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.	)	

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

Pursuant to Rule 56 of the Federal Rules of Civil Procedure the City of Bristol, Virginia d/b/a Bristol Virginia Utilities Board ("BVUB"), has moved this Court to declare on summary judgment that Virginia Code §§ 15.2-1500B and 56-484.7:1 are void and of no effect under Article VI Section 2 of the U.S. Constitution and 47 U.S.C. § 253 and that Attorney General Earley has no lawful authority to enforce these provisions against BVUB.[1]

STATEMENT OF THE CASE

Overview and Summary

In this declaratory judgment proceeding, Plaintiff asks the Court to declare that, under the Federal Supremacy Clause of the United States Constitution, Article VI, Section 2, Federal law

[1] Contemporaneously with its motion for summary judgment, BVUB is filing a separate brief in opposition to the Commonwealth's motion for dismissal.

pre-empts State law when State statutes are in direct conflict with a Federal statute and that such conflicting State law is, therefore invalid and unenforceable.

The Federal law, 47 U.S.C. 253(a), in pertinent part, provides as follows:

> "No State or Local statute or regulation, or other State or Local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." (Emphasis added.)

The State law, § 15.2-1500B of the Code of Virginia, in pertinent part, provides as follows:

> "B. Notwithstanding any other provision of law, general or special, no locality shall establish any department, office, board, commission, agency or other governmental division or entity which has authority to offer telecommunications equipment, infrastructure, other than pole or tower attachments including antennas or conduit occupancy, or services, ..."

The only exceptions to the State's prohibition are the ability to provide telecommunication services to governmental departments or agencies, and, with severe limitations, to lease "dark fibers." VA Code § 56-484.7:1. By reference to its location, the Town of Abingdon is exempted from this statute.

In cases involving alleged federal preemption of a "traditional" or "fundamental" state power, as BVUD assumes (without conceding) to be the case here, a court must find that Congress made a "plain statement" that Congress intended this result. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). In *Salinas v. United States*, 522 U.S. 45 (1997), the Supreme Court held that Congress satisfies this "plain statement" standard when it uses the modifier "any" in an expansive, unrestrictive way, and nothing in the language, structure, purposes or legislative history of the statute compels a narrower interpretation.

The Defendants note in their motion to dismiss that the Federal Communications Commission (FCC) has twice ruled that the term "any entity" does not cover public entities and

that the United States Court of Appeals for the District of Columbia, in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), upheld the first of these FCC interpretations. None of these prior decisions is binding on this Court. Nor should the court defer to them.

As to the FCC's interpretations, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), holds that a court should defer to an agency's interpretation of a statute only if the court first independently determines that Congress has not spoken to the precise matter in issue and that the statute is ambiguous or silent on that issue. Because this case involves the application of the "plain statement" standard of *Gregory v. Ashcroft*, the Court must dismiss BVUB's complaint if it finds that Congress has not made its intent to cover public entities under the term "any entity" sufficiently clear. That determination is one that the Court must make for itself, applying the traditional tools of statutory construction, and unaided by the FCC's interpretations. These tools include the language, structure, purposes and legislative history of the statute. *Chevron*, *id*. at 842-43.

Furthermore, the FCC's first interpretation and the D.C. Circuit's *Abilene* decision are distinguishable as well as erroneous, and the FCC's second interpretation is plainly incorrect. In its first interpretation, the FCC declined to preempt a Texas law to the extent that it barred municipalities, as such, from providing telecommunications services. The FCC expressly stated that it was not ruling on whether Section 253 preempts state laws that prohibit municipalities that operate their own electric utilities from providing telecommunications services.[2] On appeal, the *Abilene* court similarly said that its decision did not apply to the question whether Section 253(a) protects municipalities that operate their own electric utilities from state barriers to entry.[3]

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2 *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, (rel. Oct. 1, 1997) ("*Texas Order*"), ¶ 179.

3 *City of Abilene*, 164 F.3d at 53 n.7.

Because the City of Bristol operates its own electric utility – BVUB – the FCC's *Texas Order* and the *Abilene* decision thus do not apply here.

Moreover, even as to municipalities that do not operate their own electric utilities, the FCC's *Texas Order* and the D.C. Circuit's *Abilene* decision were simply wrong. The FCC and the D.C. Circuit failed to appreciate that the term "any entity" itself satisfies the "plain statement" standard of *Gregory v. Ashcroft* in the absence of any contrary indication in the statute or its legislative history. Instead, while acknowledging that "any entity" is broad enough to cover public entities and that nothing in the statute or legislative history was inconsistent with that interpretation, both the FCC and the D.C. Circuit insisted that a *second* plain statement was necessary to corroborate that Congress really meant what it said in Section 253(a).

In *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), the Supreme Court held that the term "any other final action" must be interpreted broadly and observed that "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id*., 446 U.S. at 592. That, however, is precisely what the FCC and the D.C. Circuit did in the *Texas Order* and *Abilene*. The D.C. Circuit's mistake in this regard was especially egregious, because the Supreme Court decided *Salinas* while the *Abilene* case was on appeal, and the D.C. Circuit ignored Abilene's contention that *Salinas* resolved the key interpretative issues in its case.

In its second interpretation, involving a Missouri barrier to municipal entry, the FCC did squarely rule on the applicability of Section 253 to municipalities that operate their own electric

utilities.[4] In that decision, the FCC unanimously found that the Missouri law was unwise, unnecessary to achieve legitimate state purpose, and contrary to the purposes of the Telecommunications Act. Three of the five FCC commissioners wrote separate statements to underscore these findings. Believing, however, that *Abilene* tied its hands because Missouri law treated municipal electric utilities as indistinguishable from their municipalities, the FCC did not take these findings into account in interpreting "any entity." Nor did the FCC at last apply the approach dictated by *Salinas*. Rather, it mistakenly read *Salinas* as holding only that an agency should interpret ambiguous statutes in a way that avoids disturbing the federal-state balance. Furthermore, as shown below, the FCC also misinterpreted the legislative history of Section 253 and completely ignored the part that underscores Congress's intent to treat public and private electric utilities alike under the Telecommunications Act.

The FCC's ruling in the *Missouri* case is also irreconcilable with the position that the agency is currently taking before the Supreme Court in another case, *Gulf Power, Inc. v. FCC*. There, the FCC insists, as it insisted to the Eleventh Circuit below, that when Congress used the term "any" in an unrestrictive way in the Telecommunications Act, it precluded the FCC and the courts from imposing limitations that Congress did not impose itself.

For these and the other reasons discussed below, BVUB submits that the Court should award it summary judgment.

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[4] *In the Matter of The Missouri Municipal League, et. al: Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, FCC 00-443, *Memorandum Opinion and Order*, 2001 WL 28068 (rel. January 12, 20010) ("*Missouri Order*"), *appeal pending, MO Municipal League v. FCC*, No.01-1379 (8th Cir. filed February 12, 2001).

STATEMENT OF FACTS

1. Bristol's Interest in this Controversy

The City of Bristol, like many other small, rural communities throughout Virginia and the Nation, was left behind in electrification by the private electric utility industry. Recognizing that electric power was critical to their economic survival and development, the citizens of Bristol took matters into their own hands and established their own municipal electric distribution system, on June 29, 1945. Since then, BVUB has thrived, furnishing the residents of Bristol high quality service at affordable rates. As documented in the exhibit attached to the Kelley affidavit filed herewith, BVUB provides electric power to its customers for the lowest average rate in the State of Virginia (public or private), and for rates that are far below the national average.

