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

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

REPLY BRIEF OF BRISTOL VIRGINIA UTILITIES BOARD
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

In this brief, the City of Bristol, d/b/a Bristol Virginia Utilities Board ("BVUB") replies to the brief that the Commonwealth of Virginia and Attorney General Mark L. Early (collectively "the Commonwealth") filed on April 3, 2001, in opposition to BVUB's motion for summary judgment and in further support of their motion to dismiss. BVUB also responds to the main non-duplicative arguments that the Virginia Telecommunications Industry Association ("VTIA") has made in the brief that it filed the same day.

ARGUMENT

I. THE COMMONWEALTH AND VTIA HAVE NOT SUCCESSFULLY REBUTTED BVUB'S SHOWING THAT IT IS INCLUDED IN THE TERM "ANY ENTITY" IN SECTION 253(a) OF THE TELECOMMUNICATIONS ACT

In its opening brief, BVUB maintained that all four of the traditional tools of statutory construction – the language, structure, purposes and legislative history of the statute – compel the conclusion that Congress intended the term "any entity" in Section 253(a) of the

Telecommunications Act to apply to public entities such as BVUB. As shown below, the Commonwealth and VTIA have either conceded or presented plainly erroneous responses to BVUB's key points and authorities.[1]

A. Section 253(a) of the Telecommunications Act Contains the Requisite "Plain Statement" That Congress Intended To Protect Public Entities From Barriers to Entry

1. *Salinas* Governs This Case

In its opening brief, BVUB showed that the Supreme Court has repeatedly held during the last 50 years that, when Congress uses the modifier "any" in an expansive, unrestricted way in a statute, courts and agencies must give the term modified its broadest possible scope, unless something else in the statute or its legislative history compels a narrowing construction. BVUB's Opening Brief at 28-31, and cases cited therein. BVUB also showed that the Supreme Court *unanimously* held in *Salinas v. United States*, 522 U.S. 52 (1997), that this rule of statutory construction applies even in cases involving federal preemption of traditional state powers, in which courts must deny federal preemption unless Congress has made a "plain statement" that it intended this result, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). *Id*. at 31-33. In such cases, Congress's unrestricted use of the modifier "any" serves as the "plain statement" of congressional intent that *Gregory* requires, and courts need not find independent corroboration elsewhere in the statute or its legislative history.

The Commonwealth does not disagree with BVUB's analysis of the Supreme Court's "any" cases but suggests that BVUB's reliance on these cases is misplaced. According to the Commonwealth, "*[n]ot one of the cases cited by Bristol concerns a federal provision purporting*

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[1] The Commonwealth does not address BVUB's structure-of-the-Act and purpose-and-policy arguments, and VTIA summarily brushes them aside without substantive (footnote continued . . .)

to interfere with the right of a State to structure and organize its own internal government by determining the types of functions in which its political subdivisions will and will not engage." Commonwealth's Opposition at 7 (Commonwealth's emphasis). The Commonwealth also contends that *Salinas* does not hold otherwise, but "actually adopts the analysis of *Gregory*, *supra*, that when confronted with an ambiguous statute, courts should opt for a construction which does not disturb the federal/state balance of power." Commonwealth's Opposition at 9 n.3. VTIA makes essentially the same points but adds that *Salinas* did not involve federal preemption of a traditional state power. VTIA's Opposition at 23-26.

To be sure, the *Salinas* Court stated that courts should interpret ambiguous statutes in ways that do not disturb the federal/state balance. The Court did not stop there, however. Rather, it went on to say that when Congress uses the modifier "any" in an "unrestricted, unqualified" way in a statute, it removes any ambiguity and "undercuts the attempt to impose [a] narrowing construction." *Salinas*, 522 U.S. at 57.

Contrary to VTIA's argument, the *Salinas* Court also dealt explicitly with the relationship between Congress's unqualified use of the term "any" and *Gregory*'s "plain statement" standard:

> As we held in *[United States v.] Albertini*, [472 U.S. 675,] at 680 [(1985)], 105 S.Ct., at 2902.
>
> > "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler v. Mathews*, 465 U.S. 728, 741- 742, 104 S.Ct. 1387, 1396-1397, 79 L.Ed.2d 646 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the

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(. . . footnote continues)

elaboration. VTIA Opposition at 27-28. Under the circumstances, BVUB will stand on what it said in its opening brief.

> Constitution. *United States v. Locke*, 471 U.S. 84, 95-96, 105 S.Ct. 1785, 1792-1794, 85 L.Ed.2d 64 (1985)."
>
> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), "[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." Id., at ----, n. 9, 116 S.Ct., at 1124, n. 9 (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. *See Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue. *Ibid. Compare United States v. Bass*, 404 U.S. 336, 349-350, 92 S.Ct. 515, 523-524, 30 L.Ed.2d 488 (1971) (relying on Congress' failure to make a clear statement of its intention to alter the federal-state balance to construe an ambiguous firearm-possession statute to apply only to firearms affecting commerce), with *United States v. Lopez*, 514 U.S. 549, 561-562, 115 S.Ct. 1624, 1630-1631, 131 L.Ed.2d 626 (1995) (refusing to apply Bass to read a similar limitation into an unambiguous firearm- possession statute).
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> The plain-statement requirement articulated in *Gregory* and *McNally* does not warrant a departure from the statute's terms. The text of § 666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction.

