IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Record Nos. 01-1741 and 01-1800

THE CITY OF BRISTOL, VIRGINIA d/b/a/
BRISTOL VIRGINIA UTILITIES BOARD,

Plaintiff/Appellee,

v.

RANDOLPH A. BEALES, Attorney General,

Defendant-Appellant,

VIRGINIA TELECOMMUNICATIONS
INDUSTRY ASSOCIATION,

Intervenor/Defendant-Appellant.

On Appeal From the United States District Court
For the Western District of Virginia
Abingdon Division

BRIEF OF APPELLEE THE CITY OF BRISTOL, VIRGINIA, d/b/a BRISTOL VIRGINIA UTILITIES BOARD

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
RICHMOND DIVISION

City of Bristol VA v. Beales and VTIA,
Nos. 01-1741 and 01-1800.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FRAP 26.1 AND LOCAL RULE 26.1

Pursuant to FRAP 26.1 and Local Rule 26.1, Plaintiff-Appellee, the City of Bristol, VA, d/b/a Bristol Virginia Utilities Board, makes the following disclosure:

1. Plaintiff-Appellee is not a publicly held corporation or other publicly held entity.

2. Plaintiff-Appellee does not have any parent corporations.

3. Plaintiff-Appellee has no stock held by any entity.

4. There is no other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. Plaintiff-Appellee is not a trade association.

_____ _____

(Signature) (Date)

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JURISDICTIONAL STATEMENT

On May 16, 2001, the United States District Court for the Western District of Virginia, Judge James Jones presiding, issued a summary judgment in favor of the City of Bristol, Virginia ("Bristol"), declaring that Section 15.2-1500B of the Virginia Code is invalid and unenforceable under Section 253(a) of the Federal Telecommunications Act of 1996 ("Telecommunications Act"), 47 U.S.C. § 253(a), and the Supremacy Clause of the United States Constitution. *City of Bristol, VA, v. Earley*, 145 F.Supp.2d 741 (W.D. Va. 2001). Citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983), the District Court also found that Bristol's Supremacy Clause challenge to the Virginia law presented a federal question over which the District Court had subject matter jurisdiction under 28 U.S.C. § 1331. *Bristol*, 145 F.S.2d at 744 n.2. Intervenor/Defendant-Appellant Virginia Telecommunications Industry Association ("VTIA") concedes that the District Court had subject matter jurisdiction. Virginia Attorney General Richard A. Beales ("the Attorney General") alleges that the District Court lacked jurisdiction because Bristol had no standing to sue the Commonwealth. For the reasons discussed below, Bristol submits that the Attorney General is mistaken.

There is no dispute among the parties that this Court has appellate jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court correctly determine that Congress intended the term "any entity" in Section 253(a) of the Telecommunications Act to cover entities of all kinds, including public entities?

2. Did the District Court correctly find that the inclusion of public entities in Section 253(a) does not violate the Tenth Amendment of the United States Constitution?

3. Did the District Court correctly find that Bristol had standing to bring suit in federal court to challenge the Virginia law at issue?

STATEMENT OF THE CASE

For more than fifty years, the United States Supreme Court has consistently and repeatedly held that when Congress uses the modifier "any" in an expansive, unrestricted way in a federal statute, courts must assume that Congress intended to give the word or term modified its broadest possible scope, unless other language in the statute or its legislative history compels a narrower construction. In *Salinas v. United States*, 522 U.S. 52 (1997), the Supreme Court *unanimously* held that this rule of construction applies with equal force in cases involving federal statutes that are said to preempt "fundamental" or "traditional" state powers, which are governed by the "plain statement" standard of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *Salinas* thus required the District Court to answer two questions in

determining whether the term "any entity" in Section 253(a) applies to public entities: (1) Is the term "entity" broad enough to include public entities? and (2) If so, does other language in the Telecommunications Act or its legislative history compel a narrower construction of Section 253(a)? In answering the second question, *Salinas* required the district court to be mindful that "'only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.'" *Salinas*, 522 U.S. at 57-58, quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985).

The District Court answered both questions in Bristol's favor. As to the first question, the court observed that in *Alarm Industries Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997), the D.C. Circuit had found that "entity" is defined expansively in standard non-technical dictionaries to include, among other things, "the broadest of all definitions which relate to bodies or units." *Bristol, at* 747 (inner citations omitted). The Virginia General Assembly apparently understood the term "entity" this way, as Section 15.2-1500B treats a local government "board" or "department" – such as Bristol's municipal electric utility, the Bristol Virginia Utility Board ("BVUB") – as an "entity."

In answering the second question, the District Court found nothing in the language or the legislative history of the Telecommunications Act that requires reading Section 253(a) to exclude public entities. To the contrary, the court found

that reading the Act restrictively would create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Bristol, at* 748, citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Furthermore, while finding it unnecessary to resort to legislative history in view of the unambiguous language of the Act, the District Court noted that the legislative history here "supports a broad, rather than narrow, interpretation." *Id*.

VTIA's and the Attorney General's efforts to distinguish or denigrate *Salinas* are plainly without merit. In fact, *Salinas* squarely addressed and disposed of every argument that VTIA and the Attorney General have made.

Equally without merit is VTIA's contention that the District Court should have ruled in the Appellants' favor because "[t]he FCC [Federal Communications Commission] and federal and state courts across the country have considered the exact arguments that the plaintiff made below and have rejected them in their entirety." VTIA's Opening Brief ("VTIA Br.") at 2; see also Attorney General Opening Brief ("A.G. Br.") at 24-25. Neither the FCC in its Texas and Missouri decisions, nor the D.C. Circuit in *City of Abilene v. FCC*, 164 F.2d 49 (D.C. Cir. 2000), applied the rule of statutory construction that *Salinas* requires, and the other cases that have considered whether "any entity" covers public entities merely followed the FCC's and the D.C. Circuits lead without performing any independent analysis. *Bristol, at* 749.

VTIA's and the Attorney General's federalism arguments are also incorrect. This is not a case in which the federal government seeks to "commandeer the Commonwealth's legislative processes by removing from Virginia the sovereign authority to structure its internal government and by effectively compelling Virginia to enter into the telecommunications business." VTIA Br. at 3, 34. As the District Court noted, there can be no Tenth Amendment issue in this case because the Supreme Court has definitively held that "the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n. 6 (1999) (Scalia, J.). Also, Section 253(a) does not "commandeer" states into doing anything against their will. All that Section 253(a) does is to preclude states from preventing local governments from exercising their *existing* authority, if any, to decide whether to provide for their community's telecommunications needs.

