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

MARCUS CABLE ASSOCIATES, L.L.C.	)	
	)	
d/b/a CHARTER COMMUNICATIONS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**Case No.: 1:02cv00197**
CITY OF BRISTOL, VIRGINIA, d/b/a	)	
	)	
BRISTOL VIRGINIA UTILITIES	)	
	)	
BOARD,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF THE DEFENDANT CITY OF BRISTOL, VIRGINIA, IN OPPOSITION TO THE AWARD OF A PERMANENT INJUNCTION AND IN SUPPORT OF THE CITY'S MOTION FOR SUMMARY JUDGMENT

The City of Bristol, Virginia ("the City") and Marcus Cable, LLC ("Charter") have agreed to submit their dispute for final adjudication at the hearing scheduled for December 9, 2002. On December 4, 2002, Charter served upon counsel for the City a memorandum of law supplementing the arguments that Charter had made in its opening brief and at the hearing of November 22, 2002, on whether the City has authority to provide cable television service. In this memorandum, the City will respond to all of the main points and authorities that Charter has presented in its two briefs and at oral argument. At the end of this memorandum, the City will also briefly summarize its objections to Charter's other grounds for enjoining the City from providing cable television service.

PRELIMINARY STATEMENT

As this Court learned in the *Earley* case, the City of Bristol is seeking to promote economic development, educational and occupational opportunity, and quality of life in the City

and Southwest Virginia by building a state-of-the-art fiber-to-the-home-and-business communications network. Now that the City's network is nearing operational status, residents and businesses are clamoring for service, and the system will be capable of meeting the current and future communications needs of the community for decades to come. Furthermore, the City's system will become increasingly valuable to the community as providers of cable and DSL service run into the bandwidth "traffic jams" that the Department of Commerce has predicted.[1]

According to the City's business plan, Bristol's fiber-optic system will cost more than $15 million to build. In order to pay for the system, the City must be able to put it to full productive use as quickly as possible, in every way that the network is capable of being used. Specifically, this means using the system to provide all major categories of communications services, including local and long distance telephone service, high-speed Internet access, data transmission, and cable television service. If the City is precluded from, or delayed in, providing any major category of service, the success of the system, and the benefits that it can bring to the City and region, will be jeopardized.

ARGUMENT

I. THE CITY HAS AUTHORITY TO PROVIDE CABLE TELEVISION SERVICE

The City acknowledges that no provision of Virginia law expressly grants it authority to provide cable television service and that this Court must therefore apply Dillon's Rule in

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[1] "It is important to note here that the current generation of broadband technologies (cable and DSL) may prove woefully insufficient to carry many of the advanced applications driving future demand. Today's broadband will be tomorrow's traffic jam, and the need for speed will persist as new applications and services gobble up existing bandwidth."

U.S. Department of Congress, *Understanding Broadband Demand: A Review of Critical Issues* (September 23, 2002), http://www.ta.doc.gov/reports/TechPolicy/Broadband_020921.htm.

determining whether the City has implied authority to do so.[2] Furthermore, the City agrees with Charter that the Virginia Supreme Court articulated the relevant standard in *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):

> 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.

The City submits that its right to provide cable television service can fairly and reasonably be inferred from several provisions of Virginia law, individually or in combination, including Virginia Code §§ 15.2-1102, 15.2-2109 and 15.2-2160 and the City's charter, which is itself a state statute.

A. Section 15.2-1102 Authorizes the City to Provide Cable Television Service

In Section 15.2-1102, the General Assembly gave all Virginia localities the following broad powers, including all powers "which are necessary or *desirable to secure and promote the*

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[2] Section 533(e) of the Communications Act, 47 U.S.C. §521(e), provides that subject to certain restrictions on exercising editorial control, "a State or franchising authority may hold any ownership interest in any cable system." The courts have split over whether Section 533(e) empowers municipalities to provide cable television. In *Warner Cable Communications, Inc. v. City of Niceville, FL*, 911 U.S. 634, 635 (11th Cir. 1990), the Eleventh Circuit found that Section 533(e) "*authorizes* local governments to own and operate their own cable systems" (emphasis added). In contrast, in *Warner Cable Communications, Inc. v. Borough of Schuylkill Haven, PA*, 784 F. Supp. 203, 213 (E.D. Pa. 1992), the district court found that Section 533(e) is "permissive rather than empowering." Not only did the district court fail to mention *Niceville*, but also it gave no weight to the House Committee on Energy and Commerce's explanatory statement that the relevant language "*enables* a State or franchising authority to own a cable system." H.R. Rep. No. 934, 98th Cong., 2nd Sess., at 55 (1984), U.S. Code Cong. & Admin. News 1984, p. 4692 (emphasis added). To be conservative, the City asks this Court not to attempt to resolve this disagreement between the courts, unless it finds that Virginia law alone does not authorize the City to provide cable television service.

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.

Va. Code § 15.2-1102 (emphasis added).

At the TRO hearing of November 22, Charter took issue with the City's reliance on that provision. The following is Charter's entire argument with respect to Section 15.2-1102:

> The first ground that they offer as authority is a different statute, 15.2-1102, which is a general grant to municipalities to have general powers to operate for the general welfare of the inhabitants of the municipality, and this is not, this does not satisfy the Dillon's Rule.
>
> If you look at this statute, it says the powers that are being talked about are pertinent to the conduct of the affairs and functions of the municipal Government. And I would submit that cable television is not part of the affairs and functions of municipal Government.
>
> The powers that they're talking about here are the things that a municipality needs to do to operate to run a government system. And for example, the *Sheppard* case in the Supreme Court of South Carolina [*Sheppard v. City of Orangeburg*, 442 S.E.2d 601 (S.C. 1994)], which is cited in our brief, looks at a similar statute under South Carolina law, and says we do not find that the supplying of cable television is necessary for the security, general welfare and convenience of the municipality, or preserving health, peace, order and good government.
>
> Well, I think that same principle is applicable here, and to my knowledge they have not cited a, a case from another state that points to a contrary ruling. And moreover, there is, of course, no reference in 15.2-1102 to either cable, or what cable is, which is the supplying of video program.

