999), in which the Court found that the exception applies to "suits for *declaratory or* injunctive relief against state officers." *Id.*, 527 U.S. at 747 (emphasis added). *See also* the above excerpts from *Lynn*, in which the Fourth Circuit explicitly indicated that *Ex parte Young* also applies to "declaratory" relief.

#### **VI. THE ATTORNEY GENERAL HAS SUFFICIENT CONNECTION WITH MATTERS IN ISSUE TO BE A PROPER PARTY**

The Defendants also allege that the complaint must be dismissed as to Attorney General Earley because he lacks the requisite "special relation" to the claim asserted. The Defendants are wrong on both the law and the facts. In making this statement, the Defendants cite the following language from *Ex parte Young*,

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party.

*Ex parte Young*, 209 U.S. at 157. The Defendants fail to note that the very next paragraph of *Ex parte Young* goes on to state:

It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (*Reagan v Farmers Loan and Trust*, 154 U.S. 362, 366, 19 of the act), but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. *The fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.*

*Ex parte Young*, 209 U.S. at 157 (emphasis added). Accordingly, *Ex parte Young* itself specifically held that an officer need not have a *special* connection but merely “some” connection that may arise out of the general law.<sup>5</sup>

While neither the Fourth Circuit nor the Supreme Court has specified the exact nature of the connection between the officer and the enforcement of the statute required by *Ex parte Young*, the Fifth Circuit in *Okpalobi v. Foster*, 190 F.3d 337 (5<sup>th</sup> Cir. 1999), has provided a thoughtful analysis of the existing case law on the issue. Based on its review of these cases, the *Okpalobi* Court developed a two-part test for resolving the “connection” necessary for Eleventh Amendment purposes. The first step is to determine what powers the defendant wields to enforce the law in question; the second is to discern the nature of the law and place it on a continuum between public regulation and private action. *Id.* at 346.

Applying this test in the present case, it is clear that the Attorney General has a sufficient connection to the challenged Virginia law to sustain the first step of an *Ex parte Young* claim. Under the Virginia Code, the Attorney General is vested with broad authority under law, including advising the Governor in bringing legal actions on behalf of the Commonwealth, serving as chief executive officer of Virginia’s Department of Law, and being responsible generally for enforcing the laws to protect businesses and consumers. VA Code §§ 2.1-117 through 2.1-133. For example, in *James v. Almond*, 170 F. Supp. 331 (E.D. Va., 1959), the Eastern District Court for Virginia included the Attorney General as a proper party in a claim for

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<sup>5</sup> The Defendants’ are also incorrect in relying on *Fitts v. McGee*, 172 U.S. 516 (1898), for the proposition that some “special relation” must exist between the officer sued and the statute in issue. *Fitts* was decided a decade before *Ex parte Young* and was specifically distinguished in the *Ex parte Young* decision as applying only to cases in which the officer in question had no duty at all with regard to the statute, either by its specific terms or by general authority of law. *Ex parte Young*, 209 U.S. at 157.

injunctive relief related to the preemption of the Commonwealth's "massive resistance" laws, which were found to be in conflict with federal desegregation laws, finding:

He is the chief law enforcement officer of the Commonwealth. While he is given no specific statutory duties under the statutes in controversy, he is nevertheless charged with the enforcement of the laws of Virginia. To the end that there will be no misunderstanding of our ruling that the questioned statutes are unconstitutional as in violation of the Fourteenth Amendment to the Constitution of the United States we conclude that the Attorney General is a proper party to the proceeding and should be included with the terms of any injunctive decree to be entered.

*James*, 170 F. Supp. at 341-42. Although *James* is not an *Ex parte Young* case, its description of the responsibilities of the Attorney General of Virginia is just as relevant here. As the chief law enforcement officer in Virginia, the Attorney General would have the ultimate responsibility for enforcing the prohibition on municipal entry into telecommunications. He is therefore most certainly an appropriate party to BVUB's suit.

Turning to the second step of the *Okpalobi* test, the type of law at issue in this case is akin to the types of challenged laws that satisfy the *Okpalobi* test. In reviewing the relevant case law, the Court in *Okpalobi* found that challenges to public regulations such as railroad rates, election laws, water control, or regulations designed to implement and serve the public interest of the state were suitable candidates for *Ex parte Young* challenges, whereas private actions such as domestic relations laws where there is a clear private civil right of action with no need for state involvement were not typically accorded *Ex parte Young* status. *Id.*, 190 F.3d at 345-48. The purpose and the effect of Sections 15.2-1500B and 56-484.7:1 of the Virginia Code are to prohibit municipal participation in telecommunications and are clearly the type of public regulation to which *Ex parte Young* applies.