Salinas, 522 U.S. at 59-60.

In short, *Salinas* makes clear that the rule of statutory construction articulated in the Supreme Court's "any" cases is a universal one that applies with full force in *Gregory*-type situations. Indeed, the *Salinas* Court, at 57 of its opinion, relied heavily upon two of the "any" cases from which BVUB quoted in its brief – *United States v. James*, 478 U.S. 597, 604-605 and n.5 (1986) and *Trainmen v. Baltimore & Ohio R. Co*., 331 U.S. 519, 529 (1947). *Salinas* in no way undermines *Gregory*'s "plain statement" standard but simply confirms that using the

modifier "any" in an expansive, unqualified way is a common and appropriate method for Congress to express its intent with "unmistakable clarity."[2]

2. The Federal Communications Commission's Recent Brief to the Supreme Court in *Gulf Power* Lends Further Weight to BVUB's Interpretation of Section 253(a)

As BVUB also noted in its opening brief, at 33-35, the FCC has repeatedly advanced precisely the same analysis as BVUB's concerning the manner in which courts and agencies must interpret an unqualified, expansive use of the term "any" in a federal statute. As of the time that BVUB filed its opening brief on March 9, 2001, the FCC had done so in its *Pole Attachment Order*,[3] in its defense of that order before the Eleventh Circuit in *Gulf Power, Inc. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), and in its successful petition for certiorari to the Supreme Court following the Eleventh Circuit's adverse ruling. Now the FCC has done so again in the brief that it filed with the Supreme Court in *Gulf Power* on April 5, 2001. The FCC's analysis in that brief further supports BVUB's interpretation of "any entity."

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[2] VTIA takes BVUB to task for suggesting that *Alarm Industry* involved an "unduly restrictive" Federal Communications Commission ("FCC") interpretation of "entity." VTIA Opposition at 24-25. According to VTIA, the entity in issue in *Alarm Industry* was a division of a private company rather than a political subdivision of a state, and the Court did not preclude the FCC from adopting a narrow interpretation of the term "entity" on remand. *Id*. BVUB characterized the FCC's initial interpretation of "entity" as "unduly restrictive" because the Court found that it was based solely on a technical definition of "entity" that did not take other possible definitions or the purposes of the Act into account. Indeed, for that reason, the Court declined to give this interpretation deference. *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066, 1069 (D.C. Cir. 1997). Furthermore, on remand, the FCC not only determined that "entity" should be interpreted broadly when necessary to achieve the pro-competitive purposes of the Act, but it also observed that "entity" is broad enough to cover units of local government. BVUB's Opening Brief at 28-29 and n.29.

[3] *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777, & 40 (February 6, 1998).

Among the issues before the Supreme Court in *Gulf Power* is whether the Eleventh Circuit correctly held that Section 224 of the Telecommunications Act does not give wireless providers of the telecommunications services the same right as wireline providers have to make attachments to utility poles, ducts, conduits and rights of way. According to the FCC,

> "[T] the protections of the Pole Attachments Act apply to "any attachment by a ... provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). "Telecommunications service" is defined as the offering of telecommunications for a fee directly to the public "regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998); see also 47 U.S.C. 153(43) (Supp. IV 1998) (defining "telecommunications"). Congress thus *unambiguously* applied the protections of Section 224 to "any attachment" by carriers that provide "telecommunications for a fee directly to the public...regardless of the facilities used." As that language specifies, the particular facilities used to provide telecommunications services -- wireless, wireline, or some combination of the two -- are of no consequence. *Congress could not have been clearer in extending the Section 224 protections to attachments used to provide wireless telecommunications services to the same extent as wireline telecommunications services.*
>
> That conclusion follows as well from Section 224(d)(3) of the Act. As we have noted … that provision states that the Section 224(d) rate formula "shall apply to the rate for *any* pole attachment used by a cable system or any telecommunications carrier…to provide *any* telecommunications service" until the FCC could adopt regulations specifically applicable to providers of telecommunications services.... 47 U.S.C. 224(d)(3) (Supp. IV 1998) (emphasis added). *As the FCC recognized [in its administrative Pole Attachment Order], in Section 224(d)(3) as in Section 224(a)(4), "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments." Pet. App. 95a. Cf. United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted)*.

FCC's Brief in *Gulf Power*, 2001 WL 345195 at *31-*32 (emphasis added). Later, the FCC added that:

> As a legal matter, the terms of Section 224(a)(4) are dispositive, regardless of whether those terms extend rate protections to a larger class of beneficiaries or attachments than the particular subclasses with which Congress was most acutely concerned. "[I]t is not, and cannot be, [judicial] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan v. United States*, 522 U.S. 398, 403 (1998).