Transcript of Hearing of November 22, 2002, ("Tr.") at 17-18.

There are several problems with Charter's argument. First, Charter's contention that Section 15.2-1102 is essentially limited to government housekeeping functions makes little sense. If the Virginia legislature did indeed intend to deal only with housekeeping functions in Section 15.2-1102, why would it have required that the exercise of these functions be linked to securing or promoting the general welfare, safety, health, peace, good order, etc. of the municipality or its inhabitants? A far more plausible interpretation of Section 15.2-1102 is the

one that this Court made in *City of Bristol v. Earley*, 145 F.Supp.2d 741, 744-45 (W.D. Va. 2001):

> Section 15.2-1102 gives a broad general grant of power to localities to exercise all powers
>
> > 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 ....
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> Va. Code Ann. § 15.2-1102 (Michie 1997). Furthermore, the statute specifies that these enumerated powers are not exclusive, but shall be construed to be in addition to a general grant of power. *See id.*

Second, Charter's interpretation of Section 15.2-1102 is refuted by Virginia's leading cases on the police power of localities – *Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach*, 241 Va. 114, 400 S.E.2d 553 (Va. 1991) and *McMahon v. City of Virginia Beach*, 221 Va. 102, 267 S.E.2d 130 (Va. 1980).[3] In *Tidewater*, the Virginia Supreme Court made clear that the police power of Virginia's localities extends to "undertaking projects" to satisfy the needs of the community. Although *Tidewater* involved the operation of a water system, for which the city had express authority under Virginia law, the Court made clear that its decision did not depend upon the existence of such express authority:

> A city, in the exercise of its police power, has the right to undertake projects to promote the health, safety, and welfare of its inhabitants, and the operation of a water system is an integral part of the process of protecting the public health. A city has the right and the duty to protect its water supply and "[i]t is settled policy of the State and of all States to encourage any reasonable exercise of this right and power." *Board of Supervisors of Nanosecond Co. v. Norfolk*, 153 Va. 768, 775, 151 S.E. 143, 145 (1930). *Additionally*, Code §§ 15.1-873 and -875 specifically authorize the City to operate a water system in order to promote the health, safety, and welfare of its inhabitants.

241 Va. at 118, 400 S.E.2d at 525 (emphasis added).

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[3] *West's Annotated Code of Virginia* cites *Tidewater* ten times and *McMahon* five times to illustrate the application of § 15.2-1102.

Similarly, in *McMahon*, the Virginia Supreme Court found that a local government had authority under its police powers to require landowners to pay for connections to a municipal water system even though they had wells of their own that provided them adequate supplies of potable water. The Court found that "[a] local governing body must necessarily enjoy broad discretionary powers to protect the public health and general welfare of its residents." 221 Va. at 107, 267 S.E.2d at 134. The Court also found that, although there might be several grounds on which public action could be justified, even a single ground is sufficient. *Id*.

As discussed the next section, there are many grounds on which the City of Bristol could justify providing cable television service. For now, however, since only a single justification is necessary to satisfy the requirements of Section 15.2-1102, we submit the following:

> [A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.

Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 663-64 (1994) (citations and inner quotations omitted). By this standard, the City would most certainly contribute to the general welfare of its inhabitants.

Third, as we will also show in the next section, the City's provision of cable television service would satisfy any reasonable and appropriate standard of "necessity." For the purposes of Section 15.2-1102, however, Charter's insistence upon necessity is plainly misplaced. The operative language of Section 15.2-1102 is not "necessary" but "necessary or desirable." Charter does not suggest that it would be unreasonable for the City to find that its provision of cable television service would be "desirable" to secure and promote the public purpose objectives enumerated in Section 15.2-1102. That is particularly so because the City would provide cable television service, not in isolation, but as part of a comprehensive suite of services that would help the City to pay for its state-of-the-art fiber-to-the-home-and-business network. Indeed, any

contrary suggestion by Charter would be absurd in the face of the Department of Commerce's findings about the multiple benefits that a system such as the City's would bring to the region.[4] In short, for all of the foregoing reasons, Section 15.2-1102 itself provides sufficient authority for the City to provide cable television service.

B. Section 15.2-2109 Authorizes the City to Provide Cable Television Service

The City submits that, in addition to its general powers under Section 15.2-1102, it also has the power to provide cable television service pursuant to its authority under Section 15.2-2109(A) to establish "other public utilities." Charter offers three main arguments in opposition to this interpretation – (1) the term "other public utilities" in Section 15.2-2109(A) does not expressly cover cable television, nor does it do so implicitly because public utilities are necessities and cable television is a luxury; (2) treating cable television as a public utility would have far-reaching and disruptive consequences; and (3) court decisions in other states confirm that cable television can be treated as a public utility only when the relevant statute specifically provides for such treatment. Again, Charter's arguments are without merit.

1. Cable television qualifies as a "public utility"

a. Standard Dictionaries

The term "public utilities" is not defined in the Section 15.2-2109(A). Thus, a court must give that term its ordinary meaning. *Anderson v. Commonwealth*, 182 Va. 560-565-66, 29 S.E.2d 838, 840 (1994); ""[W]ords and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest." *Wool folk v. Commonwealth*, 18 Va. App. 840, 847, 447 S.E.2d 530, 534 (1994) (citing *Huffman v. Kite*, 198 Va. 196, 199, 93 S.E.2d 328, 331 (1956)). 'Courts must give effect to legislative intent, which

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[4] U.S. Department of Congress, *Understanding Broadband Demand: A Review of Critical Issues* (Sept. 23, 2002), http://www.ta.doc.gov/reports/TechPolicy/Broadband_020921.htm.

must be gathered from the words used, unless a literal construction would involve a manifest absurdity.'" *Council v. Com.*, 37 Va. App. 610, 614, 560 S.E.2d 472, 473-74 (2002); *City of Lynchburg v. Peters*, 145 Va. 1, 13, 133 S.E. 674, 678 (1926) ("The rule of construction is to give words their ordinary meaning unless a contrary meaning is clearly intended."); 1995 Va. Op. Atty. Gen. 93 at *1 (Gilmore) ("[The relevant statute] does not define "public utility." In the absence of any such definition, the term must be given its common, ordinary meaning") (footnote omitted).

