

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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<b>In the Matter of</b>	)	
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<b>Comments on Electric Power Board and City of Wilson Petition Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks.</b>	)	<b>WCB Dockets 14-115 and 14-116</b>
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**COMMENTS OF BVU AUTHORITY  
IN SUPPORT OF THE ELECTRIC POWER BOARD AND CITY OF WILSON.**

**I. Introduction and Summary**

1. BVU Authority (BVU) makes these comments in support of the petitions filed by the Electric Power Board of Chattanooga as well as the City of Wilson, North Carolina. BVU is also a municipal fiber provider, which operates with imposed restrictions that limit its ability to offer retail services in Virginia. Furthermore, BVU is grandfathered as the only municipal provider with the ability to offer retail telecommunications of any kind in the Commonwealth of Virginia.

2. These comments describe BVU’s fiber business and the history of its entry into the telecommunications business. BVU faced numerous roadblocks from incumbent providers who tried to block its entry into the retail telecommunications business. Although BVU’s development of telecommunications services has continued to grow, incumbent obstructions have led to restrictions that limit BVU’s ability to compete as freely as other commercial competitors. Also described herein is how BVU’s fiber business benefits the City of Bristol, Virginia, as well as a large surrounding geographic footprint. Finally cites from Virginia

legislation that restrict BVU and prohibit other Virginia Cities from entering the telecommunications business.

3. BVU expresses hopefulness that the FCC is able to grant the petitions of these two cities. Ideally these petitions can be used as a catalyst to lift all bans and restrictions against municipal competition nationwide. Alternatively, if the Commission does not grant a blanket ban against restrictions on municipalities, we would ask the Commission to accept future petitions from cities on an individual basis.

## **II. The History of the BVU Fiber Network**

4. BVU faced many challenges entering the telecommunications business. Accomplishing this endeavor included several lawsuits as well as overcoming other entry barriers. Following is a brief chronology of how BVU entered the telecommunications business. This sequence of events is indicative of the struggle that other communities may face while seeking to bring bandwidth to their citizens.

5. Like many municipal fiber systems, BVU's fiber network was constructed to serve and support the municipal electric utility. In 1998, the City of Bristol, Virginia City Council granted authorization for BVU to commence construction of the fiber network to serve eight electric substations, therefore providing improved monitoring and control. Upon observing the infrastructure's successful implementation, fiber access was extended to local schools and city government offices in 2000.

6. BVU and the City of Bristol, Virginia, realized tremendous savings of \$156,000 annually by moving the telephone and data services for 23 entities to the new fiber network. Soon BVU began receiving requests from large businesses and real estate developers to provide

similar broadband over fiber. BVU hired a consultant to explore a fiber business plan and engaged an engineering firm to estimate the cost of constructing a city-wide fiber infrastructure. The business plan revealed that construction and continued operations of the network were financially feasible. Therefore, the City of Bristol, Virginia City Council approved advancing with the fiber-to-the-premise (FTTP) network in 2001.

7. The announcement by the City Council's approval drew the attention of the incumbent providers, and BVU was advised that Virginia law prohibited the City from being a retail provider of telecommunication services. From this point Representative Rick Boucher, local congressman and co-author of the Telecommunications Act of 1996, joined the conversation. Representative Boucher had helped to author the Act in a way that he believed protected the right of "any entity" to enter the telecommunications market. In his mind the Act preempted any state restrictions against the provision of municipal broadband. In light of the language of the Act, BVU sued the Commonwealth of Virginia regarding authority to provide retail communications services.

8. The subsequent lawsuit prompted a change in Virginia statutes, allowing BVU to enter the telecommunications business. However, the legislation made specific exception for the City of Bristol, and excluded any other city in Virginia. The legislation also placed restrictions on BVU. Nevertheless, construction on the fiber network and plans for development commenced. BVU is believed to be the first municipality in the country to build fiber past every home and business in a community to offer a competitive triple play bundle.

9. On the eve of BVU's formal telecommunications launch, the local cable company incumbent filed a lawsuit claiming that the nature of the City of Bristol charter didn't grant authority for BVU to offer cable television services. The courts ruled in favor of the incumbent

provider, and OptiNet, BVU's telecommunications division, was launched as only a data and telephone provider. BVU returned to the legislature and received a solution that granted very limited ability to serve cable television service within the confines of City of Bristol, Virginia city a portion of a Washington County highway corridor connecting the City of Bristol to the adjacent town of Abingdon, Virginia.