The Commonwealth and VTIA maintain that the FCC's position in *Gulf Power* is irrelevant here because Section 224 and Section 253 are completely different sections of the Act and Section 224 does not purport to interfere with the fundamental structure of state governments. Commonwealth's Opposition at 8 n.4; VTIA's Opposition at 26. The Commonwealth and VTIA miss BVUB's point – the FCC's brief is not relevant here because this case has anything to do with pole attachments from a substantive standpoint. It is relevant because it shows that the FCC knows very well how Congress's expansive, unqualified use of the term "any" in the Telecommunications Act should be interpreted, regardless of the substantive issue involved.

Furthermore, in the *Missouri Opinion*, the FCC rejected the petitioners' reliance on the agency's position in *Gulf Power*, holding that the Eleventh Circuit's adverse decision proves that the term "any" need not necessarily be read expansively. *Missouri Opinion* at ¶ 14. It is important for this Court to know that, contrary to this holding in the Missouri case, the FCC is now insisting to the Supreme Court that the Eleventh Circuit was wrong in failing to give the term "any" its clear, unambiguous and expansive meaning.

B. THE LEGISLATIVE HISTORY FURNISHES COMPELLING PROOF THAT CONGRESS INTENDED SECTION 253 TO COVER PUBLIC ENTITIES

The Commonwealth concedes that the legislative history supports the following conclusions: "(1) that the reach of the Telecommunications Act was intended to be broad, (2) that the act was designed to promote competition, and (3) that Congress meant to include "utilities" within the term "entities" in § 253(a)." Commonwealth's Opposition at 11. The Commonwealth insists, however, that "because nothing within this legislative history deals specifically with the authority of the States to regulate and restrict the authority of their political

subdivisions, the legislative history is irrelevant to the issues before this Court." *Id*. Similarly, VTIA contends that the Court must reject BVUB's "strained" legislative history because "BVUB has failed to meet its burden to demonstrate Congress' clear and manifest intent in enacting Section 253(a) to include municipally-owned utilities in the term "any entity." VTIA's Opposition at 28-29. VTIA also suggests that BVUB is in effect claiming "that Congress, without notice, hearing or any word at all swept aside and redefined in critical ways the relationship between states and their localities." VTIA Opposition at 20.

At the outset, the Commonwealth apparently would not be satisfied with anything less than an explicit statement in the legislative history that Congress intended to preempt state laws that prohibit their political subdivisions from providing telecommunications services. As *Gregory* itself made clear, however, no such explicit statement is necessary. *Gregory*, 501 U.S. at 467 ("This does not mean that the Act must mention [the allegedly preempted subject] explicitly . . . But it must be plain to anyone reading the Act that it covers [the allegedly preempted subject]" (citations omitted).

Furthermore, when Congress uses the term "any" in an unqualified way in a statute, the Supreme Court's "any" cases and *Salinas* shift to the person arguing for a narrowing construction the burden of showing that this result is compelled by something else in the statute or its legislative history. This burden is a heavy one. As *Salinas* held, "only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." *Salinas*, 522 U.S. at 57-78 (citations and inner quotations omitted).

Thus, contrary to the Commonwealth's and VTIA's suggestion, the burden is not on BVUB to show that Congress meant what it said in Section 253(a). Rather, the burden is on the Commonwealth and VTIA to prove, by compelling evidence, that Congress did *not* intend to cover entities of all kinds, including public entities. The Commonwealth and VTIA have cited

nothing whatsoever in the legislative history that even suggests, much less compels the conclusion, that Congress intended to exclude public entities from the scope of Section 253(a). Nor is there anything in prior FCC and court cases to help the Commonwealth or VTIA meet their burden.[4]

Even if BVUB did indeed have the burden of proving, through the legislative history, that Congress intended to cover public entities under Section 253, BVUB could readily meet that burden. In view of the Commonwealth's concession that Congress meant to cover "utilities" under the term "entities" in Section 253(a), BVUB would merely have to show that Congress meant to cover publicly-owned utilities under the term "utilities." The legislative history resoundingly confirms that Congress did have this understanding and intent.

As BVUB has previously shown, the 104th Congress took Section 253(a) *verbatim* from Section 230(a) of S.1822 of the 103rd Congress. The Senate Report on S.1822 was replete with references to, and examples of, utilities of all kinds, explicitly including "state or local energy utilities," and it detailed the many reasons why Congress intended to treat electric utilities *of all kinds* the same for the purposes of the Act.[5] Furthermore, BVUB traced the migration of the preemption language of Section 230(a) of S.1822 into Section 253(a) of the Telecommunications Act and demonstrated that the 104th Congress accepted this language with the clear understanding and intent that it would have the same scope in Section 253(a) as it had in Section 230(a) of S.1822.[6] Thus, BVUB has already met any burden of proof that it might have to show

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4 As shown in BVUB's Opening Brief, at 19-24, the FCC and the D.C. Circuit did not consider legislative history in the *Texas Order* and *Abilene*, respectively, and in the *Missouri Order,* the FCC held only that the legislative history is consistent with, but does not compel, the conclusion that Congress meant Section 253(a) to cover public entities.