When faced with the need to give terms their ordinary meanings, courts often look to commonly used dictionaries. Such dictionaries either explicitly include cable television in the definition of "public utility" or define that term in ways that are broad enough to include cable television.

For example, *Law.com Dictionary* defines the term "public utility" as

> **Public Utility** n. any organization which provides services to the general public, although it may be privately owned. Public utilities include electric, gas, telephone, water and *television cable systems*, as well as streetcar and bus lines. They are allowed certain monopoly rights due to the practical need to service entire geographic areas with one system, but they are regulated by state, county and/or city public utility commissions under state laws.

http://dictionary.law.com (emphasis added).

Black's Law Dictionary (7th Ed. 1999) does not expressly include cable television in the definitions of "utility" or "public utility" but defines these term in ways that cover cable television:

> **Utility: 1.** The quality of serving some function that benefits society. **2.** *Patents.* … **3.** A business enterprise that performs essential public service and that is subject to governmental regulation.
>
> *Public Utility* A company that provides necessary services to the public, such as telephones, electricity, and water. * Most utilities operate as monopolies but are subject to governmental regulation.

Similarly, *Webster's Ninth New Collegiate Dictionary* (1989) also defines "utility" and "public utility" in ways that would cover cable television:

> **UTILITY 1:** fitness for some purpose or worth to some end **2:** something useful or designed for use **3 a:** PUBLIC UTILITY **b** (1)**:** a service (as light, power, or water) provided by a public utility (2)**:** equipment or a piece of equipment to provide such service or a comparable service[.]

b. Leading Virginia Cases

In a Virginia case that is directly on point on the key issue present here – *Texeira v. City of Norfolk, VA*, 1990 WL 751403 (Va. Cir. Ct. 1990) – the court upheld a "utility tax" that the City of Norfolk had imposed on a cable operator, Cox Cable Hampton Roads. In reaching this decision, the court interpreted a provision of the Norfolk's charter that authorized the City to impose a tax on consumers of "water, gas, electricity or telephone or any other public utility services." The court reasoned,

> *Black's Law Dictionary*, 4 ED (1951) states in part: A public utility is considered to be a business or service which is engaged in regularly supplying the public with some commodity or service which is of public consequence and need such as electricity, gas, water, transportation, or telephone or telegraph service; not limited or restricted to any particular class of the community; holds itself out as ready, able and willing to serve the public; the term implies a public use of an article, product, or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service to serve the public and treat all persons alike without discrimination; it is synonymous with "public use", and refers to persons or corporation charged with the duty to supply the public with the use of property or facilities owned or furnished by them; to constitute a true "public utility; the devotion to public use must be of such character that the public generally, or that part of it which has been served and which has accepted the service, has the legal right to demand that that service shall be conducted, so long as it is continued with reasonable efficiency under reasonable charges; etc."
>
> The Court finds that Cox Cable is a "public utility" and therefore under the Norfolk City Charter would be an "other public utility service."

Id. at *2.

On appeal, the Supreme Court of Virginia upheld this portion of *Texeira* and rejected Cox's claim that the city "lacks authority from the Virginia General Assembly to impose a utility tax on consumers of cable television service." *Cox Cable Hampton Roads, Inc. v. City of*

Norfolk, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). The Court reversed and remanded the case for further proceedings on whether the City had violated Cox's right to equal protection by failing to impose a similar tax on a Satellite Master Antenna Television System, but it "affirm[ed] all other portions of the judgment of the trial court." 242 Va. at 402, 410 S.E.2d at 656.

Notably, Charter has failed to address *Texeira* and *Cox* in its briefs or oral argument. Rather, Charter cites only a single Virginia case in support of its position that cable television is not a public utility – *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 28 Va. Cir. 220, 223, 1992 Lexis 277 (1992). That case, however, furnishes scant support for Charter's position. Not only was *Multi-Channel TV* decided in the context of a motion for a temporary restraining order, but the court said no more than that there was "a question" whether a cable operator qualified as a public service corporation that would have a right of eminent domain. This is hardly compelling support for Charter's position.

2. Cable television meets any appropriate standard of "necessity"

Section 15.2-2109(A) authorizes localities to establish and operate "waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems *and other public utilities*." Charter maintains that all of the utilities listed have a common feature that cable television lacks – "they provide services that have long been identified as essential public utility services." Charter's Memorandum in Support of Temporary Restraining Order at 9. Charter then goes on to cite *Sheppard* and three other cases holding that cable television is not an essential public service. *Id*. at 9-10. Charter's analysis is serious flawed for several reasons.

First, Charter mistakes what is essential to individuals with what is essential to the community. While cable television may not be essential to any particular user, it does not follow that cable television is a luxury *to the community as a whole*. The same is true of gas works,

public water systems, mass transportation, and numerous other public services that are commonly considered public utilities.

Indeed, since the enactment of the federal Cable Act in 1984, the fundamental premise underlying the cable franchising process has been that *communities as a whole* have needs that local governments are best situated to evaluate and require cable operators to meet. For example, in H.R. Rep. No. 934, 98th Cong., 2nd Sess. 1984, 1984 WL 37495 (Leg. Hist.), U.S.C.C.A.& N 4655, to accompany P.L. 98-549, The Cable Communications Policy Act of 1984, the House Energy and Commerce Committee made clear that

> The bill establishes franchise procedures and standards to encourage the growth and development of cable systems, and assure that cable systems are responsive to the needs and interests of the local communities they service.
>
> It is the committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.
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> The ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community, and H.R. 4103 explicitly grants this power to the franchising authority. However, the committee does not believe it is appropriate for government officials to dictate the specific programming to be provided over a cable system, and H.R. 4103 reflects this determination.