In *Bell Atlantic Md., Inc. v. MCI WorldCom Inc.*, 2001 WL 123663 (4<sup>th</sup> Cir. 2001), the Fourth Circuit recently identified three additional factors that courts should consider when asked to apply *Ex parte Young* – (1) whether doing so would potentially subject public officials to sanctions; (2) whether a comprehensive alternative “remedial scheme” exists; and (3) whether the matter involves an ongoing violation of federal law.

In *Bell Atlantic MD*, in a 2-1 split opinion that reached a conclusion different from that of all other Circuits that had considered the issue,<sup>6</sup> the Fourth Circuit dismissed an *Ex parte Young* action against Maryland Public Service Commissioners for an alleged violation of the “interconnection” requirements of Section 252 of the Telecommunications Act. The Court noted that “an *Ex parte Young* action against a State Commission would expose the Commissioners to the full remedial powers of a federal court, including presumably, contempt sanctions.”, citing *Seminole Tribe*, 517 U.S. at 75, *Bell Atlantic, MD*, at 9. The Court found that Congress had explicitly adopted a narrowly defined and exclusive remedy for violations of Section 252 and that the Court should therefore not improperly expand the remedy selected by Congress. The

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<sup>6</sup> In his dissenting opinion in *Bell Atlantic MD*, Judge King stated that “the Fifth, the Seventh, and the Tenth Circuits have each held that a state waives Eleventh Amendment immunity by electing to participate in the regulation of local telephone service pursuant to the Act. See *AT&T Communications v. BellSouth Telecomms., Inc.*, No. 99-30421, 2001 WL 38281 (5th Cir., Jan. 16, 2001); *Illinois Bell*, 222 F.3d at 342; *MCI Telecomms. Corp. v. Public Serv. Comm’n*, 216 F.3d 929, 938-39 (10th Cir. 2000). . . These courts have also held that actions may be brought in the district courts, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), to compel individual commissioners to cease ongoing violations of federal law. See *AT&T Communications*, 2001 WL 38281, at \*11; *Illinois Bell*, 222 F.3d at 345; *Public Serv. Comm’n*, 216 F.3d at 939. Earlier, in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir.), cert. denied sub nom. *Strand v. Michigan Bell Telephone*, 121 S. Ct. 54 (2000), the Sixth Circuit provided a model that the Fifth, Seventh, and Tenth Circuits followed with regard to the *Ex parte Young* issue. I find these decisions highly persuasive in addressing the jurisdictional and immunity issues advanced in this proceeding.”

Court also found that the suit would involve state contract law issues rather than an on-going violation of federal law, and that the doctrine was therefore not applicable.

Here, BVUB seeks only a declaratory judgment action that will determine its right to proceed with its telecommunications plans free of the Commonwealth's barriers to entry. If the Court agrees, the City will go forward, relying on the Court's judgment as a defense, if necessary. This course of action will not put Attorney General Earley or any other official of the Commonwealth at risk of sanctions. There is no alternative narrow and exclusive remedy for violations of Section 253. In fact, the federal courts have specifically held that "nothing in the plain language of § 253(d) purports to confer exclusive jurisdiction [over § 253 claims] with the FCC." *AT&T*, 975 F. Supp. at 938. *See also TCG v. City of Dearborn*, 977 F. Supp. 836 (E.D. Mich.), *aff'd*, 206 F.3d 618, 622-624 (6<sup>th</sup> Cir. 2000), in which the Court rejected an interpretation of Section 253 conveying exclusive remedial jurisdiction to the FCC. In addition, in the instant case, unlike that of *Bell Atlantic MD*, the central issue of debate here involves an on-going violation of federal law.

The final issue is whether some adverse action by Attorney General Earley is threatened or imminent. While some courts initially held that the plaintiff must demonstrate that the named officer(s) have taken or threatened to take action with respect to the enforcement of the statute at issue, this is no longer the prevailing practice around the United States. The Fourth Circuit, for example, allows actions for a declaratory ruling at a "pre-enforcement" stage. As the Court noted in *Mobil Oil Corp. v. Attorney General of Com. of Va.*, 940 F. 2d 73 (4<sup>th</sup> Cir. 1991),

Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.

*Mobil*, 940 F. 2d at 75. This is particularly true with respect to local governments, such as Bristol, that should not be required to break a State law before being able to redress their constitutional rights. Moreover, the prohibitions of Sections 15.2-1500B and 56-484.7:1 of the Virginia Code were only adopted two years ago. It would therefore be unreasonable to assume that the General Assembly adopted the new code provisions “without intending that [they] be enforced.” *Mobil*, 940 F. 2d at 76.

### CONCLUSION

For all of the foregoing reasons, the Court should deny the Defendants’ motion to dismiss the complaint.

Respectfully submitted,

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