5 BVUB's Opening Brief at 11-16.

6 *Id*. at 16-18.

that Congress understood the term "utilities" to include utilities operated by state and local governments.

In view of the Commonwealth's reluctance to concede that Congress intended to treat utilities of all kinds alike, BVUB has reexamined the legislative history on this point and found even more proof that supports its position. For example, as BVUB previously noted, during the hearings on S.1822, William Ray, testifying on behalf of the American Public Power Association, made Congress aware of the remarkable steps that some municipal electric utilities had already taken, and that others could take, with appropriate incentives, to bring competitive telecommunications services to their communities. Shortly after Mr. Ray testified, Senator Trent Lott (R-MS), now the Senate Majority Leader, observed, "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[7] As a key sponsor and floor manager of the Telecommunications Act, Mr. Lott's statements are entitled to substantial weight.[8]

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[7] Hearings on S. 1822, The Communications Act of 1994, Before the Senate Committee on Commerce, Science and Transportation, 103d Cong, 2d Sess., A&P Hearings S.1822 (Westlaw) at 351-61 ("Hearings on S.1822").

[8] *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Federal Energy Administration v. Algonquin SNG, Inc*., 426 U.S. 548, 564 (1976) ("Senator Millikin himself stated without contradiction that the Amendment authorized the President... As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 3441 U.S. 384, 394-95 (1951) ("The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

Congress did indeed find the "right language" to encourage both public and private utilities to make a "real contribution" in the telecommunications area. As the Senate Report on S.1822 expressly confirms, that language included "new Section 230(a)." Thus, in its summary of the major features of S.1822, the Report included the following statement (with BVUB's emphasis added):

> 5. Entry by electric and other utilities into telecommunications
>
> S. 1822 allows *all* electric, gas, water, stem [sic], and other utilities to provide telecommunications (section 302 of S. 1822, *new section 230(a)*).[9]

"New Section 230(a)," it bears repeating, stated that "[N]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service" (emphasis added).

Citing *Jefferson v. United States*, 178 F.2d 518, 520 (4th Cir. 1949), *aff'd* 340 U.S. 135 (1950), VTIA suggests that this Court should not give too much weight to "discarded measures" or to the statements of members of Congress in the course of debate. VTIA Opposition at 28. The Commonwealth, too, urges this Court not to consider the statements of the prominent members of Congress that BVUB has appended to its opening brief.[10] Commonwealth's Opposition at 10.

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9 *S. Rep. No. 103-367*, 103d Cong., 2d Sess. 22 (1994), 1994 WL 509063.

10 The Commonwealth quotes selectively from and seriously misrepresents the holdings of *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) and *United States v. O'Brien*, 391 U.S. 367, 384 (1968). The Commonwealth claims that *Chrysler Corp.* stands for the proposition that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Commonwealth's Opposition at 10. But *Chrysler Corp*. went on to say that "Congressman Moss' statement must be considered with the Reports of both Houses and the statements of other Congressmen.… *Chrysler Corp*., 441 U.S. at 311. Similarly, to show the Commonwealth's distortion of *O'Brien*, we begin by highlighting the portion of the Court's opinion that the Commonwealth leaves out: "*Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply interpretation of legislation, the Court will look to statements by*

(footnote continued . . .)

As BVUB has shown, however, the operative language of Section 230(a) was by no means "discarded" – indeed, the FCC has itself explicitly acknowledged that the history of Section 230(a) is an integral part of the legislative history of Section 253(a).[11] Furthermore, BVUB's presentation of the legislative history is fully confirmed by the brief of Congressman Boucher as Amicus Curiae. As a key sponsor of the Telecommunications Act in the House of Representatives and a member of the Joint Conference Committee, Congressman Boucher's statements are also entitled to substantial weight. The legislative history is thus entirely one-sided in the BVUB's favor.

C. The Virginia Municipal Telecommunications Ban Cannot Be Sustained Under Section 253(b)

As BVUB showed in its Opening Brief, at 40-41, a state can sustain a barrier to entry prohibited by Section 253(a) only if it can prove that the barrier is "non-discriminatory" and "necessary" to achieve one or more of the public interest goals designated in Section 253(b). The Commonwealth has offered no evidence to suggest that the General Assembly enacted the Virginia barrier to municipal entry for any purpose that is permissible under Section 253(b). The Commonwealth apparently does not even know what the General Assembly intended, as it offers only speculation as to conclusions "likely to have been reached by the General Assembly."

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legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress's purpose. It is an entirely different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *O'Brien*, 391 U.S. at 384.

[11] BVUB's Opening Brief at 18. Ironically, while relying heavily on the FCC for everything else, the Commonwealth has moved to strike this concession by the FCC from the record.