Id. at 4654, 4661, 4654.

Second, "what is indispensable to the attainment and maintenance of the declared objects and purposes of a municipality has been said to be subject to 'change with changing circumstances,' so that 'what might not have been implied at one time may be implied at another time.' 2A McQuillin Mun. Corp. § 10.12 (3rd ed.) (August 2002), quoting *Bridgeman v. City of Derby*, 132 A. 25, 27 (Conn. 1926). If there was ever a time when cable television was a luxury, that time has long since passed. Charter knows this perfectly well. On website of the Cable Center – which acknowledges that it is funded by Paul G. Allen, Jeffrey A. Marcus and Marcus Cable – the following history of the cable industry appears:

> The U. S. cable television industry took its first steps in 1948 to bring television to people who lived in areas that were unable to receive conventional broadcast signals. Since those early days, the industry has grown into a thriving and global telecommunications force. Cable television is currently available to more than 96% percent of the television viewing homes with 73 million households in the U. S. being served by over 9,000 systems and it continues to grow worldwide. The cable industry has enriched the information, news, public affairs and entertainment choices of American television viewers. On a broader scale, the industry has also created new options for home and business consumers through convergence with telephone and computer technologies. Many cable systems have now moved beyond offering only video programming and offer voice and data products, including personal communications services and high speed access to the world wide computer network, the Internet.

http://www.cablecenter.org/history/index.cfm. Furthermore, national surveys have repeatedly confirmed that approximately two-thirds of Americans obtain most of their news and political information from television. The Roper Organization, *America's Watching" Public Attitudes Toward Television* (1997), http://www.stanford.edu/class/polisci10/media.pdf; Reg Gale: "Poll: Internet use drops in favor of Television," Newsday.com (September 17, 2001), http://www.newsday.com/templates/misc/printstory.jsp?slug=ny%2Duspoll162369779sep17&section=%2F According to statistics compiled by the Federal Communications Commission, franchised cable providers such as Charter are the "dominant" providers of such television programming to consumers, with a nearly 80 percent of share of the market. FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, *Eighth Annual Report* ¶ 5 (rel. January 14, 1992).

As Judge Moody presciently noted nearly a quarter of a century ago in a concurring opinion in *White v. City of Ann Arbor*, 406 Mich. 554, 577, 281 N.W.2d 283, 291 (Mich. 1978), "While cable television may not cater to the physical needs of man as do utilities that provide heat, light and power, it provides equally important service in terms of the rational, psychological and esthetic growth processes of man. Furthermore, as many commentators so adroitly point out, cable television is in essence a de facto monopoly." Judge Moody's observations are all the more true today.

Third, the City submits that the cases on which Charter relies have minimal persuasive value. *Devon-Aire Villas Homes v. Americable Assoc*., 490 So.2d 60 (Fla. Dist. Ct. App. 1885) was decided shortly after the enactment of the Cable Act of 1984 and long before the cable industry experienced its explosive growth in the 1990s. *Sheppard* and *State v. Wilson*, 140 N.H. 44, 662 A.2d 954 (1995) reflect no consideration of any of the issues discussed above.[5] *Greening v. Johnson*, 53 Cal. App. 4th 1223 (Cal. Ct. App. 1997), was completely individual-need-oriented, as distinguished from community-need-oriented. Indeed, the Court took pains to make clear that its primary reason for finding that cable television was not a "utility" in the unique circumstances of the case was that the effect of ruling otherwise would have been to force protected members of a class – residents of trailer homes – to pay retroactively for cable television service that they did request and did not want. *Id*. at 1230.

2. Treating cable television as a public utility for the purposes of Section 15.2-2109(A)

In its oral argument at the TRO hearing, Tr. at 17-18, and again in its supplemental brief, at 4-5, Charter has suggested that a cascade of horrible consequences with "national ramifications" would flow from treating cable television as a "public utility." Charter's Supplemental Memorandum at 4-5. According to Charter, cable operators would obtain the right to exercise eminent domain, localities would lose jurisdiction over cable operators and be deprived cable revenues as well as the ability to regulate customer service standards, the State Corporation Commission would take over control of the cable industry, numerous conflicts between federal and Virginia law would occur, and so on and so forth. These claims border on the frivolous. Charter has overlooked the fact that Section 621(c) of the Communications Act,

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[5] Indeed, the *Sheppard* court appeared to be so determined to block South Carolina municipalities from providing cable television services that it found "absurd" the suggestion that cable service could be considered a "recreational service" and it completely overlooked the fact that it had ruled two years earlier that South Carolina had abolished the Dillon Rule by enacting a Home Rule Amendment in 1976! *Williams v. Town of Hilton Head*, 311 S.C. 417, 423, 429 S.E.2d 802, 805 (S.C. 1993).

47 U.S.C. § 541(c) provides that "Any cable system *shall not be subject to regulation* as a common carrier or utility by reason of providing any cable service." Furthermore, Section 15.2-2108(E) provides in pertinent part that "No locality may regulate cable television systems by regulations inconsistent with either laws of the Commonwealth or federal law relating to cable television operations." Taken together, these provisions would eliminate or minimize any untoward effects resulting from treating cable television operators as utilities for the purposes of Section 15.2-2109(A). If anything, these provisions undermine Charter's argument that cable television is not a public utility, as there would be no need for these provisions if cable television did not have many of the characteristics of common carriers or public utilities.