Now, the patterns that marked the evolution of the electric power industry are repeating themselves in the field of telecommunications. As privately-owned telecommunications providers focus on larger, more lucrative markets, Bristol and many other small communities are falling behind in obtaining the full benefits that access to advanced telecommunications services can bring in the Information Age. These benefits include the ability to attract new businesses and to hold on to existing ones, the ability to provide progressive educational and employment opportunities, the ability to improve and reduce the costs of health care, and the ability to achieve a high quality of life. As the former Chairman of the FCC, William Kennard has observed,

> Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is -- the network of our national community...We must always be looking for ways to remove barriers to investment and to promote competition. I am particularly concerned about deployment in rural areas and in inner cities. Given the early stage of deployment of advanced telecommunications generally, it may seem difficult to discern the extent of the disparity between rural and urban areas. But today's Report [to Congress] suggests that in the very short term, demand for high bandwidth will

> really start to take off. My concern is that a geometric increase in demand may be mirrored by a geometric increase in the urban-rural disparity.[5]

Like all electric utilities, BVUB depends upon reliable and secure communications to assist it in carrying out its public service obligations. In order to meet these communications requirements, and those of schools and other local governmental agencies, BVUB constructed and now maintains an extensive sophisticated fiber optic communications system that could easily be adapted to provide advanced broadband communications infrastructure to new entrants seeking to provide telecommunications services in Bristol. As a last resort, BVUB could also provide services that the residents of Bristol want but are unable to obtain from the private sector at affordable rates. To accomplish these goals, BVUB adopted the following policy statement:

> "BVUB's purpose for constructing a fiber optic network is to provide a high-speed, reliable communication system for its own operations and other local governmental uses. Where economically feasible and legal to do so, BVUB would like to make its infrastructure available to others in the community served, as an open-access network system. Competitive new and old service providers on a fair and non-discriminatory basis could use the open-access network. Such an arrangement would bring about high-speed quality services, which would not be available in this community without an open-access infrastructure.
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> BVUB believes such enhanced community preparedness will offer the best opportunities for economic growth and development."

Through BVUB, the residents of Bristol have the means of preventing their community from becoming a digital backwater in the Information Age. They seek no additional funding or special assistance to do so, but simply want to remove the arbitrary barriers that prevent them from helping themselves, as they always have done.

In the last two years, public and private entities, frustrated by the incumbent local exchange carrier's high prices and limited service offerings in Bristol, have sought access to

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[5] Separate Statement of Chairman Kennard, accompanying adoption of *Report on the Deployment of Advanced Telecommunications Capability to All Americans*, CC Docket (footnote continued . . .)

BVUB's system. The City has no desire to become a telephone company itself, but it does want to ensure that the residents and businesses of Bristol will have the same or better access to advanced communications services as those available in what Virginia's telecommunications industry refers to as the "Golden Crescent" of northern and tidewater Virginia. Indeed, the City wishes to ensure that it will not fall behind its sibling city in Bristol, Tennessee, which is proceeding with a major telecommunications project in the absence of state roadblocks in Tennessee, such as the ones that the Virginia legislature has erected in BVUB's path.

2. Sections 15.2-1500B and 56-484.7:1 of Virginia Code

In 1998, the General Assembly of Virginia enacted § 15.2 -1500B of the Code of Virginia, which provides, in part as follows:

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

This law prohibits Virginia's localities from providing telecommunications services themselves and even from making their equipment or infrastructure available to other persons for use in competing with incumbent providers. While § 56-484.7:1 of the Code provides a limited exception for the leasing of "dark fiber,"[6] the provision is so restrictive and cumbersome that it is effectively meaningless for the majority of communities in the Commonwealth.

In its motion to dismiss, the Commonwealth ironically characterized the intent of the General Assembly in prohibiting municipal participation in telecommunications as an effort to "advance the goal" of "building a modern telecommunications network in rural Virginia." Despite this high-sounding rhetoric, there is virtually no competition in local rural markets in

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(. . . footnote continues)

No. 98-146, released February 3, 1999.

Virginia today, and § 15.2-1500B has significantly curtailed the prospects for facilities-based telecommunications competition in central and southwestern Virginia.

Furthermore, for the municipal electric utilities throughout Virginia, including the BVUB, this is a time of profound change as the electric power industry undergoes restructuring and deregulation. Congress and many states are now struggling to develop approaches that would preserve the competitive balance in the electric power industry from which the Nation has benefited greatly for decades.[7] With investor-owned and cooperatively-owned electric utilities free to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers "one-stop shopping" for energy, communications and other services, § 15.2-1500B of the Virginia Code threatens to place municipal electric utilities at a severe competitive disadvantage in the electric power field.[8]

3. The Telecommunications Act

On February 8, 1996, the President signed the Telecommunications Act of 1996 into law. As the Supreme Court has observed, the Act was "an unusually important legislative enactment." *Reno v. ACLU*, 117 S.Ct. 1329, 1338 (1997). The new law "fundamentally" changed telecommunications regulation from a paradigm that encouraged monopolies to one that seeks to

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(. . . footnote continues)

[6] VA Code § 15.2-1500C defines "dark fiber" as "fiber optic cable which is not lighted by lasers or other electronic equipment."

[7] Congress's concern about preserving healthy competition in the electric power industry is reflected in the statements of various members of Congress in a hearing on the role of public power in a competitive environment. S. Rep. No. 105-25, Part I, 105th Cong. 1st Sess. 85-92 (1997).

[8] Section 103 of the Telecommunications Act and the FCC's implementing orders and regulations, 47 C.F.R. § 1.4000 et seq., 61 Fed. Reg. 52887 (October 9, 1996), have effectively eliminated the constraints that the Public Utility Company Holding Company Act of 1935 had previously imposed on the ability of the major investor-owned electric

(footnote continued . . .)

foster robust competition in all telecommunications markets.[9] The FCC has succinctly described the local competition goals of the Act as follows:

> In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in *all* telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.
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> . . .
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> [U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications -- the local exchange and exchange access markets -- to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, *by allowing all providers to enter all markets*. The opening of *all telecommunications markets to all providers* will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. *The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges*.

Id., ¶¶ 3, 4 (emphasis added).

In developing the Act, Congress recognized that strong measures were necessary to encourage and assist potential providers of telecommunications services to enter into competition with entrenched incumbent local exchange carriers. Thus, Congress "armed" the FCC with "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." *Texas Order*, ¶ 2. Recognizing that incumbents could thwart the national policies of the Act at the state and local level, where they have historically

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(. . . footnote continues)

utilities, including American Electric Power, to provide telecommunications services. At the same time, rural electric cooperatives are not constrained by the Virginia law.

9 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶1 (rel. August 8, 1996).

had enormous political influence, Congress expressly prohibited state and local governments from impairing the ability of *any* potential provider to enter *any* telecommunications market:

> Section 253 – Removal of Barriers To Entry
>
> (a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a) (emphasis added). In enacting Section 253(a), the 104th Congress adopted *verbatim* the operative language of the preemption provision on which the 103rd Congress had reached consensus before recessing – Section 230(a)(1) of S.1822.

a. The 103rd Congress

During the 103rd Congress, the American Public Power Association ("APPA") and other representatives of public power utilities urged Congress to do everything possible to encourage such entities to participate actively in the development of what was then called the "National Information Infrastructure." APPA advised Congress that some of its members were willing to provide telecommunications services themselves and others were willing to make their telecommunications infrastructure and facilities available to potential competitors of incumbent providers, if doing so would not subject them to the burdensome requirements applicable to telecommunications carriers. APPA appealed to Congress to accommodate both groups.[10]

APPA's appeals were successful. To promote competition and diversity in the telecommunications industry, the Senate crafted both the key definitions and the preemption provisions of the S.1822 in ways that were intended to encourage public power utilities to

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[10] A copy of APPA's testimony is appended as Attachment A. This testimony acquainted Congress with the remarkable accomplishments of the municipal electric utility of Glasgow, Kentucky, which had brought a rural community slightly smaller than Bristol, Virginia, into the Information Age, far exceeding the achievements of the private sector in many larger communities.

become involved in the full spectrum of telecommunications activities. Rather than treat providers of comparable services differently, S.1822 embraced an activity-based approach that defined various communications services and subjected all providers of the same services to the same benefits and the same burdens. The Senate Report on S.1822 took pains to assure public power utilities that were considering making their telecommunications infrastructure and facilities available for use by potential competitors to the incumbent monopolists that doing so would not subject the utilities to treatment as telecommunications carriers. At the same time, the Report assured public power utilities that were considering crossing over the line and becoming providers of telecommunications services themselves that they would not merely be subject to the burdens of the Act but also to the full panoply of the benefits that it provided.