The District Court also correctly rejected the Attorney General's argument that the City had no standing to sue the Commonwealth. *Bristol, at* 744. In the absence of definitive Fourth Circuit guidance, the court applied the position of the majority of the circuits that have addressed this question. The court relied especially heavily on the rationale of *Branson School Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir.1998), in which the Tenth Circuit had carefully analyzed the

leading cases in other circuits as well as the discredited and irrelevant Supreme Court cases on which VTIA and the Attorney General base their arguments.

Finally, amicus curiae Virginia Cable Telecommunications Association ("VCTA") has advanced various policy arguments to demonstrate "the wisdom of Virginia's decision that its political subdivisions remain out of the marketplace as competitors." VCTA Br. at 6-7. Before the District Court, the parties agreed, and the court found, that policy issues of the kind that VCTA has raised are irrelevant to the statutory interpretation issues in this case. *Bristol, at* 744. Indeed, VCTA itself acknowledges that "[t]his appeal should be determined on legal rather than policy principles.…" VCTA Br. at 6. This Court should therefore disregard VTCA's policy arguments. Besides, as shown below, VCTA's arguments are simply wrong on the merits.

STATEMENT OF FACTS

1. Bristol's Communications Project

The City of Bristol, like many other small, rural communities in Virginia and elsewhere, was left behind for decades while the private sector focused on electrifying major population centers across the United States. Recognizing that electric power was critical to their economic survival and development, the citizens of Bristol and thousands of other rural communities took matters into their own hands and established their own municipal electric utilities. Since then, Bristol's

municipal electric utility, BVUB, has thrived, furnishing the residents of Bristol high quality electric service at the lowest rates charged by any public or private electric utility in Virginia -- rates that are far below the national average. J.A.121.

As the late 1990s approached, Bristol perceived that the patterns that had marked the evolution of the electric power industry were repeating themselves in the field of telecommunications. Once again, privately-owned providers were concentrating on establishing markets in large, lucrative population centers and were leaving Bristol and other small communities behind in obtaining the benefits of an essential new technology. 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 a result, in the last two years, numerous residents and businesses in Bristol have asked the City to do in the communications area what it has been doing so well in the electric power area – provide for the community's needs itself. J.A.121.

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 an extensive, sophisticated fiber optic communications system. In doing so, BVUB included sufficient excess capacity

to support the rapid deployment of advanced communications services at affordable rates to all areas of the City. J.A.234-35.

Specifically, to set itself apart from other rural communities in similar straits, Bristol intends to establish a fiber-to-the-home/business network capable of providing bandwidth of 1 Gigabit per second or more throughout the City, which would vastly exceed the bandwidth capacities of Digital Subscriber Line (DSL) and cable modem service that the private sector is currently offering or developing. BVUB will offer "open access" to its system to any provider of communications services that wants to use it, including incumbent and new providers. By offering potential entrants access to a highly sophisticated network without their having to make significant capital investments, BVUB hopes to accelerate the emergence of meaningful competition in Bristol. While providing some services itself, BVUB will focus on building out its network as broadly as possible, providing communications transport service, managing network quality of service and bandwidth, and maintaining connectivity between independent service providers and their customers. J.A.234-35.

2. The Virginia Barrier to Municipal Entry

In 1998, Virginia enacted § 15.2–1500B of the Code of Virginia. In pertinent part, this provision reads as follows:

> Notwithstanding any other provision of law, general or special, no locality[1] shall establish any department, office, board, commission, agency or other governmental division or entity which has authority to offer telecommunications equipment, infrastructure … or services… However, any town which is located adjacent to Exit 17 on Interstate 81 and which offered telecommunications services to the public on January 1, 1998, is hereby authorized to continue to offer such telecommunications services, but shall not acquire by eminent domain the facilities or other property of any telephone company or cable operator. Any locality may sell any telecommunications infrastructure, including related equipment, which such locality had constructed prior to September 1, 1998, …[2]

This anti-competitive law not only prohibited Virginia's localities from providing telecommunications services themselves, but it even barred them from making telecommunications infrastructure available to private-sector telecommunications providers to facilitate competition with incumbent providers. In 1999, the Virginia General Assembly voted unanimously to relax Section 15.2-1500B by enacting Section 56-484.7:1, which provides a limited exception for the leasing of "dark fiber" – i.e., fiber optic cable that is not powered by electronics.[3]

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1 A "locality" under Virginia law is "a county, city, or town as the context may require." Va. Code § 15.2-102.

2 Section 15.2-1500B was not enacted by the unanimous vote of the Virginia legislature on May 29, 1999, as VTIA contends. VTIA Br. at 7. Rather, Section 15.2-1500B, with a sunset provision of June 1, 2000, was passed by a 66-29 margin on April 22, 1998, and signed into law on May 26, 1998. http://leg1.state.va.us/cgi-bin/legp504.exe?ses=81&typ=bil&val=hb335.

3 http://leg1.state.va.us/cgi-bin/legp504.exe?ses=991&typ=bil&val=hb2277. In return for this "benefit," the General Assembly removed the sunset provision.

This "exception" is so restrictive and cumbersome that since its enactment, not a single provider has sought to lease dark fiber from BVUB in order to provide communications services in Bristol. J.A.235. As the District Court found, the restrictions and conditions in § 56-484.7:1 are so onerous that they, themselves, impose an effective barrier to competition. *Bristol*, at 744.

3. The Telecommunications Act of 1996

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 1996 Act brought sweeping changes. It ended the monopolies that incumbent LECs [local exchange carriers] held over local telephone service by preempting state laws that had protected the LECs from competition." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 737 (4th Cir. 1999). The FCC has described the pro-competitive purposes of the Act as follows:

> [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*.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, 1996 WL 452885, ¶ 4 (emphasis added). Senator Trent Lott (R-MS), at the time a floor manager of the Telecommunications Act and soon to become the Senate Majority leader, summarized Congress's intent even more succinctly: "In short, [the Act] constructs a framework where *everybody* can compete *everywhere* in *everything*." A.R.68 (emphasis added).