3. Cases from other states do not support Charter's position

Charter concedes that courts in several other states have found that the term "public utility" is broad enough to cover cable television service. Charter cites four of these cases itself in footnote 17 of its brief of December 4,[6] and it could well have cited many others. These cases include, but are not limited to, *Hernley Family Trust v. Fayette County Zoning Hearing Board*, 722 A.2d 1115, 1117-1118 (Comm. Ct. Pa. 1998) ("Appellants direct this Court to the definition of "public utility" in Black's Law Dictionary, which states that "[t]he test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public." *Black's Law Dictionary*, 1232 (6th Ed.1990)"); *Glendora v. Kofalt*, 162 Misc.2d 166,

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[6] Charter's footnote 17 reads as follows: *"See City of Owensboro v. Top Vision Cable Co. of Ky.*, 487 S.W.2d 283 (Ky. App. 1972) (permitting the municipality to franchise cable operator for the purposes of permitting access to the rights-of-way and to collect reasonable remuneration for such access); *Aberdeen*, [*Cable TV Service, Inc. v. City of Aberdeen*, 176 N.W.2d 738, 742 (S.D. 1970)] (cable service is a public utility under South Dakota law requiring municipality to allow the electorate to vote on award of cable franchise); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968)(state law explicitly designated cable television as public utility); *City of Waterville v. Barbell Telephone TV Systems*, 233 A.2d 711 (Me. 1967)(telephone company solely transmitting cable television signals was providing a utility service authorized by its statewide franchise)."

174, 616 N.Y.S.2d 138, 144 (N.Y. Sup.1994) ("a cable company is considered a public utility"); *Houston Cable TV, Inc. v. Inwood West Civic Ass'n, Inc.*, 839 S.W.2d 497, 504 (Tex. App. 1992) ("appellants are in the nature of a public service company"); *White v. City of Ann Arbor*, 406 Mich. 554, 572-73, 281 N.W.2d 283, 288-89 (Mich. 1978) (cable television is a public utility under the statute at issue as it has "a similar nature" to telephone service. It has "communicative aspects and potentials" and "the medium used to transmit these services is very similar to that used in providing telephone services").

In short, the City submits that the Court should draw precisely the opposite conclusion from cases from other jurisdictions than the conclusion that Charter suggests. Rather than deny cable television treatment as a public utility unless a statute expressly requires such a result, most of the cases that we have found suggest that cable television should indeed be treated as a public utility unless the relevant statutory definition simply will not bear such a result. Here, it would do no violence to Section 15.2-2109(A) for the Court to find that cable television fits comfortably within the meaning of the term "other public utilities."

C. Bristol's Charter Authorizes It to Provide Cable Television Service

For the purposes of this section, the City assumes (without conceding) that Charter is correct in arguing that the term "other public utilities" in Section 15.2-2109(A) is a term of art that excludes cable television service and that treating cable television as a public utility would result in at least some of the adverse effects that Charter has identified. The City submits that the Court should then find that the Charter of the City of Bristol gives the City such additional authority as the City may need to provide cable television services.

1. The legal relationship between charters and general laws

Article VII, § 2 of the Virginia Constitution provides the General Assembly authority to issue a charter – that is, a "special act" – for the organization, government, and powers of any county, city, town, or regional government. Virginia Code § 15.2-100 provides that "except

when otherwise expressly provided by the words, 'Notwithstanding any contrary provision of law, general or special,' or words of similar import, the provisions of this title shall not repeal, amend, impair or affect any power, right or privilege conferred on counties, cities and towns by charter."

"A charter provision . . . will prevail over general law, absent an indication of legislative intent to the contrary, in the event of a conflict between the two." Hon. Edwin Wilmot, AG Opinion 99-080, 2000 WL 425333, *2 (March 8, 2000). "Charter provisions . . . 'must be construed to be a qualified amendment of the general law, and controlling in the locality to which it applies.'" *Pierce v. Dennis*, 205 Va. 478, 484, 138 S.E.2d 6, 11 (1964)." *City Council of Alexandria v. Lindsey Trusts*, 258 Va. 424, 428, 520 S.E.2d 181, 183 (1999). "If the city's charter grants a particular power to the city, an ordinance passed pursuant to that grant has the same status as an act of the General Assembly." *Board of Directors of Tuckahoe Ass'n, Inc. v. City of Richmond*, 257 Va. 110, 119, 510 S.E.2d 238, 243 (1999).

Because charter provisions are enactments of the General Assembly, "they must be read and construed together in order to give full meaning, force, and effect to each." *County of Greensville v. City of Emporia*, 245 Va. 143, 149, 427 S.E.2d 352, 356 (1993)." *Kole v. City of Chesapeake*, 247 Va. 51, 56, 439 S.E.2d 405, 408 (1994). "[U]nder generally accepted principles of statutory construction, the terms of a general law and the terms of a charter are to be construed together if at all possible. *See Kole v. City of Chesapeake*, 247 Va. 51, 56 (1994)." *Fordney v. City Council of City of Harrisonburg*, 51 Va. Cir. 383, 2000 WL 33258830, *3 (Va. Cir. Ct. 2000).

2. Relevant terms of the City of Bristol's Charter

The relevant portions of Bristol's Charter were enacted through House Bill No. 25, Chapter 542, as adopted by the General Assembly of Virginia at the 1990 session. Section 2.01 of the Charter 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).

3. Legal standard for interpreting the phrase "any other utility or utilities"

In *City of Bristol v. Earley*, this Court ruled that when a statute uses the modifier "any" in an unrestricted, expansive way, the term modified should be given its broadest possible scope. *Earley*, 145 F.Supp.2d at 747-48. The Court found that this rule of construction was so well established through decades of consistent Supreme Court practice, that it satisfies the ultra-rigorous "plain statement" standard of *Gregory v. Ashcroft*, 401 U.S. 452 (1991), which courts must use in determining whether Congress has preempted a traditional state function. In *United States of America v. Wildes*, 120 F.3d 468, 469-470 (4th Cir. 1997), the Fourth Circuit interpreted the term "any" in precisely the same broad way. Furthermore, following this Court's lead, the Eighth Circuit found in *Missouri Municipal League v. FCC*, that Congress's expansive, unrestrictive use "any" in modifying the term "entity" in Section 253(a) of the Telecommunications Act signified its intent "to include within the statute all things that could be

considered as entities." *Missouri Municipal League, et al. v. FCC*, 299 F.3d 949, 953-54 (8th Cir. 2002).

