

STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

November 16, 2012 - 10:18 a.m.  
Concord, New Hampshire

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RE: DT 12-308  
COMCAST PHONE OF NEW HAMPSHIRE, LLC,  
AND COMCAST IP PHONE II, LLC:  
*Application of Senate Bill 48 on VoIP  
and IP-Enabled Services.*

PRESENT: Chairman Amy L. Ignatius, Presiding  
Commissioner Robert R. Scott  
Commissioner Michael D. Harrington  
  
Sandy Deno, Clerk

APPEARANCES: Reptg. Comcast Phone of New Hampshire, LLC  
and Comcast IP Phone II, LLC:  
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Stacey Parker, Esq. (Comcast)

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Alexander W. Moore, Esq.

Reptg. the Rural Local Exchange Carriers:  
Harry N. Malone, Esq. (Devine Millimet)

Reptg. Northern New England Telephone  
Operations d/b/a FairPoint Communications:  
Patrick C. McHugh, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

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**APPEARANCES: (C o n t i n u e d)**

**Reptg. Residential Ratepayers:**

Susan W. Chamberlin, Esq., Consumer Advocate  
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JAN 10 2012

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**P R O C E E D I N G**

1  
2 CHAIRMAN IGNATIUS: I'd like to open the  
3 hearing in Docket DT 12-308. This is Comcast Phone of New  
4 Hampshire and Comcast Phone II, LLC. It grows out of a  
5 proceeding at the Commission that was then appealed to the  
6 New Hampshire Supreme Court. And, on October 12th, 2012,  
7 the Supreme Court remanded the case to the New Hampshire  
8 Commission for the limited purpose of reconsidering  
9 Commission Orders 25,262 and 25,274, and related orders in  
10 Docket DT 09-044.

11 We issued an order of notice on October  
12 24th, 2012, explaining the situation and asking for any  
13 parties to that underlying case, or other interested  
14 people who weren't part of that case, but were concerned  
15 about the issues, give them an opportunity for filing  
16 briefs on the issues raised by the Court. And, because  
17 the Court was on a very tight schedule, our order of  
18 notice also followed a very tight schedule. So, we  
19 scheduled a briefing deadline for November 9th and oral  
20 argument this morning, November 16th, at 10:00. And, so,  
21 that's where we are today.

22 Let's begin with appearances, and then  
23 I'll talk about the game plan for how we're going to work  
24 our way through this.

1 MR. PLATZER: Thank you. It's Luke  
2 Platzer, appearing on behalf of Comcast. And, with me at  
3 counsels' table are Susan Geiger and Stacey Parker.

4 CHAIRMAN IGNATIUS: Good morning.

5 MS. PARKER: Good morning.

6 MR. MOORE: Alex Moore, for Verizon.  
7 With me is Lisa Thorne, our Director of State Regulatory.

8 CHAIRMAN IGNATIUS: Good morning.

9 MR. MALONE: Good morning. Harry  
10 Malone, with Devine Millimet, representing the Rural  
11 Carriers. And, with me is Bill Stafford, at Granite State  
12 Telephone. I'd like to take care of one little bit of  
13 housekeeping, if I may. The Footnote Number 1 of our  
14 brief listed the members of the Rural Carrier Association.  
15 And, because of an eccentricity in Microsoft Word, which  
16 wouldn't have happened with WordPerfect -- don't get me  
17 started -- only the first line of the footnote appeared.  
18 And, so, we're missing the names of a number of the  
19 companies. And, for the record, I would like to read them  
20 off, if I could?

21 CHAIRMAN IGNATIUS: Please do.

22 MR. MALONE: Footnote 1 should have  
23 read: "Bretton Woods Telephone Company, Incorporated;  
24 Dixville Telephone Company; Dunbarton Telephone Company,

1 Incorporated; Granite State Telephone, Incorporated;  
2 Hollis Telephone Company, Incorporated; Kearsarge  
3 Telephone Company; Merrimack County Telephone Company; and  
4 Wilton Telephone Company." Thank you.

5 CHAIRMAN IGNATIUS: Thank you. We were  
6 trying to guess at why some were in and some were out, and  
7 it led to some intriguing questions, but not very good  
8 answers, and certainly not that the Microsoft product  
9 didn't allow for it.

10 All right. Next, who do we have?  
11 Mr. McHugh.

12 MR. McHUGH: Good morning. Pat McHugh,  
13 appearing on behalf of Northern New England Telephone  
14 Operations, LLC. Thank you.

15 CHAIRMAN IGNATIUS: Good morning.

16 MS. CHAMBERLIN: Susan Chamberlin,  
17 Consumer Advocate, on behalf of the residential  
18 ratepayers.

19 CHAIRMAN IGNATIUS: Good morning.

20 MR. SHULOCK: Good morning. David  
21 Shulock, on behalf of Staff. And, with me at the table is  
22 the Director of the Legal Division, Ed Damon, and members  
23 of the Telecommunications Staff.

24 CHAIRMAN IGNATIUS: Good morning, and

1 welcome, everyone. The order of proceedings will be to  
2 allow each party a ten-minute period to present oral  
3 argument. You don't need to take the ten minutes, if you  
4 don't feel you need, you won't be penalized for that. But  
5 we want to give people an opportunity to make their  
6 arguments and respond to arguments made by others in their  
7 briefs, if you wish. And, then, as we go around, we'll  
8 have questions from the Bench and from our General  
9 Counsel, Anne Ross. We then will move to the next party  
10 and continue on.

11 At the end of it, it may be that we go  
12 back around for further questions to some others, but that  
13 may not be necessary. We do not plan on questions from  
14 each other. This is really a "questions from the Bench"  
15 on these issues.

16 At the close of it, I think we'll  
17 probably take a break, recess for a moment, for us to just  
18 reconnoiter among ourselves and be sure that we covered  
19 all the things that we wanted to, to see if there are any  
20 further questions we meant to get back to. And, if there  
21 are, we'll come back and conclude. If not, we can adjourn  
22 at that point.

23 And, I understand an order of  
24 proceedings was circulated yesterday or the day before,

1 that would be the Comcast entities; followed by ATT and  
2 Verizon, working as -- as they filed the joint brief; then  
3 the New Hampshire Telephone Association members, the  
4 RLECs; then OCA; then FairPoint; and, finally, if anyone  
5 here from New Hampshire Legal Assistance arrives, an  
6 opportunity for them to speak, but I don't see anyone here  
7 at present.

8 And, that was conveyed to everyone,  
9 correct? That's an order that people are aware of?

10 (No verbal response)

11 CHAIRMAN IGNATIUS: All right. Then, is  
12 there anything else? Any procedural matter to take up  
13 before we begin or should we begin with Comcast?  
14 Ms. Geiger.

15 MS. GEIGER: Yes. Just want to note for  
16 the record that, as ordered, Comcast filed an affidavit of  
17 publication on November 2nd.

18 CHAIRMAN IGNATIUS: Thank you very much.  
19 Appreciate that.

20 MR. MALONE: Madam Chairman, just a  
21 question for clarification. The ten minutes, will that  
22 include questioning from the Bench? Or, will questionings  
23 from the Bench be after the ten minutes?

24 CHAIRMAN IGNATIUS: They will be in

1 addition to. So, you'll have your --

2 MR. MALONE: Thank you.

3 CHAIRMAN IGNATIUS: -- your full ten  
4 minutes, if we let you. No, this won't be trial by fire.  
5 Although, I have to say, there's been certain arguments at  
6 the Supreme Court where I had so little to say I welcomed  
7 questions, because I didn't have much of an argument.

8 All right. Why don't we begin then with  
9 Comcast. And, Mr. Platzler, are you doing that?

10 MR. PLATZER: Yes.

11 CHAIRMAN IGNATIUS: Thank you.

12 MR. PLATZER: Thank you.

13 CHAIRMAN IGNATIUS: If you're  
14 comfortable there, or at the center, it's your choice.

15 MR. PLATZER: Oh, we want to thank the  
16 Commission for the opportunity to present our comments  
17 here today. We think that the order of notice sort of  
18 asked the right questions coming out of the Supreme  
19 Court's remand, which we tried our best to address in our  
20 briefs, and would like to summarize here. But, of course,  
21 happy to answer questions as they come up.

22 And, what we see as the critical  
23 question here now on remand is whether there's still any  
24 live controversy involving the regulation of Comcast

1 service that actually requires resolution of the questions  
2 that the Commission asked when it opened the DT 09-044  
3 docket. And, we believe that the questions that the  
4 Commission had to address at the time have now been  
5 answered rather clearly by the Legislature in Senate Bill  
6 48, and that there is no longer a live controversy here.  
7 And, as a result, not only as a matter of law, but simply  
8 as a matter of prudence, that the orders in 09-044 need to  
9 be vacated.

10 We think that Senate Bill 48 is quite  
11 clear in laying out what the regulatory obligations of  
12 VoIP providers in the state are. The Bill has very broad  
13 language, including a regulation that doesn't fall in the  
14 specific exceptions, the savings clauses in the statute.  
15 And, we think it's clear that the Legislature was trying  
16 to hit sort of everything as precluded, unless it was  
17 specifically exempted in the statute. And, because not  
18 only did they -- the Senate Bill 48 bar direct regulation,  
19 it also has very broad language that bars any regulation  
20 that would even have the effect of regulating the various  
21 different items listed in the statute, terms, conditions  
22 of service, market entry, market exit. And, the  
23 legislative history is clear on that as well. And that,  
24 while it certainly doesn't mean that the Commission no

1 longer has any regulatory authority over VoIP providers,  
2 we think that the question that the Commission was trying  
3 to answer when it opened the 09-044 docket, which was  
4 precisely "what authority does the Commission have?" The  
5 Legislature has now given rather precise answers to that.  
6 It listed specific statutes and specific general  
7 categories of statutes that now fall within the  
8 Commission's jurisdiction.

9           So, now that the Legislature has clearly  
10 answered that question, we think that the controversy that  
11 may have existed at the time the docket was opened no  
12 longer exists, and therefore makes this case moot. And,  
13 what we've tried to do in our brief is show how all of the  
14 different statutes and regulations that still apply to  
15 VoIP providers in the state are ones where the Commission  
16 no longer needs to determine whether or not fixed VoIP  
17 providers are public utilities in order to exercise that  
18 jurisdiction. We showed a lot of those -- a lot of the  
19 statutes that are called out in the savings clause don't  
20 depend on whether or not an entity is a public utility or  
21 not, they apply independent criteria that vary from  
22 statute to statute. So, whether or not something is a  
23 public utility doesn't matter anymore to the application  
24 of the Commission's jurisdiction.

1                   And, in the few cases where a "public  
2 utility" designation remains relevant to whether or not a  
3 particular statute or regulation applies, those  
4 regulations either have no application to fixed VoIP  
5 providers, such as Comcast, for instance, ones that deal  
6 with ILEC obligations. And, the remainder all apply  
7 anyway, because they apply to Comcast Phone of New  
8 Hampshire, the CLEC, well, I guess now it's the ELEC,  
9 subject to those regulations. Things like Dig Safe and  
10 number porting or slamming, are all regulations that  
11 certainly apply to Comcast, but they apply through the  
12 CLEC. So, there's no controversy -- no conceivable  
13 controversy as to whether or not they would apply to a  
14 VoIP provider, because they apply anyway.

15                   CHAIRMAN IGNATIUS: Can I ask you, are  
16 you stating that the provider is a public utility, but the  
17 things that flow from that are not important? Or, that  
18 you're not a public utility, and, therefore, the things  
19 that flow from that aren't required?

20                   MR. PLATZER: So, we certainly concede  
21 that the ELEC, Comcast Phone of New Hampshire, not the  
22 VoIP provider, but the ELEC is a public utility. And,  
23 we've never contested that the Commission has jurisdiction  
24 authority to regulate the ELEC as a public utility. And,

1 what we are saying is that the question of whether or not  
2 the VoIP provider, Comcast IP Phone, whether that is also  
3 a public utility, no longer has any legal effect or  
4 significance after Senate Bill 48, because --

5 CHAIRMAN IGNATIUS: But my question was,  
6 is it a public utility, the VoIP provider?

7 MR. PLATZER: Well, we believe that it's  
8 not, for the reasons that we sort of were preparing to  
9 appeal to the New Hampshire Supreme Court. But we don't  
10 believe that the Commission needs to resolve that question  
11 anymore, in light of Senate Bill 48. Because, and,  
12 certainly, at the time that the orders in 09-044 were  
13 issued, and at the time we appealed those orders, that  
14 designation of the "VoIP provider" as a "public utility"  
15 carried substantially -- carried a lot of legal  
16 significance with it. And, it's our contention that it no  
17 longer has that legal significance. Because the few  
18 statutes and regulations that are preserved by SB 48's  
19 savings clause that still apply on the basis of whether or  
20 not something is a public utility, as opposed to being  
21 generally applicable or applying to cable providers,  
22 *etcetera*, those few regulations, none of them really have  
23 any relevance to the VoIP provider anymore, because they  
24 deal with things like number porting, like facilities

1 management, like herbicide use, all of which are  
2 regulations that apply to the ELEC or -- and/or to the  
3 local cable affiliate.

4 So, I guess that what I'm trying to  
5 express is there is no additional regulations that would  
6 fall on Comcast, if the VoIP provider is a public utility,  
7 that don't already fall on Comcast through the ELEC and  
8 through the cable affiliate. So, while we certainly still  
9 believe that the VoIP provider is not a public utility,  
10 and would appeal that -- the resolution of that statutory  
11 question to the Court, if it goes back up, we think that  
12 that question has now become academic, as a practical  
13 matter, which is why we think that this case is now moot.