The Telecommunications Act had four features that are particularly important here:

a. Removal of Barriers to Entry

In developing the Act, Congress knew that strong measures were necessary to encourage and assist potential providers of telecommunications services to enter into competition with entrenched incumbents. Thus, Congress "armed" the FCC with "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past." *Public Utility Commission of Texas,* 13 F.C.C.R. 3460, 1997 WL 603179, ¶ 2 (1997) ("*Texas Order*"). Among these tools was Section 253(a) of the Telecommunications Act, which was intended to prevent incumbents from thwarting the national policies of the Act by obtaining barriers to entry at the state and local level, where they had historically had enormous political influence:

> 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).

b. Encouragement of entry by all electric utilities

Congress acted vigorously to ensure that electric utilities of all kinds, including municipal electric utilities, would become major players in the telecommunications industry. For example, at a hearing in which the Senate heard testimony from representatives of investor-owned, cooperatively-owned and municipally-owned electric utilities, William J. Ray acquainted Congress with the remarkable accomplishments of the municipal electric utility of Glasgow, Kentucky, which had brought its small rural community rapidly into the Information Age, far exceeding the achievements of the private sector in many larger communities. J.A.51-58. Senator Lott responded that "I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do

think it is important that we make sure we have got the right language to accomplish what we wish accomplished here."[4]

Congress did, indeed, develop the "right language" – the definitions and preemption provisions of the Act. Thus, in summarizing the major features of the S.1822, the bill in the 103rd Congress from which 104th Congress took Section 253(a) the Telecommunications Act *verbatim*, the Senate reported (with our emphasis added):

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

Significantly, "section 302" included the key definitions that were carried into the Telecommunications Act, and the "new Section 230(a)" was the preemption provision that became Section 253(a). J.A.61-65.[6]

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[4] Hearings on S.1822 Before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d Sess. (1994) A&P HEARINGS S.1822 at *378-79.

[5] S. Rep. No. 103-367, 103d Cong., 2d Sess. 22 (1994), 1994 WL 509063, ("S. Rep. No. 103-367").

Indeed, Congress was so eager to bring all electric utilities into the telecommunications industry, that it was even willing to remove the line-of-business restrictions that had for six decades prevented the electric utilities subject to the Public Utility Holding Company Act (PUHCA) of 1935 from providing telecommunications services.[7] Specifically, Congress gave the following reasons for removing these restrictions and treating the affected electric utilities like all other electric utilities under the Telecommunications Act:

> 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,

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[6] In a colloquy on the Senate floor, Senator Kempthorne (R-ID) and Senator Hollings (D-SC), the sponsor of S.1822, confirmed 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. J.A.70-71. In its brief to the D.C. Circuit in the *Abilene* case, the FCC conceded that the legislative history of Section 253(a) includes that of S.1822, "whose provision for removing entry barriers formed the basis for Section 253." J.A.91.

[7] PUHCA had been enacted in response to a broad range of abusive practices by investor-owned electric utilities controlled by certain major holding companies. 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. *Id*.

> one registered holding company, the Southern Co., has approximately 1,700 miles of fiber optics cables in use, with several hundred more miles planned.
>
> 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.
> …
> 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.

S. Rep. No. 103-367, at 10-11 (emphasis added).

As the passage quoted above confirms, Congress had a profound understanding of "electric utilities in general" and the "utilities world," was acutely aware that electric utilities of all kinds were well-situated to help the Nation to achieve its pro-competitive telecommunications goals, and was clearly and unambiguously intent upon treating all electric utilities alike under the Telecommunications Act. 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, municipal and other public power utilities collectively served approximately 35 million customers.[8]

Later, during the floor debates on the Telecommunications Act in the 104th Congress, Senator Lott reaffirmed 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." J.A.68. Similarly, the 104th Congress's understanding that Section 253(a) would apply to utilities of all kinds was 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*.

J.A.74 (emphasis added). Referring to this passage, its author, Congressman Dan Schaefer (R-CO), confirmed in a letter to former FCC Chairman Reed Hundt that

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

"Congress recognized that utilities may play a major role in the development of facilities-based local telecommunications competition," that "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.*" J.A.77 (emphasis added). Many other members of Congress made the same point to the FCC. J.A.80-87.

c. Promotion of universal service and rapid deployment of advanced telecommunications services and capabilities to all Americans

In Sections 254 and 706 of the Act, Congress made clear that it had learned its lessons well from the history of the electric power industry. Rather than allow advanced telecommunications and information services to follow the same deployment pattern that electrification had followed – where the private sector focused first on electrifying major population centers while leaving other areas literally in the dark for up to five decades – Congress declared in Section 254(b)(3) the national policy that "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are

available at rates that are reasonably comparable to rates charged for similar services in urban areas." Similarly, in Section 706(a), Congress admonished the FCC and the States to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." In Section 706(b), Congress went on to require the FCC to determine annually whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion," and if the FCC's determination is negative, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

Although one of Congress's goals in enacting the Telecommunications Act was to accelerate private sector deployment of advanced telecommunications and information technologies and services, S. Rep. No. 104-230, 113 (Feb. 1, 1996); H.R. Rep. No. 104-458, 206 (Jan. 31, 1996), Congress knew very well from the history of the electric power industry that the Nation could not rely on the private sector alone to achieve the pro-competitive, universal-service and rapid-

deployment goals of the Act. For example, as VTIA notes in its brief, Senator John Kerry (D-MA), at one point observed on the floor of the House that "[t]his legislation sets forth a national policy framework to promote the private sector's deployment of new and advanced telecommunications…technologies and services…." 142 Cong. Rec. S687-01, 709-10 (Feb. 1, 1996). Elsewhere, however, Senator Kerry, joined by Senators Tom Harkin, J. Robert Kerrey, Byron Dorgan and Tom Wellstone, made clear in a joint letter to the FCC that they understood that Section 253(a)'s prohibition on state barriers to municipal entry was critically important despite the Act's goal of encouraging private sector deployment:

> *State prohibitions on telecommunications activities by municipal utilities clearly conflict with the language and intent of Section 253(a) of the Telecommunications Act of 1996 – which was designed to ensure that "any entity" could provide communications services in a newly competitive marketplace*. In addition, the conference report accompanying the Act recognized the inclusiveness of the term "any entity" by stating that, "nothing in this section shall affect the ability of a state to safeguard the rights of consumers…however, explicit prohibitions on entry by a utility are into telecommunications are preempted under this section."
>
> It is clear that in enacting the Telecommunications Act of 1996, *Congress envisaged electric utilities, with their existing communications infrastructures, as key players in the effort to facilitate competition in the telecommunications industry*. Their communications networks and facilities often provide an alternative source of access for the new entrants we depend upon to bring new services and increased competitiveness to the industry.

> *In addition, approximately 75% of municipal power systems in the U.S. serve cities with populations of less than 10,000 residents. These utilities, just as they brought electrical service to their traditionally under-served areas of the country, are now prepared to bring new telecommunications services to their communities. Barring municipal utilities from utilizing their communications infrastructure to provide telecommunications services will undermine the benefits of local control and unfairly restrict the availability of services and the development of competition of rural areas throughout the United States.*

J.A.83 (emphasis added).

d. Exemption of public entities from federal pole requirements

At the same time that Congress was developing Section 253(a), it was also working on major changes to the pole attachment requirements of the Act. In so doing, Congress showed that it knew how to exclude municipal utilities from a section of the Act, 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 Communications Act of 1934 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." If left unaltered, this definition would have applied to federal, state and local government entities as well as 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," again 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). Notably, Congress could easily have imposed similar limitations on the term "entity" in Section 253(a), but it conspicuously chose did not do so.