In this case, the Virginia legislature used the modifier "any" without restriction before "other utility or utilities" in Section 2.04(8) of the Bristol Charter. Thus, if the term "utility" is broad enough to cover cable television service, then the Virginia legislature must be deemed to have intended to cover such service in the Bristol Charter. As shown in the next subsection, the Virginia Supreme Court, the Fourth Circuit, the General Assembly and numerous cases from other states confirm that the term "utility" is commonly understood to include cable television unless contrary language appears in the statute.

4. The term "utility" is generally understood to encompass cable television service

As the dictionary definitions quoted in the previous section indicate, the term "utility" is a broader term than "public utility." The latter term is often treated as a term of art that may or may not exclude cable television. The broader treatment of "utility" is also reflected in the many Virginia and other cases and statutory provisions discussed in this section.

For example, in the *Cox Cable Hampton Roads* case discussed in the previous section, the Virginia Supreme Court upheld a "utility tax" imposed on a cable operator. In *Media General Cable of Fairfax, Inc. v. Sequoyah Council of Condominium Owners*, 991 F.2d 1169, 1174 (4th Cir. 1993), the Fourth Circuit found that Section 621 of the Communications Act gives cable television companies "the ability to make use of public rights of way and easements which are being used *by similar utilities* such as telephone companies and power companies" (emphasis added). Similarly, in *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 67 (4th Cir. 1992), in the course of discussing the historical role of localities in land use planning, the Fourth Circuit observed that localities typically "required each lot to have adequate access to

public services and utilities, such as water, sewage, gas, electricity, telephone, *and cable television*" (emphasis added).

Legions of cases from other jurisdictions likewise reflect the understanding that cable television is commonly considered to be a "utility." For example, in *Huntington Beach City Council v. Superior Court of Orange County*, 94 Cal.App.4th 1417, 1425, 115 Cal.Rptr.2d 439, 444 (Cal. App. 2002), the court observed that, "Since 1970 … Huntington Beach has imposed a 5 percent utilities tax on purchases of natural gas (and other utilities as well, *including cable television*)" (emphasis added). In *Bolt v. City of Lansing*, 459 Mich. 152, 175, 587 N.W.2d 264, 275 (Mich. 1998), the court noted that, "In adding storm water language to the Revenue Bond Act in 1992, the Legislature notably aligned storm water treatment and disposal with other utilities listed under the term "public improvement," including the light, heat, and power utilities, garbage collection and disposal, sewage treatment and disposal, transportation systems, *cable television* systems, stadiums, and other municipal activities that fall *within the traditional thinking of "public improvements" and utilities*" (emphasis added).

In *In re: Township of East Hanover*, 701 A.2d 313, 315 n.1 (Comm. Ct. Pa. 1997), the court stated that "[t]he entire mobile home park is improved with *utilities*, including private water and private sewer, inclusive of sewer laterals, collector lines, interceptor lines and transmission lines leading to a private sanitary sewage treatment plant, electric, *cable television*, and telephone" (emphasis added). The Third Circuit has also found, in *A.D. Bedell Wholesale Co. v. Philip Morris Tobacco Co*., 263 F.3d 239, 255 (3d Cir. 2001), that "state governments frequently sanction monopolies to ensure consistent provision of essential services like electric power, gas, *cable television*, or local telephone service" (emphasis added).

The Virginia legislature has also frequently defined the term "utility" broadly to include cable television. For example, Va. Code § 15.2-2404 authorizes certain localities to impose taxes or assessments upon the owners of abutting property for the underground relocation of

distribution lines for electricity, telephone, *cable television and similar utilities*" (emphasis added). Va. Code § 56-265.15 defines the term "utility line" to include "any item of public or private property which is buried or placed below ground or submerged for use in connection with the storage or conveyance of water, sewage, telecommunications, electric energy, *cable television*, oil, petroleum products, gas, or other substances, and includes but is not limited to pipes, sewers, combination storm/sanitary sewer systems, conduits, cables, valves, lines, wires, manholes, attachments, and those portions of poles below ground." Similarly, Va. Code § 56-523 states that the words "utilities" or "public utilities" when used in this chapter shall be construed to mean any person, partnership, association or corporation, engaged in the business of furnishing electric power, water, light, heat, gas, transportation or *communication*, or any one or more of them, to the people of Virginia" (emphasis added).

The foregoing examples and many others that we could cite show that the term "utility" is typically understood to include cable television. At the very least, the term "utility" is capable of such a construction. As a result, when the Virginia legislature coupled that term with the expansive, unrestricted modifier "any" in the Bristol Charter, the legislature must be deemed to have given Bristol the option of providing cable television as a "utility" if it so desired.

D. Nothing in SB 245 Precludes the City of Bristol From Providing Cable Television Service

In its opening brief and at the oral argument at the hearing on a TRO, Charter maintained that nothing in the authority that the Virginia legislature afforded municipalities in Section 56-484.7:1 to provide "qualifying communications services" can be read to imply that municipalities have authority to provide cable television service. Charter's Memorandum in Support of Motion for Temporary Restraining Order at 8. According to Charter, "the term 'qualifying communications service' refers only to a "*communications* service…of general application such as "high-speed data service and Internet access service." *Id*. (Charter's

emphasis). Charter goes on to observe that the Federal Communications Commission has recently issued a declaratory ruling explaining that Internet access offered by cable providers is an "information service" rather than a cable service." At the TRO hearing, in response to the City's point that the Virginia legislature had removed a cable-industry provision from a draft of the legislation that would have excluded cable television service from the definition of "qualifying communications service," Charter suggested that the legislature probably assumed that the provision was unnecessary in light of the Dillon Rule. Tr. at 21-22.

Charter's argument is incorrect on several levels. At the outset, Charter's argument is irrelevant, as the City has not sought authority to provide cable television service under Section 56-484.7:1. The City simply believed that it already had ample authority to provide cable television service for the reasons discussed above. Thus, the City's decision not to apply for such authority pursuant to Section 56-484.7:1 is not an admission of anything.