10. When BVU petitioned for authority to provide telephone service from the Virginia State Corporation Commission (VSCC), it was determined that a municipality could not become a Competitive Local Exchange Carrier (CLEC) like any other competitive provider. Instead, the VSCC created a new category of competitor that they called MLEC (Municipal Local Exchange Carrier). MLECs adhere to slightly different guidelines than those that apply to CLECs. Specifically, the MLEC rules prohibit BVU from subsidizing telephone rates from any other parts of the City, from any other divisions of the utility or from other telecommunications products.

11. This cross-subsidy regulation, which applied only to BVU and not to other CLECs in the state, prompted the incumbent telephone company, Sprint, to file a complaint against BVU at the VSCC claiming that BVU residential telephone rates were subsidized. As a result, BVU hired experts to perform a very costly Total Service Long Run Incremental Cost (TSLRIC) analysis, similar to those performed historically by large incumbent telephone companies like AT&T and Verizon. It was obvious before the analysis commenced that BVU's telephone rates were not subsidized (since even residential voice products had a healthy margin), but BVU was still required to undergo the costly process of disproving Sprint's claim.

12. This whole process was both time-consuming and costly. BVU spent around \$2.1 million on the lawsuits and another \$285,000 on the cost study at the VSCC to enter the

telecommunications business. To some extent, the strong negative reaction by incumbent providers may have been due to BVU being one of the first municipalities to build a fiber network. It is important to note that these incumbents wrote a cautionary tale, by warning other cities that entry into the business was going to be expensive. Even today, cities entering the telecommunications business risk lawsuits and/or incumbent harassment that differ from any barriers that commercial competitors may face. There is true irony in that incumbents often employ the position of ‘level playing field’ to ensure municipal competitors receive no unfair advantages. However, they strive to hinder municipalities with legislation that never applies to other commercial competitors.

### **III. The BVU Success Story**

13. The fiber-to-the-premise network was originally constructed within the City of Bristol, Virginia. The launch of this telecommunications division was branded as OptiNet. BVU has been very successful, having gained 62% penetration of the residential and business customers in the City of Bristol, VA. Soon thereafter, demand for OptiNet services spurred construction into the neighboring and adjacent town of Abingdon, Virginia. Additionally, construction took place in parts of adjacent Washington County, VA; although, throughout the county, BVU is restricted by Virginia statute to sell only data and voice services.

14. In 2003, BVU entered into partnership with the Cumberland Plateau Planning District Commission and created a partnership named ‘CPC OptiNet’. The new network began with a 45-mile fiber-optic circuit reaching Richlands, Virginia, which was funded by grants from the U.S. government’s Economic Development Association (EDA) office and the Virginia Tobacco Commission. The Virginia Tobacco Commission distributes money to state projects from the

monies they received in the 1998 settlement of the largest class-action lawsuit in US history. Through additional grants the network ultimately expanded to 200 miles spanning four rural counties in Southwest Virginia.

15. Further network expansion commenced in 2010 when BVU was awarded a \$22.7 million grant from the National Telecommunications & Information Administration (NTIA) under the federal stimulus plan to extend 388 miles of middle-mile fiber infrastructure through eight rural counties. BVU now serves a significant number of customers outside the City limits of Bristol, Virginia, serving approximately 40% of passings.

16. The OptiNet fiber business model has been a financial success. BVU currently serves over 13,260 customers throughout 9 counties, offering triple play services in Bristol and Abingdon. In the remainder of the infrastructure footprint, OptiNet is only allowed to offer data and voice services to residences, which is a significant barrier to creating a successful business plan for last-mile service extension to any of the NTIA-funded areas.

17. OptiNet offers a wide variety of services to businesses including Internet access up to 1Gbps, carrier Ethernet and wavelength services up to 10Gbps, and collocation in their data center for cloud/disaster recovery. BVU also provides services to carriers including high capacity transport, alternative access loops, and cell tower back-haul. BVU also offers advanced broadband and cloud services that further leverage the capabilities made possible by the fiber network.

18. BVU has expanded beyond the historic triple play. For example, BVU made strategic deployments of WiFi in all public venues within the City of Bristol VA to extend Internet access and OptiNet services into areas frequented by community residents. Other new residential products include symmetric 1 Gigabit broadband, home automation and security services

(QuantumHome), hosted PBX and data services (OptiPro), and whole home/business content filtering (SafetiNet).