4. Prior Litigation Over the Meaning of "Any Entity"

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 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. The private provider 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, the private provider 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 and stated, "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 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. The FCC concluded that Section 253 did not go far enough in furnishing such a statement and 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 S.1822 in the 103rd Congress 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. J.A.91-92.

While the *Abilene* appeal was pending, the Supreme Court decided *Salinas*. 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* standard, unless the language or legislative history compel a different result. J.A.96-97. 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, the court 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.

Abilene, 164 F.3d at 52.

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, the court 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.

b. The Missouri Litigation

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 statute (HB 620) similar to the Texas barrier to municipal entity. The Missouri case differed from the Texas case in squarely presenting the issue that the FCC's *Texas Order* and the D.C. Circuit's *Abilene* decision left unresolved – whether Section 253(a) bars states from erecting barriers to entry by municipalities 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.

In re Missouri Municipal League, et al., ¶ 10, 2001 WL 28068 (January 12, 2001) ("*Missouri Order*") (emphasis added), a*ppeal pending, MO Municipal League v. FCC*, No. 01-1379 (8th Cir. filed Feb. 12, 2001).

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. Three commissioners filed separate statements to emphasize that the FCC's decision, "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*." J.A.99; see also J.A.101.

Because Missouri laws treats municipal electric utilities as constituent parts of their municipalities, the FCC believed that the Missouri case was indistinguishable from, and controlled by *Abilene*. As a result, in interpreting the term "any entity," the FCC gave no weight to its findings that the Missouri law was contrary to the purposes of the Telecommunications Act. Nor did the FCC take advantage of this opportunity to apply the teaching of *Salinas* for the first time. 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 admission to the D.C. Circuit that the legislative history of Section 253 was full of references to municipal electric utilities, 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.

c. The Iowa and Georgia Cases

Two other 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).

SUMMARY OF THE ARGUMENT

1. Because Congress used the modifier "any" in an expansive, unrestrictive way in Section 253(a) and said nothing elsewhere in the statute or legislative history that would compel a narrow interpretation, Salinas required the

District Court to give the word modified, "entity," its broadest possible scope. As *Alarm Industry* and numerous standard non-technical dictionaries confirm, "entity" is commonly understood to include public as well as private organizations. It follows that the District Court correctly held that the Virginia barrier to municipal entry is preempted by Section 253(a).

2. The District Court also correctly held that considerations of federalism and the Tenth Amendment do not require a narrow construction of Section 253(a). In *Iowa Utilities Board*, the Supreme Court held that the Telecommunications Act removed traditional authority over local telecommunications authority, and it upheld far more invasive federal action than is present in this case. Moreover, Section 253(a) does not "commandeer" states into doing anything. It merely precludes states from preventing localities from voluntarily exercising authority that they already had to provide telecommunications services.

3. The District Court correctly determined that Bristol had standing to bring its Supremacy Clause claims against the Commonwealth to the federal district court. In the absence of any controlling Fourth Circuit authority, the District Court appropriately adopted the thoughtful and thorough analysis of the Tenth Circuit in the *Branson* case.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 253(a) OF THE TELECOMMUNICATIONS ACT APPLIES TO PUBLIC ENTITIES

A.. The District Court Appropriately Applied *Salinas* and *Alarm Industry* In Interpreting the Term "Any Entity"

1. The District Court's Decision

The District Court determined that the term "any entity" in Section 253(a) reflected Congress's "clear," "manifest" and "unambiguous" intent to protect entities of all kinds, including public entities, from state barriers to entry. In the key passage of its decision, the court reasoned:

> I find that the broad and unambiguous language of § 253(a) makes it clear that Congress did intend for cities to be "entities" within the meaning of the Telecommunications Act. Therefore, § 15.2-1500(B) is in direct conflict with federal law and is void under the Supremacy Clause. Section 253(a) is a concise mandate that no state "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.A. § 253(a) (emphasis added). Although the word "entity" is not defined in the Act, the plain meaning of "entity" suggests broad application. *See Alarm Indus. Communications Comm. v. FCC,* 131 F.3d 1066, 1069 (D.C.Cir.1997) (supporting proposition that "entity is the broadest of all definitions which relate to bodies or units" (internal quotations omitted)). Such an interpretation is confirmed by the use of the modifier "any." The Supreme Court has held that the use of the modifier "any" in a federal statute precludes a narrow interpretation of the law's application. *See Salinas v. United States,* 522 U.S. 52, 57, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997); *see also United States v. Gonzales,* 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) ("Read naturally, the word 'any' has an expansive meaning ...."). Specifically, the Court has held that where Congress uses unambiguous statutory language, such as the word "any," it has

> expressed a "clear and manifest" intent to preempt a traditional area of state law, satisfying *Gregory*, 501 U.S. at 461, 111 S.Ct. 2395. *See Salinas*, 522 U.S. at 60, 118 S.Ct. 469. ("The plain-statement requirement articulated in *Gregory* ... does not warrant a departure from the statute's terms.").

Bristol, at 747. The Court found nothing in the Act or the legislative history that compelled a narrower construction.

2. The Appellants' Arguments

VTIA contends that the District Court's use of the method of construction prescribed by *Salinas* is "bizarre," "novel," "demonstrably wrong" and "nonsensical." VTIA Br. at 3, 9, 19-20, 31, 34. According to VTIA, "*Salinas* did not involve a statute that would have impaired a sovereign state power," and "the Supreme Court expressly stated that the plain statement requirement of *Gregory* was not applicable in *Salinas* because the statute at issue, a federal penal statute, was not capable of a construction which would alter the balance between federal and state power." VTIA Br. at 31. VTIA contends that "*Salinas* did not take account of the burdens and level of clarity required to prove federal preemption of a sovereign state power," the Supreme Court nowhere held that "use of the modifier 'any' makes an otherwise undefined or ambiguous term unambiguous, thus satisfying the plain statement required by *Gregory* for a finding of federal preemption," and even if "any" is unambiguous, "it does not follow that the ambiguity associated with the word 'entity' in the context of Section 253(a) is

somehow removed because the word "any" precedes it." *Id*. at 31-32. VTIA further argues the District Court should have interpreted Section 253(a) narrowly to avoid a constitutional issue. *Id*. at 9, 34. VTIA also suggests that the Court should deem the term "any entity" ambiguous because the District Court supposedly conceded that it is "possible" to read Section 253(a) as excluding public entities. *Id*. at 9. Turning to *Alarm Industry*, VTIA asserts that the dicta in that case supports only the conclusion that the term "entity" is ambiguous, and the "entity" in issue was a private corporation and not a public entity. *Id*. at 31-32.