Specifically, the Report stated that S.1822 defined the term "telecommunications service" as "the direct offering of telecommunications for profit to the general public or to such classes of users as to be effectively available to the general public regardless of the facilities used to transmit such telecommunications services."[11] In explaining this definition, the Report used the term "entities" to refer to all potential providers of "telecommunications service," whether public or private:

> The definition of "telecommunication service" in new subsection (jj) was broadened from the version in S.1822 as introduced to ensure that *all entities* providing service equivalent to the telephone exchange services provided by the existing telephone companies are brought under title II of the 1934 Act. This expanded definition ensures that these competitors will make contributions to universal service. . . . [12]

In the following paragraph, the Report illustrated the application of these principles through an example involving electric utilities:

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11 *S. Rep. No. 103-367*, 103d Cong., 2d Sess. 122 (1994), Attachment B.

12 *Senate Report on S.1822* at 56 (emphasis added).

> New subsection (kk) provides a definition of "telecommunications carrier" as *any* provider of telecommunications services, except for hotels, motels, hospitals, and other aggregators of telecommunications services. *For instance, an electric utility that is engaged solely in the wholesale provision of bulk transmission capacity to carriers is not a telecommunications carrier*. *A carrier that purchases or leases the bulk capacity, however, is a telecommunications carrier to the extent it uses that capacity, or any other capacity, to provide telecommunications services*. Similarly, a provider of information services or cable services is not a telecommunications carrier to the extent it provides such services. *If an electric utility*, a cable company, or an information services company *also provides telecommunications services, however, it will be considered a telecommunications carrier for those services*.[13]

This passage did not distinguish between publicly-owned and privately-owned electric utilities, and on the next page, the Report confirmed that no such distinction was intended. There, discussing Section 230(a)(1), the preemption provision of S.1822, the Report made clear that S.1822 applied to public power utilities as well as to other electric utilities. Thus, in explaining one of the exceptions to Section 230, the Report stated:

> Paragraph (2) also states that *States or local governments* may make their own telecommunications facilities available to certain carriers and not others so long as making such facilities available is not a telecommunications service. This provision essentially allows a *State or local government* to discriminate not in the regulations it imposes, but in its offering of State-owned or local-owned [facilities to] telecommunications carriers.[14]

The Report then gave another example that left no room for doubt that Congress had public power utilities in mind at the time that it developed the precursor of Section 253(a):

> For instance, some State or local governments own and operate municipal energy utilities with excess fiber optic capacity that they make available to telecommunications carriers. Such a municipal utility may not have sufficient capacity to make it available to all carriers in the market. This provision clarifies that *State or local governments may sell or lease capacity* on these facilities to some entities and not others without violating the principle of nondiscrimination. Since the offering of telecommunications capacity alone is not a

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13 *Senate Report on S.1822* at 54-55 (emphasis added).

14 *Senate Report on S. 1822,* at 56 (emphasis added).

> "telecommunications service," the nondiscrimination provisions of this section would not, in any case, apply to the offering of such capacity.[15]

Taken together, and especially when viewed in the context of the issues that APPA had raised with Congress, these passages make clear that (1) Congress intended that the term "entities" cover *all* public and private providers of "telecommunications service," including electric utilities; (2) Congress understood "electric utilities" to include "State or local" energy utilities; and (3) Congress intended that, if State or local electric utilities chose to cross the line from leasing infrastructure and facilities to providing telecommunications services themselves – as Congress knew that Glasgow, Kentucky, had done – they would be subject to the same obligations and benefits as the Act extended to all other carriers of telecommunications service. These obligations included a duty to contribute funds to the universal service program, and the benefits included protection from state barriers to entry.

These conclusions are reinforced by Congress's response to a closely-related issue. As the Report also notes, while working on the definitions and preemption provisions of S.1822, Congress realized that a potentially significant class of electric utilities might not be able to join all other electric utilities in providing telecommunications services – the electric utilities that were subject to the Public Utility Holding Company Act (PUHCA) of 1935.[16] For the following

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15 *Senate Report on S. 1822,* at 56 (emphasis added).

16 PUHCA had been enacted in response to a broad range of abusive practices by investor-owned electric utilities controlled by certain major holding companies. As one commentator has colorfully observed, these utilities had established holding companies that managed "fantastic aggregates of geographically and socially unrelated systems scattered from hell to hallelujah," including real estate companies, water companies, street and railroad ventures, and fuel and engineering firms, ranging from the Philippines to central and southern Europe and South America. R. Rudolph and S. Ridley, *Power Struggle: The Hundred Year War Over Electricity* 52 (1986). In PUHCA, Congress responded, in part, by requiring these holding companies to register under the Act and to refrain from making investments or providing services in areas outside the electric power industry.

reasons, Congress concluded that all electric utilities should be treated alike under the Telecommunications Act and that the restrictions in PUHCA should therefore be removed:

> First, *electric utilities in general have extensive experience in telecommunications operations. Utilities operate one of the Nation's largest telecommunications systems-much of it using fiber optics*. The existence of this system is an outgrowth of the need for real time control, operation and monitoring of electric generation, transmission and distribution facilities for reliability purposes. *Within the utility world*, registered holding companies are some of the more prominent owners and operators of telecommunications facilities. For example, one registered holding company, the Southern Co., has approximately 1,700 miles of fiber optics cables in use, with several hundred more miles planned.
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> Second, *electric utilities are likely to provide economically significant, near-term applications* such as automatic meter reading, remote turn on/turn off of lighting, improved power distribution control, and most importantly, conservation achieved through real-time pricing.
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> With real-time pricing, electric customers would be able to reprogram major electricity consuming appliances in their homes (such as refrigerators and dishwashers) to operate according to price signals sent by the local utility over fiber optic connections. Electricity costs the most during peak demand periods. Since consumers tend to avoid higher than normal prices, the result of real-time pricing would be significant "peak shaving"-reduction in peak needs for electric generation. Because electric generation is highly capital intensive, reductions in demand can become a driving force for basic infrastructure investment in local fiber optic connections. Registered holding companies are leaders in the development of real-time pricing technology.
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> Third, registered holding companies have sufficient size and capital to be effective competitors. Collectively, registered companies serve approximately 16 million customers-nearly one in five customers served by investor-owned utilities. Three registered companies who have been active in the telecommunications field, Central and South West, Entergy, and Southern Co., have contiguous service territories that stretch from west Texas to South Carolina.[17]

The passage just quoted confirms that Congress had a profound understanding of the electric power industry, was acutely aware that electric utilities of all kinds were well-situated to help the Nation achieve its telecommunications goals, and intended to treat all members of the

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[17] *S. Rep. No. 103-367*, 103d Cong., 2d Sess. 10-11 (1994) (emphasis added).

"utilities world" alike. Furthermore, as Congress observed, registered holding companies were potentially significant players in the telecommunications field because they collectively served approximately 16 million customers in 1994. Notably, during the same period, public power utilities collectively served approximately 35 million customers.[18]

b. The 104th Congress

The 103rd Congress ended without passage of new telecommunications legislation. Congress still had much to do in drafting other areas of law, and significant issues remained to be resolved concerning the effect of the Act's preemption provisions on the ability of local governments to manage their rights-of-way. But Congress's work on what was to become Section 253(a) of the Telecommunications Act was essentially done. As a result, there was not much additional legislative history on this issue. What there was, however, corroborated that the 104th Congress understood and intended that the term "any entity" apply to local governments, particularly those that operate their own municipal electric utilities.

For example, during the floor debates in the Senate on June 7, 1995, Senator Trent Lott (R-MS), one of the key proponents of the Telecommunications Act and currently the Senate Majority Leader, rose to summarize the major features of the Act. Two of his statements are particularly relevant here. First, Senator Lott explained that PUHCA was being amended "to allow registered electric utilities to join with *all other utilities* in providing telecommunications services, providing the consumer with smart homes, as well as smart highways."[19] Second, Senator Lott observed,

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[18] American Public Power Association, *Straight Answers to More False Charges Against Public Power*, http://www.appanet.org.

[19] *Cong. Rec*. S7906 (June 7, 1995) (emphasis added), Attachment C.