19. BVU is proud that its fiber network is providing services that customers need. In today's technology driven culture, high-speed broadband connectivity is an essential utility service. One of the best examples of the need for municipal fiber networks is seen in the growth of over-the-top streaming video services such as Netflix. Those streaming video services currently account for 67% of the total bandwidth on the BVU network. BVU can support customers who want to watch multiple high definition video streams, as large as 8 Mbps per stream. The BVU fiber-to-the-home network will support the continued and growing demand for bandwidth throughout its entire nine county service area where the incumbent DSL and pre-DOCSIS 3 cable networks will not.

#### **IV. Community Benefits From BVU's Fiber Network**

20. BVU has brought significant benefits to the local community by constructing and operating a fiber network. Possibly one of the most significant benefits of the network are the savings brought to local communities. It is calculated, since inception, that residences and business have saved an estimated \$17 million compared to what they would have paid to incumbent providers. Moreover, citizens' telecommunications dollars have remained in the local market, as opposed to distributing profits to other regions and parts of the country. Given the Bristol areas minimal average household income, these savings and monetary retentions prove significant to the local economy.

21. There are many additional benefits to both the City of Bristol, Virginia, and the surrounding region from the BVU fiber network and operations. The following are for consideration:

- BVU has grown to 158 employees and is a major employer in Bristol, Virginia. Employees are well compensated and enjoy technical careers with benefits in a community whose job market is less than desirable.
- Bristol and parts of the surrounding area have access to the fastest Internet connections in Southwest Virginia. BVU offers residential speeds up to 1 Gbps and business connections up to 1 Gbps symmetric. Given that the Commission has extensively studied the community impacts of improved Internet speeds, the benefit this service brings to the area are already understood.
- BVU provides fiber connectivity to all school district in its nine-county service area. This includes both city and county school systems, many with very rural locations. BVU provides a wide range of services to schools including Ethernet connections up to 1 Gbps, hosted PBX voice, WiFi in external venues and content filtering. Since 2000 BVU has been meeting the speeds presently suggested for schools by the President and the FCC.
- BVU currently provides a 100 Mbps connection to Johnston Memorial Hospital for a telemedicine link to the University of Virginia Medical Center, which is used for remote imaging and diagnostic work. BVU will continue to provide large bandwidth to health care providers, as requested.

- BVU was awarded grant funds for participating in the Virginia Acute Stroke-Telehealth (VAST) Network with the University of Virginia to bring broadband connections to health facilities.
- BVU has offered free Internet classes to the public on how to best use the Internet and other computer topics. BVU also has offered a free course through a local college.
- BVU supports four local high schools with engineering training and technology classes.
- BVU has made GED preparatory classes available to its customers through Video on Demand courses.
- BVU has donated computers for local adult literacy classes.
- BVU has assisted wireless carriers throughout the area in reaching their cellular towers with fiber – allowing providers to upgrade to 4G LTE networks in very rural areas much sooner than would have otherwise occurred.
- BVU provides connectivity to the major Internet POP's in Ashburn Virginia and Atlanta Georgia, allowing the businesses and governments in their region to access high quality / low latency Tier 1 Internet backbones for VPN and cloud services.
- BVU provides wholesale connectivity throughout the region to numerous CLECs and WISPs, bringing more competitive options to end-users.
- BVU supports the community and community events in numerous ways, including the Birthplace of Country Music museum, Bristol Rhythm & Roots Reunion, and many other events that contribute to a higher quality of life for residents.

22. BVU has won numerous national awards for its broadband efforts. A few of the many awards include:

- 2009 – TOP 7 Intelligent Communities of the Year awarded by the Intelligent Community Forum;
- 2008 – Governor’s Technology Award awarded annually by the governor of Virginia;
- 2008 – Gold Award for Municipal Excellence awarded by the National League of Cities;
- 2007 – Cornerstone Award for Outstanding Customer Service awarded by Broadband Properties.
- 2004 – E.F. Scattergood Award from the American Public Power Association for advancing the position of municipalities in telecommunications.

23. The BVU fiber network has spurred economic development by attracting new jobs to the area as well as retaining existing businesses. The importance of economic development in rural areas cannot be underestimated. It is obvious that jobs are the lifeblood of rural areas (like Southwest Virginia) that have lost many jobs through the decline of coal mining and tobacco farming. Following are a few of the many testimonies regarding how fiber has benefited economic development in Southwest Virginia communities:

- In 2007 both Northrop Grumman, a large American defense contractor, and CGI, an international IT consultancy, brought over 700 technicians, consultants and call-operators to new offices in nearby Lebanon, Virginia, which is part of BVU's fiber network. Both companies cited the area's universities and low cost of living, but neither would have come without BVU's fiber investment, which Northrop calls absolutely critical.
- There are numerous stories of economic development from smaller companies. As an example, a publisher in Bristol said. “If we didn’t have it (fiber) we would have to

move out of the community. Second, we anticipate doubling our staff and profit; if it weren't for broadband we wouldn't be able to accomplish that.”

