

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

	)	
CITY OF BRISTOL, VIRGINIA	)	
	)	
<i>Plaintiff/Counterclaim Defendant,</i>	)	
	)	
v.	)	Civil Action No. 1:20-cv-00041-JPJ-PMS
	)	
BVU AUTHORITY,	)	
	)	
<i>Defendant/Counterclaim Plaintiff.</i>	)	
	)	

## ANSWER TO COUNTERCLAIM, AND AFFIRMATIVE DEFENSES

The City of Bristol, Virginia (the “City”), by its undersigned counsel and pursuant to Rule 12 of the Federal Rules of Civil Procedure, answers the Counterclaim as follows:

Although not pled in any specifically numbered paragraph, the Counterclaim contains a “preamble” paragraph in which BVU Authority (“BVU”) makes certain allegations with regard to the nature of its Counterclaim and the request it seeks in connection therewith. To the extent a response to this preamble paragraph is deemed necessary or required, the City denies BVU’s entitlement to relief, and incorporates the answers to the Counterclaim set forth below. To the extent that the “preamble” paragraph attempts to summarize the Counterclaim, the City states that the Counterclaim is a written document that speaks for itself, and it denies any allegations inconsistent therewith.

### **Jurisdiction and Venue<sup>1</sup>**

1. Paragraph 1 of the Counterclaim contains allegations and conclusions of law to which no response is required. Whether this Court has subject matter jurisdiction is a legal question for which no response is required. The Court has set a briefing schedule for the parties to address subject matter jurisdiction.

2. Paragraph 2 of the Counterclaim contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that the factual predicates for venue in this judicial district are satisfied.

### **Parties**

3. Admitted.

4. Admitted.

### **History and Formation of BVU**

5. The City lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 5, and thus denies the same.

6. The City lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 6, and thus denies the same.

7. Admitted.

### **Interfund Debts**

8. The City admits that the BVUB's Electric Division advanced funds to the OptiNet Division to establish working capital to build the OptiNet network, which created a debt owed to the Electric Division by the OptiNet Division. The City avers that such debt was memorialized in certain promissory notes between 2002 and 2006, and admits that it was tracked on the BVUB's financial statements during that time. The City admits and avers that the BVUB extinguished such internal debt in 2007. The City admits that such internal debt had grown to

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<sup>1</sup> This Answer adopts the Counterclaim's section headings for convenience only; any allegations or characterizations implied by the Counterclaim's section headings are denied.

exceed \$23 million prior to extinguishment. The remaining allegations contained in Paragraph 8 are allegations and conclusions of law to which no response is required; to the extent a further response may be required, they are denied.

**BVU Purchased and Owned Real Property**

9. The City admits that beginning in or around 1954, the City purchased sixteen parcels of land in downtown Bristol to create the Lee Street downtown campus. The City further admits that such properties were in the vicinity of 300 Lee Street, Bristol, Virginia, that BVUB previously shared office space with Bristol Tennessee Essential Services (BTES), and that the BVUB relocated its operations to Washington County in 2002 and 2003. The City admits that the underlying deeds speak for themselves, all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the remaining parts of this allegation, including alleged later purchases of the properties by BVUB, and the source of funds used to purchase the properties, and thus denies such parts of the allegation.

- a. The City admits that on August 2, 1954, the City of Bristol, Virginia purchased the property located at 308-310 Lee Street, Bristol, Virginia, from Jones. The deed is a written document and it speaks for itself; all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- b. The City admits that on August 2, 1954, the City of Bristol, Virginia purchased the property located at 517 Scott Street, Bristol, Virginia, from Cecil. The deed is a written document and it speaks for itself; all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- c. The City admits that on January 3, 1955, the City of Bristol, Virginia purchased the property located at 511 Scott Street, Bristol, Virginia, from Howell. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.

- d. The City admits that on February 26, 1955, the City of Bristol, Virginia purchased property located at the north east corner of Scott Street and Moore, Bristol, Virginia, from Nininger. The City lacks knowledge or information sufficient to form a belief as to the source of funds and the purpose of the purchase at the time, and thus denies those parts of the allegation.
- e. The City admits that on February 26, 1955, the City of Bristol, Virginia purchased property located at 300 Lee Street, Bristol, Virginia, from Hassinger. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- f. The City admits that on January 28, 1956, the City of Bristol, Virginia purchased property located at 318 Lee Street, Bristol, Virginia, and property on Moore Street, Bristol, Virginia, from Powers. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- g. The City admits that on August 24, 1961, the City of Bristol, Virginia purchased property located at 329 Moore Street, Bristol, Virginia, from Markwalter. The deed is a written document and it speaks for itself; all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- h. The City admits that on August 1, 1968, the City of Bristol, Virginia purchased property located at 314 Lee Street, Bristol, Virginia, from Hayes. The deed is a written document and it speaks for itself; all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- i. The City admits that on August 1, 1968, the City of Bristol, Virginia purchased property located at 322 Lee Street, Bristol, Virginia, from Hayes. The deed is a written document and it speaks for itself; all characterizations thereof are denied.