> In short, [the Act] constructs a framework where everybody can compete everywhere in everything. It limits the role of Government and increases role of the market. It moves from the monopoly policies of the 1930s to the market policy of the future.
>
> Toward that end, the removal of all barriers to and restrictions from competition is extremely important, and it is the primary objective, and I believe, the accomplishment of this legislation ….

Id (emphasis added).

In a colloquy on the Senate floor one week later, Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, clarified for the record that the 104th Congress understood that Section 253(a) originated in S.1822 and had "no problem" with affording Section 253(a) the same scope as its predecessor in S.1822.[20] The 104th Congress's understanding that Section 253(a) applied indiscriminately to utilities of all kinds is also reflected in the final Joint Explanatory Statement of the Committee of Conference on the bills that became the Telecommunications Act:

> New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, *to the extent such utilities choose to provide telecommunications services*. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, *explicit prohibitions on entry by a utility into telecommunications are preempted under this section*.[21]

Referring to this passage, its author, Congressman Dan Schaefer (R-CO) confirmed in a letter to former FCC Chairman Reed Hundt that "Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition," that

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20 141 Cong. Rec. at S8174 (June 12, 1995), Attachment D.

21 H.R. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) (emphasis added), Attachment E.

"any prohibition on their provision of this service should be preempted," and that the FCC "must reject any state and local action that prohibits entry into the telecommunications business by any utility, *regardless of the form of ownership or control.*" Attachment F (emphasis added). Subsequently, many other members of Congress, including Bristol's representative in the House of Representatives, Rick Boucher, made the same point to the FCC. Attachment G.

c. Section 703 of the Telecommunications Act

At the same time that Congress enacted Section 253, it made extensive revisions to the pole attachment requirements in Section 224 of the Communications Act of 1934. With these actions, Congress showed that it knew how to treat local governments, political subdivisions and instrumentalities as inseparable from their State governments, yet Congress did so only for the purposes of Section 224 and not for the purposes of Section 253.

Specifically, in Section 703(1) of the Telecommunications Act, Congress amended the definition of a "utility" in Section 224(a)(1) of the 1934 Act to include "a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." This definition would have applied to federal, state and local government entities and to cooperatives and railroads, which had all been exempt from federal pole attachments requirements since 1978. Congress avoided this result by stating in Section 224(a)(1) that, "as used in this section," the term "utility" does not include "any railroad, any person who is cooperatively organized, or any person who is owned by the Federal Government or any State." In Section 224(a)(3), Congress also defined the term "State," solely for the purposes of Section 224, as "any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or*

instrumentality thereof " (emphasis added).[22] Notably, Congress could easily have imposed similar limitations on the term "entity" in Section 253(a), but it conspicuously did not do so.

4. Prior Litigation Over the Meaning of "Any Entity" In Section 253

a. The *Texas* Litigation

In 1995, the Texas legislature enacted a law that prohibited the municipalities and municipal electric utilities of Texas from providing certain telecommunications services either directly or indirectly. In November 1995, the municipal electric utility of San Antonio agreed to lease one half of its fiber optic strands to ICG Telecom Group, a privately-owned telecommunications provider that intended to use the fiber to compete with the incumbent telephone company in San Antonio. In May 1996, the Attorney General of Texas issued an opinion letter finding that this agreement violated the Texas law. ICG promptly petitioned the FCC to preempt the Texas law pursuant to Section 253 of the Telecommunications Act. Shortly afterward, the City of Abilene filed a second petition asking the FCC to preempt the Texas law as applied to Texas municipalities, such as Abilene, that do not operate their own electric utilities.

After waiting more than a year for a decision, ICG withdrew its petition, terminated its agreement with San Antonio's electric utility, and turned its attention to other markets. As a result, when the FCC finally issued its decision in October 1997, it limited its holding to the facts that Abilene had presented, stating that "we do not decide at this time whether section 253 bars the state of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Texas Order,* & 179. Invoking *Gregory v. Ashcroft*, the

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[22] The general-purpose definition of "State" in 47 U.S.C. § 153 reads as follows: "(40) STATE -- The term ''State'' includes the District of Columbia and the Territories and possessions."

FCC observed that it could preempt a state's exercise of the "fundamental" and "traditional" state power to regulate its own political subdivisions only if Congress had made a "plain statement" to that effect in the statute or its legislative history. Finding that Section 253 did not go far enough in furnishing such a statement, the FCC upheld the Texas statue. *Texas Order*, ¶ 173.

Abilene appealed the FCC's decision to the United States Court of Appeals for the District of Columbia Circuit. In its opposing brief, the FCC conceded that the legislative history of Section 253(a) includes that of its predecessor in S.1822 and that the history of both the 103rd and 104th Congresses is replete with evidence that Congress intended to protect public power utilities from state barriers to entry. The FCC insisted, however, that the Court should not consider this legislative history because it applied only to municipal electric utilities, whose rights were not before the Court, and not to municipalities, such as Abilene, that do not operate their own electric utilities. Here are the FCC's own words:

> T]he legislative history cited by petitioners does not clarify whether Congress intended for Section 253 to preempt State laws that regulate municipalities. See Pet. Br. 10-17. *Most of the legislative materials quoted by petitioners focus on the provisions of telecommunications service by utilities*.[8] These materials are not pertinent to this case. In the Order challenged by petitioners, the Commission expressly declined to decide "whether section 253 bars the State of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." *Order* ¶ 179.
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> > [8] See S. Rep. No.367, 103d Cong., 2d Sess. 55 (1994 Senate bill, whose preemption provision for removing entry barriers formed the basis for section 253, defined "telecommunications carrier" to include "an electric utility" that "provides telecommunications services"); Conference Report 127 [on the Telecommunications Act] ("explicit prohibitions on entry by a utility into telecommunications are preempted" under Section 253; Letter from Congressman Dan Schaefer to FCC Chairman Reed Hundt (section 253 requires the Commission to "reject any state or local action that prohibits entry by any utility, regardless of the form of ownership or control"); Letter from Senator J. Robert Kerry to FCC Chairman Reed Hundt (by using the term "any entity" in section 253, "Congress intended

> to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets").

Brief of Respondents, Attachment H.

While the Abilene appeal was pending, the Supreme Court decided *Salinas v. United States*, 522 U.S. 52 (1997). As a result, in its reply brief and at oral argument, Abilene urged the D.C. Circuit to apply the teaching of *Salinas* that Congress's use of the modifier "any" in an expansive, unrestrictive way precludes narrowing constructions, removes any ambiguity and satisfies the *Gregory v. Ashcroft* standard unless the language or legislative history compel a different result.[23] But the D.C. Circuit did not embrace or even mention *Salinas* in its opinion. To the contrary, in the key passage of the opinion, it analyzed the issues in a manner that was wholly inconsistent with the approach that *Salinas* prescribed:

> Abilene thinks it important that [Section 253(a)] places the modifier "any" before the word "entity." If we were dealing with the spoken word, the point might have some significance, or it might not, depending on the speaker's tone of voice. A speaker, by heavily emphasizing the "any" in "any entity," might be able to convey to his audience an intention to include every conceivable thing within the category of "entity." But we are dealing with the written word and we have no way of knowing what intonation Congress wanted readers to use. All we know is that "entity" is a term Congress left undefined in the Telecommunications Act. The term may include a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, an association. *See Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997). Abilene maintains that it is also linguistically possible to include a municipality under the heading "entity." But it is not enough that the statute could bear this meaning. If it were, *Gregory*'s rule of construction would never be needed. *Gregory* 's requirement of a plain statement comes into play only when the federal statute is susceptible of a construction that intrudes on State sovereignty. Other than the possibility just mentioned, Abilene offers nothing else, and certainly no textual evidence, to suggest that in using the word "entity," Congress deliberated over the effect this would have on State-local government relationships or that it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business.

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[23] *See* Abilene's Reply Brief at 6-7, Attachment I; *see also* discussion of *Salinas* in Section I.B.1 below.