Commonwealth's Opposition at 2. The Commonwealth goes so far as to offer the far-fetched theory that the General Assembly intended to prohibit BVUB from providing or facilitating the provision of advanced services in Bristol because allowing BVUB to do so would discourage private telecommunications providers from providing similar services in *other* communities! Commonwealth's Opposition at 2 n.2.[12]

For its part, VTIA cites a self-serving industry-sponsored "study,"[13] various industry press releases and reports, and scattered news articles that, according to VTIA, demonstrate that localities are incapable of meeting their own telecommunications needs successfully and that Bristol has what the industry believes to be ample access to telecommunications services. VTIA's Brief 4-11. Without citing any proof of legislative intent or responding to BVUB evidence to the contrary, VTIA suggests that considerations such as these prompted the General Assembly to enact the Virginia law in issue and Congress to exclude public entities from Section 253(a). *Id*. at 11.

Even if VTIA's references said what VTIA claims they say and were truthful and accurate,[14] they would not present genuine issues of material fact that preclude the Court from entering summary judgment for BVUB. In fact, VTIA itself suggests that the Court should not decide the question of federal preemption on policy grounds. VTIA Opposition 11. In VTIA's

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12 As the FCC found in the *Missouri Order*, at ¶ 10, and as Commissioner Ness noted in her separate statement, the effect of municipal entry can be precisely the opposite of what the Commonwealth and VTIA suggest here. For example, when the municipal electric utility of Muscatine, Iowa, began to provide high-speed services, the incumbent cable and telephone providers rapidly followed suit, giving the residents a choice among three competitive providers. *Id*.

13 The list of sponsors of this "study" furnishes a good predictor of how it turned out. *See* http://www.pff.org/supporters.htm.

view, the Telecommunications Act left the policy debate on whether to allow municipal entry into telecommunications to the states. *Id*. That is simply wrong. As the FCC has expressly held, Congress enacted Section 253 "to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipalities or states, including . . . the actions of state legislatures."[15] As indicated, state policy considerations are also irrelevant, except in the context of Section 253(b). Furthermore, as the FCC found in both the *Texas* and *Missouri* cases, statutes such as the Virginia law in issue here are unwise, unnecessary to meet any legitimate state purpose, and inconsistent with the national policies embodied in the Telecommunications Act. BVUB's Opening Brief at 40-41, citing *Missouri Order* at ¶ 10.

II. THE COURT SHOULD NOT DISMISS THIS CASE

In addition to its attack on the substantive merits of BVUB's challenge to the Virginia barrier to municipal entry, the Commonwealth and VTIA contend that, for various reasons, the Court has no authority to decide this case. None of these arguments has merit.

A. BVUB Has Standing to Bring this Suit

The Commonwealth contends that BVUB has failed to allege a threshold basis for standing under the criteria specified in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000). These criteria include: (1) injury in fact; (2) a causal connection that is traceable to the conduct of the defendant; and (3) substantial likelihood that the requested relief

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[14] Lest VTIA's statements go unchallenged in the record, BVUB refutes them in the second affidavit of Robert James Kelley, which is appended hereto. *See also* Section II.A. below, in which BVUB responds to the Commonwealth's arguments on standing.

[15] *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, 13 FCC Rcd 3460, 1997 WL 603179 (rel. Oct. 1, 1997) ("*Texas Order*"), ¶ 4.

will remedy the alleged injury in fact. Commonwealth's Opposition at 3-4. Specifically, the Commonwealth alleges that BVUB cannot show injury in fact or a causal connection between the Virginia law and any such injury because BVUB has made no effort to take advantage of the "dark fiber" exception to the Virginia ban on municipal telecommunications activities. This argument is flawed for several reasons.

First, BVUB has no duty to attempt to comply with an "exception" that is itself unlawful. Section 253(a) applies not only to explicit state barriers to entry, such as Section 15.2-1500, but also to state measures that "may…have the effect" of barring "any entity" from providing any telecommunications service. As the FCC has held,

> Section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, *but also those state or local requirements that have the practical effect of prohibiting an entity from providing service. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment*.[16]

The "dark fiber" exception does not establish anything remotely like a "fair and balanced legal and regulatory environment." If a telecommunications provider wanted to lease dark fiber from a private company, it would negotiate a deal and be done with the process in one step. If the provider wanted to lease dark fiber from a public entity, negotiating the deal would be only the beginning of an absurdly long, drawn-out, expensive and discriminatory process under the procedures prescribed in Section 56-484.7.

To qualify for the exception, the telecommunications provider would have to be a certificated local exchange telephone company or a non-profit institution that would use the fiber

for not-for-profit purposes. This excludes profit-making cable companies, electric utilities, and a host of other potential users of the dark fiber. The lease would also have to spell out the specific qualifying telecommunications service to be offered by the lessee and the geographic area in which that service will be offered. To be a "qualifying telecommunications service," the service could not otherwise be generally and competitively available in the relevant geographic area.