14 CHAIRMAN IGNATIUS: And, if, for some  
15 reason, either because of change in business models or, I  
16 don't know, some regulatory action, the regulated ELEC was  
17 no longer in operation in New Hampshire, what would that  
18 mean for the things that you say "well, don't worry,  
19 they're getting picked up through the ELEC's obligations?

20 MR. PLATZER: If that, sort of if that  
21 scenario were to come to pass, the Commission might then,  
22 at that point, have a live controversy before it, that  
23 might require it to take up the question of the  
24 designation, the categorization of the VoIP provider. But

1 we believe that, and I think there's law out there, we  
2 cited it in our Supreme Court briefing, and Verizon also  
3 cited it in its brief as well, that you need more than the  
4 speculative possibility that some legal question might  
5 become relevant at some point in the future for a case not  
6 to be moot. It needs to -- there needs to actually be a  
7 live controversy now. And, with the way that things stand  
8 right now, everything is being picked up through the cable  
9 affiliates and the ELEC. And, certainly, we're not asking  
10 here, in the context of this remand, for the Commission to  
11 hold that our VoIP provider is not a public utility and to  
12 reverse the determination from 09-044. That is the relief  
13 we would be forced to ask the Supreme Court for. But, if  
14 the Commission decides that this question is moot, I think  
15 that that issue just goes away, and is open -- and is  
16 still there for the Commission to pick up, if, at some  
17 point in the future, if some controversy were to arise.

18 And, as a matter of prudence, we think  
19 that's also the better course. Because, if this were to  
20 ever become relevant in the future, which we don't think  
21 is likely, there would then be a live issue that the  
22 Commission could decide, and then Comcast, if necessary,  
23 could then take up on appeal. Because, otherwise, if that  
24 "public utility" designation for the VoIP provider lives

1 on, but doesn't actually have any practical significance  
2 here, we're put in this weird situation where we have to  
3 appeal the order to the Supreme Court, and they have to  
4 decide this in the context of a moot case. And, for the  
5 reasons we stated in our Supreme Court briefing, that's  
6 not the way mootness works. You're supposed to, you know,  
7 to wait until there's actually a live controversy.

8 And, actually, I realize, as a  
9 housekeeping matter, I realize that, because this is  
10 technically a new docket, I think that our briefing on the  
11 motion to vacate at the Supreme Court is actually not  
12 technically in this docket. And, we would ask the  
13 Commission to take notice of the briefs that we filed at  
14 the Supreme Court, which were also filed in 09-044.

15 CHAIRMAN IGNATIUS: Commissioner  
16 Harrington.

17 CMSR. HARRINGTON: Excuse me, but a  
18 quick follow-up, just so I make sure I understood part of  
19 what you said. You're not asking the Commission to  
20 reverse the position that the VoIP provider is a public  
21 utility at this time?

22 MR. PLATZER: No. We're merely asking  
23 for that conclusion to be vacated.

24 CMSR. HARRINGTON: Okay. Thank you.

1 MR. PLATZER: In other words, we're not  
2 asking for a precedential decision on the merits that the  
3 VoIP provider is not a public utility. Certainly, we  
4 asked the Commission to make that decision, and initially  
5 we lost at the Commission. But, if we have to appeal this  
6 to the Supreme Court, we will raise that argument there.  
7 But we don't believe it's necessary for the Commission to  
8 decide on the merits that we're not a public utility, all  
9 that we're asking for is that that decision be vacated.

10 Although, and, obviously, and sort of  
11 the elephant in the room here is all of the federal law  
12 determinations that the Commission made in the previous  
13 orders, because independent of this public utility  
14 question, the orders here contain rather extensive  
15 holdings on what the federal classification of what our  
16 VoIP provider services are, whether they are information  
17 services or telecommunications services under federal law.  
18 And, we don't think there could be any question that that  
19 determination has now become purely academic in light of  
20 SB 48. Because the types of state public utility  
21 regulations that we were arguing would be preempted under  
22 federal law, no longer -- have now been legislatively  
23 removed by SB 48. But, it's, unfortunately, those federal  
24 determinations are also what would compel further

1       appellate litigation in this case if the orders aren't  
2       vacated.

3               So, we'd certainly ask that, at a bare  
4       minimum, if the Commission is not inclined to vacate the  
5       state law determination that our VoIP provider is a public  
6       utility, even though we believe that should be vacated,  
7       that the Commission, at a bare minimum, vacate the parts  
8       of the orders that address the federal classification of  
9       the VoIP service. Because we don't think there can be any  
10      dispute that federal determination has now been mooted by  
11      the legislative removal of the state public utility  
12      regulations that would have attached to Comcast VoIP  
13      service under the legal regime at the time.

14             And, I do want to briefly address the --  
15      there have been some arguments made mainly by the rural  
16      carriers about what regulations would still apply if  
17      Comcast's VoIP provider is, in fact, a public utility.  
18      And, we really believe that the examples that they have  
19      given don't support the continuation of that "public  
20      utility" holding, because they don't really present any  
21      live controversy.

22             The first argument we saw from them is  
23      that, "well, there are certain fees that the Commission  
24      still assesses on public utilities." But, and, certainly,

1 in Comcast's case, it's one of those cases where those  
2 fees are picked up by the ELEC, the regulated entity. The  
3 revenues of the VoIP carrier are imputed to the regulated  
4 entity. So, there's no -- the amount of fees that Comcast  
5 would have to pay to the Commission doesn't turn on  
6 whether or not the VoIP provider is a public utility. So,  
7 there's no live controversy there.

8 CHAIRMAN IGNATIUS: Can you repeat that?  
9 Did you just say "the revenues of the VoIP provider are  
10 imputed to the ELEC"?

11 MR. PLATZER: Yes. The Comcast Phone  
12 pays the -- pays the fees on behalf of the revenues of the  
13 VoIP provider. So, whether or not the VoIP provider has  
14 an independent obligation to pay those fees has no real  
15 relevance, it wouldn't change anything, in terms of what  
16 -- what fees Comcast, as a whole, has to pay to the  
17 Commission.

18 We've also seen the argument that it  
19 matters for purposes of the pole attachment rates. We  
20 sort of articulated in our briefing why we don't believe  
21 there's any difference, under the Commission's  
22 regulations, as to whether a provider is a cable company  
23 or a local exchange carrier. But, now that there is a --  
24 looks like there's going to be a settlement, pending

1 Commission approval, of the dispute that the Commission  
2 had before it about pole attachment rates, that that issue  
3 has now also gone away.

4 And, then, finally, --

5 CMSR. HARRINGTON: Excuse me just one  
6 second, before you get to the last one, and I'm sorry to  
7 interrupt. But, on the previous one, about the  
8 assessments to the PUC, you had stated that "the VoIP  
9 provider imputes the revenue to the ELEC", and then that's  
10 how their revenues are calculated to get the assessment?

11 MR. PLATZER: Yes.

12 CMSR. HARRINGTON: Going back to what  
13 Chairman Ignatius said earlier, if there was no ELEC in  
14 the state for various reasons, I'm assuming then there  
15 would be no assessment to the VoIP provider whatsoever?

16 MR. PLATZER: Well, if there were no --  
17 in that sort of speculative example, and, of course, it's  
18 a speculative example that we don't believe could ever  
19 come to pass, because we need the ELEC for interconnection  
20 and number porting and all of those things, so, we don't  
21 think that's a situation that could ever really truly  
22 arise. But, if it were to arise, that would be perhaps a  
23 case in which there might be some live controversy that  
24 then might require the Commission to revisit the question

1 of whether the VoIP provider is a public utility. Our  
2 position is that there is no such question before the  
3 Commission now.

4 CMSR. HARRINGTON: And, you don't see  
5 that as a likely occurrence?

6 MR. PLATZER: We don't see that as a  
7 likely occurrence, because there couldn't be -- there  
8 couldn't be a VoIP carrier without the CLEC there to  
9 provide all the functions it serves.

10 CMSR. HARRINGTON: Okay. Thank you.

11 MR. PLATZER: And, then, finally, there  
12 is also the argument from the independents that --

13 CMSR. SCOTT: Sorry to interrupt. I  
14 just wanted to follow up while that topic was hot.

15 MR. PLATZER: Certainly.

16 CMSR. SCOTT: So, again, I just want to  
17 make sure I understood. So, from your view, if we, since  
18 there's no live issue, we were to moot the orders, that  
19 they would have no bearing on the future, if we were to  
20 make -- to have a docket on the -- whether it's a public  
21 utility or not, is that correct?

22 MR. PLATZER: Precisely.

23 CMSR. SCOTT: Kind of without president?

24 CMSR. HARRINGTON: Precedent.

1 CMSR. SCOTT: Excuse me, precedent.

2 Thank you.

3 MR. PLATZER: Yes. Precisely. We're  
4 not asking the Commission here today to hold that our VoIP  
5 provider is not a public utility in light of Senate Bill  
6 48. We're merely asking for the finding that they "are a  
7 public utility" to be vacated as moot, such that, in the  
8 unlikely event that some dispute were to arise in the  
9 future, the Commission's hands would be free to rule any  
10 way on that that it sought, that there wouldn't be any  
11 precedential effect to the vacatur.

12 CMSR. SCOTT: Thank you.

13 MS. ROSS: One additional follow-up. Is  
14 it Comcast's position then that the exceptions in the  
15 savings clause in Senate Bill 48, that talk about laws of  
16 general applicability and assessment, would not allow the  
17 Commission to collect an assessment directly from Comcast  
18 or any other VoIP provider?

19 MR. PLATZER: It's certainly our  
20 position that it does not -- that there's no live  
21 controversy about that. That the question of whether the  
22 -- sort of the question of whether the assessment is  
23 assessed against the VoIP provider or the ELEC is an  
24 academic one, because it's the same assessment in either

1 event. It's not -- it is not our contention that Senate  
2 Bill 48 sort of preempts or precludes the assessment of  
3 the Commission -- the Commission's fees, I believe it's  
4 363-A, it's not our position that that is one of the  
5 regulations that is precluded by Senate Bill 48. It's  
6 rather that it doesn't matter where they're assessed, the  
7 way the fixed VoIP providers tend to be structured.

8 CMSR. HARRINGTON: But is your position  
9 that the VoIP revenues need or must be imputed to the ELEC  
10 and the total amount of combined revenues is used for the  
11 assessment?

12 MR. PLATZER: We've -- that's certainly  
13 the way that we have historically calculated and paid  
14 those assessments in New Hampshire. And, we don't believe  
15 there's any controversy that the way that we've  
16 historically done it complies with the law. Which we  
17 don't believe --

18 CMSR. HARRINGTON: I guess my question  
19 would be --

20 (Court reporter interruption - cellphone  
21 ringing.)

22 CMSR. HARRINGTON: Let me just say,  
23 since there are some issues about assessments that are in  
24 front of us, among other issues, I'm just trying to get a

1 little clarification on this. You're saying that you  
2 believe that complies with the law or that it's required  
3 by the law?

4 MR. PLATZER: And, we certainly believes  
5 that it complies with the law. I believe you're  
6 referencing that there's -- I'm aware that there is also a  
7 dispute about the exact methodology that's used to compute  
8 the amount of assessment that public utilities need to  
9 pay, based on whether interstate revenues are included or  
10 not, but we believe that's an entirely independent issue  
11 from the question of whether or not the assessment  
12 technically falls on the VoIP provider or the ELEC. So,  
13 one has no -- one has not bearing or effect on the other.

14 CMSR. HARRINGTON: I'm not trying to say  
15 they're related, other than that there was a methodology  
16 that had been done for a while, and now people are  
17 challenging it. So, I guess my question is, do you see  
18 this combination of the VoIP revenues being imputed to  
19 their associated ELEC, and then using that total for the  
20 assessment value as something that could be challenged?  
21 Simply because it's been done in the past does not mean --  
22 no one's challenged that. So, would it be something that  
23 Comcast would be looking at? Again, I get back to my  
24 original question is, doing that you believe complies with

1 the law, and no one said "No, No. You're paying too much  
2 money." But does it -- is it required by the law?

3 MR. PLATZER: We don't believe that the  
4 mechanism is mandatory. We do believe that the mechanism  
5 complies with the law. We have no intentions of changing  
6 it. And, in the event we -- in the highly speculative  
7 event that a VoIP provider were not to do it that way,  
8 then the Commission might have a live controversy before  
9 it. But that live controversy does not exist here today.

10 CHAIRMAN IGNATIUS: Why don't you wrap  
11 up, and then we'll have a few more questions.

12 MR. PLATZER: Okay. And, the final  
13 point I wanted to raise, about why there's no controversy,  
14 and we also heard the "universal service" argument floated  
15 by the independents as to why "public utility" designation  
16 might still matter. Of course, they're -- and, it's not  
17 entirely clear whether they were talking about POLR  
18 obligations or universal service contributions. But, in  
19 the event POLR obligations were to be created by the  
20 Commission at some point in the future, we think that that  
21 would quite clearly be precluded as a term or condition of  
22 service, that Senate Bill 48 prevents the Commission from  
23 imposing on VoIP providers, in the event that it involves  
24 contributions to some future state universal service fund.

1 We also think that there's no controversy there, because  
2 the FCC has spoken rather clearly in recent years about  
3 what types of universal contributions -- universal service  
4 contributions state commissions are allowed to impose on  
5 VoIP providers.

6 So, answering the question of what the  
7 Commission might be able to do in the future about a state  
8 universal service fund, doesn't require a determination of  
9 whether or not the VoIP provider is a public utility,  
10 because there's pretty clear FCC law on that one.