City of Abilene v. FCC, 164 F.3d 49, 52 (D.C. Cir. 2000)

Aside from its failure to apply *Salinas*, the D.C. Circuit also failed to consider the structure, policies or purposes of the Act in interpreting Section 253. In a footnote, it accepted the FCC's distinction between Abilene and municipalities that operate their own utilities and concluded that "the statements [from the legislative history that Abilene] quotes deal with an issue not before us -- whether public utilities are entities within § 253(a)'s meaning." *City of Abilene*, 164 F.3d at 53 n.7.

The FCC's second, and only other, interpretation of the term "any entity" in Section 253(a) occurred in a subsequent decision involving a Missouri barrier to municipal entry similar to the Texas law. The Missouri case differed from the Texas case in that it squarely presented the issue that the FCC's *Texas Order* and the D.C. Circuit's *Abilene* decision had left unresolved – whether Section 253(a) bars states from erecting barriers to entry by local governments that operate their own electric utilities. The FCC unanimously found that the Missouri law was unwise and contrary to the purposes of the Telecommunications Act

> [M]unicipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities. We emphasized this fact in our August 2000 report on the deployment of advanced services. In that report, we presented a case study detailing advanced services deployment in Muscatine, Iowa where the municipal utility competes with other carriers to provide advanced services to residential customers. . . . Our case study is consistent with APPA's statements in the record here that municipally-owned utilities are well positioned to compete in rural areas, particularly for advanced telecommunications services, because they have facilities in place now that can support the provision of voice, video, and data services either by the utilities, themselves, or by other providers that can lease the facilities.

Missouri Order, ¶ 10.

The FCC also found that the Missouri law in issue is unnecessary to achieve any legitimate state purpose:

> We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

Missouri Order, ¶ 10.

Nevertheless, the FCC upheld the Missouri law, finding that "the legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition." *Missouri Order*, ¶ 10. Chairman William Kennard and Commissioner Gloria Tristani jointly filed a separate statement to emphasize that this result, "while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's *City of Abilene* decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft*." Attachment J. Similarly, Commissioner Susan Ness stated in a separate statement that

> I write separately to underscore that today's decision not to preempt a Missouri statute does not indicate support for a policy that eliminates competitors from the marketplace. In passing the Telecommunications Act of 1996, Congress sought to promote competition for the benefit of American consumers.
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> In the Telecommunications Act, Congress recognized the competitive potential of utilities and, in section 253, sought to prevent complete prohibitions on utility entry into telecommunications. The courts have concluded, however, that section 253 is not sufficiently clear to permit interference with the relationship between a state and its political subdivisions. [Citing *Abilene*].
>
> Nevertheless, municipal utilities can serve as key players in the effort to bring competition to communities across the country, especially those in rural areas. In

> our recent report on the deployment of advanced telecommunications services, we examined Muscatine, Iowa, a town in which the municipal utility was the first to deploy broadband facilities to residential consumers. The telephone and cable companies in Muscatine responded to this competition by deploying their own high-speed services, thereby offering consumers a choice of three broadband providers. It is unfortunate that consumers in Missouri will not benefit from the additional competition that their neighbors to the north enjoy.

Attachment J.

Believing that *Abilene* left it no choice but to deny preemption once it found that Missouri law treated municipal electric utilities as constituent parts of their municipalities, the FCC gave no weight to these findings in interpreting the term "any entity." Nor did the FCC take advantage of this opportunity to apply the teaching of *Salinas* for the first time.[24] Rather, in a footnote, it erroneously read *Salinas* as holding only that a court, confronted with an ambiguous federal statute, should opt for an interpretation that does not disturb the federal/state balance of power. The FCC also brushed the legislative history aside, finding that it generally does not distinguish between public and private electric utilities and therefore does not indicate clearly, or at all, whether Congress intended to preempt barriers to entry by public entities. *Missouri Order*, at ¶ 14 n.49. The FCC did not address its own prior admissions to the D.C. Circuit about what the legislative history meant, nor did it mention the parts of the legislative history reflecting that Congress intended to treat all electric utilities alike under the Telecommunications Act. *Missouri Order*, at ¶ 18.

Aside from the D.C. Circuit, two state courts have interpreted the term "any entity" in Section 253(a) – *Iowa Telephone Assoc. v. City of Hawarden*, 589 N.W.2d 245, 253-54 (Iowa 1999), and *Municipal Electric Authority of Georgia v, Georgia Public Service Commission*, 241 Ga. App. 237, 525 S.E. 2d 399 (1999). In the *Iowa* case, the court merely accepted the FCC's

decision in its *Texas Order,* and in the Georgia case, the court relied exclusively on *Abilene*. Neither court performed an independent review of the meaning of Section 253(a).

ARGUMENT

I. THE TERM "ANY ENTITY" IN SECTION 253(a) OF THE TELECOMMUNICATIONS ACT APPLIES TO MUNICIPALITIES AND PUBLIC POWER UTILITIES

Article VI, Clause 2, of the Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Ever since the Supreme Court's decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that any state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Preemption analysis "[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, "[t]he purpose of Congress is the ultimate touchstone" in determining the effect of federal law on state legislation. *Malone v. White Motor Corp.*, 345 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).[25]

There was a time when uncertainties existed about whether Congress could preempt state laws dealing with "fundamental" or "traditional" state functions. In *Garcia v. San Antonio*

(. . . footnote continues)

[24] As indicated above, the Supreme Court decided *Salinas* two months after the FCC issued the *Texas Order,* while *Abilene* was on appeal.

[25] *See also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("The ultimate question underlying any preemption analysis is "whether Congress intended that federal regulation supersede state law").

Metropolitan Transit Authority, 469 U.S. 528 (1984), the Supreme Court laid these uncertainties to rest:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions -- as undoubtedly there are -- we must look elsewhere to find them.

Id. at 546-47. The proper place to look, the Supreme Court concluded, is the federal political process. *Id*. at 555.[26]

In *Gregory v. Ashcroft*, the Supreme Court set forth the relevant standard for determining whether Congress intended to preempt state laws involving "traditional" or "fundamental" state functions. In such cases, the Court said, an agency or court must find that Congress made a "plain statement" to that effect. *Id*., 501 U.S. at 467. The statement need not be express, but Congress's intent must be "plain to anyone reading the Act." *Id*. ("This does not mean that the Act must mention [the preempted issue] explicitly.... But it must be plain to anyone reading the Act that it covers [that issue]" (citations omitted).

Assuming (without conceding) that the Virginia laws in issue stem from an exercise of "fundamental" or "traditional" state powers, this case does not present substantial questions of "States' rights." Rather, it boils down to a simple case of whether Congress manifested in the language, structure, legislative history and purposes of the Telecommunications Act, the intent to

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[26] *See also Alden v. Maine*, 527 U.S. 706, 806 (1999) (Souter, J., dissenting) ("[I]n light of *Garcia* . . . the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty").

protect municipalities and public power utilities from state and local barriers to entry. As shown below, the answer is plainly "Yes."

A. The Relevant Standards

1. Preemption Analysis

In ascertaining whether Congress intended to preempt a state law, the starting point is "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 383 (1992); *accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

In determining whether the meaning of a statute is "plain," one must examine the statute in its entirety, utilizing all of the "traditional tools of statutory construction." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). In *Brown & Williamson Tobacco Co. v. Food and Drug Administration,* 153 F.3d 155 (4th Cir. 1998), *aff'd*, 529 U.S. 120 (2000), the Fourth Circuit summarized the critical steps in this process as follows:

> Although the task of statutory construction generally begins with the actual language of the provision in question, *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989), the inquiry does not end there. The Supreme Court has often emphasized the crucial role of context as a tool of statutory construction. For example, the Court has stated that when construing a statute, *courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy*." *United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc*., 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122, (1849)); *see also Regions Hosp. v. Shalala*, 66 U.S.L.W. 4125, 4129 n.5 (U.S. Feb. 24, 1998) (No. 96-1375); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). Thus, the traditional rules of statutory construction to be used in ascertaining congressional intent include: the *overall statutory scheme*, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-221 (1986) (directing courts to examine the *language of the statute as a whole*); legislative history, *Atherton v. FDIC*, 65 U.S.L.W. 4062, 4067 (U.S. Jan. 14, 1997) (No. 95-928); "the *history of evolving congressional regulation* in the area," Dunn v. CFTC, 65 U.S.L.W. 4141, 4144 (U.S. Feb. 25, 1997) (No. 95-

1181); and a consideration of *other relevant statutes*, *United States v. Stewart*, 311 U.S. 60, 64 (1940).