The Attorney General also takes issue with the District Court's reliance upon *Salinas*. He interprets *Salinas* as inconsistent with *Gregory*, asserts that the question here "is whether this case should be governed by *Gregory* or by *Salinas*," and chides the District Court for "mistakenly" opting for *Salinas*. A.G. Br. at 21. The Attorney General also contends that *Salinas* does not diminish the authority of, but reaffirms, the authority of *Gregory*; that *Salinas* does not say that the use of expansive, unqualified statutory language is sufficient to satisfy *Gregory*; that no other case has reached the same conclusion as the District Court; and that the District Court's holding essentially renders the Supreme Court's federalism concerns and *Gregory*'s "plain statement" standard meaningless. *Id*. at 22. Like VTIA, the Attorney General also argues that the District Court should have read

Section 253(a) narrowly to avoid a constitutional challenge. *Id*. at 5, 13-18. The Attorney General does not discuss *Alarm Industry*.

3. The Appellants' Arguments Are Incorrect

Contrary to VTIA's and the Attorney General's contentions, the District Court's decision is fully supported by *Salinas* and *Alarm Industry*, as well as by numerous other Supreme Court and Fourth Circuit cases. In fact, *Salinas* addresses and refutes each of VTIA's and the Attorney General's main arguments. Furthermore, there is nothing elsewhere in the statute or the legislative history that even hints, much less compels the conclusion, that Congress intended to exclude public entities from Section 253(a).

a. The term "any entity" in Section 253(a) unambiguously covers public entities

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).

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, *when there is outright or actual conflict between federal and state law*, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where

> Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or *where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress*.

Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368-69 (1986) (emphasis added); *see also Crosby*, 530 U.S. at 372. The highlighted considerations apply here.

There was a time when uncertainties existed about whether Congress could preempt state laws dealing with "fundamental" or "traditional" state functions. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984), the Supreme Court laid these uncertainties to rest:

> We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles 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.[9]

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[9] *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").

In *Gregory v. Ashcroft*, the Supreme Court set forth the relevant standard for analyzing federal statutes that are said to preempt "traditional" or "fundamental" state powers. In such cases, the Court said, an agency or court must find that Congress made a "plain statement" that it intended the federal government to preempt the state activity in issue. *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).

In *Salinas*, the Supreme Court unanimously held that, even in a case involving a traditional or fundamental state power, when Congress uses the modifier "any" in an expansive, unqualified way in a statute, it removes any ambiguity about its intent to preempt the state power, and it meets *Gregory*'s "plain statement" standard. Specifically, in *Salinas*, a state official argued that the phrase "any business or transaction" in a federal bribery statute should be read narrowly to avoid disturbing 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*.

Id. at 57 (emphasis added). The Court recognized that, in cases in which the *Gregory* 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, its intent is not ambiguous, and courts must honor that intent without bending over backwards to avoid federal preemption.

> As we held in [*United States v.*] *Albertini*, [472 U.S. 675,] at 680, 105 S.Ct., at 2902 [(1985)].
>
> > "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)."
>
> These principles apply to the rules of statutory construction we have followed to give proper respect to the federal-state balance. As we observed in applying an analogous maxim in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), "[w]e cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." Id., at ----, n. 9, 116 S.Ct., at 1124, n. 9 (internal quotation marks omitted). *Gregory* itself held as much when it noted the principle it articulated did not apply when a statute was unambiguous. *See Gregory*, 501 U.S., at 467, 111 S.Ct., at 2404. A statute can be unambiguous

> without addressing every interpretive theory offered by a party. It need only be "plain to anyone reading the Act" that the statute encompasses the conduct at issue. *Ibid. Compare United States v. Bass*, 404 U.S. 336, 349-350, 92 S.Ct. 515, 523-524, 30 L.Ed.2d 488 (1971) (relying on Congress' failure to make a clear statement of its intention to alter the federal-state balance to construe an ambiguous firearm-possession statute to apply only to firearms affecting commerce), with *United States v. Lopez*, 514 U.S. 549, 561-562, 115 S.Ct. 1624, 1630-1631, 131 L.Ed.2d 626 (1995) (refusing to apply Bass to read a similar limitation into an unambiguous firearm-possession statute).
>
> 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. Having found the text of the statute "unambiguous," the Court examined the legislative history, not for further confirmation that Congress meant what it said when it used the term "any," but for compelling proof that Congress did *not* mean what it had said. The Court also made clear that "'only the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from [the language in issue].'" *Id*. at 57-58, quoting *Albertini*, 472 U.S. at 680.

The method of statutory construction that the Court applied in *Salinas* has deep roots going back at least fifty years. In one of the two cases that the Court *Salinas* cited, *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 the second case, *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." The Court has applied the same rule of construction in numerous other cases.

For example, in *United States v. Gonzales*, 520 U.S. 1 (1997), the 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 *Harrison v. PPG Industries, Inc.*, 446 U.S. at 578, 589 (1980), the Court held 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." The Court 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.

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 "[n]othing in the legislative history contradicts the broad sweep of [the term in issue]," and 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). 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."

The Fourth Circuit also adheres to this method of construing "any." For example, in *United States of America v. Wildes*, 120 F.3d 468, 469-470 (4th Cir. 1997), this Court interpreted the term "any felony" broadly and explained:

> "[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").

Similarly, this Court recently used the same approach in interpreting the phrase "any telecommunications facility" expansively in *MediaOne Group, Inc. v. County of Henrico, VA*, 257 F.3d 356 (4th Cir. 2001).

> The County and Verizon argue that even if the cable modem platform is a telecommunications facility, § 541(b)(3)(D) still does not outlaw the open access provision. Section 541(b)(3)(D), they say, only prohibits localities from requiring cable operators to construct new telecommunications facilities, and the provision here does not impose any such requirement. *That argument ignores the statute's plain language*. Again, § 541(b)(3)(D) declares that franchising authorities may not require cable operators "to provide any telecommunications ... facilities" as a condition to the transfer of a franchise. The section does not limit itself to new construction. Rather, it bars any condition that requires a cable operator to provide telecommunications facilities regardless of whether the facilities are in existence or must be built.