11 CHAIRMAN IGNATIUS: Throughout this  
12 morning, you've been referring to "VoIP providers" sort of  
13 in general. In your brief, you specifically identified  
14 Comcast Digital Voice as an "integrated VoIP service". Is  
15 there a difference, in terms of the regulatory response?  
16 Is your argument the same for all VoIP providers or for a  
17 variety of different things that Comcast may provide? Or,  
18 is it specific to an interconnected voice service?

19 MR. PLATZER: Our arguments are -- were  
20 sort of crafted with a fixed interconnected VoIP service  
21 in mind. And, that's because they tend to be structured  
22 the way that Comcast is structured, which is that there is  
23 -- there is a CLEC to whom -- by whom all of the relevant  
24 regulations preserved by the savings clause would fall.

1 Such that there's no real -- there's no dispute or no  
2 controversy as to whether or not those regulations also  
3 fall on the affiliated VoIP provider.

4 CHAIRMAN IGNATIUS: I know I'm mindful  
5 of the admonitions of FairPoint that we not answer  
6 questions that haven't been asked us. And, so, we're not  
7 looking to determine everything about every possible  
8 provision of VoIP service in the future. I just want to  
9 be sure I understand what your position is, and that's the  
10 "fixed interconnected VoIP service" is what you're talking  
11 about here?

12 MR. PLATZER: That's correct.

13 CHAIRMAN IGNATIUS: You also said in the  
14 brief that CDV now requires a broadband connection to  
15 operate. And, is that -- am I correct in that? And, just  
16 is it a factual underpinning, is that correct?

17 MR. PLATZER: In the since that there --  
18 so, it's correct in the sense that there needs to be a  
19 physical broadband connection to the end-user's premises.  
20 It was not meant to suggest that the end-user needs to  
21 also subscribe to Comcast's internet service in order to  
22 purchase CDV, that's not -- wasn't the intention of that,  
23 in that respect, it's not changed.

24 And, where there are some -- there are

1 some nomadic features that are offered through some  
2 business services, I believe we articulated in some of the  
3 supplemental briefing in 09-044, but those also require  
4 that there be some kind of physical broadband connection.  
5 And, which we don't think there's any dispute here that,  
6 as the Legislature defined a "VoIP service" for purposes  
7 of Senate Bill 48, that CDV and its various different  
8 business and residential applications, always falls within  
9 that definition.

10 CHAIRMAN IGNATIUS: You had said that  
11 both the legislative history and the language of Senate  
12 Bill 48 itself bar direct regulation. And, I know you've  
13 read others' briefs. At least one party says "there's  
14 nothing other than the legislative history to support  
15 that, and the legislative history shouldn't be governing  
16 here because there's no confusion." So, what's your  
17 response to that? What is it in the Bill itself you're  
18 turning to, separate from the legislative history?

19 MR. PLATZER: Well, certainly, the text  
20 of 362:7, II, itself, is the first place that we look for  
21 that. I mean, it's -- the language that the Legislature  
22 used was certainly very broad: "Law, rule, regulation,  
23 ordinance, standard, order, or other provision having the  
24 force of law", as well as "market entry, market exist,

1 transfer of control, rates, terms, conditions of service".  
2 The expansiveness of the language that the Legislature  
3 used, both in terms of the types of rules that were  
4 covered and the types of subjects those rulings could  
5 address, indicate that they were sort of trying to hit  
6 everything under the Sun, unless it was a called out in  
7 the savings clause.

8 The second place we get that from is  
9 that, in addition to the prohibition on direct regulation,  
10 there's also this additional broadening language in the  
11 text of the statute that -- that says, not only directly  
12 regulating, but "has the effect of regulating", which is  
13 even -- which is broad -- goes even beyond the prohibition  
14 on these types of regulations, to also prohibition on any  
15 kind of regulations that would have the effect of  
16 affecting these various different areas.

17 And, certainly, in the context of  
18 some -- in a different statute, which we cited in our  
19 briefs, the Supreme Court has, in the past, viewed that as  
20 -- that "has the effect of" language as encompassing a  
21 very broad scope.

22 And, then, finally, we think that the  
23 savings clause itself, by sort of articulating like an  
24 enumerated list of the various different laws and

1 regulations that still apply, suggest that that's what's  
2 left. Those are the areas that the Commission has  
3 authority to regulate VoIP providers. We'd also note  
4 that, under the statute, VoIP providers are treated  
5 identically to IP-enabled services. And that the same  
6 regulations are both precluded and preserved for both  
7 categories of services. The Legislature treated VoIP  
8 services and IP-enabled services as identical for purposes  
9 of SB 48. And, we certainly think that whatever sort of  
10 the unresolved state of federal law may be with respect to  
11 VoIP services, it's quite clear that IP-enabled services  
12 are not subject to public utility regulation via the  
13 states. And, that's been established for quite some time.  
14 So, the fact that the Legislature treated VoIP and  
15 IP-enabled services as essentially identical for  
16 regulatory purposes, also, in our mind, speak to a very  
17 broad intention of the Legislature, consistent with the  
18 legislative history.

19 CHAIRMAN IGNATIUS: Would a requirement  
20 that a fixed VoIP provider register with the Commission  
21 with name, contact numbers, mailing address, would that be  
22 a form of direct regulation or have the effect of  
23 regulating in a way that you think is prohibited by Senate  
24 Bill 48?

1 MR. PLATZER: We believe that would fall  
2 under the market entry requirements, yes.

3 CHAIRMAN IGNATIUS: Even an  
4 informational filing, a name and a phone number?

5 MR. PLATZER: Yes. We believe that the  
6 market entry encompasses the types of registration and  
7 reporting requirements that are in the Commission's CLEC  
8 regulations.

9 CHAIRMAN IGNATIUS: All right. Anything  
10 further from the Bench?

11 MS. ROSS: Yes, I have a few follow-ups.  
12 A moment ago you indicated that IP-enabled service and  
13 VoIP service are treated differently under the federal  
14 regime. Does, and I'll use CDV, although I understand  
15 you've migrated to a new service, but does CDV meet all of  
16 the requirements of the definition of "IP-enabled  
17 service", apart from the exclusiveness of the VoIP  
18 definition under Senate Bill 48?

19 MR. PLATZER: As resistant as I am to  
20 fight the hypo, which I know you're never supposed to do,  
21 I just want to clear up, it's not our position that  
22 IP-enabled services and VoIP services are treated  
23 differently under the federal regime. It's rather that  
24 federal law has been very clear for a long time, that

1 states can't regulate IP-enabled services. Whereas, the  
2 FCC hasn't spoken yet on VoIP. Although, a couple of  
3 federal district courts have gone the same place. But we  
4 certainly concede that, for purposes of the classification  
5 of CDV, that, because the definition of "IP-enabled  
6 service" in the statute says that "VoIP services are not  
7 included within that definition." That the basic voice  
8 functionality of CPA -- CDV, the calling features, fall  
9 within the "VoIP service" definition of the statute, and  
10 not within the "IP-enabled services" definition.

11 Certainly, the various ancillary  
12 communications features that are also part of the whole  
13 communications package, like the online -- like online  
14 voicemail and calls showing up on your television screen,  
15 and accessing your service through your mobile phone  
16 through an app. All of those features would fall under  
17 IP-enabled service, but the calling itself does not fall  
18 under the "IP-enabled service" definition in the statute.

19 MS. ROSS: On Pages 8 and 9 of your  
20 brief, you reference a small set of regulations that might  
21 apply to VoIP providers if they're public utilities. What  
22 are those and why is it relevant that Comcast CLEC  
23 affiliates comply with those regulations?

24 MR. PLATZER: If you don't mind I'll

1 just grab the brief. So, what we had done on Pages 8 and  
2 9, as well as again later in our brief on Pages 13 and 14,  
3 was an attempt to answer the question the Commission had  
4 asked about which of the CLEC regulations still turn on a  
5 "public utility" designation. Or are -- and/or are  
6 preserved -- and are preserved by the savings clause. So,  
7 that was our best attempt to do the crosswalk between the  
8 statutes that the Legislature had called out in the  
9 savings clause is still applying, notwithstanding the  
10 general bar on regulation of VoIP services. And, then,  
11 limit those to the ones where the "public utility"  
12 designation still matters, as opposed to applying based on  
13 some general criteria. And, the reason that we had shown  
14 that each of those either applies to the CLEC or a cable  
15 provider in any event, was just to make the point that  
16 there's no live case or controversy here. So, in our  
17 view, the reason that it matters that, when you look at  
18 the savings clause and you look at each statute and each  
19 implementing regulation by the Commission, that if that is  
20 preserved by SB 48, there is no contravention or controversy  
21 as to whether or not Comcast is operating in compliance  
22 with any of those, such that -- and, that's in  
23 furtherance of our argument that the case is moot.  
24 Because, if the public -- if a "public utility"

1 designation of a "VoIP provider" would only preserve this  
2 vanishingly small set of regulations, and all of those  
3 regulations are regulations that really sort of are  
4 targeting the wrong entity. They affect the CLEC, rather  
5 than the VoIP provider, then there's no controversy for  
6 the Commission to resolve.

7 MS. ROSS: If the Legislature did not  
8 consider VoIP and IP-enabled services to be public  
9 utilities under 362:2, II, why was it necessary for the  
10 Legislature to exempt VoIP and IP-enabled services from  
11 public utility regulation regarding market entry, exit,  
12 transfer of control and rates?

13 MR. PLATZER: If the Legislature had  
14 simply accepted VoIP and IP-enabled services from the  
15 definition of a "public utility" by changing the "public  
16 utility" definition, then the law would have been  
17 substantially narrower than the one that the Legislature  
18 actually passed. Because, as we attempted to show in our  
19 brief, a lot of the -- a lot of the relevant statutes and  
20 regulation don't turn on whether or not an entity is a  
21 public utility or not, but rather apply based on various  
22 other criteria. And, if all the Legislature had done was  
23 amend the "public utility" designation, then there would  
24 still be a lot of other state laws, rules, and regulations

1 that would still apply, because something doesn't have to  
2 be a public utility for them to apply, but the Legislature  
3 wanted to exempt VoIP providers and IP-enabled service  
4 providers from having to comply with it.

5 So, we think that the fact that they  
6 carved out regulations and then put in a savings clause,  
7 actually is a much broader preclusion of regulation than  
8 the Legislature would have accomplished if they had merely  
9 amended the "public utility" definition.

10 MS. ROSS: Is there a difference between  
11 an end-user in the statute's definition of "IP-enabled  
12 services" and an end-user in the statute's definition of  
13 "VoIP"?

14 MR. PLATZER: If you don't mind, I'll  
15 take a moment to look at the statute. It's not a question  
16 I had focused on beforehand.

17 (Short pause.)

18 MR. PLATZER: And, just to be clear, the  
19 question is whether or not an end-user has a different  
20 definition for "IP-enabled service" or a "VoIP provider"  
21 under the statute?

22 MS. ROSS: Right.

23 MR. PLATZER: It's our position that  
24 this -- the definition of "end-user" doesn't apply either.

1 Like I said, a customer of a VoIP service provider or a  
2 customer of an IP-enabled service would not qualify as an  
3 end-user under the statute, because it is limited to  
4 telecommunications service customers. And, as the  
5 Commission knows, it's Comcast's position that our VoIP  
6 service is an information service, not a  
7 telecommunications service, under federal law.

8 MS. ROSS: And, yet, the statute does  
9 use the term "end-user" in connection with VoIP and  
10 IP-enabled services?

11 MR. PLATZER: And, it certainly has a  
12 definition of "end-user" in the statute, but that  
13 definition does not -- does not appear again in the VoIP  
14 -- in the definition of a VoIP services, that speaks of  
15 users, but doesn't incorporate the "end-user" definition  
16 from I, subpart (a).

17 MS. ROSS: It does with regard to  
18 IP-enabled service.

19 MR. PLATZER: You're right, it does.  
20 And, I don't have an explanation for what the Legislature  
21 was thinking in that regard. But, certainly, the fact  
22 that the "end-user" definition, as it's used in the  
23 statute, speaks of "customers of telecommunications  
24 services". Certainly, an IP-enabled service is not a

1 telecommunications service under federal law. So, I -- I  
2 understand the point, which is that the same words do  
3 appear there. But there doesn't appear to be any legal  
4 effect or significance to the fact that the term  
5 "end-user" is used in the IP-enabled service definition.

6 MS. ROSS: Thank you. I have no further  
7 questions.

8 MR. PLATZER: Thank you.

9 CHAIRMAN IGNATIUS: Commissioner Scott.

10 CMSR. SCOTT: Yes, we're giving you much  
11 longer than ten minutes. I just wanted to clarify, you  
12 mentioned regarding the definition of "telephone utility",  
13 I think, the "savings clause". I just wanted to make sure  
14 I understood what section you were talking about that you  
15 were considering the savings clause there.

16 MR. PLATZER: It's Roman -- it's III.

17 CMSR. SCOTT: Okay. That's helpful.  
18 Thank you. And, again, I don't want to put words in your  
19 mouth, which is why I'm asking. Are you saying, if it's  
20 not in the savings clause, then it can't be regulated?

21 MR. PLATZER: That's correct. It's our  
22 position that the language -- the language in II that  
23 precludes -- that precludes regulation, unless it falls  
24 under the III savings clause, is so broad that, when read

1 in combination with the legislative history, I believe  
2 it's intended to preclude all regulations not specifically  
3 excepted.

4 CMSR. SCOTT: I guess I would ask you to  
5 opine on it. Then, why would they give -- so, are you  
6 saying market entry/exit, transfer of control, rates,  
7 terms or conditions," those are examples, not specifics  
8 that are -- is that correct?