Brown & Williamson, 153 F.3d at 162 (emphasis added).

In the following sections, we demonstrate that each of the factors emphasized above supports BVUB's position. Afterward, BVUB shows that the FCC and the D.C. Circuit failed to analyze the issues correctly in the *Texas* and *Missouri* cases and that those decisions are not entitled to deference by this Court.

B. The Language, Structure, Legislative History and Purposes of the Telecommunications Act Require Preemption of the Virginia Barriers to Municipal Entry

1. Language of the Act

The term "entity" is not defined in Section 253(a) of the Telecommunications Act or in the general definitions of the Communications Act, collected in 47 U.S.C. § 153, that apply throughout the Act unless expressly overridden by section-specific definitions. The term "entity" must therefore be given its common, ordinary meaning. *Morales*, 504 U.S. at 383; *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.")

Standing alone, the term "entity" is broad enough to include public entities. As the D.C. Circuit found in *Alarm Industry Communications Council v. Federal Communications Comm'n*, 131 F.3d 1066 (D.C. Cir. 1997),[27] definitions of "entity" found in standard non-technical dictionaries include (1) "something that exists as a particular and discrete unit," (2) a "functional

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[27] In the *Alarm Industry* case, the D.C. Circuit rejected an unduly restrictive FCC interpretation of the term "entity" in Section 275 of the Act, finding that this term should ordinarily be given its broad, common meaning. The Court declined to afford the FCC's interpretation any deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional (footnote continued . . .)

constituent of a whole" and (3) "the broadest of all definitions which relate to bodies or units." *Id*. at 1069. Local governments and public power utilities meet all of these definitions. At the very least, "political subdivisions" of a state operate as "functional constituent[s] of a whole."[28]

It is not appropriate, however, to view the term "entity" in isolation. "We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of the statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (citations and inner quotations omitted). In the oft-quoted words of Judge Learned Hand, "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used ..." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.). Likewise, the Fourth Circuit has emphasized that, in analyzing "whether the language at issue has a plain and unambiguous meaning," a court's determination should be " guided by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States of America v. Wildes*, 120 F.3d 468, 469-470 (4th Cir. 1997) (quoting, *Robinson v. Shell Oil Co*., 519 U.S. 337 (1997).

(. . . footnote continues)

policy, no application of expertise in telecommunications." *Alarm Industry*, 131 F.3d at 1069.

[28] In its decision on remand of *Alarm Industry*, the FCC found that the term "entity" is broad enough to encompass units of local government. In that decision, the FCC found that "entity" should be interpreted expansively when necessary to achieve the pro-competitive purposes of the Act; that such an interpretation is "consistent with the idea that 'entity' is 'the broadest of all definitions which relate to bodies or units,'" which is "reflected in judicial and statutory definitions of 'entity' in other contexts;" and that "'[e]ntity' has been statutorily defined to include . . . a division of a government bureau...." *In the Matter of Enforcement of Section 275(A)(2) of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996, Against Ameritech Corporation*, 13 FCC Rcd 19046, ¶¶ 10, 16 (September 25, 1998).

As the Supreme Court and the Fourth Circuit have repeatedly recognized, when Congress uses the modifier "any" in an expansive, unrestricted way, no ambiguity results, and Congress's broad intent must be given effect unless the statute or its legislative history compel a contrary conclusion. For example, in *United States v. Gonzales*, 520 U.S. 1 (1997), the Supreme Court interpreted the term "any" in the phrase "any other term of imprisonment." The Court found,

> The question we face is whether the phrase "any other term of imprisonment" means what it says, or whether it should be limited to some subset of prison sentences -- namely, only federal sentences. Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts. There is no basis in the text for limiting § 924(c) to federal sentences.

Gonzales, 520 U.S. at 5.

Similarly, in *Trainmen v. Baltimore & Ohio R. Co*., 331 U.S. 519, 529 (1947), the Court found that the term "any proceeding arising under this Act" was "unmistakable on its face" and entitled to broad effect as there was "not a word [in the statute] which would warrant limiting this reference...." In *United States v. James*, 478 U.S. 597, 604-605 (1986), the Court found that "the language 'any damage' and 'liability of any kind' undercuts a narrow construction." In *Harrison v. PPG Industries, Inc.*, 446 U.S. at 589, the Court found that "the phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, any other final action."

Likewise, in *United States v. Turkette*, 452 U.S. 576, 580-81 (1981), the Court found that the term "any union or group of individuals associated in fact" covered both legitimate and illegitimate enterprises within its scope and that Congress "could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate.'" In *Freitag v. Commissioner of Internal Revenue*, 501 U.S. 868, 874-75 (1991), the Court found that the term "any other

proceeding" "could not be more clear," that the statute's text "contains no limiting term that restricts its reach," that courts 'are not at liberty to create an exception where Congress has declined to do so,'" quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989), and that "[n]othing in the legislative history contradicts the broad sweep of [term]." In *Brogan v. United States*, 522 U.S. 398, 400-402 (1998), the Court found that the term "any false statement" must be interpreted broadly to include a false statement "of whatever kind."

In *Wildes*, the Fourth Circuit also found that the modifier "any" – as used in the phrase "any felony" -- creates an expansive definition:

> "[A]ny" is a term of great breadth. *See* Black's Law Dictionary 94 (6th ed. 1990) (defining "any" to mean "[s]ome; one out of many; an indefinite number ... [that] is often synonymous with 'either', 'every', or 'all'). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 117 S. Ct. at 1035 (quoting Webster's Third New Int'l Dictionary 97 (1976)); *see also id*. (determining that the phrase "any other term of imprisonment" must be read broadly to include both state and federal terms of imprisonment); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (finding that language requiring defendant to forfeit "any property" derived from narcotics trafficking "could not have [been] ... broader ...[in] defin[ing] the scope of what was to be forfeited").

Wildes, 120 F.3d at 470 (parentheses and ellipses in original).

The foregoing Supreme Court and Fourth Circuit cases reflect the general rule that when Congress uses the modifier "any" in an expansive, unrestricted way, the word or phrase that "any" modifies must be given its broadest possible scope unless Congress has indicated elsewhere in the statute or in the legislative history that a more narrow construction is necessary. In *Salinas*, the Supreme Court *unanimously* held that the same rule of construction applies in cases involving federal preemption of "traditional" or "fundamental" state powers.

In *Salinas,* the appellant alleged that the term "any" in the phrase "any business or transaction" in a federal bribery statute should be read as being limited to bribery involving

federal funds and that reading the phrase broadly would disturb the federal-state balance. The Court rejected this argument

> The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B).... The prohibition is not confined to a business or transaction which affects federal funds. *The word "any," which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction*.[29]

The Court recognized that, in cases in which the *Gregory v. Ashcroft* standard applies, a "plain statement" of congressional intent is required and that a court should resolve ambiguities in favor of interpretations that do not disturb the federal-state balance. The Court concluded, however, that when Congress uses the term "any" without restriction, it creates no ambiguity, but requires courts to move forward with honoring Congress's intent without bending over backwards to avoid federal preemption.

> "No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope...." United States v. Raynor, 302 U.S. 540, 552, 58 S.Ct. 353, 359, 82 L.Ed. 413 (1938). As we held in Albertini, supra, at 680, 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 Constitution. *United States v. Locke*, 471 U.S. 84, 95-96, 105 S.Ct. 1785, 1792-1794, 85 L.Ed.2d 64 (1985)."
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> 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.

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[29] *Salinas*, 522 U.S. at 57. The Court cited *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947), which holds that when Congress uses the term "any" in a broad, unrestricted way, a court must give effect to Congress's intent unless a contrary intent appears elsewhere in the statute.