The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.

- j. The City admits that on May 23, 1978, the City of Bristol, Virginia purchased property located at 324 Lee Street, Bristol, Virginia, from Williams. The deed is a written document and it speaks for itself; all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.
- k. The City admits that on May 28, 1980, the City of Bristol, Virginia purchased property located at 332 Lee Street, Bristol, Virginia, from Trinkle and Cooper. The deed is a written document and it speaks for itself; all characterizations thereof are denied. The City lacks knowledge or information sufficient to form a belief as to the source of funds, and thus denies that part of the allegation.

10. Paragraph 10 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

#### **Wholesale Power Contract**

11. The City lacks knowledge or information sufficient to form a belief about the existence of a wholesale power contract with TVA dated September 29, 2006 and when power purchases under such alleged agreement began, and thus denies the same. The remaining allegations contained in Paragraph 11 are allegations and conclusions of law to which no response is required; to the extent a further response may be required, these allegations are admitted.

#### **BVU Authority Transition Agreement**

12. The City admits that, in or about 2009, a plan was formulated to separate the functions previously performed by the BVUB from the City, but denies the characterization of the City as the party that “formed” the plan. The City further admits that the rationale for this effort included legal, financial and operational considerations. To the extent a further answer may be required, the allegations are denied.

13. The City admits that the City and the BVUB entered into the Transition Agreement in 2009. The Transition Agreement is a written document that was attached to the Complaint as Exhibit 1, and it speaks for itself; all characterizations thereof are denied. The City avers that the City and the BVU specifically ratified the Transition Agreement on January 25, 2016, and that a copy of such ratification was attached to the Complaint as Exhibit 2. The remaining allegations contained in Paragraph 13 are allegations and conclusions of law to which no response is required; to the extent a further response may be required, these allegations are denied.

14. Paragraph 14 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

15. Paragraph 15 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that the BVU Authority Act was passed by the General Assembly in 2010, and that it created the BVU. The language of the statute speaks for itself, and characterizations thereof are denied.

#### **In Lieu of Tax Payment Provision**

16. Admitted.

17. Admitted.

18. Admitted.

19. The City admits that the Transition Agreement is a written document that was attached to the Complaint as Exhibit 1, and avers it speaks for itself; all characterizations thereof are denied.

#### **Sunset Transaction**

20. Admitted.

21. The City admits that the Bristol City Council approved the Sunset Transaction on March 15, 2016, but denies that such approval was “with no conditions.” The City avers that the Bristol City Council’s approval of the Sunset Transaction was conditioned and predicated upon

the BVU's compliance with the terms of both the Sunset Transaction and the Transition Agreement, as ratified.

**Auditor of Public Accounts**

22. Admitted.

23. The City admits that the APA report is a written document that speaks for itself; all characterizations thereof are denied. The remaining allegations contained in Paragraph 23 are allegations and conclusions of law to which no response is required; to the extent a response may be required, the City admits that Virginia law places certain limits on utility cross-subsidization.

24. The City admits that the APA report is a written document that speaks for itself; all characterizations thereof are denied. By way of further response, the City admits that the APA report recommended that the BVU "re-establish an interfund receivable/payable" accounting for the internal debt that had been extinguished in 2006, "including foregone interest, between the Electric and OptiNet Divisions in the amount of \$13,741,288." The remaining allegations contained in paragraph 24 contained allegations and conclusions of law to which no response is required; to the extent a further response may be required, the City lacks information or knowledge sufficient to form a belief as to whether the "BVUB's governing Board did not vote upon or approve" the extinguishment of the internal debt, and avers that the decision to extinguish such debt was approved.

25. The City admits that on or about June 23, 2017, the BVU approved a promissory note for \$13,741,288 from the OptiNet Division to the Electric Division. The City lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 25, and thus denies the same.

26. The City admits that the APA report is a written document that speaks for itself; all characterizations thereof are denied. The City lacks information or knowledge sufficient to form a belief as to whether there "is no record that BVUB's Board ever voted to remove that internal debt" and avers that the decision to extinguish such debt was approved. The remaining

allegations contained in Paragraph 26 are allegations and conclusions of law to which no response is required; the language of the Virginia Code speaks for itself.

27. The City admits that the APA report is a written document that speaks for itself; all characterizations thereof are denied. The City further admits that both the Electric Division and the OptiNet Division had attachments to certain poles, and that the Electric Division historically had paid the so-called “pole attachment” fees.

28. The City lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 28 of the Counterclaim, and thus denies the same.

29. Admitted.

30. The City lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 30 of the Counterclaim, and thus denies the same.

31. The City lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in paragraph 31 of the Counterclaim, and thus denies the same.