9 MR. PLATZER: We think that the  
10 combination of that, with the "have the effect of"  
11 language in the statute, is broad enough to encompass  
12 anything that's in the Commission's CLEC regulations.  
13 And, so, we did the walk-through, I believe on Pages 13  
14 and 14 of our brief, where these were the regulations we  
15 were able to find that did not appear to be precluded by  
16 the language in II or excepted by the savings clause in  
17 III.

18 CMSR. SCOTT: Okay. So, you're  
19 suggesting then that the market entry/exit, *etcetera*, are  
20 not necessarily the driving factors, but more -- but  
21 what's more broad is the word "effect" of regulating?

22 MR. PLATZER: We think it's the  
23 combination of those two, combined with the legislative  
24 history, which had a very broad statement that "the goal

1 was to preclude telecommunications" -- public utility --  
2 "telecommunications regulation of VoIP providers." And,  
3 the fact that IP-enabled services and VoIP services are  
4 treated the same under II of the statute. And, it's sort  
5 of well known and well established in the  
6 telecommunications world that IP-enabled services can't be  
7 subject to state public utility regulation.

8 CMSR. SCOTT: So, why do you think  
9 those, if that's your position, if that's why it's so  
10 broad, and, again, I know you don't -- I'm not in the mind  
11 of the Legislature, but why do you think they wouldn't  
12 have just said, "it's not regulated, with the exception of  
13 those items in the savings clause"? Why would they put  
14 these examples in?

15 MR. PLATZER: It appears to be an  
16 attempt to be as comprehensive as possible. I understand  
17 that the argument is that, when they try to be this  
18 comprehensive, people will try to brainstorm things that  
19 might -- that they might have left -- technically left  
20 out. But we think that, in combination with the  
21 legislative history, the "have the effect of" language,  
22 the fact that they're treated the same as IP-enabled  
23 services, that the Legislature really was trying to cover  
24 the gamut of everything here. As a practical matter, we

1 also, I'd say, we combed through the CLEC regulations and  
2 tried to find things that wouldn't fall in here. And, the  
3 ones that we found are all things that are excepted by the  
4 savings clause.

5 CMSR. SCOTT: Okay. Thank you.

6 CHAIRMAN IGNATIUS: Commissioner  
7 Harrington.

8 CMSR. HARRINGTON: Yes, I just had a  
9 question, maybe a clarification. On the pole attachment  
10 issue, in your brief on Page 11 and 12, you talk about  
11 "whether a public utility" and so forth. But I was trying  
12 to get finally your opinion on the -- another part of SB  
13 48, which added a new section to RSA 34 -- 374:34-a. And,  
14 it says, I'll read Section VIII, I'll just read it to you  
15 because you don't have it in front of you: "The  
16 Commission shall retain its authority to regulate the  
17 safety, vegetation management, emergency response, and  
18 storm restoration requirements for poles, conduits, ducts,  
19 pipes, and pole attachments, wires, cables, and related  
20 plant and equipment of public utilities and other private  
21 entities located within the public right-of-way, on, over,  
22 and under state lands and water bodies." And, I guess my  
23 question is, are you interpreting that section to limit  
24 the Commission's authority to just those things to

1 regulate safety, vegetation management, emergency response  
2 and storm restoration requirements? Or, does it still  
3 have the capability for setting rates, charges, terms and  
4 conditions and to have authority to hear and resolve  
5 complaints concerning rates, charges, terms and conditions  
6 that's stated in earlier sections in that same RSA?

7 MR. PLATZER: The latter. It's not our  
8 position that SB 48 limited the Commission's authority  
9 over pole attachments in any way, nor is it our position  
10 that the exemption of VoIP services from regulation in SB  
11 48 somehow took away from the Commission's authority to  
12 set rates in that regard. Our position on the pole  
13 attachment issue is, first, there's just the purely  
14 regulatory argument that we just don't believe that  
15 whether or not the VoIP provider is a public utility or  
16 not matters for purposes of what the rates ought to be,  
17 the way that the statute and the regulations are written  
18 now.

19 And, second, that there's no controversy  
20 here, because, to the extent that there was a dispute  
21 about whether or not VoIP services have to pay a different  
22 rate, that dispute now appears to be settled, and settled  
23 with a unitary rate, where it does matter if it's the  
24 cable provider or the VoIP provider, who's ownership you

1 impute the cable for that purpose. So, we don't think  
2 that SB 48 took away the Commission's authority over pole  
3 attachment rates. We just don't believe that, whether or  
4 not our VoIP provider is a public utility, has any  
5 significance for that -- for that area.

6 CMSR. HARRINGTON: All right. Thank  
7 you. I guess it just leaves us with the -- trying to  
8 figure out what indeed the purpose of that new section of  
9 the law is supposed to do, if it's not that. You're  
10 saying it does not limit the authority just to those  
11 things, but it's for whatever reason reiterated that  
12 authority.

13 MR. PLATZER: And, it's certainly not  
14 uncommon for legislatures to engage in overkill by putting  
15 redundant language in to make sure that people don't  
16 misread what they were trying to do. We certainly don't  
17 see anything in SB 48 that limits the Commission's  
18 authority over pole attachment rates.

19 CMSR. HARRINGTON: Thank you.

20 CHAIRMAN IGNATIUS: Thank you. Thank  
21 you for your responses and working through that.

22 We move now to Mr. Moore, for  
23 AT&T/Verizon.

24 MR. MOORE: I'll make this very brief.

1 Just one housekeeping matter to clarify. I'm not here  
2 representing AT&T. We filed a joint brief, but I only  
3 represent Verizon.

4 We agree with Comcast. The statute is  
5 comprehensive. Paragraph II essentially says "Thou shall  
6 not regulate VoIP", and it does it in very broad language.  
7 One piece of the language that the Commission just  
8 discussed just now is the phrase, in the third line, where  
9 it says "either directly or indirectly". So, it's saying  
10 that "no agency or subdivision of the state can even  
11 indirectly enforce any law that even has the effect of  
12 regulating", and then all those different elements of VoIP  
13 service or aspects of it. So, we think that that covers  
14 it. And, paragraph III then provides the exceptions.

15 But we also agree with Comcast that, if  
16 it's possible for an issue to arise where the Commission  
17 could regulate VoIP or IP, other than the listed  
18 exceptions, you don't have that case in front of you now.  
19 And, the Commission would be much more prudent to await  
20 for an actual fact situation to arise, so it has actual  
21 facts to look at to address any of those issues. We're  
22 confident that, if that ever comes up, you will find that  
23 you can't regulate VoIP. But, in any event, prudence  
24 would dictate that you wouldn't make speculative decisions

1 now, without having some hard facts in front of you.

2 That's all we have to add. Thank you.

3 CHAIRMAN IGNATIUS: All right. I was  
4 struck that in your filing you took a different tack than  
5 Comcast did on the question of "whether the service was  
6 VoIP or IP-enabled?" Comcast has said "it's clearly VoIP,  
7 and not IP-enabled", in which definitions it met. Yours  
8 said "it's one or the other", as if it was not important  
9 to distinguish which it is.

10 MR. MOORE: Well, let's --

11 CHAIRMAN IGNATIUS: Did I misread your  
12 brief?

13 MR. MOORE: By the statutory definition,  
14 it excludes -- it expressly excludes VoIP from the  
15 definition of "IP-enabled". So, it just can't be both  
16 under the statute. All right? But, if you didn't have  
17 that exclusion, you could certainly argue that a VoIP  
18 service falls within the larger set of IP -- VoIP is  
19 IP-enabled, it uses an IP, Internet protocol. But the  
20 statute has an express provision in the definition of  
21 "IP-enabled" to exclude VoIP, so that they are two  
22 separate things under the statute.

23 CHAIRMAN IGNATIUS: And, I think you  
24 took the similar position that Comcast did that, because

1 you've got both the VoIP provider and the regulated ELEC  
2 in place, or the cable operator, that some things, some of  
3 the regulatory requirements are picked up by those other  
4 entities, they don't -- you don't have to worry about  
5 whether they're being picked up by the VoIP provider.  
6 First of all, is that fair to put that in as a position?

7 MR. MOORE: Well, no. We were just  
8 working off the facts in this case, which is all about  
9 Comcast/CDV, not any service by Verizon.

10 CHAIRMAN IGNATIUS: All right.

11 MR. MOORE: So, we don't intend to take  
12 -- put in any new facts or discuss what's in the services  
13 that our companies provide. But, certainly, the facts as  
14 the Commission found it on the first round in this case  
15 are -- addressed the way that Comcast has its business  
16 structured.

17 CHAIRMAN IGNATIUS: So, if, as I asked  
18 Mr. Platzer, if, for some reason, the ELEC was no longer  
19 in business in New Hampshire or was no longer certified,  
20 or the cable provider that is -- cable TV provider, I  
21 assume we're talking about, that might be picking up the  
22 Dig Safe requirements were not in place anymore, what does  
23 that mean for the regulatory concerns that Senate Bill 48  
24 seems to still hold as important for any provider? If

1 you're not -- if the ones who were picking it up aren't  
2 there, for whatever reason, --

3 MR. MOORE: Yes. No, I think -- I see  
4 what you're saying. I think that I agree with Mr. Platzer  
5 as well, that that's very unlikely to happen. But, if you  
6 could have a situation where there was just a VoIP  
7 provider, without working with a CLEC entity, then, again,  
8 the Commission would have to look at the particular  
9 dispute that was in front of it. I mean, you can imagine  
10 someone saying, I'll make a silly example, someone comes  
11 into the Commission and says "You should regulate the  
12 rates that that provider offers." And, you would very  
13 quickly say "No, we can't do that. That's very clear."

14 Well, could someone come up with an  
15 issue that the Commission could find a way to regulate,  
16 even though it's not listed in III? We don't think so.  
17 And, you can brainstorm about that. But, if you get to  
18 the point of brainstorming, then your answer from this  
19 case should be "We'll vacate the decision, and we'll see  
20 if that ever arises."

21 So, you know, we can come up with lots  
22 of arguments. There was a question earlier about "whether  
23 registration would be a barrier to the market?"  
24 Absolutely. Whether imposing an assessment? Well, our

1 position is, certainly, if you're saying to a provider  
2 that, "if you do business in our state, we're going to  
3 make you pay part of the budget of some state agencies",  
4 that's a barrier to entry. But, again, there's no point  
5 or reason for the Commission to be reaching that decision  
6 today. And, you may never reach it. It may never happen.

7 CHAIRMAN IGNATIUS: Well, why is that --  
8 I guess I'm not following that. Why is there not a  
9 question for -- I'm going to get too many notes in here.  
10 Isn't one of the things we're looking at today to evaluate  
11 for the sake of the Supreme Court whether registration  
12 processes that we called for in our orders coming out of  
13 09-044 still appropriate, notwithstanding Senate Bill 48?  
14 That's not a speculative question, that's what we're  
15 looking at today.

16 MR. MOORE: I think, I can let Comcast  
17 answer that better, but my understanding is that Comcast  
18 says "our CLEC is registered", and so there's no issue  
19 there. You don't have a -- I don't know, call it a "pure  
20 VoIP provider" that has said "no, we won't register."

21 CHAIRMAN IGNATIUS: It seems odd to me,  
22 though, that a question of regulatory jurisdiction should  
23 depend on the particular facts of each provider. I think  
24 of jurisdiction as fairly clean, and it either is or it

1       isn't. And, to say "well, it might be in certain facts,  
2       but it isn't in this case, because there's other regulated  
3       providers who are going to pick up those duties. But, if  
4       you get to the point where you're a stand-alone VoIP,  
5       where there are no other providers, then it might be, and  
6       at that point you should take it up."

7                   MR. MOORE: Well, it might be, but there  
8       are lots of instances in which that happens. For example,  
9       Comcast's structure in the state, and in many states, is  
10      set up specific -- for a number of reasons, but one of  
11      which is so that they can interconnect with different  
12      carriers, because there's been controversy about whether a  
13      VoIP carrier is entitled to interconnect with an ILEC.  
14      And, so, Comcast has this set up, and I think others do it  
15      as well, where their CLEC in the state interconnects. So,  
16      it is very much the fact that the structure that they have  
17      chosen to do business does make a difference.

18                   So, I'd say the same thing applies here  
19      in another respect. That, if you, and, again, keep in  
20      mind what Mr. Platzer said earlier, it is awful difficult  
21      to understand how a VoIP provider could do business on its  
22      own, without being tied in some way to a carrier that is  
23      entitled to interconnect.

24                   So, I don't think you have any such

1 situation in the state, and it's kind of hard to see that  
2 you ever could.

3 CHAIRMAN IGNATIUS: Any other questions?

4 Ms. Ross.

5 MS. ROSS: What is the significance of  
6 or what is the reason for having VoIP services and  
7 IP-enabled services be exclusive categories --

8 MR. MOORE: I don't know.

9 MS. ROSS: -- under Senate Bill 48?

10 MR. MOORE: I don't know the answer to  
11 that.

12 MS. ROSS: Would there be any problem if  
13 the Commission revoked IP-enabled service providers' CLEC  
14 authority?

15 MR. MOORE: If the Commission did what?

16 MS. ROSS: Revoked CLEC authority for  
17 IP-enabled providers?

18 MR. MOORE: I don't know what that  
19 means. CLEC authority?

20 MS. ROSS: CLEC authority is our  
21 registration for competitive local exchange carriers. It  
22 would be considered, I believe, at least the position  
23 we've heard argued that says it would be a barrier to  
24 entry to require registration. So, my question is, what,

1 if anything, would happen if the Commission revoked CLEC  
2 authority for its IP-enabled providers?