## **V. The Legal Restrictions on BVU and Others in Virginia**

24. As noted in the discussion of BVU's history, BVU was grandfathered in Virginia to be a triple play service provider within geographically prescribed areas. Following are key excerpts from the Virginia Code that limits BVU's geographic service territory for each service. We note that while the Virginia laws allow for a loophole for BVU to offer the triple play services on a retail basis, the law does not allow any other cities in the state to do the same.

### BVU Restrictions on Cable TV Services

25. The following Virginia Code defines the current geographic limitation on BVU for providing cable TV service:

§ 15.2-2108.11 (G). A municipality shall offer to provide or provide cable television services to only those subscriber locations within either (i) the municipality's electric utility service area as it existed on January 1, 2003, or (ii) the area, as of January 1, 2003, in which the municipality was providing local exchange service or Internet service over telecommunications facilities owned by the municipality, provided that a cable television franchise from any jurisdiction other than the municipality authorized herein shall be required for any service outside the municipality's boundaries.

26. In practical terms this has limited BVU's cable TV offering to the City limits of Bristol, Virginia and to the very nearby and adjacent City of Abingdon, Virginia. BVU is unable to offer cable TV service to the rest of Washington County, Virginia where BVU is headquartered, even just outside Bristol's city borders. Further, BVU now serves data and telephone customers throughout nine counties and is unable to provide cable TV in any of those areas.

27. This restriction has proven a stumbling block since OptiNet's inception. Incumbent providers have argued that cable television is a low margin product and is, therefore, not necessary in order for a company to sell broadband services. Throughout the communities BVU serves, cable television maintains status as a vital product, due to the fact that so few channels are available over the airwaves. In many places that BVU serves, there is no programming available through the air. BVU marketing efforts show that residential households still want the triple play, or at least the double play of data and cable television. Without a cable product, BVU's progress of connecting more homes to fiber has been hampered, and federal investments in the NTIA BTOP middle mile routes will be underutilized due to the current restrictions on providing cable service.

28. BVU has a high success rate with triple play products. In the footprint of Bristol and Abingdon, where providing the triple play is possible, BVU has achieved a penetration rate of approximately 60 % of total households. However, success outside the city limits is much lower due to the fact that customers cannot bundle cable television with BVU's data products. BVU still receives requests almost daily to bring cable television to residents in Washington County, where BVU provides other traditional utility services. BVU's penetration rates would greatly increase if BVU were able to offer the triple play or the double play including cable television. While cable television service is a low-margin product, it is not a zero margin product. Consequently, the addition of cable television to BVU's area-wide service offerings would improve BVU's profitability, allowing for reinvestment. It is also important to note that the cable television business is an economy of scale business. After significant investments in a cable headend, profitability for the entire product line improves with each incremental cable customer added to that headend.

## BVU Restriction on Data and Telephone Services

29. The following Virginia Code restricts where BVU can provide telephone and data services:

### § 15.2-2160. Provision of telecommunications services

A. Any locality that operates an electric distribution system may provide telecommunications services, including local exchange telephone service as defined in § 56-1, within or outside its boundaries if the locality obtains a certificate pursuant to § 56-265.4:4. Such locality may provide telecommunications services within any locality in which it has electric distribution system facilities as of March 1, 2002. Any locality providing telecommunications services on March 1, 2002, may provide telecommunications, Internet access, broadband, information, and data transmission services within any locality within 75 miles of the geographic boundaries of its electric distribution system as such system existed on March 1, 2002.

30. This law places a 75-mile limit on BVU for the provision of voice and data services and prohibits BVU from serving a customer beyond that confine. To date, this has not proven a major roadblock for BVU, because the backbone fiber is all within the 75-mile radius of Bristol. However, as BVU's over-the-top and mobile services continue to grow, a day will come when this may present a problem. BVU is currently the only entity in Southwest Virginia that is actively building a fiber infrastructure to residences. As such, BVU is constantly being asked to expand its footprint.