Before entering into the proposed lease, the lessee would have to petition the State Corporation Commission to approve the lease. The Commission, in turn, would have to issue notice and conduct a hearing in the affected area to determine whether to approve the lease. In making this determination, Commission would have to ascertain whether the lease will promote the provision of competitive communications service within the geographic area; whether the service will enhance economic development; whether the qualifying telecommunications service specified in the lease is readily and generally available from three or more nonaffiliated certificated local exchange companies, not including any lessee; whether the lease will benefit consumers; and whether the lease is in compliance with the requirements of Sections 56-484.7:1 and 15.2-1500 of the Code of Virginia. If the Commission made a negative determination on any of these issues, it would have to disapprove the lease.

What provider in its right mind would subject itself to this cynical process, which would take months to complete, would cost tens of thousands of dollars or more, would require the provider to make its confidential market strategies public, giving its competitors a tremendous competitive advantage, and would potentially result in an adverse ruling by the Commission?! Not surprisingly, in the period since the "dark fiber' exception was enacted, not a single potential

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(. . . footnote continues)

[16] *Texas Order* at ¶ 22.

lessee has sought to lease dark fiber from BVUB in order to provide telecommunications services in Bristol. Second Kelley Affidavit at ¶ 6.

BVUB submits that the General Assembly could not have enacted the "dark fiber" exception for any purpose other than to drive potential lessees into the arms of incumbent providers and to discourage potential competitors from gaining a foothold against the incumbents by leasing facilities from public entities. In any event, whatever the purpose of the exception, its effect is to create an unlawful effective barrier to entry under Section 253(a).

Second, the Commonwealth has misunderstood BVUB's objectives. BVUB does not seek to lease dark fiber, as the Commonwealth appears to assume. To the contrary, as Robert James Kelley states in his second affidavit, in the absence of the Virginia barrier to entry, BVUB would take immediate steps to create an advanced fiber optic communications network that would facilitate the rapid deployment of competitive communications services at affordable rates to all areas of the City.

BVUB's goal is to establish a fiber-to-the-home/business network that would provide bandwidths of up to, or in excess of 1 Gigabit per second throughout the City, which would vastly exceed the bandwidth capacities of Digital Subscriber Line (DSL) and cable modem service that are currently available or under development. BVUB would provide open access to its system to any provider of communications services that wished to use it, including incumbent and new providers. By offering potential entrants access to a highly sophisticated network without their having to make significant capital investments, BVUB hopes to accelerate the emergence of meaningful competition in Bristol. BVUB would focus on building out its network as broadly as possible, providing communications transport service, managing network quality of service and bandwidth, and maintaining connectivity between independent service providers and their customers. Second Kelley Affidavit at ¶ 3.

Third, BVUB belongs to the people of Bristol, who wish to take maximum advantage of their investment in BVUB's communications facilities to promote economic development, educational and employment opportunity, and quality of life in the City. Section 15.2-1500C and 56-484.7:1 of the Code of Virginia injure both BVUB and the people of Bristol by denying them the ability to take full advantage of BVUB's facilities, expertise and other assets.

Fourth, restricting BVUB's telecommunications activities to leasing dark fiber pursuant to Section 56-484.7:1 of the Code of Virginia would be inconsistent with BVUB's goal of ensuring that advanced communications services are deployed in all areas of Bristol at affordable rates as rapidly as possible. If BVUB could only lease dark fiber – assuming that any private provider would even consider leasing dark fiber under the onerous terms and conditions specified in Sections 56-484.7:1 and 15.2-1500 – this would limit revenues that BVUB would use to expand its network to all areas of the City. BVUB would also be relegated to a purely passive role, unable to act itself to fill service gaps if lessees of dark fiber chose to serve – that is, to "cherry pick" – only the most lucrative business opportunities in the City. Second Kelley Affidavit at ¶ 4.

Thus, BVUB does indeed have standing to sue. All the elements required by *Vermont Agency for Natural Resources* are present here – (1) injury in fact, (2) caused by the Virginia barrier to municipal entry, and (3) a reasonable probability that the relief sought would free BVUB to provide the infrastructure and services that the residents of Bristol desire.

B. BVUB Has the Right to Bring This Action

1. Bristol Has a Right To Sue Under VA Code Section 15.2-1404

In its brief in opposition to the Commonwealth's motion to dismiss, BVUB demonstrated that it has a right to sue the Commonwealth under VA Code Section 15.2-1404, which authorizes localities to bring suit regarding "matters connected with its duties." BVUB showed that it has

authority to provide "utility" type services under VA Code Sections 15-2-1100, 15.2-1102, and 15.2-2109 and under the City's Charter.

The Commonwealth does not contend that BVUB would lack the power to provide telecommunications services under these authorities in the absence of the Virginia barrier to entry in VA Code Sections 15.2-1500 and 56-484.7:1. Rather, the Commonwealth contends that these provisions have trumped BVUB's authority and have made clear that BVUB no longer has the power, much less the duty, to provide telecommunications services. Thus, the Commonwealth concludes, BVUB has no right to sue under Code Section 15.2-1404. Commonwealth's Opposition at 14-16.