3 MR. MOORE: Again, I don't think there  
4 are any pure IP-enabled providers, certainly not that have  
5 interconnection. But, if you were -- if there were such a  
6 thing, then my argument would be that they don't need  
7 registration in this state. That would be a barrier to  
8 market entry, and you're not allowed to do that. But I  
9 don't think that it can come up here.

10 MS. ROSS: Do you think the VoIP  
11 services defined in 362:7 is the service which was  
12 preempted by the FCC's 2004 Vonage order?

13 MR. MOORE: Yes. Well, I think that,  
14 certainly, state regulation of VoIP services, whether  
15 fixed or nomadic, is preempted by federal law. We all  
16 know that the FCC hasn't actually weighed in on that, but  
17 I don't think you would need that. But that's exactly one  
18 of the issues that would have been appealed had the  
19 statute not passed.

20 MS. ROSS: Does your company provide  
21 VoIP services?

22 MR. MOORE: Excuse me?

23 MS. ROSS: Does your company provide  
24 VoIP services?

1 MR. MOORE: Yes. MCI Communications  
2 Services is a subsidiary of Verizon. It operates in New  
3 Hampshire. It's an IXC -- or, was an IXC, now it's an  
4 ELEC. I guess everyone is an ELEC almost. And, they do  
5 provide VoIP services. So, that's another way, actually,  
6 that's a good example how -- that company is structured a  
7 little differently than Comcast. It's one company that  
8 provides multiple services. So, you know, mostly they  
9 provide services to large companies. And, the large  
10 company can come to us and get traditional -- some  
11 traditional TBM circuit switched services --

12 (Court reporter interruption.)

13 MR. MOORE: I'm sorry. They can come to  
14 MCI Communications and obtain both traditional TBM circuit  
15 switched services and VoIP services.

16 MS. ROSS: Is that service that your  
17 describing as "VoIP" nomadic or fixed?

18 MR. MOORE: I think they have got some  
19 of both. I'm not really sure. But, again, I don't think  
20 it's -- well, first, you know, our service is not at issue  
21 in this case. But it doesn't matter, even if it were,  
22 because it's one company providing it. So that, you know,  
23 MCI is registered with the Commission and so on, because  
24 it's an IXC.

1 MS. ROSS: Is your VoIP service provided  
2 by a registered CLEC?

3 MR. MOORE: No, it's an IXC. Well, it's  
4 an ELEC, I guess. We also --

5 MS. ROSS: Is it currently registered as  
6 a CLEC?

7 MR. MOORE: No.

8 MS. ROSS: Was it registered as a CLEC  
9 prior to Senate Bill 48?

10 MR. MOORE: No. We have MCI, MCI Metro  
11 Business Transmission Services is -- was registered as a  
12 CLEC in New Hampshire. I don't think they provide VoIP.

13 MS. ROSS: What services do they  
14 provide?

15 MR. MOORE: Oh, they're -- it's the --  
16 they're a CLEC. They're a local exchange.

17 MS. ROSS: Is there a difference between  
18 an "end-user" in the statute's definition of "IP-enabled  
19 services" and a "user" in the statute's definition of  
20 "VoIP"?

21 MR. MOORE: You know, I don't see it. I  
22 don't see a difference. I know that it was defined, and  
23 that the definition of "IP" uses "end-user", and the  
24 definition of "VoIP" uses "user". I can't tell you any

1 practical significance of the difference.

2 MS. ROSS: Thank you.

3 CHAIRMAN IGNATIUS: Thank you,  
4 Mr. Moore. We move to Mr. Malone.

5 MR. MALONE: Thank you, madam Chair. As  
6 I've been listening to the two previous parties, I think  
7 that the issues that seem to be coming to the top here  
8 regard the breadth of the exemption that SB 48 grants to  
9 VoIP providers, and also the issue of a "case in  
10 controversy", which, as an initial matter, I'll tell you  
11 that I think is a bit of a red herring. Because we're not  
12 talking about a "case of controversy", we're talking about  
13 a legal definition, one that sets the ground rules for the  
14 entire industry. Which, as Chairman Ignatius indicated,  
15 doesn't necessarily lend itself to a factual inquiry.

16 There are -- I'll start off with just  
17 three things that I think that we all need to take note  
18 of. Is that Senate Bill 48 did not expressly vacate or  
19 revoke the rule -- the VoIP orders in any way, or even  
20 reference them. Secondly, it did not alter or even  
21 mention the status of VoIP as a statutory telephone  
22 service, or, aside from certain regulatory exemptions  
23 unique to VoIP distinguish it from statutory telephone  
24 service. And, most importantly, number three, it did

1 create a blanket exemption for VoIP from any and all laws  
2 related to telecommunications service.

3 Now, Comcast, in their brief, said that  
4 SB 48 "emphatically rejected the proposition that VoIP  
5 should be regulated". And, Attorney Platzer said that  
6 that phrase was "expansive". But that's not what the  
7 plain words of the statute say. As Commissioner Scott  
8 indicated earlier, it lists certain things that it applies  
9 to.

10 And, with your permission, I'd like to  
11 give you an example of how the Legislature does  
12 emphatically reject the regulation of a particular  
13 industry. If you look in the statute that immediately  
14 precedes the one we're talking about, RSA 362:6, and I  
15 have copies that I'd be happy to distribute, if people  
16 would like them?

17 CHAIRMAN IGNATIUS: If it's not lengthy,  
18 just go ahead and read it.

19 MR. MALONE: Okay. It says, and I'm  
20 going to take out some of the descriptors, but it says  
21 "The term "public utility" shall not include any provider  
22 of cellular mobile radio communications services. Such  
23 services shall not be subject to the jurisdiction of the  
24 Public Utilities Commission pursuant to this title." So,

1 what I'm saying, and when I read that, is that that is an  
2 emphatic statement that "we're not going to regulate a  
3 particular industry." It's a rule of statutory  
4 interpretation that legislators presume to mean what they  
5 say and know how to say it. And, this is what they did  
6 with CMRS. And, if they were emphatically removing VoIP  
7 from all Commission regulation, it seems to me that that's  
8 how they would have worded it. But they didn't. They put  
9 in conditions. Conditions that, you know, that the  
10 Commission could only regulate market entry, market exit,  
11 transfer of control, rates, terms, or conditions.

12 But, as we discussed in our brief, there  
13 are lots of areas of Commission authority that it does not  
14 exclude. Some of them are called out in 367:7, in III,  
15 which Attorney Platzer did talk about, but this is not an  
16 exclusive list. And, this gets to this discussion of the  
17 savings cause.

18 I'm not 100 percent sure what a "savings  
19 clause" really is, and the definition can be kind of  
20 fluid. But the way -- this does not read like a savings  
21 clause to me, it reads like an explanatory clause or what  
22 they sometimes call an "interpretive directive". And, you  
23 know, in fact, if you look at the -- at the beginning of  
24 III, it says "The prohibitions of paragraph II shall not

1 be construed to:" Okay, there's no exceptional language  
2 there. This is a guide to interpretation. This is saying  
3 "let's, you know, be sure, when you're interpreting the  
4 statute, that you don't include these things in the  
5 definition of "market entry", "market exit", *etcetera*,  
6 *etcetera*. A savings clause would have applied more to  
7 that particular statute. For instance, it would have  
8 said, "you cannot regulate market entry, except for these  
9 markets" or "you cannot regulate the types of, you know,  
10 terms and conditions except for these types of customers."  
11 Or, one that's probably more pertinent to SB 48, you  
12 cannot regulate anything other than basic service.  
13 That's, I think, what a savings clause is.

14 And, so, this is not a clause that is  
15 limiting the Commission's jurisdiction. It's a clause  
16 that is merely enlightening, it's giving interpretive  
17 guidance for what that statute means.

18 In terms of what, you know, I'd like to  
19 talk a little bit about the nature and purpose of the  
20 original proceeding. And, this sort of lends itself to  
21 the "case in controversy" issue that's come up. The  
22 Commission asked, and it was interesting phrasing,  
23 actually, "in light of the nature and purpose of DT  
24 09-044", it asks for the significance of those findings in

1 light of SB 48.

2 Comcast has tried to frame this as an  
3 exercise in "abstract curiosity". And, described the  
4 beginning of this proceeding as one where -- that  
5 referenced the concern of the RLECs about unregulated  
6 competitors. Well, the RLECs are much more than  
7 concerned. They're vitally interested in the concept of  
8 "competitive neutrality", or, as the New Hampshire Supreme  
9 Court has said, "fair and balanced legal and regulatory  
10 environment". And, the question that was being answered  
11 in DT 09-044 was "does Comcast get special treatment or do  
12 cable VoIP providers get special treatment? And, if they  
13 do, how does everyone else get that special treatment as  
14 well?" That was what -- that was the relief that they  
15 were asking for. So, 09-044 was not necessarily a case in  
16 controversy, it was an investigation that the Commission  
17 was empowered to conduct, to answer a basic question about  
18 the ground rules on how public utilities conduct  
19 themselves in New Hampshire.

20 Now, we concede that, as of SB 48, VoIP  
21 providers do get treated differently. But they're not  
22 exempt from all regulation. And, I think the one that  
23 we've been focusing on is assessments. Now, Comcast has  
24 indicated that, through their CLEC affiliate, they pay

1 assessments based on their VoIP revenues. But what we  
2 need to emphasize is, they can stop tomorrow. They're  
3 doing this voluntarily. They could stop tomorrow, if they  
4 wanted to.

5 Secondly, we have no way of knowing if  
6 they're really paying their fair share. They're  
7 self-reporting their VoIP revenues. We don't know how  
8 much of the revenues that they are imputing to their CLEC  
9 affiliate, you know, essentially. And, there's no way  
10 that the Commission, if Comcast is correct about the  
11 Commission's limited jurisdiction under SB 48, there is no  
12 way that the Commission can investigate that.

13 Now, on information and belief, I  
14 believe that Comcast is one of the largest telephone  
15 companies in the state. I think this is, you know, they  
16 have an immediate need to report their telephone revenues.  
17 So, if you're looking for an active case in controversy,  
18 that's one right there. I think it's a very important  
19 issue.

20 On the issue of pole attachments, I do  
21 agree, once again, that there's a settlement in DT 12-084.  
22 But I remind you that it's a settlement among a few select  
23 parties. And, it's also a settlement that, if I read it  
24 correctly, does not address anything going on in the

1 federal court case, about retroactive relief, which, once  
2 again, will turn -- turns on the issue of whether VoIP  
3 providers are telephone companies.

4 There are other things, and as we  
5 discuss in our brief, this is really more of a discussion  
6 for what goes on in a Puc 400 rulemaking. But we believe  
7 that there are other areas that, you know, do not involve  
8 retail, you know, retail customers that may reach cable  
9 VoIP providers if they're public utilities. Things like  
10 intercarrier obligations. Even in the pole attachment  
11 issue, Section 251, which I think Comcast admits still  
12 applies per SB 48, the access to poles and conduits is a  
13 reciprocal obligation. All local exchange carriers, not  
14 just ILECs, are required to provide access. So, once  
15 again, with a large carrier like Comcast, maybe that  
16 becomes an issue if other carriers want to get access to  
17 their poles and conduits. But, if they're not a telephone  
18 company, that issue is moot.

19 We've talked about universal service --

20 CHAIRMAN IGNATIUS: Can I interrupt you  
21 first?

22 MR. MALONE: Sure.

23 CHAIRMAN IGNATIUS: You may have said it  
24 and I missed it. Why is it, if they're not -- if a VoIP

1 provider isn't categorized as a telephone company, what  
2 then makes them have no obligations to provide access to  
3 poles and conduits?

4 MR. MALONE: Under Section 251B, it says  
5 that "all local exchange carriers have an obligation to  
6 provide access to their poles and conduits." And, I would  
7 submit that, if Comcast is not a public utility and is not  
8 a telecom carrier in the state, it would be hard to define  
9 them as a "local exchange carrier".

10 CHAIRMAN IGNATIUS: And, there's no  
11 parallel provision that you know of that would apply to  
12 other providers who may not be local exchange companies,  
13 but still have --

14 MR. MALONE: I don't believe so. I  
15 would have to re-read Section 224 of the federal act to  
16 see who the pole attachment obligations run to. But my  
17 reading of 251 is it would only run to telephone  
18 companies.

19 CMSR. HARRINGTON: Just to follow up on  
20 that. Are you saying then that Comcast has or may have in  
21 the future their own poles, and that -- and they would not  
22 be required to allow for non-discriminatory access to  
23 those pole attachments?

24 MR. MALONE: I, at the risk of

1     testifying, I don't believe they have poles. I don't know  
2     if they have poles. I would suspect they have conduit.  
3     There's a lot of green boxes popping up in neighborhoods.  
4     But that's about all I can say. I'm just tossing this out  
5     as an example. Not of the entire universe of obligations  
6     they have, but as an example of that, they are not without  
7     obligations.

8                   CMSR. HARRINGTON: So, under 374:34-a,  
9     I, your contention is, if they weren't a public utility,  
10    then the obligations having to do with pole, duct,  
11    conduit, or right-of-way would not apply to them?

12                   MR. MALONE: That's correct.

13                   CHAIRMAN IGNATIUS: All right. Please  
14    proceed.

15                   MR. MALONE: Okay. I've skipped around  
16    a little bit, so if you'll bear with me. I was going to  
17    talk about universal service. I understand that that is  
18    not on a lot of people's radar. And, in these times, is  
19    probably not going to be on anyone's radar any time soon.  
20    But I have to emphasize that, with the clients I'm  
21    representing, the RLECs, this is a critical issue. And,  
22    we think about it all the time. And, we believe that at  
23    some point a public policy is going to demand that this be  
24    dealt with. And, when it's dealt with, it's going to be

1 -- it will, of course, have to involve every  
2 telecommunications carrier in the state. I can't predict  
3 exactly what that's going to look like. But I think I can  
4 safely say that, if the cable companies are exempt from  
5 telecommunications regulation, that will have a huge  
6 impact on universal service and carrier of last -- how we  
7 handle universal service and carrier of last resort.