32. Paragraph 32 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

33. Paragraph 33 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

34. The BCS Report is a written document that speaks for itself, and all characterizations thereof are denied. The City denies that the internal debt allegedly owed by the OptiNet Division to the Electric Division, which the BVU subsequently reinstated and applied to reduce net proceeds of the Sunset Transaction, existed or was known to the City and the BVUB at the time the Transition Agreement was executed, or at the time the Transition Agreement was ratified by the BVU.

35. The City admits that the BVU’s Board voted on June 23, 2017 to reinstate previously extinguished debt owed by the OptiNet Division to the Electric Division, and to record such reinstated debt on the BVU’s financial statements. The remaining allegations in Paragraph 35 are denied.



36. The City lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 29 of the Counterclaim, and thus denies the same. The City specifically denies that “net proceeds” – as that term was used in the Transition Agreement, as ratified – of the Sunset Transaction were (\$2,923,571).

**COUNT I**  
**Declaratory Judgment that the Transition Agreement is Void**

37. The City incorporates its answers to Paragraphs 1 through 36 as if fully set forth herein.

38. Paragraph 38 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that there is an actual justiciable controversy between the parties, which involves specific adverse claims based upon present facts, and which is ripe for adjudication. Whether this Court has subject matter jurisdiction is a legal question to which no response is required. The Court has set a briefing schedule for the parties to address subject matter jurisdiction.

39. Paragraph 39 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

**COUNT II**  
**Declaratory Judgment that Because the Transition Agreement  
is Void, Bristol Must Disgorge and Return in Lieu of Tax  
Payments to BVU from OptiNet and Non-Electric Revenue**

40. The City incorporates its answers to Paragraphs 1 through 39 as if fully set forth herein.

41. Paragraph 41 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that there is an actual justiciable controversy between the parties.

42. Paragraph 42 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

**COUNT III**  
**Declaratory Judgment that BVU is the Owner of Property**

43. The City incorporates its answers to Paragraphs 1 through 42 as if fully set forth herein.

44. Paragraph 44 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that there is an actual justiciable controversy between the parties.

45. Paragraph 45 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

46. Paragraph 46 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

**COUNT IV**  
**Payment of Past Due Rents to BVU for Use of Property**

47. The City incorporates its answers to Paragraphs 1 through 46 as if fully set forth herein.

48. Paragraph 48 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that there is an actual justiciable controversy between the parties.

49. Paragraph 49 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

50. Paragraph 50 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

51. Paragraph 51 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

**COUNT V**  
**Declaratory Judgment, in the Alternative,**  
**That There Are No Net Proceeds**

52. The City incorporates its answers to Paragraphs 1 through 51 as if fully set forth herein.

53. Paragraph 53 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the City admits that there is an actual justiciable controversy between the parties.

54. Paragraph 54 contains allegations and conclusions of law to which no response is required. To the extent a response may be required, the allegations are denied.

The City contends that the paragraph that follows Paragraph 54 is a prayer for relief, to which no response is required, to the extent a response may be required, the allegations and demands contained therein are denied.

**AFFIRMATIVE DEFENSES**

1. The Counterclaim fails to state a claim upon which relief can be granted.
2. The claims asserted in the Counterclaim are barred by the statute of limitations.
3. The claims asserted in the Counterclaim are barred by the doctrine of laches.
4. The claims asserted in the Counterclaim are barred by the doctrine of equitable estoppel.
5. The claims asserted in Counts I, II and V are barred by the doctrine of promissory estoppel.
6. The claims asserted in Counts I, II and V are barred by the doctrine of ratification.

7. The claims asserted in Counts I, II and V are barred by the doctrine of unclean hands.

8. The claims asserted in Counts II, III and IV of the Counterclaim are barred by the doctrine of unjust enrichment.

9. The claims asserted in Counts II, III and IV of the Counterclaim are barred by the doctrine of waiver.

10. The claims asserted in Counts III and IV of the Counterclaim are barred by the doctrine of adverse possession.

11. To the extent the BVU may be entitled to relief on Count IV of the Counterclaim, the amount of any judgment is subject to setoff and recoupment.

#### **JURY DEMAND**

The City demands a trial by jury on all issues so triable.

#### **PRAYER FOR RELIEF**

WHEREFORE, the City respectfully requests that this Court grant the City judgment in its favor, and dismiss the Counterclaim in its entirety, with prejudice, along with such further relief as this Court deems just and appropriate.

Dated: September 11, 2020

Respectfully submitted,

The City of Bristol, Virginia  
*By Counsel*

/s/ Alexander H. Berman  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of September, 2020, I filed the foregoing Answer to Counterclaim using the Clerk's CM/ECF system, which will send notice of this filing to the following:

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