> 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).
>
> 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, 520 U.S. at 59-60. Given the lack of ambiguity in Congress's use of "any," the *Salinas* Court looked to the legislative history, not for confirmation that Congress meant what it said when it used the term "any," but for evidence that Congress did *not* mean what it said -- "'[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from that language.'" *Id*. at 57-58, quoting *United States v. Albertini*, 472 U.S. 675, 680.

The FCC has advanced precisely the same interpretation of the term "any," first to the Eleventh Circuit, and more recently to the Supreme Court.[30] The specific issue before the Eleventh Circuit, and now pending before the Supreme Court, is whether the pole-attachment provisions of Section 224 of the Communications Act, as amended by Section 703 of the Telecommunications Act, cover attachments by carriers of wireless telecommunications services,

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[30] *Gulf Power, Inc. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted,* (January 19, 2001).

as the FCC had found in its *Pole Attachment Order*.[31] In a brief to the Eleventh Circuit, the FCC defended that decision as follows:

> [The *Gulf Power*] Petitioners challenge the Commission's determination that Section 224 applies to wireless carriers, despite the fact that Section 224(f) expressly states that a utility must provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit or right-of-way" and Section 224(d) prescribes an interim pole attachment rate formula for "any telecommunications service" [FCC's underlines]. 47 U.S.C. § 224(d)(3) & (f). Petitioners efforts to invent a wireline limitation on the scope of Section 224 is flatly at odds with its plain language.[32]

Finding further support for its "plain-language interpretation" in Congress's use of the term "any" in Sections 224(a)(4) and (d)(3) of the Act, the FCC went on to say that it had recognized in the *Pole Attachment Order* that "'[i]n both sections, the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments.'"[33]

Later in its brief, the FCC was even more emphatic about the significance of Congress's unqualified use of the term "any:"

> By granting attachment rights to "any telecommunications carrier," Congress expressed clearly its intent that wireless telecommunications carriers receive the protection of Section 224. *United States v. Gonzales*, 117 S.Ct. 1032, 1035 (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); *accord Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997) ("any" means "all").[34]

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31 *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).

32 FCC's *Gulf Power* Brief at 37, Attachment L.

33 FCC's *Gulf Power* Brief at 38.

34 FCC's *Gulf Power* Brief at 39-40 (FCC's underlining).

Without specifically addressing the FCC's plain-language argument, the Eleventh Circuit found that Congress did not intend to grant wireless providers pole attachment rights.[35] In response, the FCC petitioned the Supreme Court to review *Gulf Power*, insisting that, as a result of Congress's use of the term "any" in an unrestricted way in various provisions of the Telecommunications Act, it "could not have been clearer" that Congress intended to extend pole attachment rights to "a larger class of beneficiaries . . . than the subclasses with which Congress was most acutely concerned."[36]

In summary, under controlling Supreme Court and Fourth Circuit precedent, and under the FCC's own rationale in the *Gulf Power* case, the term "entity" is broad enough to cover public entities, and Congress's expansive, unrestricted use of the modifier "any" precludes a narrow interpretation of that term.

3. The Structure and Context of the Act

As previously discussed, proper statutory construction also requires that a court look to the overall statutory scheme. *Brown & Williamson* observes that "statutory language must be examined by 'reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole'" and that "acts of Congress 'should not be read as a series of unrelated and isolated provisions.'" *Brown & Williamson*, at 163, quoting *Robinson* and *Gustafson v. Alloyd Co*, 513 U.S. 561, 570 (1995). Thus, the term "any entity" in § 253(a) should also be read in the context of the overall context and the statutory scheme of the Act.

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35 *Gulf Power*, 208 F.3d at 1273-74.

36 FCC's *Petition for Certiorari* at 20, Attachment M.

Nothing in the structure or language of other provisions of the Telecommunications Act suggests that Congress intended to give the term "any" anything but its broadest possible meaning in Section 253(a). Rather, as in *Trainmen*, "[t]here is not a word which would warrant limiting this reference. . . ." 331 U.S. at 529. Quite the contrary is true.

First, the juxtaposition of "any entity" and "telecommunications service" in Section 253(a) reinforces the conclusion that Congress intended the term "any entity" to apply to any potential provider of telecommunications service. As the FCC confirmed in its report to Congress on the key definitions in the Telecommunications Act,[37] the term "telecommunications service" is the primary structural device through which Congress allocated various burdens and incentives to achieve its purposes under the Act. For example, providers of telecommunications service must comply with the interconnection requirements imposed by Section 251, with the universal service contribution requirements imposed by Section 254, with the common carrier duties imposed by Title II of the Communications Act, and the with consumer privacy requirements imposed by Section 222.[38] At the same time, the Act encourages persons to provide telecommunications service by affording them nondiscriminatory access to poles, ducts, conduits and rights of way under Section 224, opportunities for interconnection under Section 251, universal service subsidies under Section 254, and protection from state barriers

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37 *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, at ¶ 32 (rel. April 10, 1998).

38 In numerous decisions, orders, forms and other issuances, the FCC has in fact subjected public power utilities that provide "telecommunications" or "telecommunications services" to the same requirements as other entities engaged in the same activities. For example, the Commission's *Universal Service Order* and FCC Form 457 require stated and local government "entities" to contribute funds to universal service mechanisms if they provide "interstate telecommunications" or "telecommunications services." *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order*, FCC 97-157, ¶¶ 784, 800 (rel. May 8, 1997); Instructions to FCC Form 457.

and local barriers to entry under Section 253(a). None of these provisions distinguishes between public and private providers of telecommunications service. Indeed, it would be unreasonable to suppose that Congress intended to subject public entities to the burdens of the Act without also affording them the corresponding benefits.

Second, as noted above, Congress carefully distinguished privately-owned entities from "political subdivisions" or "instrumentalities" of a state for the purposes of the pole-attachment provisions of Section 224 of the Act and *at the same time* conspicuously failed to do so for the purposes of Section 253(a). This is significant, for as the Supreme Court noted in *Gonzales*, "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" 520 U.S. at 5, quoting *Russello v. United States*, 464 U.S. 16, 23 (1983).[39] The Court should draw a similar conclusion in this instance.

Third, when the *Brown & Williamson* case reached the Supreme Court, the Court emphasized that reading a statute in context may require reading the statute in the light of other related legislative activities. *FDA v. Brown & Williamson*, 529 U.S. at 154-55. As indicated above, this is a time of profound change as the electric power industry undergoes restructuring and deregulation. Recognizing that the competition among public and private electric utilities has served the Nation well for more than a century, Congress and many states, including Virginia, are struggling to develop approaches that would preserve the competitive balance in the

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[39] The FCC has similarly held that "[w]hen Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing." *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, *Second Report and Order and Further Notice of Proposed*

(footnote continued . . .)

electric power industry.[40] With investor-owned and cooperatively-owned electric utilities free to enter into new lines of business, form alliances with telecommunications providers of their choice, and offer consumers "one-stop shopping" for energy, communications and other services, laws such as the Virginia laws in issue could put public power utilities at a severe competitive disadvantage.

Furthermore, as discussed above, in enacting the Telecommunications Act, Congress amended PUHCA to eliminate the barriers that would have prevented large investor-owned electric utilities from providing telecommunications services. It is inconceivable that Congress would have taken this step, which could have fundamentally altered the competitive balance in the electric power industry if public power utilities did not have the same flexibility to provide telecommunications services, unless Congress believed that it had adequately protected public power utilities from state barriers to entry in Section 253(a).

4. The Policies and Purposes of the Act

In *Alarm Industry*, the D.C. Circuit rejected an unduly restrictive FCC interpretation of the term "entity" in Section 275 of the Act, finding that this term should ordinarily be given its broad, common meaning. The Court declined to afford the FCC's interpretation any deference, finding that it "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in

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(. . . footnote continues)

Rulemaking, FCC 98-27, ¶ 32 n.113 (rel. February 26, 1998), *quoting Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996).

40 Congress's concern about preserving healthy competition in the electric power industry is reflected in the statements of various members of Congress in a hearing on the role of public power in a competitive environment. S. Rep. No. 105-25, Part I, 105th Cong. 1st Sess. 85-92 (1997) (Attachment N hereto).

telecommunications." *Alarm Industry*, 131 F.3d at 1069. Such a determination is all the more appropriate here.