8 I won't belabor the fact that -- you  
9 know, I won't read the statute to you. We believe that  
10 the plain meaning of the statute, you know, is -- limits  
11 the exemption that cable VoIP gets from Commission  
12 regulation, to the five things that, you know, market  
13 entry, market exit, rates, terms and conditions.

14 There are a number of areas,  
15 assessments, pole attachments, universal service,  
16 intercarrier relationships, where the Commission still has  
17 jurisdiction in many respects.

18 Thank you. I'm open for questions.

19 CHAIRMAN IGNATIUS: Thank you. You know  
20 that the argument from Comcast and from Verizon and AT&T  
21 is that it's not a wise use of resources to force a party  
22 to appeal orders that may have been based on law that's no  
23 longer in effect. And that, if the underpinnings, in  
24 part, were based on state law that's since been changed by

1 the Legislature, it's not -- the most efficient thing is  
2 to vacate those orders. Do you have any sympathy to that  
3 argument?

4 MR. MALONE: I would, if I felt the law  
5 had changed their status. I don't believe it has. The  
6 basis of their argument is that SB 48 has relieved them  
7 completely of all regulation, and, therefore, there's no  
8 basis for their appeal. We disagree. Yes. It has, you  
9 know, it's given them broad exemptions. But it has not  
10 changed the fact that they're public utilities under the  
11 definition of the statute, it has not changed the fact  
12 that they're telephone companies, and it has not changed  
13 the fact that there are areas of Commission regulation  
14 that this -- that SB 48 did not touch. So, the law still  
15 applies to them. And, if they don't like the Commission's  
16 decisions, then, yes, I believe that is appealable and not  
17 moot.

18 CHAIRMAN IGNATIUS: In your view, are  
19 the things that are required, the continuing scope of  
20 regulation after those orders in 09-044, those are things  
21 that are still allowed for under SB 48?

22 MR. MALONE: Yes. If you remember, the  
23 Commission did not make a list. It just said "they are  
24 telephone companies", you know, "if they fit the

1 definition as a "public utility" and they are telephone  
2 carriers, then they are subject to regulation", to the  
3 extent that we have the power to regulate them. And, I  
4 believe that, even after SB 48, the Commission does.

5 CHAIRMAN IGNATIUS: So, is it your view  
6 that the definition of what remains in effect is to be  
7 developed in a rulemaking and the response to the Supreme  
8 Court should be that the scope of regulation is still  
9 being resolved through the rulemaking, but that there's no  
10 requirement under 48 that those orders be vacated?

11 MR. MALONE: Well, if you're asking me,  
12 I would suggest a hybrid approach. I believe that there  
13 are specific areas in regulation that are fairly clear. I  
14 think assessments is fairly clear, I think pole  
15 attachments are clear. I think that there are areas that  
16 need to be worked out as part of the PUC 400 rulemaking.  
17 So, I would anticipate or I would suggest a hybrid  
18 response to the Supreme Court, where you list a few items  
19 that are clearly still within the Commission's  
20 jurisdiction, and leave open the fact that you're  
21 undergoing a fairly complicated rulemaking to determine  
22 what the rest of those might be.

23 CHAIRMAN IGNATIUS: Other questions from  
24 the Bench?

1 MS. ROSS: I have a few.

2 CHAIRMAN IGNATIUS: Ms. Ross.

3 MS. ROSS: With regard to whether or not  
4 Cable Digital Voice requires a broadband connection to the  
5 internet, is it your view that the Court mandate would  
6 authorize the Commission to reconsider an issue like that?

7 MR. MALONE: I have to admit I have not  
8 given that any thought. I don't believe that that's the  
9 -- I don't believe that that's the extent of the mandate,  
10 though.

11 MS. ROSS: Thank you. I believe the  
12 RLECs agree that cable VoIP services do meet the  
13 definition of "interconnected VoIP", but do not meet the  
14 definition of "VoIP" -- I'm sorry. I've got it flipped.  
15 Cable voice services do not meet the definition of  
16 "Interconnected VoIP", but do meet the definition of  
17 "VoIP" in Senate Bill 48. What are the differences  
18 between the two definitions? And, what are the  
19 consequences of falling into one category or the other?

20 MR. MALONE: The definition of  
21 "interconnected VoIP" -- you know, at the risk of delving  
22 into some of 09-044, interconnected VoIP, one of the --  
23 it's a four-factor definition. And, one of the  
24 definitions is that it is converted to IP at the

1 customer's premises. And, we had a technical and esoteric  
2 difference with Comcast as to whether it was, you know,  
3 the customer's premises or the customer that was doing the  
4 conversion, or whether it was Comcast that was doing the  
5 conversion. And, that's why we disagreed. That the VoIP  
6 service in 09-044 was interconnected VoIP.

7 MS. ROSS: And, what is the consequence  
8 of distinguishing between interconnected VoIP and VoIP as  
9 defined under Senate Bill 48?

10 MR. MALONE: Interconnected VoIP has  
11 been found by the FCC to be -- have the possibility of  
12 being nomadic. And, because -- and that was the essence  
13 of the Vonage order, in which it was nomadic VoIP. The  
14 focus of 09-044 was on fixed VoIP, in which the two ends  
15 -- or, that the VoIP call was at a fixed location.

16 MS. ROSS: Would any of the RLECs'  
17 conclusions regarding public utility status or which  
18 regulations apply change if the Commission were to hold  
19 that Comcast voice -- VoIP -- voice, excuse me, was an  
20 IP-enabled service, rather than a VoIP service?

21 MR. MALONE: I think that it wouldn't  
22 change the -- it wouldn't change the fact that the  
23 Commission's VoIP order, original VoIP order, focused on  
24 the functional characteristics of the service, not the

1 technical. You know, it didn't talk about what was being  
2 used, what equipment was being used. It simply said, you  
3 know, it focused on the actual service, in real-time  
4 voice-to-voice communication. So, whether it's an  
5 IP-enabled service, whatever that definition means,  
6 whether it's a VoIP service, whatever, the fact that it's  
7 real-time voice-to-voice would still make it a public  
8 utility telephone service under the statute.

9 MS. ROSS: Is there a difference between  
10 an "end-user" in the statute's definition of "IP-enabled  
11 services" and a "user" in the statute's definition of  
12 "VoIP services"?

13 MR. MALONE: We don't believe so.

14 MS. ROSS: Thank you.

15 CHAIRMAN IGNATIUS: Questions?  
16 Commissioner Harrington.

17 CMSR. HARRINGTON: Yes, just sort of  
18 following up on that last question. Is there a reason why  
19 -- we've heard people state earlier that IP-enabled and  
20 VoIP are basically -- sort of one is a subset of the  
21 other, yet, the Legislature, in SB 48, has made them as  
22 two separate, not related or not overlapping categories.  
23 Do you know why that was necessary?

24 MR. MALONE: No, Mr. Commissioner. This

1 is where I would come up with my joke about "sausage  
2 making".

3 CMSR. HARRINGTON: Okay.

4 MR. MALONE: I can't really say why they  
5 made a distinction like that.

6 CMSR. HARRINGTON: And, maybe the same  
7 -- I'll solicit the same "sausage-making" response on  
8 this. But, having to do with the pole attachment  
9 authority, the new section that was added, that talks  
10 about "the Commission shall retain its authority to  
11 regulate" and limits it to only certain things, nothing  
12 having to do with rates. Do you think that that -- it was  
13 put in to cancel the ratemaking authority with other  
14 provisions or is it just a "belt and suspenders" as  
15 alluded to by an earlier speaker?

16 MR. MALONE: I think it's "belt and  
17 suspenders". As I'm sure you know, legislation,  
18 particularly legislation as complicated as this, usually  
19 represents a number of different interests and  
20 compromises, so.

21 CMSR. HARRINGTON: That's all I had.  
22 Thank you.

23 CHAIRMAN IGNATIUS: Thank you. Thank  
24 you, Mr. Malone.

1 MR. MALONE: Thank you.

2 CHAIRMAN IGNATIUS: Let's go off the  
3 record for a moment.

4 (Brief off-the-record discussion  
5 ensued.)

6 CHAIRMAN IGNATIUS: All right. Let's go  
7 back on the record. We just took a short break to talk  
8 about scheduling for the remaining parties here. Our plan  
9 is to take a short 15-minute break, and then resume at  
10 12:00 with the OCA, and then FairPoint, and then that may  
11 be the end of our proceedings, unless we find we have  
12 additional questions we need to go back to anyone. But  
13 why don't we regather here at 12:00 sharp. Thank you.

14 (Recess taken at 11:48 a.m. and the  
15 hearing reconvened at 12:15 p.m.)

16 CHAIRMAN IGNATIUS: We're back from a  
17 break, and we took longer than we planned. So, I  
18 apologize for that. We, I think, now have the OCA on  
19 board, is that right, Ms. Chamberlin?

20 MS. CHAMBERLIN: Yes. Yes. And, I'm  
21 going to stay here so I can reach all my stuff.

22 CHAIRMAN IGNATIUS: That's fine.

23 MS. CHAMBERLIN: Susan Chamberlin, for  
24 the Consumer Advocate's Office. I want to bring to the

1 Commission's attention the fact that the decisions in this  
2 case will affect residential users of telecommunications  
3 services. And, that we focused on the language of the  
4 Commission's order where it states: "The language of RSA  
5 362:2 defines a public utility by the service it renders,  
6 not by the technology it uses to provide such service."  
7 And, that's a theme that will continue regardless of the  
8 technological advances of the telecommunications world.  
9 We're in a period of transition. We're going from the  
10 copper line to the broadband, but telecommunications will  
11 always be in a period of transition. The technology is  
12 changing all the time. And, if the definition of a  
13 "public utility" depends on that technology, then we will  
14 constantly be playing catch-up, we'll constantly be trying  
15 to pass laws that capture the future, and that's a  
16 difficult place to be.

17 The experience of the customer, and this  
18 the Commission went into in depth in its decision, is  
19 that, here she is making a telephone call, and that  
20 customers do not necessarily choose the type of technology  
21 they use, they want to choose the service they get. And,  
22 the RLECs pointed out that, if the definition of a "public  
23 utility" depends on the technology, then, the companies  
24 will simply reconfigure their technology so that they get

1 a preferable treatment, and that is not fair and equitable  
2 regulation.

3 It's important with SB 48 to look at not  
4 only the language that they pass, but the language that  
5 they preserved. And, one of those sections is the  
6 374:22-p, "Affordable Television" -- "Telephone Service".  
7 And, the aspect that that is important to customers, SB 48  
8 didn't just take that out, they actually added it in and  
9 in express language, so that that protection remains.  
10 And, without at least a little bit of regulatory  
11 authority, there's no way that that affordable telephone  
12 service can be put in place. SB 48 did change the  
13 significance of the Commission decision that it's a public  
14 utility; it did not change the threshold decision itself.  
15 The decision is still a controversy that needs to be  
16 solved. The fact that we're all here interpreting a  
17 statute that is very complex points to that. However, the  
18 original determination is unaffected by the change in law.

19 One of the sections that SB 48 left in  
20 place is 374:22-p, III, which states: "The Commission  
21 shall seek to ensure that affordable basic telephone  
22 services are available to consumers throughout all areas  
23 of the state at reasonably comparable rates." So, if the  
24 Commission retains that authority, and the exact contours

1 of, you know, the VoIP exceptions here and there, that  
2 remains to be worked out. The Commission has a rulemaking  
3 docket that's open. We will work through that  
4 interpretation. But, again, it doesn't affect the  
5 fundamental decision that the service is -- that the  
6 providers are public utilities based on the service that  
7 they render.

8 And, I think it's important to look back  
9 at, you know, we had the Communications Act of 1934. That  
10 statute is still in place, as amended. The purpose of the  
11 statute is, and I'll make this short, but it's interesting  
12 in how comprehensive the regulatory statute is. It's "for  
13 the purpose of regulating interstate and foreign commerce  
14 in communication, by wire and radio, so as to make  
15 available so far as possible to all the people of the  
16 United States". So, in the very beginning, we were  
17 looking at universal service. "Without discrimination on  
18 the basis of race, color, religion, national origin or  
19 sex, a rapid efficient nationwide and worldwide wire and  
20 radio communication service, with adequate facilities at  
21 reasonable charges." So, we began here making sure that  
22 everyone in the United States gets this service. And, we  
23 continue to be in that place.

24 When we look at the Telecommunications

1 Act of 1996, it maintained provisions of universal  
2 service. So, while we were bringing in competition to  
3 offer -- to create more options and to drive prices down,  
4 the idea that universal service still will apply was  
5 maintained in the statute.

6 The same with SB 48. It does not take  
7 away the universal service obligations. It maintains a  
8 competitive playing field for all the companies. It's  
9 carving out certain exceptions, but the exact nature of  
10 those exceptions has to be worked out, and it has to be  
11 worked out in the context of the entire statute, not just  
12 the new language.

13 One of the things we put together, this  
14 book [indicating], which is, you know, about an inch thick  
15 or so, it's all of the statutes with the new language  
16 incorporated. So, it's not just the new language, but  
17 it's the old language as well that was kept in. And, it  
18 has to be interpreted in a harmonious fashion. So that,  
19 seemingly, when you read through some of these, there's a  
20 conflict here or there's an inconsistency there, which  
21 typically happens, we have to look at it comprehensively.