Henrico County, 257 F.3d at 363 (emphasis added).

In short, as the Supreme Court made clear in *Salinas*, the long-standing and familiar rule of construction of the term "any" does not change simply because the statute in question may involve federal preemption of a traditional state power. In reaching this decision, the *Salinas* Court rejected each of main arguments that

VTIA and the Attorney General are making here, including their federalism and avoidance-of-constitutional-issues arguments.[10]

The District Court also appropriately relied on *Alarm Industry* in interpreting the term "entity."[11] Because "entity" is not defined in Section 253(a) or in the general definitions of the Communications Act collected in 47 U.S.C. § 153, the District Court was required to give that term its common, ordinary meaning. *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."); *Morales v. Trans*

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[10] The District Court most certainly did not acknowledge that Section 253(a) is ambiguous because other interpretations than the one the court adopted are "possible." To the contrary, as the context makes clear, the court was simply referring to the *Salinas* Court's statement that "[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Bristol*, 145 F.2d at 747, quoting *Salinas*, 522 U.S. at 60.

[11] In *Alarm Industry*, the court overturned an FCC interpretation of the term "entity" in Section 275 of the Act, finding that agency's sole reliance on Black's Law Dictionary "reflect[ed] no consideration of other possible interpretations, no assessment of statutory objectives, no weighing of congressional policy, no application of expertise in telecommunications." *Alarm Industry*, 131 F.3d at 1069. In its decision on remand, 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,'" that a broad definition 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*, ¶¶ 10, 1613 FCC Rcd 19046, 1998 WL 658606 (September 25, 1998).

World Airlines, Inc., 504 U.S. 374, 383 (1992) (same). Thus, the District Court cited *Alarm Industry* because the court in that case had looked up "entity" in several standard non-technical dictionaries and had found that the term includes: (1) "something that exists as a particular and discrete unit," (2) a "functional constituent of a whole" and (3) "the broadest of all definitions which relate to bodies or units." *Id*. at 1069. Local governments and municipal electric utilities meet all of these definitions. Indeed, the Virginia General Assembly, itself, evidently believed that this was so when it enacted Section 15.2-1550B, as that provision states that "no locality shall establish any department, office, board, commission, agency *or other governmental division or entity* which has authority to offer telecommunications equipment, infrastructure,…services …" (emphasis added).

VTIA simply misses the point when it criticizes the District Court for relying on *Alarm Industry*. To be sure, *Alarm Industry* involved a private corporation rather than a unit of local government, and the D.C. Circuit held the term "entity" has many meanings. Because "entity" in Section 253(a) is preceded by "any," however, the key question here, in light of *Salinas*, is not whether "entity" *necessarily* includes governmental units but whether "entity" *could* include governmental units. *Alarm Industry* unequivocally answers that in question in the affirmative. Ironically for present purposes, Blacks Law

Dictionary, which the D.C. Circuit criticized the FCC for using to the exclusion of all other dictionaries, contains the following: "Entity includes person, estate, trust, *governmental unit*" (emphasis added).

In summary, had Congress wanted to exclude public entities from the scope of Section 253(a), it could easily have preceded "entity" with "independent," "separate," "non-public," "private" or some other similar term. Congress could also have set forth an explicit exclusion, as it did in Section 224. Alternatively, as the Attorney General suggests, Congress could have rendered this litigation moot by preceding "entity" with "public," as it did in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). This case, however, is not about what Congress might have done but about what it did. What it did was to use "any," the broadest of all possible modifiers, in combination with "entity," a term that is itself very broad. Furthermore, Congress did this against the backdrop of fifty years of Supreme Court precedents that uniformly hold that courts must honor Congress's use of "any" in an expansive, unrestricted way. That is what this Court should now do.

b. Nothing elsewhere in the Act or its legislative history compels a narrowing construction

Given Congress's expansive, unrestricted use of the modifier "any" in Section 253(a), *Salinas* precluded the District Court from imposing a narrowing construction in the absence of "the most extraordinary showing of contrary

intentions" elsewhere in the Act or its legislative history. *Salinas*, 522 U.S. at 57-58. VTIA and the Attorney General did not even attempt to make such a showing before the District Court, and they have failed to do so here.

VTIA and the Attorney General do not point to any other provision of the Act that is inconsistent with the District Court's construction of Section 253(a). Nor could they, for the other provisions of the Act overwhelmingly support the District Court's interpretation of Section 253(a). First, the preamble of the Telecommunications Act states the purpose of the Act is "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub.L 104-104, 110 Stat 56, 104th Cong. (Feb. 8, 1996). As shown above, in Sections 254(b)(3) and 706(b), Congress declared a national policy and prescribed specific actions for the FCC and the States to take to ensure that advanced telecommunications and information services would be extended to all Americans in all areas of the country, including rural, high cost and insular areas, as rapidly as possible and at reasonably comparable rates. Thus, the FCC was on firm ground in the Missouri Order when it found that state measures such as the one at issue here are contrary to the purposes of the Telecommunications Act. *Missouri Order*, at ¶¶ 10, 11. Similarly, the District Court was fully justified in concluding that excluding entities such as

Bristol's municipal electric utility from Section 253(a) would create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Bristol, at* 748, citing *Crosby*, 530 U.S. at 372.

Furthermore, with one exception, the Telecommunications Act treats all providers of telecommunications service the same, including public providers of such services. All 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 with the consumer privacy requirements imposed by Section 222.[12] At the same time, the Act encourages entry into the telecommunications arena by affording entrants 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 and local barriers to entry under Section 253(a).

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[12] In numerous decisions, orders, forms and other issuances, the FCC has subjected public providers of "telecommunications" or "telecommunications services" to the same obligations as other entities engaged in the same activities. For example, the Commission's *Universal Service Order* and FCC Form 457 require state 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, http://www.fcc.gov.

It would be unreasonable and inequitable to suppose that Congress intended to subject public entities to the burdens of the Act without also affording them all of the corresponding benefits.

The one exception is in the area of pole attachments. As discussed above, Congress explicitly excluded public entities from the Act's federal pole attachment regulation under Section 224 at the same time that it enacted Section 253(a), yet Congress conspicuously did not exclude public entities from Section 253(a).

Legislative history, as shown above, overwhelmingly supports the District Court's interpretation of Section 253(a). While not relying on legislative history, the District Court agreed, finding that it "supports a broad, rather than narrow, interpretation." *Bristol, at* 748.