Second, Charter misstates both what Section 56-484.7:1 says and what it means. Section 56-484.7:1 does not refer "only" to communications services "such as" high-speed Internet access. Rather, it refers to any communications service "which shall include but is not limited to high-speed data service and Internet access service" that meet the criteria enumerated in the remainder of Section 56-484.7:1. Furthermore, as Charter knows, whatever else cable television service may be, it is surely a "communications service."[7]

Third, since the term "qualifying communications service" plainly covers cable television service, the removal of the exception for cable television service was no mere meaningless act. As a general matter, when a legislature "includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."

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[7] On September 19, 2002, Charter filed a Notice of Participation in the proceeding before the State Corporation Commission on Bristol's application for a certificate of necessity and convenience to provide certain telecommunications services. In its Notice, Charter stated that it "offers for sale to the public communications services, including telecommunications services, in the proposed service territory of the City of Bristol."

Media General Cable of Fairfax, Inc. v. Sequoyah Council of Condominium Owners, 991 F.2d 1169 (4th Cir. 1993), quoting *Russello v. United States*, 464 U.S. 16, 23-24 (1983). Furthermore, as Senator William Wampler explains in his affidavit and brief, the General Assembly fully intended to authorize localities that did not already have authority to provide cable service to do so, and the legislature intentionally removed the cable industry's proposed limitation to ensure that the legislature's intent would not be misunderstood. As the sponsor of the legislation at issue, Senator Wampler's interpretation of the statute "is an authoritative guide to its construction." *National Home Ins. Co. v. Com.*, 248 Va. 161, 169, 444 S.E.2d 711, 715 (1994).

Fourth, as Senator Wampler also notes in his affidavit and memorandum, the legislature added Section 15.2-2160(E) to S.B.245 to ensure that a telecommunications provider would not condemn cable provider property to provide cable service. If the legislature believed that telecommunications providers were prohibited by Dillon's Rule from providing cable television service, there would have been no reason to enact Section 15.2-2160(E).

Finally, Section 15.2-2160(A) does not merely authorize municipalities to provide *telephone* service, as Charter suggests. Rather, on its face, it authorizes municipalities to provide "telecommunications services, *including* local exchange telephone service." While the legislature did not define "telecommunications service" in Section 15.2-2160, that provision was adopted at the same time as various amendments to provisions of Article 5.1 Offenses Involving Telecommunication Devices, Chapter 6. Crimes Involving Fraud, of Title 18.2. Crimes and Offenses Generally. In § 18.2-190.1, the legislature defined "telecommunication services" for purposes of the article making the possession of unlawful telecommunication devices or equipment a crime, defines telecommunication services as follows:

> "Telecommunication service" means any service provided for a charge or compensation to facilitate the lawful origination, transmission, emission or reception of signs, signals, writings, images and sounds or intelligence of any nature through the use of a telecommunication device as that term is defined in this section.

"Telecommunication device" is then defined as follows:

> "Telecommunication device" means (i) any type of instrument, device, machine or equipment which is capable of transmitting or receiving telephonic, electronic or radio communications, (ii) any part of such an instrument, device, machine or equipment, or any computer circuit, computer chip, electronic mechanism, or other component, which is capable of facilitating the transmission or reception of telephonic or electronic communications or (iii) any type of instrument, device, machine, equipment or software that is capable of transmitting, acquiring, encrypting, decrypting, or receiving any telephonic, electronic, data, internet access, audio, video, microwave or radio transmissions, signals, communications or services, including the receipt, acquisition, transmission, encryption, or decryption, of all such telecommunication services over *any cable television*, fiber optic, telephone, satellite, microwave, data transmission, radio, internet-based, or wireless distribution system, network or facility, or any part, accessory or component thereof, including any computer circuit, security module, smart card, software, computer chip, electronic mechanism or other component, accessory or part of any telecommunication device that is capable of facilitating the transmission, decryption, encryption, acquisition, or reception of telecommunication services. (Emphasis added)

This definition of telecommunication services includes by its reference to telecommunication devices in the same section a telecommunication service that consists of cable television.

Furthermore, the term "telecommunication service provider" was defined as follows:

> "Telecommunication service provider" means any person or entity providing any telecommunication service including (i) any person or entity owning or operating *any cable television*, satellite, internet-based, telephone, wireless, microwave, fiber optic, data transmission or radio distribution network, system or facility; (ii) any person or entity who for a fee supplies equipment or services to a telecommunication service provider; and (iii) any person or entity providing a telecommunication service directly or indirectly using any of the systems, networks or facilities described in clause (i).

Under the doctrine of *in pari materia*, statutes enacted at or about the same time on similar topics should be read together. *Mitchell v. Witt*, 98 Va. 459; (1900); *Commonwealth v. Sanderson*, 170 Va. 33; 195 SE 516 (1938). The Court in *Mitchell v. Witt* said:

> Statutes which are not inconsistent with one another and which relate to the same subject matter, are *in pari materia*, and can be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times. Especially should effect be given, if possible, to statutes *in pari materia* enacted in the same section of the legislature. 25 Amer. & Eng. Enc. L. 311 and the numerous authorities there cited. There is no exception to the universality of this rule. Same authority, note p. 313. . *Mitchell v. Witt*, 98 Va. 459, 461; (1900). The Court in *Sanderson* said, "It attains added

> weight when such statutes are passed at the same section of the legislature and is well expressed in *Mitchell v. Witt*, 98 Va. 459; 36 SE 548." *Commonwealth v. Sanderson*, 170 Va. 33, 38; 195 SE 516 (1938).