22 So, to simply say that "the decision  
23 that was made previously is now moot, and we can just go  
24 forward and we don't have to decide anything, SB 48 takes

1 care of it all", is simply too broad a statement.

2 It does make changes. We're conceding  
3 that. But exactly how those changes move forward need to  
4 be carefully considered. The controversy that was settled  
5 originally remains, and it's been settled, and now we take  
6 that fact-finding and we move forward. How is this going  
7 to play out in all the different areas?

8 We support the position of the RLECs.  
9 We think that their interpretation of the statute is  
10 consistent with overall goals of competitive equity. And,  
11 along with competitive equity, we preserve customer  
12 options and affordability. And, while "universal service"  
13 has been raised, this is not the place to make broad  
14 determinations on universal service, but just to realize  
15 that it does have an impact, and it is important.  
16 Customers need to be able to have -- to rely on some small  
17 amount of regulatory authority to make sure that their  
18 provisions are protected.

19 CHAIRMAN IGNATIUS: So, is it fair that  
20 your recommended response to the Supreme Court would be  
21 that there is no need to vacate the orders, that Senate  
22 Bill 48 doesn't require any change in the ultimate  
23 findings of those orders, but that the details of which  
24 regulatory requirements will apply have yet to be

1 resolved, and that's being done through the rulemaking?

2 MS. CHAMBERLIN: Yes. That's correct.

3 CHAIRMAN IGNATIUS: Other questions from  
4 the Bench? Commissioner Scott.

5 CMSR. SCOTT: Thank you. I just wonder  
6 if you could help me a little bit, walk me through. You  
7 mentioned 374:22-p still applies under Senate Bill 48.  
8 And, I would -- if you could walk me through the legal  
9 logic for that.

10 MS. CHAMBERLIN: Sure. If you turn to  
11 374 -- let me just find my copy of it. Okay. It starts  
12 out, the original statute had just one section, and it  
13 says that -- it defined the federal Telecommunications Act  
14 of 1996. The SB 48 then went on to define "basic  
15 service", "safe and reliable single-party, ability to  
16 receive calls", all of these different, they're listed,  
17 there's 14, 15 -- 16 of these areas are identified. And,  
18 then, it did not remove III, which states: "The  
19 commission shall seek to ensure affordable basic telephone  
20 service is available." So, we have to incorporate an  
21 interpretation of the new sections, with the old sections,  
22 how do they apply? How is it going to work? But the  
23 controversy that gave rise to the Commission's decision to  
24 begin with, here we have a provider, they're operating,

1 they haven't been registered as a "public utility", do  
2 they need to be? Are they a public utility?" That  
3 question has been resolved. It's still alive; it's been  
4 resolved. SB 48 doesn't change that threshold question,  
5 but it does change how the rest of it gets worked out  
6 through the rulemaking. We just don't have the -- this  
7 particular proceeding does not cover all of the issues  
8 that are raised. It's not as simple as Comcast has  
9 presented.

10 CMSR. SCOTT: Thank you.

11 CHAIRMAN IGNATIUS: Any other questions?

12 (No verbal response)

13 CHAIRMAN IGNATIUS: If not, thank you  
14 very much.

15 MS. CHAMBERLIN: Thank you.

16 CHAIRMAN IGNATIUS: Mr. McHugh.

17 MR. MCHUGH: Chair Ignatius,  
18 Commissioner Scott, Commissioner Harrington, and General  
19 Counsel Ross, good afternoon. Patrick McHugh, here on  
20 behalf of Northern New England Telephone Operations, LLC.  
21 I'd like to start out, if I could, I have listened to the  
22 arguments today. I certainly read the parties' positions  
23 last week. And, in light of all of that, I sort of  
24 scratched out a proposed order that I'd like you to

1 consider, and certainly would ask, on behalf of my client,  
2 that you adopt, only two sentences, one's a little bit  
3 long, and I'll try and go slow for the court reporter.

4           What I would propose is that, in light  
5 of the Supreme Court's order asking you to take a look at  
6 your orders, that this Commission issue a very simple  
7 order to read as follows: After fully considering the  
8 parties' positions as filed in response to the  
9 Commission's order of notice dated October 24, 2012, and  
10 as expressed during the hearing on November 16, 2012,  
11 Commission Orders 25,262 and 25,274 hereby are vacated as  
12 moot, without prejudice to NHTA or any other party to file  
13 a specific complaint alleging facts requiring Commission  
14 adjudication. Docket numbers DT 09-044 and DT 12-308  
15 shall be closed." That would be the end of the order.

16           I think, overall, looking at the  
17 submissions, while I don't necessarily agree with all that  
18 Comcast says, obviously, based on my proposed order, I  
19 don't necessarily agree with all of the positions advanced  
20 by NHTA.

21           I think, in terms of the best expression  
22 of the case law, is -- was put forth, actually, by Verizon  
23 and AT&T, in their joint submission. I don't agree with  
24 their entire positions in the case. But, if you look to

1 Page 5, it spills over to Page 6, starting out in the  
2 second full paragraph, and they start "Because SB 48  
3 establishes", and I would strike basically most of those  
4 first two lines.

5 CMSR. HARRINGTON: Excuse me. What are  
6 you reading from?

7 MR. McHUGH: Oh. I apologize,  
8 Commissioner. I am on Page 5 of the brief of AT&T  
9 Corporation and Verizon.

10 CMSR. HARRINGTON: And, just give us a  
11 second to find that.

12 MR. McHUGH: Certainly.

13 CMSR. HARRINGTON: Okay.

14 MR. McHUGH: So, what I think is the  
15 best expression of the law, after reading the parties'  
16 submissions, really starts in that second paragraph, but I  
17 would strike the conclusion that Comcast -- I'm sorry, I  
18 apologize, that AT&T Corporation and Verizon put in sort  
19 of the first two lines. And, then, basically, I would  
20 start out with "Comcast's appeal of the orders has become  
21 moot." I think the case law supports that. I think that  
22 is the right way to go in this present controversy. I do  
23 think both dockets should be closed. The Commission has a  
24 rulemaking docket open, in which the Part 400 rules, I

1 submit, are going to be substantially revised in light of  
2 Senate Bill 48. But, in any event, we know there are  
3 revisions, however you want to categorize or classify it,  
4 and maybe we don't need anything, just going to say  
5 "there's going to be revisions to the Part 400 rules."  
6 That may also lead to revisions to some of the  
7 administrative rules in Part 200, dealing with the  
8 Commission's procedures.

9 But I don't think it's appropriate or  
10 warranted that the Commission revise the orders in DT  
11 09-044 to essentially become a rulemaking on how you are  
12 or are not going to regulate specifically Comcast, and  
13 potentially other VoIP providers. FairPoint, at the time,  
14 was not a party to that docket. We only joined because we  
15 were provided an opportunity by the Commission in its  
16 recent order of notice to be a limited intervenor. And, I  
17 don't think that it's fair that we turn that proceeding,  
18 use those five or six questions to come up with  
19 essentially either a revised order or promulgations that  
20 essentially are rulemaking. And, our opportunity, and the  
21 opportunity of others, who weren't in that original  
22 docket, is limited to, I guess, essentially, a brief. Of  
23 course, mine was in a letter format, but that's challenges  
24 with Microsoft Word that I have versus really anything

1 else.

2                   So, the -- and, I do, I guess, want to  
3 -- I mean, a lot of the questions asked to me were really  
4 hypotheticals, and that shouldn't be decided in this  
5 docket what might happen. For example, assessments came  
6 up. And, I want to assure the Commission, while I don't  
7 agree with Attorney Malone that Comcast, you know, can  
8 voluntarily pay or they can decide not to pay, I mean, I  
9 can assure you, you know, within an hour of my learning  
10 that Comcast isn't going to pay an assessment, Ms. Parker  
11 is getting a complaint landing on her desk that will be on  
12 the Commission's desk asking for an investigation and  
13 demanding that they pay.

14                   Senate Bill 48, I submit, that makes  
15 that whole argument, I think that the whole question  
16 probably is moot in any event, because, under 362:7, III,  
17 it addresses it. I mean, the prohibitions related to how  
18 you treat either a VoIP provider or an IP-enabled  
19 provider, you know, "shall not be construed to", and then  
20 there's a list of exceptions. And, one of them is,  
21 "Affect, mandate, or prohibit the assessment of taxes or  
22 nondiscriminatory 911 fees, telecommunications relay  
23 service fees, or other fees of general applicability."  
24 So, you don't need to decide that in this docket.

1           To the extent there is some desire to  
2 clarify it, that I think is more appropriate for a  
3 rulemaking docket. We have a rulemaking docket. And, I  
4 think almost all of these general questions, examples,  
5 what ifs, they should be decided in the context of a  
6 rulemaking docket. They shouldn't be decided in the  
7 context of this.

8           To the extent that NHTA has specific  
9 factual circumstances that need to be addressed, it should  
10 be afforded a chance to file a new petition, bring it to  
11 the Commission, so that it can be adjudicated, with or  
12 without the involvement of FairPoint, it depends what the  
13 general facts are, which is how I decide anyway whether or  
14 not I think FairPoint should be in a docket or not be in a  
15 docket.

16           That's -- I certainly stand on what I  
17 wrote and submitted on November 8. I don't feel the need  
18 to drag everybody through it in a ten-minute presentation.  
19 So, I'm happy to address the Commission's questions or,  
20 certainly, if General Counsel Ross has questions, I can  
21 address them as well.

22           CHAIRMAN IGNATIUS: Thank you. Let's  
23 assume that we were to do as you say, vacate the orders,  
24 and proceed towards the rulemaking that's already

1 beginning now. What's the starting point for Comcast  
2 Digital Voice? I mean, do they come in and say "well,  
3 there's no finding, because these orders have been  
4 vacated, there's no finding that we're a public utility or  
5 not a public utility. We're just out there." Do they  
6 submit to the rulemaking? Do they say "you've got no  
7 authority over me." Do we begin all over again at that  
8 point?

9 MR. McHUGH: We, at NHTA, provided the  
10 Commission with a set of rules. I know there hasn't been  
11 any sort of official, I don't know, an official response  
12 from the Commission, but the rules are there. In my  
13 opinion, those rules were drafted, they cover the Comcast  
14 entities. And, if they don't believe they're covered by  
15 them, if you were to adopt them, and they got through  
16 JLCAR, then they would have to take some affirmative  
17 action. And, the Commission would have the opportunity to  
18 rule on whatever that affirmative action might be.

19 It could be that they simply not pick  
20 that dispute and act and file as an excepted local  
21 exchange carrier under the statutes as amended and under  
22 the new rules, in which case there would never be a  
23 controversy -- there would be no reason to issue a ruling  
24 one way or another as to whether they are -- those

1 entities are or are not public utilities.

2 CHAIRMAN IGNATIUS: And, that doesn't  
3 trouble you as another provider who's, you know, at times  
4 working hand-in-hand and at times in competition with  
5 those entities. To say, "we're not sure what they are.  
6 They're sort of like a public utility, but maybe they're  
7 not, or maybe they are connected to a public utility,  
8 though, another business model might mean that they  
9 aren't." And, that sense of uncertainty about what their  
10 status is does not --

11 MR. MCHUGH: Does not trouble me in the  
12 slightest. If I have a concern that Comcast won't  
13 voluntarily address, and we have a difference of opinion  
14 on either a statute or a rule, I'll bring it to you, and  
15 it will be dealt with at that time. So, to answer your  
16 question directly is "no, it does not trouble me."

17 CHAIRMAN IGNATIUS: Other questions?

18 MS. ROSS: Good afternoon.

19 MR. MCHUGH: Ms. Ross.

20 MS. ROSS: In your letter, you didn't  
21 object to Questions 1 and 2, which had, as we framed them  
22 in the order of notice, which had to do with "whether or  
23 not the cable voice service falls within the statutory  
24 definitions?" And "what regulation, if any, is still

1 appropriate?" So, I'm assuming that you think it is  
2 proper for the Commission to address those things in its  
3 order in this docket?

4 MR. McHUGH: I would stand by my  
5 proposed order, as I've read it to you.

6 MS. ROSS: Well, that's giving us a  
7 result. But, in order to get there, would you acknowledge  
8 that we might have to answer some of those questions?  
9 Because, if the service isn't covered by Senate Bill 48,  
10 then that's the end of the analysis. There is no effect,  
11 correct?

12 MR. McHUGH: I would say that's correct.  
13 I didn't address, really, any of the questions. But I  
14 will also tell you that I did not go back and review the  
15 record in DT 09-044 to see exactly how the evidence  
16 developed in connection with the service provided by  
17 Comcast at that time, or at least as the record was  
18 developed. So, I would be guessing, if I really tried to  
19 answer it more directly.

20 MS. ROSS: And, again, would you agree  
21 that, in order to reach the result that you promote, the  
22 Commission would have to determine that its previous  
23 findings were legally insignificant and practically  
24 meaningless, I mean, we would have to reach that

1 conclusion, wouldn't we, in order to vacate orders?

2 MR. McHUGH: No, I would respectfully  
3 disagree with that. I think, because of the lapse of  
4 time, combined with the enactment of Senate Bill 48,  
5 there's really no need to address that question  
6 whatsoever.

7 MS. ROSS: If that were the case,  
8 though, there are hundreds of Commission orders that  
9 relate to statutes that have been subsequently amended,  
10 and the Commission doesn't routinely vacate prior orders  
11 any time there's a change in law. So, in order to do  
12 that, wouldn't you agree that the Commission would need  
13 some legal basis for determining that vacating the order  
14 was necessary?