Completely ignoring Bristol's extensive discussion of the legislative history before the District Court, VTIA maintains that "[w]hat little legislative history exists for the Telecommunications Act and Section 253(a) reflects an intent to encourage private sector -- not municipal -- deployment of advanced telecommunications services." VTIA Br. at 30. In support, VTIA cites a single sentence from the identical Senate and House conference report on the Telecommunications Act and statements by Senators John Kerry and Robert Dole during the floor debates on the Act. *Id*.

There is nothing inconsistent between Congress's preference for private sector deployment of advanced telecommunications services and the inclusion of public entities in Section 253(a). First, as Senator Kerry made clear in the statement quoted at length above, Congress was well aware at the time that it enacted Section 253(a) that the private sector could not deploy advanced telecommunications and information services rapidly in all areas at the same time, particularly in rural areas, and Congress extended the protections of Section 253(a) to public entities to ensure that they would step forward to do what they had done in similar circumstances in the electric power industry. Second, in her separate statement in the Missouri case, former FCC Commissioner Susan Ness noted that the municipal electric utility of Muscatine, Iowa, had stimulated competition by private providers by being the first to deploy high speed services. J.A.101. Third, Bristol, itself, furnishes an excellent example of how affording a municipal utility protection from a state barrier to entry can accelerate private-sector entry, as Bristol's creation of a gigabit per second "open access" network will enable new providers to enter the Bristol market without having to construct separate facilities of their own. J.A.234-35. Finally, even if the legislative history that VTIA cites could somehow be interpreted as inconsistent with a broad interpretation of Section 253(a), *Salinas* makes clear that "only the most extraordinary showing of contrary

intentions in the legislative history will justify a departure from [the language in issue." *Salinas*, at 57-58.

c. This Court owes no deference to the prior decisions that have addressed this issue.

The District Court found that it owed no deference to any of the prior decisions holding that the term "any entity" in Section 253(a) does not cover public entities. Because Section 253(a) is unambiguous, the District Court found that *Chevron, U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires it to apply the statute without considering the FCC's contrary view, as first expressed in the *Texas Order*. *Bristol, at* 748. "[W]here the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, quoting *Chevron*, 467 U.S. at 842-43. Furthermore, the District Court found that the FCC's interpretation also "must be rejected as wrong." *Id*. Similarly, the District Court found that the D.C. Circuit's Abilene decision was incorrect because the court failed to apply the teaching of *Salinas*. *Id*. at 749. Because the subsequent *Missouri*, *Georgia* and *Iowa* decisions had merely followed the *Texas Order* or *Abilene* without reexamination of the plain language of the Telecommunications Act, the District Court declined to follow them as well. *Id*.

Bristol does not disagree with anything that the District Court has said, but it would had three points. First, in addition to failing to appreciate the significance

of Congress's expansive use of "any" in Section 253(a), the FCC in its *Texas Order* and the D.C. Circuit in *Abilene* also expressly stated that they were ruling only on the rights of municipalities that did not operate their own electric utilities, and were not deciding the rights of municipal electric utilities under Section 253(a). Thus, as to municipal electric utilities, the *Texas Order* and *Abilene* are distinguishable as well as incorrect.

Second, believing that its hands were tied by *Abilene* is not the only serious error that the FCC made in the *Missouri Order*. The FCC also failed to appreciate that its finding that the Missouri barrier to entry is contrary to the purposes of the Telecommunications Act was tantamount to a determination that excluding public utilities from Section 253(a) would create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 372. Even without more, the FCC should have preempted the Missouri law. In addition, the FCC erroneously searched the legislative history for a second "plain statement" to corroborate that Congress meant what it said in Section 253(a) rather than for evidence that Section 253(a) should be *not* read broadly. Thus, the FCC got the wrong answer because it asked the wrong question. Furthermore, the FCC failed to acknowledge the inconsistency between its interpretation of Section 253(a) and its simultaneous insistence, first to the Eleventh Circuit and later to the Supreme Court in *Gulf Power, Inc. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert.*

granted, sub nom FCC v. Gulf Power, Inc., No. 00-832 (January 19, 2001), that "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments."...*Cf. United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.")." FCC's Brief to the Supreme Court, 2001 WL 345195.

d. VTIA's and VCTA's policy arguments are irrelevant and incorrect

According to VTIA, the Virginia General Assembly's enactment of Section 15.2-2000 was justified because it "ensured that private telephone companies would not have to compete with public entities that paid no taxes, could provide subsidized services below cost, raise capital outside the private marketplace and who otherwise controlled many of the regulatory burdens that private companies must satisfy." VTIA Br. at 7. VCTA elaborates on these themes in its Statement of the Case. VCTA Br. at 2-7. Both rely heavily on a "study" by Jeffrey Eisenach, "Does Government Belong in the Telecom Business?" *Progress on Point, Release 8.1 January 2000*.

As VTIA argued to the District Court, "the decision to be made here today should not be made with reference to policy. We have a pure question of law." J.A.288. Bristol agreed, J.A.279, and the District Court correctly held that "the issue is not whether allowing local government to compete with commercial

providers is good public policy or not. That decision has been made by Congress, and under the Commerce Clause of the Constitution, its decision trumps any conflicting state law." *Bristol, at* 744. Now, VCTA itself acknowledges that "this appeal should be decided on legal rather than policy principles." VCTA Br. at 6. Thus, VTIA's and VCTA's policy arguments are simply irrelevant. They are also simply wrong.

The only "study" that Mr. Eisenach performed was to track the rapid growth of public communications systems. The rest of his piece is simply a polemic against public involvement in telecommunications that serves the interests of the Progress & Freedom Foundation's industry clients. John Kelley, Director of Economics and Research of the American Public Power Association, has recently laid Mr. Eisenach errors bare in a paper entitled, "Old Snake Oil in New Bottles: Ideological Attacks on Local Public Enterprises in the Telecommunications Industry," http://www.appanet.org/general/pressroom/KellyTelecom.pdf. If the

Court is inclined to consider Mr. Eisenach's paper, Bristol urges the Court to consider Mr. Kelly's response.[13]

II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' FEDERALISM AND TENTH AMENDMENT ARGUMENTS

Pervading both VTIA's and the Attorney General's briefs is the theme that the reading Section 253(a) to apply to public entities would have serious adverse effects on the federal-state balance. VTIA asserts that the District Court's decision "radically rewrites the balance of power between the states and the federal government," "direct[s] state governments, whether they want to or not, to authorize their own subdivisions to enter the telecommunications business," and "commandeer[s] the Commonwealth's legislative processes by removing from Virginia the sovereign authority to structure its internal government and by effectively compelling Virginia to enter into the telecommunications business." VTIA Br. at 3, 34. According to VTIA, the District Court "divines a canon of statutory construction for federal preemption law that, if allowed to stand, would have dangerous implications for state sovereignty reaching far beyond the confines

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[13] VCTA also relies on generalized statements in an affidavit that VTIA filed in support of its motion to stay pending appeal as well as newspaper articles and testimony that VTIA presented during a hearing on its motion. VCTA Br. 4-6, citing J.A.363-65, J.A.181-85, 395, 403, 405. The District Court found that the affidavit "doesn't appear to me to be very explicit," J.A.392, and that VTIA's arguments based on it and the rest of the evidence that VCTA cites were "entirely speculative and unsupported," J.A.434.

of this case. *Id*. at 9. The Attorney General agrees – "If Congress can authorize localities to go into the *telecommunications* business, then by the same logic, it may authorize them to undertake *any* sort of commercial enterprise: shopping malls, manufacturing plants, banks, home construction, to name but a few." A.G. Br. at 20 (emphasis in original).