The definition of "telecommunication service", "telecommunication device" and "telecommunication service provider" contained in § 18.2-190.1 were all amended by the acts of the 2002 General Assembly. This was the same General Assembly that amended other Code sections that had before barred municipalities from entering into the telecommunications field and added § 15.2-2160 expressly enabling localities to be involved in that business under certain circumstances. The changes in the sections of the criminal code contained in 18.2 including 18.2-190.1 were part of Senate Bill 221. *Telecommunication Devices; Penalty,* which was introduced on the 9th day of January, 2002 in the Senate of Virginia. Senate Bill 245, which included the enabling statute § 15.2-2160 was introduced in the Senate on the same day. Both bills were considered by committees in each House, committee substitute bills were offered replacing the original bills as presented, amendments were offered on both bills and ultimately on the 6th and 7th of March, each of the bills was voted on in the House and Senate respectively and passed. Both bills were presented to and approved by the Governor on the 6th day of March, 2002. Very clearly, both the bill that created the definition of telecommunication services in § 18.2-190.1 and the bill permitting localities with electric distribution systems to provide said services under certain terms and conditions as contained in the new act, § 15.2-2160, were being processed through both houses of the General Assembly at the same time. As such, the definition of telecommunication services contained in 18.2-190.1 should be given weight in determining the intent of the General Assembly in using that term in § 15.2-2160.

That is particularly true if one looks at the amendments to the definition contained in § 18.2-190.1 that were adopted by both houses of the General Assembly in that session. First, the definition of "telecommunication services" was changed to delete the language "by telephone, including either cellular or other wireless telephones, wire, radio, television, optical or

other electromagnetic system" and to insert in its place the words "through the use of a telecommunication device as that term is defined in this section." The City notes that the restriction of the term telecommunication services to telephone, including cellular or other wireless telephone, wire, radio, and television optical or other electromagnetic system was removed. In its place, telecommunications device was rewritten to add the following language:

> … (iii) any type of instrument, device, machine, equipment or software that is capable of transmitting, acquiring, encrypting, decrypting or receiving any telephonic, electronic, data, internet access, audio, video, microwave or radio transmissions, signals, communications, or services, including the receipt, acquisition, transmission, encryption, or decryption of all such telecommunication services over any *cable television* fiber optic, telephone, satellite, microwave, data transmission, radio, internet-based, or wireless distribution system, network or facility, … . (emphasis added).

It is clear therefore that the General Assembly at this same session changed the definition of "telecommunication service" by incorporating the definition of telecommunication device into it in such a way as to expressly expand it to cover cable television.

Similarly, the definition of "telecommunication service provider" in the same section was specifically changed by deleting the language, "but not limited to, a cellular or otherwise telephone or paging company or other person or entity which," and inserting in its place "(i) any person or entity owning or operating *any cable television*, satellite, internet-based, telephone, wireless, microwave, fiber optic, data transmission or radio distribution network, system or facility; (ii) … " (emphasis added).

Therefore, not only did the General Assembly pass a definition of telecommunication services in the same session as the enabling statute was created permitting localities to provide telecommunication services, but the changes they made to the definitions of telecommunication service and the attendant definitions expressly and specifically broadened the definitions to include, among other things, cable television.

The City therefore respectfully submits to this Court that the definition of "telecommunications services", as contained in § 15.2-2160, is clearly intended to include cable TV. That being the case, the statute does in fact serve as an enabling statute for the City to provide cable TV service to those individuals to whom it is empowered to provide telecommunication services by that statute.

II. THE CITY DID NOT VIOLATE ANY OF CHARTER'S PROCEDURAL RIGHTS

Charter contends that the City violated its procedural rights under Section 15.2-2108(B) by failing to conduct a hearing "at which testimony is heard concerning the economic consideration, the impact on private property rights, the impact on public convenience, the public need and potential benefit, and such other factors as are relevant." Once again, there are several problems with Charter's argument.

First, it is difficult to understand how the legislature could have intended that Section 15.2-2108(B) apply to municipal cable providers if it is true, as Charter insists, the legislature believed that municipal providers generally had no authority to provide cable television service.

Second, even if the legislature did not believe that municipalities were barred from providing cable services, there is no reason to assume that the legislature intended Section 15.2-2108(B) to apply to municipal cable providers. After all, Virginia does not impose local franchising requirements on municipal utilities of any other kind, and Section 541(f) expressly exempts municipal cable providers the franchising requirements prescribed by the federal Cable Act. Thus, Charter can hardly claim to have been injured by the City's action when the City could have avoided the procedures set forth in Section 51.2-2108(B) simply by refraining from obtaining a franchise at all.

Third, none of the specific items on which Section 15.2-2108(B) requires Virginia's franchising authorities to obtain evidence could serve as a lawful basis for denying a franchise under 47 U.S.C. §541(a)(4). Indeed, if circumstances were reversed and Charter was the entity

seeking a franchise, it would surely haul the City into court if it tried to deny Charter a franchise for failure to satisfy the City on any of the issues specified in Section 15.2-2108(B). Thus, at most, Section 15.2-2108(B) serves no other purpose than to assist franchising authorities to obtain general information about franchise applicants. As the City will show at the hearing on December 9, that goal was more than amply met in this case by the massive amount of information that the City had obtained about all aspects of the project during the previous two years.

In brief, the City does not believe that it violated any procedural rights of Charter, and if it did, no damage was done. If the Court believes otherwise, the City requests the opportunity to affect a cure.

III. THE CITY DID NOT VIOLATE VIRGINIA'S LEVEL PLAYING LAW

The City has already briefed this issue extensively, and it will not burden the Court with additional briefing here. Suffice it to say that the City believes that Charter, as the incumbent, is the party in whose favor the playing field is tipped and that it is only because the City is offering the residents and business of Bristol far superior products and services that the City has any hope of succeeding in the marketplace. Again, the City will present more factual information, if necessary, at the hearing.

IV. CONCLUSION

For all of the reasons set forth above and in the City's prior submissions, the City submits that the court should dismiss all of Charter's claims and prayers for relief and should award summary judgment for the City.

CITY OF BRISTOL VIRGINIA d/b/a

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The foregoing was served by fax and electronic mail on counsel for the plaintiff on this the 6th day of December 2002.

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