The Commonwealth's argument is fundamentally flawed for two reasons. First, the Commonwealth *assumes* that VA Code Sections 15.2-1500 and 56-484.7:1 are lawful and then bootstraps that *assumption* into the conclusion that BVUB has no right to sue under Section 15.2-1404. If the Commonwealth is wrong about VA Code Sections 15.2-1500 and 56-484.7:1, then its argument under Section 15.2-1404 falls by the wayside as well. Second, as indicated, Section 15.2-1404 literally gives BVUB the right to sue regarding "matters connected with its duties." The term "connected with" can certainly be fairly read to apply to suits to establish precisely what BVUB's duties are. The Commonwealth is thus wrong on both grounds.

2. BVUB Has A Cause of Action Against the Commonwealth

At pages 16-19 of its Opposition, the Commonwealth takes issue with BVUB's reliance on *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), which holds that localities can sue their creating states under the Supremacy and Commerce Clauses of the United States Constitution. According to the Commonwealth, *Rogers* and its progeny are "simply incorrect," particularly because they do not embrace the Commonwealth's view of *Gregory* and other "more recent Supreme Court precedent appearing to recognize a constitutional requirement that states be

allowed to structure their internal governments without federal interference." Commonwealth's Opposition at 17. For the reasons it has stated throughout this brief, BVUB disagrees.

The Commonwealth also observes that the Ninth Circuit recently refused to adopt the analysis of *Rogers* in *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998), and Judge Alex Kosinski wrote what the Commonwealth considers an "extremely well-reasoned concurring opinion." Commonwealth's Opposition at 18. The issue in *Burbank* was whether a *panel* of the Ninth Circuit should depart from a prior decision of the Court in *South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980), denying municipalities a right to sue the State. The *Burbank* panel recognized that the Third, Fourth, Fifth and Eleventh Circuits had either disagreed with *South Lake Tahoe* or had found that the general rule against standing is waning. The panel found, however, that it was bound by existing Ninth Circuit precedent. Judge Kosinski suggested in a concurring opinion that, given the rulings of the other circuits, an *en banc* determination of the Ninth Circuit might be warranted. Judge Kosinski expressed reservations about overruling *South Lake Tahoe* but concluded, "I am therefore content to await such reconsideration if and when a case arises where the question is given appropriate attention." *Burbank*, 136 F.3d 1364.

C. Section 253(a) Is Not Unconstitutional

The Commonwealth maintains that, if the Court determines that the term "any entity" in Section 253(a) covers public entities, it must then hold that Section 253(a) unconstitutionally interferes with the federal/state balance. The Commonwealth largely reiterates the arguments that it made on this issue in its motion to dismiss. Commonwealth's Opposition 13-14. BVUB has already responded fully to these arguments, and it stands on what it said in its opposition to the motion to dismiss.

The Commonwealth does make one new argument that BVUB cannot allow to stand unchallenged. The Commonwealth contends that BVUB erroneously relies on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), "to support its contention that there are no limits upon the authority of Congress to regulate in areas which traditionally have been left to the control of the States." Commonwealth's Opposition at 13. According to the Commonwealth, *Garcia* did not "squarely address" whether Congress has authority "to interfere with the internal structure of state governments," and when the Supreme Court dealt with that issue for the first time in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), it "cautioned that, with respect to decisions relating to the internal structure of state government, 'the authority of the people of the States . . . may be inviolate.' *Id*. at 464." Commonwealth's Opposition at 14. Since the Court sidestepped this issue in *Gregory*, the Commonwealth claims, it remains free to contend that "Congress lacks the authority to interfere with the Commonwealth's ability to structure its government by designating the functions that her political subdivisions may and may not perform." *Id*.

The Commonwealth's has once again seriously misrepresented its authorities. *Gregory* did not say or suggest that state decisions "relating to the internal structure of state government" may be inviolate. Rather, it said that "the authority of the people of the States to determine *the qualifications of their government officials* may be inviolate." *Gregory*, 501 U.S. at 464 (emphasis added). Moreover, even if *Gregory* had said what the Commonwealth claims, this case does not involve "the internal structure of state government" but merely the ability of localities to provide telecommunications services through structures, such as BVUB, that have existed for decades, that are well-suited to providing telecommunications services and infrastructure, that were widely viewed by Congress as essential to fulfilling our national telecommunications policies, and that are ready, willing, able and eager to play that role.

D. BVUB's Suit Against General Earley Is Not Barred By the Eleventh Amendment

The Commonwealth contends that General Earley is not a proper party to this suit for two reasons. First, the Commonwealth states that BVUB's complaint should be dismissed under Section 12(b)(6) of the Federal Rules of Civil Procedure because it gives no information about BVUB's reasons for naming General Earley as a defendant. While BVUB believes that its complaint is adequate, it is concurrently filing a motion to amend the complaint that should dispose of any doubts about the sufficiency of BVUB's claims against General Earley.