At the outset, even if Section 253(a) were much broader than it really is, there could not be a Tenth Amendment issue here. As the District Court noted, "the Supreme Court has recognized that with the passage of the Telecommunications Act, the federal government preempted areas traditionally regulated by states. *AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 378 n. 6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) ("[T]he question is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.")." *Bristol,* at 750. In *Iowa Utilities Board*, the Supreme Court found that the Telecommunications Act removed boundaries to federal regulation in areas of traditional state authority that the Eighth Circuit had described as "a fence that is 'hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf,'" *id*., quoting *Iowa Utilities Board v. Federal Communications Comm'n*, 120 F3d 753, 800 (8th Cir. 1997).

The Court thus upheld intrusions upon state sovereignty that go far beyond anything involved here.

In any event, VTIA's and the Attorney General's concerns about the potential breadth of the District Court's decision are unfounded. Section 253(a) does not "commandeer" states into doing anything against their will. On its face, Section 253(a) is a prohibition, not an authorization. It merely precludes a state from interfering with the exercise of authority that an entity already has to provide telecommunications services. If a locality did not wish to provide telecommunications services, nothing in Section 253(a) would force it to do so, and if the locality had no authority to begin with, nothing in Section 253(a) would provide such authority.

Here, in Section 15.2-2109(A), the Virginia legislature conferred upon all localities the power to (i) acquire or otherwise obtain control of or (ii) establish, maintain, operate, extend and enlarge: waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems *and other public utilities* (emphasis added)." *Bristol,* at 744-45. Because Section 15.2-2109A does not define the term "public utilities," the District Court looked for guidance to the Utilities Facilities Act, Section 56-265(1), which defines "public utility" as including "telephone service." *Id.* While Section 56-265(1) is aimed at describing the types of services that are subject to

regulation by the State when provided by non-public entities, it is nevertheless instructive as to the range of utility services that a locality can provide pursuant to Section 15.2-2109(A). Based on this definition, the term "other public utilities" can fairly be read to include telecommunications services. Certainly telephone services are traditionally viewed as a type of public utility.

Furthermore, in enacting Section 15.2-2000B in May 1998, the Virginia Legislature clearly understood that it was acting to remove authority that localities possessed. The Legislature did not suggest that it was clarifying existing law, as it often does.[14] Rather, it stated that "no locality shall …" – words that imply prospective effect. The Legislature also expressly authorized the City of Abingdon to "continue" to offer telecommunications services, and to mitigate the harsh effects that the prohibition would have on localities that had already begun to develop telecommunications systems under their existing authority, it allowed all such localities to "sell any telecommunications infrastructure, including related equipment, which such locality had constructed prior to September 1, 1998." Section 15.2-2000B.

In Bristol's case, the City had additional authority to provide telecommunications services based on its City Charter, which the General

Assembly had approved. Specifically, Section 2.04(8) of the Charter provides that the City shall have the power "to acquire, construct, own, maintain .. waterworks, gas plants and electric plants, water supply and pipe and transmission lines for water, electricity and gas supplies and *any other utility or utilities* within and without the City. J.A.45 (emphasis added). Although the term "utilities," as such, is not defined in the Virginia code or cases, this term is broader in scope than the statutory term "public utilities," as it is not limited by the modifier "public."[15]

Moreover, although Virginia follows Dillon's Rule, Section 15.2-1102 of the Virginia Code gives localities broad authority to exercise powers that "are necessary *or desirable* to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power." It is well within Bristol's discretion to determine that it is "necessary or desirable" for the City to

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[14] The Virginia legislature knows how to indicate when it intends to "clarify" rather than change the law. *See*, *e.g.*, VA Code § 8.1-102(2)(a), § 55-248.3, and § 59.1-501.6(a)(2).

[15] Notably, in Section 56-231.15, which applies to cooperatives, "utility services" is defined as including "any products, services and equipment related to energy, *telecommunications*, water and sewerage" (emphasis added).

develop a telecommunications system that will greatly contribute to the economic development, educational opportunity and quality of life in the community.

Thus, in the absence of the Virginia barrier to municipal entry, Bristol would have ample authority under both § 15.2-2109 and the City's Charter to provide telecommunications services.

III. THE DISTRICT COURT CORRECTLY HELD THAT BRISTOL HAS STANDING TO BRING THIS ACTION

The District Court correctly rejected the Attorney General's argument that the City had no standing to sue the Commonwealth. *Bristol, at* 744. According to the Attorney General, the District Court's decision was incorrect because the Court did not discuss the Supreme Court decisions that the Attorney General cites, did not address the relevant federalism considerations, did not read correctly the cases on which it relied, and did not appreciate that its main authority, *Branson School Dist. RE-82 v. Romer,* 161 F.3d 619 (10th Cir. 1998), while broadly holding that municipalities have standing to sue their states, was ultimately decided on the merits, based on a federal statute that does not affect Virginia. A.G. Br. at 6-14. The Attorney General does, however, acknowledge that the only Fourth Circuit decision on point expressed doubts as to the validity of a rule banning suits by cities against states, A.G. Br. at 14, citing *City of Charleston v. Public Serv. Comm'n of W. Va.,* 57 F.3d 385, 390 (4th Cir. 1995).

Bristol submits that the District Court did not need to dwell at length on the cases or considerations that the Attorney General mentions because they are all addressed in considerable detail in *Branson*. In that case, the 10th Circuit concluded that only the Ninth Circuit follows the rule than municipalities cannot sue their states in Supremacy Clause cases and that this result in not appropriate. Bristol submits that the District Court's reliance on *Branson* was justified and that this Court should adopt the reasoning of that case as well.

IV. CONCLUSION

For all of the foregoing reasons, this Court should dismiss the appeal and affirm the District Court's decision. Respectfully submitted,

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