In the *Missouri Order* and the accompanying statements of Commissioners Kennard, Tristani and Ness, the FCC could not have stated more clearly that policies and purposes of the Telecommunications Act are advanced by municipal entry and are thwarted by state barriers of the kind that Virginia has enacted. The FCC expressly recognized that "municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry" and can "further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." *Missouri Order*, ¶ 10.

The FCC also found that state barriers to municipal entry are also unnecessary to achieve any legitimate state purpose.

> We continue to recognize, as the Commission did in the *Texas Preemption Order*, that municipal entry into telecommunications could raise issues regarding taxpayer protection from economic risks of entry, as well as questions concerning possible regulatory bias when a municipality acts as both a regulator and a competitor. While some parties maintain that these types of advantages make it unfair to allow municipalities and municipally-owned utilities to compete with private carriers, we believe these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, such as through non-discrimination requirements that require the municipal entity to operate in a manner that is separate from the municipality, thereby permitting consumers to reap the benefits of increased competition.

Missouri Order, ¶ 11.

The reality in Virginia is that unless this Court acts forcefully to preempt §§ 15.2-1500B and 56-484.7:1, there will be no effective competition and no real consumer choice for years in many parts of Virginia. That will be especially true in rural areas, which could well be ignored by private telecommunications providers for years, just as private electric power companies

ignored them years ago. The City of Bristol, acting through the BVUB stands ready, willing and able to serve its community, as it has done with success in the electric power area for decades.

5. The Legislative History of the Act

While resort to the legislative history is unnecessary in view of the clear indication of congressional intent in the language, structure and purposes of the Telecommunications Act, reference to the legislative history further confirms that, far from intending that the term "any entity" in Section 253(a) be read narrowly, Congress fully intended that it protect public entities from state barriers to entry.

As discussed at length above in the Statement of Facts, the legislative history of § 253(a), including the history of its precursor in S.1822, verifies that Congress understood that public entities could accelerate development of our National Information Infrastructure by providing or facilitating the provision of competitive telecommunications services, especially in rural areas; that Congress intended to encourage as many public entities as possible to play these roles in their communities; and that Congress manifested this intent through the definitions and preemption provisions of the Act. The legislative history also confirms that Congress intended to treat all electric utilities alike in obtaining the burdens and benefits under the Telecommunications Act, including the benefit of protection from state barriers to entry.

C. Sections 15.2-1500B and 56-484.7:1 Cannot Be Sustained Under Section 253(b)

For the reasons discussed in the previous sections, the Plaintiff submits that §§ 15.2-1500B and 56-484.7:1 of the Code of Virginia violate Section 253(a) of the Telecommunications Act. The Telecommunications Act and the Supremacy Clause therefore require that these provisions be preempted, unless the Defendants can justify them under one of

the public-purpose exceptions set forth in § 253(b). The relevant standard for such a showing is as follows:

> Section 253(b) preserves a State's authority to impose a legal requirement affecting the provision of telecommunications services, but only if the legal requirement is: (i) "competitively neutral"; (ii) consistent with the Act's universal service provisions; and (iii) "necessary" to accomplish certain enumerated public interest goals. Thus, we must preempt the [measures in issue] pursuant to section 253(d) unless they meet all three of the criteria set forth in section 253(b).

In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCBPol 97-1, *Memorandum and Order*, FCC 97-336, ¶ 40 (rel. September 9, 1997) (footnote omitted).

Sections 15.2-1500B and 56-484.7:1 are not "competitively neutral," as their restrictions apply only to municipalities and their departments. They undermine the Telecommunications Act's universal service provisions by reducing both the number of potential providers of universal service and the number of potential contributors to universal service mechanisms. These state code sections were not promoted, nor can they now be defended, as being "necessary" to achieve any of the public interest goals enumerated in Section 253(b). In fact, the FCC's finding that *Missouri* law was unnecessary and lacked any legitimate state purpose would apply with equal force to the Virginia laws at issue here. Rather, the sole purpose of the Virginia laws was to preserve the monopolies of incumbent telecommunications providers in local markets, which is precisely the opposite of the National policy reflected in the Telecommunications Act.

II. THE COURT SHOULD NOT DEFER TO PRIOR JUDICIAL AND ADMINISTRATIVE DECISIONS ON THE MEANING OF "ANY ENTITY"

In interpreting the term "any entity" in Section 253(a), this Court should not accord deference to any of the prior administrative or judicial determinations on this issue.

First, with respect to the FCC's prior administrative determinations in the *Texas* and *Missouri* orders, the Court not only owes the FCC no deference, but in this case, the Court cannot appropriately even consider these FCC determinations.

In the landmark *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court established the standards and process governing review of an agency's interpretation of a statute which the agency administers. As the Fourth Circuit indicated in *Edelman v. Lynchburg College*, in a *Chevron* analysis:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Edelman v. Lynchburg College, 228 F.3d 503, 507(4th Cir. 2000)(quoting *Robinson v. Shell Oil).* At this first stage of the *Chevron* analysis, no deference is due to a federal agency since the Court is considered to have the same, if not better, ability to determine whether the statute has a plain and unambiguous meaning. *Walton v. Apfel*, 235 F.3d 184, 189 (4th Cir. 2000).

The FCC's determinations would ordinarily be entitled to deference in the second *Chevron* stage, in which the Court interprets a statute that is silent or ambiguous with respect to the issue in question, *EFCO v. National Labor Relations Board*, Case No. 99-1147, (4th Cir. 2000) (quoting *Chevron*, 467 U.S. at 843). But in cases involving the "plain statement" standard of *Gregory v. Ashcroft*, a reviewing court need not, and cannot, reach the second *Chevron* stage, because the determination of whether preemption is appropriate must be based solely on whether *Congress* has spoken to the precise issue at hand. It follows that the Court cannot consider, much less defer to, the FCC's administrative interpretations of the term "any entity."

Even if the Court could consider the FCC's prior determinations, it should not afford them deference. In *Watkins v. Cantrell*, 736 F.2d 933 (4th Cir. 1984), the Fourth Circuit

succinctly summarized the Supreme Court's standards for deference to statutory interpretations by administrative agencies:

> The role of interpretative rules in the construction and interpretation of statutes was articulated perhaps most comprehensively in *Skidmore v. Swift & Co*., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944): We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control*.

Watkins, 736 F.2d at 944.

As discussed previously, the FCC's *Texas* and *Missouri* Orders are not in accordance with law, are not thoroughly and well-reasoned, and are not consistent with prior and later agency pronouncements – particularly the FCC's position in the *Gulf Power* case. The FCC has never interpreted the term "any entity" either in accordance with *Salinas* or in the light of its own findings about the purposes and policies of the Act. As for the legislative history, the FCC's current interpretation is inconsistent with the interpretation that it presented to the D.C. Circuit and, in addition, does not account for Congress's clearly-expressed intent that all electric utilities be treated alike under the Telecommunications Act. In short, the *Texas* and *Missouri* orders hardly merit the Court's deference.

Nor should the Court defer to the prior decisions of the courts that have interpreted the term "any entity" in Section 253(a). As shown, the D.C. Circuit in the *Abilene* case did not apply or even mention *Salinas*, did not take the purposes and policies of the Telecommunications Act into account in interpreting Section 253 and did not rule on the issue that BVUB has raised here – "whether public utilities are entities within § 253(a)'s meaning." *Abilene*, 164 F.3d at 53 n.7. Accordingly, the *Abilene* case is of no precedential value with respect to BVUB's status

under § 253(a). Nor are the *Iowa* and *Georgia* cases, in which the courts merely adopted the *Texas* and *Abilene* holdings, respectively, and performed no independent analyses.

III. CONCLUSION

For all of the foregoing reasons, the Court should grant BVUB's motion for summary judgment and declare that the Commonwealth of Virginia and Attorney General Earley cannot lawfully enforce §§ 15.2-1500B and 56-484.7:1 of the Code of Virginia.

Respectfully submitted,

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Certificate of Mailing

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