31. BVU currently has products where these restrictions are a cause for concern. For example, BVU sells VoIP services, such as IP Centrex, where any business with a sufficiently fast Internet service can utilize BVU's business voice service. While BVU only markets services targeted in its geographic area, it is not uncommon to have customers with branch offices that are outside of the restricted 75-mile service area. In the past BVU did not employ a technological solution for these situations, but now BVU can serve all phones of a particular business,

regardless of their physical location. The 75-mile restriction is not allowing BVU to fully serve a customer within its footprint and forces the potential client to look elsewhere for a total-firm solution.

32. BVU might be able to accept the restrictions if they were part of an effort to create a fair level playing field between BVU and the incumbent providers. But the restrictions placed on BVU are nothing more than a ban on competing. Unfortunately, as unfair as the above restrictions might be for BVU, other municipalities throughout Virginia are essentially barred from offering any retail services.

33. For comparison consider how commercial companies are restricted in Virginia when they want to provide the same competitive services:

- Data services. There are no laws that ban any commercial entity from offering data services anywhere in the State. It is not even required for a commercial entity to obtain any sort of certification to offer data services beyond obtaining a basic business license.
- Cable TV. Generally, the only restriction on offering cable TV in Virginia is that an entity that wants to offer it needs to obtain a franchise from the local government in those places that require franchises. Franchises are generally only required by Cities, and very few rural areas or Counties in Virginia require a cable TV franchise. Thus, in terms of geographical area most of the Commonwealth of Virginia - the rural areas outside of cities - require no franchise. Any entrepreneur can base a cable TV operation in a no-franchise area and offer cable service with no specific approval or certification from any government entity in Virginia. It is important to note, in most of Southwest Virginia's rural areas there are no cable

television providers other than satellite service. BVU is unfortunately not allowed to serve many of these areas where the only cable alternative available is satellite.

- Telephone Service. A Commercial provider must obtain certification from the VSCC in order to provide telephone service. Generally such certifications allow a provider to offer telephone service statewide. Certification can be issued for a smaller geographic area, but these are usually self-restricted where an entity getting the certification self-limits the service area they want to serve.

34. In summary, BVU is restricted from serving data outside the 75-mile circle while no commercial entity needs any license or certification to be an ISP. BVU is restricted to serve cable TV only within the City of Bristol, Virginia and the town of Abingdon, Virginia while a commercial provider can seek a franchise in any town or city and is free to serve in unfranchised areas with no restrictions. And while BVU has a certification to provide voice services from the VSCC, they are limited to a 75-mile service area while a commercial provider with a certification is allowed to compete anywhere in Virginia.

## **VI. Municipalities Other than BVU**

35. BVU does not claim expert knowledge about the specific legal restrictions placed on cities in Virginia other than Bristol. BVU is hopeful other localities will go on record in this docket to explain their own outlooks regarding of the ban on providing telecommunication service. It is BVU's understanding of Virginia law that only BVU was grandfathered to be allowed to provide retail telecommunication services and that all other cities are completely banned from offering retail services. For example, there is a ban on providing data and telephone

services that applies to other Virginia cities. This ban is similar to the following Virginia Code that effectively bans other cities from providing cable television.

§ 15.2-2108.4. Limitations on providing cable television services

A. Except as provided in this article, a municipality shall not (i) provide a cable television service; or (ii) purchase, lease, construct, maintain, or operate any facility for the purpose of providing a cable television service to one or more subscribers.

B. For purposes of this article, a municipality provides a cable television service if the municipality provides the service:

1. Directly or indirectly, including through an authority or instrumentality acting on behalf of the municipality or acting for the benefit of the municipality; or
2. By itself, through a partnership, joint venture, or by contract, resale, or otherwise.

## **VII. Summary**

36. While BVU is pleased to have been able to provide needed telecommunication services to their local region, more can be done. There appears to be no motive other than incumbents being purely anticompetitive for the level of restriction currently in place. There has been no other explanation of why there should be restrictions on BVU and other municipalities that are any more onerous than restrictions that would apply to a commercial competitor selling the same products.

37. BVU would like to see these restrictions lifted, particularly the restriction against selling cable television service outside of the City of Bristol, Virginia and the town of Abingdon, Virginia limits. BVU remains hopeful the Commission will find ways to lift all bans on municipal competition nationwide and in Virginia, so other cities in the Commonwealth can bring similar benefits to their respective communities, as BVU has brought to areas of Southwest Virginia. If the Commission is unable to lift all restrictions on municipal competition, it is

BVU's sincerest hope that these restrictions may be addressed to the Commission through individual petitions, such as the two filed in this Docket.