Second, the Commonwealth contends that, in the period since BVUB filed its opening brief, the Fifth Circuit issued an *en banc* decision, *Okpalobi v. Foster*, 2001 WL 242485 (en banc) (5th Cir. 2001), that reversed a panel's decision on which BVUB had relied, *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999). The Commonwealth contends that the *en banc* court rejected an argument similar to the one that BVUB is making here – i.e., that *Ex parte Young,* 209 U.S. 123 (1908), relaxed the "special relation" test of *Fitts v. McGee*, 172 U.S. 516 (1898). Commonwealth's Opposition at 21. According to the Commonwealth, the rationale of the *en banc* court requires dismissal of General Earley from this case because "[n]either Va. Code § 15.2-1500(B) nor Va. Code § 56-484.7:1 designates the Attorney General as the proper party to enforce these provisions of state law." *Id*. at 22. The Commonwealth has plainly misread the *en banc* court's decision.

Okpalaki involved a challenge to a Texas abortion law that gives the mother and fetus a cause of action in tort against a person who performs an abortion, but gives the state no civil or criminal enforcement authority. The court focused on whether a person who performs abortions could challenge the constitutionality of this law in federal court through a suit against the governor and attorney general of Texas, neither of whom had any authority to enforce the statute

in issue. Contrary to the Commonwealth's argument, the *en banc* court did not say that the statute in issue must specifically designate the attorney general as the proper party to enforce the statute. To the contrary, the court summed up its rationale as follows:

> In sum, *Young* does not minimize the need to find an actual enforcement connection -- some enforcement power or act that can be enjoined -- between the defendant official and the challenged statute. Instead, it provides that this connection can be found implicitly elsewhere in the laws of the state, apart from the challenged statute, so long as those duties have the same effect as a "special charge" in the statute.

Okpalobi, 2001 WL 242485 at *11. As BVUB has shown in its brief in opposition to the Commonwealth's motion to dismiss, at 17-18, Virginia's statutes and cases vest General Earley with ample enforcement authority to enforce the laws at issue in this case. The Commonwealth does not contest BVUB's showing on this.

Last, the Commonwealth maintains that the Fourth Circuit's analysis in a recent case, *Lytle v. Griffith*, 240 F.3d 404 (4th Cir. 2001), "appears to be consistent with that of the *en banc* Court in *Okpalobi*." Commonwealth's Opposition at 21. *Lytle* involved a suit in federal court against the governor of Virginia to challenge the constitutionality of an anti-loitering statute that had been used to break up an anti-abortion protest. The specific issue addressed by the Fourth Circuit was whether the governor of Virginia had a sufficient connection with the enforcement of the statute in question to be amenable to suit under the *Ex parte Young* doctrine.

The Fourth Circuit began its analysis by reiterating its support for the what it called the "well-recognized" *Ex parte Young* doctrine, observing that "We do not … question the continuing validity of the *Ex parte Young* doctrine," *Lytle*, 240 F.3d at 408, quoting *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). The Court also noted that the key issue under *Ex parte Young* is whether the state official in question has "some connection" with

the enforcement of the act, "whether it arises out of the general law or is specially created by the act itself." *Lytle*, *id*., quoting *Ex parte Young*, 209 U.S. at 157.

In the passage of its opinion that sets forth the gravamen of the Court's decision to remand the matter to the district court for further fact determination, the Court stated:

> The Governor, on the other hand, asserts that a violation of the statute is a non-criminal traffic infraction that does not implicate his authority to seek prosecutions by the Attorney General. He also rejects the purported connections between the gubernatorial powers cited by the Lytles and enforcement of the anti-loitering statute. The Governor argues that the Lytles are left with his general duty to "take care that the laws be faithfully executed," Va. Const. art. V, § 7, which is simply not sufficient to merit an exception to sovereign immunity. Moreover, the Governor asserts that "it is difficult, if not impossible, to imagine the Governor using the power of his office to enforce the act--a traffic violation." Reply Brief of Appellants, at 9.
>
> In addition to these factual and legal disputes, the Governor and Griffith assert that rather than choosing the Governor as a defendant, the Lytles should have either sued the Commissioner, or brought their case as a class action naming one or more Commonwealth's Attorneys as class representatives, *see, e.g., Virginia Soc'y for Human Life, Inc. v. Caldwell,* 152 F.3d 268 (4th Cir.1998).

Lytle, 240 F.3d at 409. No such fact issues exist here, as there is no dispute that General Early has authority to enforce the Virginia ban on municipal entry against BVUB.

III. CONCLUSION

For all of the foregoing reasons, as well as the reasons discussed in BVUB's briefs in support of its motion for summary judgment and in opposition to the Commonwealth's motion to dismiss, the Court should award BVUB summary judgment declaring that Va. Code § 15.2-1500(B) and Va. Code § 56-484.7:1 violate the Supremacy Clause and Section 253(a) of the Telecommunications Act and are therefore void and of no effect.

Respectfully submitted,

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