15 MR. McHUGH: I think the reasoning for  
16 vacating the order is necessary is set forth in the  
17 Supreme Court cases cited very well by Verizon and AT&T.  
18 The issue is moot. And, that's the reason for vacating  
19 it. I'm not certainly proposing or asking that every time  
20 a law changes, the Commission has to undertake an analysis  
21 of prior orders, specifically because that will come up  
22 when facts lead to Commission proceedings. So, as  
23 statutes get changed, facts will be developed, complaints  
24 will be brought forth, and then, to the extent parties

1 think prior Commission orders are no longer valid or  
2 enforceable because of a change in law, that will come to  
3 light.

4 In this case, what you have is an order  
5 from the Supreme Court saying "we don't want to take up  
6 this issue until you tell us if your orders, you know,  
7 need to be vacated or changed, then we'll decide what we  
8 want to do at the Supreme Court." And, given the status,  
9 I think the best decision is to vacate the orders. That  
10 will have no precedential effect whatsoever on future  
11 Commission proceedings, in my humble opinion. And, if the  
12 carriers, the rural carriers affiliated with NHTA have  
13 more specific facts or complaints, they should be free to  
14 bring them forward to deal with whoever is providing VoIP  
15 service, whether it's just Comcast or Time Warner, or  
16 MetroCast, or whoever might be providing VoIP services at  
17 the time.

18 MS. ROSS: All right. Thank you.

19 CHAIRMAN IGNATIUS: Commissioner Scott.

20 CMSR. SCOTT: Hello. Good afternoon.

21 Following pretty much the same line of reasoning and  
22 questioning, I think. What I struggle with is, is it  
23 seems to be somewhat, from the different testimony,  
24 somewhat a tacet agreement that, as we move into the

1 rulemaking, that would be an appropriate area for further  
2 discussions that maybe more controversy may be there.  
3 Implied in that is, my concern is, if we were to rule the  
4 matter as "moot" and vacate the current rules, it seems  
5 like we're making a decision that Senate Bill 48 has  
6 certain impacts that we may be adjudicating later in  
7 rulemaking, let's say.

8 So, my question is this, is would it not  
9 be better, in your opinion, rather than to call it "moot"  
10 and vacate, but to effectively say that "the issue is no  
11 longer ripe"?

12 MR. MCHUGH: That's the same thing. I  
13 think, by vacating the order, and maybe you could add to  
14 my two sentences, but to vacate the order and indicate  
15 that it shall have no precedential effect on future  
16 Commission determinations or the rulemaking process, will  
17 not hinder in any way the Commission to develop rules. I  
18 mean, one way or another, I'm expecting that, you know, we  
19 are going to have disputes amongst carriers and amongst  
20 the Staff and perhaps the OCA as to what the rules should  
21 be. I can tell you, for example, I don't at all agree  
22 with the OCA's position over the effects of Senate Bill 48  
23 in terms of, you know, residential customers.

24 So, these issues are going to come up.

1 You're going to have to deal with them at least in the  
2 context of revising your administrative rules, and people  
3 will go from there. In the meantime, if there is a new  
4 complaint brought, by anybody, whether it's over  
5 assessments or barriers to entry, you can deal with it at  
6 that time, in light of the facts that you'll have before  
7 you as applied to the statutes, the telecommunications  
8 statutes in New Hampshire, as revised by Senate Bill 48.

9 That, just taking that one as an  
10 example, barriers to market entry, Comcast is here,  
11 Metrocast, they're here. So, if a new carrier comes in,  
12 then you can deal with it when that new carrier comes in,  
13 and somebody perhaps will file a complaint and say "hey  
14 you can't let them into my service territory." But that's  
15 the way, you know, to me, that's the way it should be  
16 handled.

17 The same with the assessments, I just  
18 give you that example. I mean, if Comcast sent a letter  
19 and said "we're not paying your assessment", I'm sure  
20 folks up here would have an opinion on it and would take  
21 action. But, like I said, you know, once I found out  
22 about it, there's going to be something brought and I am  
23 going to ask you to deal with it.

24 CHAIRMAN IGNATIUS: But, Mr. McHugh, you

1 say "we don't have to worry about barriers to entry as it  
2 relates to these parties, because they're already here."  
3 They have already told us this morning that even an  
4 informational filing, with name address, phone number, a  
5 contact name, would be impermissible, because it has the  
6 effect of being a barrier to entry or affecting their  
7 ability to operate in the market. So, --

8 MR. McHUGH: But my understanding was  
9 that was a hypothetical that was thrown out. Their  
10 opinion, and just, again, going back, now it's my opinion,  
11 but their opinions have no practical effect to what will  
12 happen if a carrier comes forward. So that, whether it's  
13 Verizon or Comcast that sits here and says "well, that's a  
14 barrier to entry", well, you know what, it doesn't matter  
15 what they think, it doesn't really matter what I think.  
16 What's going to happen is, if a new carrier comes in and  
17 claims that "this is a barrier to entry and I'm not filing  
18 it", you will deal with it at that time. Or, perhaps, if  
19 it's simply paperwork, you know, people are going to take  
20 the path of least resistance, file the paperwork, and not  
21 worry about the legal significance of "is it a barrier to  
22 entry under the law or is it not a barrier to entry under  
23 the law?"

24 CHAIRMAN IGNATIUS: But my concern is

1 not even the new players, but the current players. If the  
2 answer is we -- any effort in a regulatory requirement,  
3 whether it's developed through rulemaking or order, that  
4 says "we need to know who you are and how to get in touch  
5 with you" has gone too far under Senate Bill 48, which is  
6 what I took the answers from Comcast and Verizon to be,  
7 then, to say "let's just vacate the orders and begin again  
8 in the rulemaking", we've already teed up the first  
9 question, the first moment of the rulemaking, is companies  
10 that have said "you can't even ask us to give us our  
11 name."

12 MR. MCHUGH: Well, they can --

13 CHAIRMAN IGNATIUS: So, why is that an  
14 efficient process, to throw everything out, know that  
15 tomorrow we sit down in something we call a "rulemaking"  
16 and have exactly the same issue and begin over again?

17 MR. MCHUGH: Well, first, you're  
18 affecting, one way or the other, rights of companies who  
19 didn't participate in Docket DT 09-044. That's number  
20 one. Number two, that issue has been squarely -- has been  
21 squarely faced in the rulemaking docket, because NHTA,  
22 FairPoint, we proposed rules. And, I have not heard from  
23 any party that, except Verizon over one -- I take that  
24 back. I haven't heard from any party, other than Verizon

1 over one rule that they disagreed with, but nobody's taken  
2 the position in that docket yet that the administrative  
3 forms that we at NHTA proposed for ELEC's is somehow a  
4 violation of law, not heard from anybody that's overly  
5 burdensome. Maybe I will, perhaps they didn't focus on  
6 it. But that issue is right in front of you. I set out  
7 all kind of rules and forms, a lot of which were struck,  
8 but still have administrative requirements for all ELEC's.  
9 And, you're going to have notice of who to call in an  
10 emergency, and what their number is, and where they're  
11 located. You know, that's --

12 CHAIRMAN IGNATIUS: I'll give those  
13 companies a chance to respond at the end of this, because  
14 it may be that I misunderstood or they misunderstood my  
15 question, and I haven't seen any of those rulemaking  
16 materials you're talking about yet. But I certainly don't  
17 want to -- I think we've got arguments of efficiency on  
18 both sides. We don't want to force appeals of issues that  
19 are based on laws that are no longer in effect. We also  
20 don't want to have the need, and maybe we do not, I'm not  
21 sure, but I certainly wouldn't want to set up a situation  
22 where we have to be begin anew, if it's something that is  
23 still validly whole coming out of the prior proceeding.  
24 And, that's, obviously, what we have to resolve here.

1 Other questions? Yes, Commissioner  
2 Harrington.

3 CMSR. HARRINGTON: Just kind of getting  
4 back on this, following up on it a little bit. You're  
5 saying, on Page 5 of the AT&T/Verizon, you agreed with  
6 their paragraph that says "Because SB 48 establishes that  
7 the Commission cannot regulate fixed VoIP providers, this  
8 preliminary finding becomes academic", which is a finding  
9 that the providers of cable VoIP services are public  
10 utilities under New Hampshire law. Are you saying then  
11 that they're not public utilities under New Hampshire law?

12 MR. MCHUGH: No. But I am saying,  
13 consistent with what I think their positions have been, at  
14 least as I understood it today, is that that is not a  
15 determination you need to make in this docket.

16 CMSR. HARRINGTON: Okay. Not in this  
17 docket, but is it a determination that needs to be made  
18 sometime?

19 MR. MCHUGH: No, not unless they  
20 challenge the rules that say they're, you know, they're  
21 going to be treated as public utilities, and they have  
22 administrative requirements and other requirements, both  
23 under the law and the rules. If they challenge it, you'll  
24 have to decide it. If they don't challenge it, you know,

1 I don't think you can presume people are going to violate  
2 the law. You presume they're going to honor the law.  
3 And, then, if situations come to your attention or  
4 complaints are filed alleging that they are not following  
5 the law, you deal with it then.

6 CMSR. HARRINGTON: And, if we did as you  
7 requested, and, by the way, I kind of like this idea of  
8 the people writing their own orders here, it will save a  
9 lot of time. And, if we can get everybody to write one,  
10 we'll pick the best one. And, spend less time watching --  
11 more time eating and watching football over Thanksgiving  
12 Weekend that way.

13 If we followed your advice and vacated  
14 the orders and closed the dockets, then what is in effect  
15 during the time between the vacating of those orders and  
16 the time the new rules go through the whole process and  
17 they actually get signed and approved?

18 MR. McHUGH: Well, the statutes are in  
19 effect, and people have to comply with the statutes. And,  
20 then, the effort has to turn to, for lack of a better  
21 phrase, squaring regulations into the same peg as the  
22 statutes.

23 CMSR. HARRINGTON: And, you see no  
24 problem with, as we've seen here today, there's multiple

1 opinions on what the statutes that are in effect actually  
2 imply and would be required to comply with? Doesn't that  
3 set a kind of confusing thing, if we have one group of  
4 people saying "this applies" and another group saying  
5 "this doesn't apply", and so forth?

6 MR. MCHUGH: No, I'm not concerned at  
7 all by that.

8 CMSR. HARRINGTON: Okay.

9 MR. MCHUGH: I mean, we are definitely  
10 in competition, there's no doubt about it. And, if  
11 somebody has a problem, between the staff and all of the  
12 carriers here, you're going to hear about it. And, that's  
13 just, to me, maybe it's too simplistic, I don't know, but  
14 that's the way it works. And, I'm certainly -- you know,  
15 I'm capable of doing that, as are others within FairPoint.

16 CMSR. HARRINGTON: Okay. That's all my  
17 questions. Thank you.

18 CHAIRMAN IGNATIUS: I'm concerned that  
19 we're still in sort of a circular situation, where you  
20 said, you know, "you shouldn't assume that people are  
21 going to violate the law." Agreed. But, if we don't even  
22 know the regulatory definition of a "provider", then how  
23 do we know what -- what are we testing it against to say  
24 "are they in compliance with the law or not?" I'm not as

1 comfortable with this "it's what it is, and we'll work it  
2 out if it turns out to be a problem" as you are.

3 MR. McHUGH: I'm not sure if I  
4 understand the question, but let me try and answer it, and  
5 then you can come back and whack it and we'll do it again.

6 But, you know, there is no test, in my  
7 opinion, to undertake, until you have some complaint,  
8 whether it's raised by your staff or others, there is  
9 nothing to test. Until somebody takes either affirmative  
10 action or an affirmative omission that requires the  
11 Commission to get involved, whether it's an investigation  
12 or an informal inquiry as to "why didn't you do this?"

13 CHAIRMAN IGNATIUS: Well, but, just the  
14 basic notion "are you a public utility or not?"

15 MR. McHUGH: I guess --

16 CHAIRMAN IGNATIUS: I have -- maybe I'm  
17 too simplistic in my approach to my job. I think I've got  
18 a list of people who I know are within my jurisdiction,  
19 and those that are not. And, occasionally, you get  
20 behavior by someone that looks like it should have been on  
21 one side of the line and not on the other and we take it  
22 up. But, to go in from the beginning saying "We know  
23 you're operating. And, we're just going to leave that  
24 uncertain. We're not going to define what you are, and

1 wait and see if anyone's bothered by it." Seems like a  
2 strange approach.

3 MR. McHUGH: Entities are registered in  
4 your records as a competitive local exchange carrier, an  
5 incumbent local exchange carrier, an IXC, I don't know  
6 that anyone is complaining about how they registered  
7 specifically, vis-a-vis what services they're offering. I  
8 read it quite a while ago, but the overall complaint was  
9 very broad. And that, you know, "Comcast", you know,  
10 whatever the right adjective is, but "is not subject to  
11 regulations, and they should be." Well, that world got,  
12 in my opinion, turned upside-down by Senate Bill 48. And,  
13 you have, for example, in Senate Bill 48, a requirement  
14 that says "all excepted local exchange carriers basically  
15 have to be treated equally", except for a couple of  
16 exceptions, most of which, quite frankly, apply to  
17 FairPoint, wholesale obligations, certain broadband  
18 obligations, I don't have the list, but that's it.

19 So, I don't know why there's a need, or  
20 perhaps maybe I don't understand why, Commissioner  
21 Ignatius, you are so uncomfortable with the proposition  
22 that you need to go further than how they register.

23 CHAIRMAN IGNATIUS: Well, because  
24 certain entities are registered, but we have a VoIP

1 provider that says "it's not the ELEC", it works with the  
2 ELEC, but it's not the ELEC. It says, "we don't have to  
3 really decide if they're a public utility or not, just  
4 don't worry about it." And, that's the part that I don't  
5 -- I have trouble with. It's not all the regulated ones  
6 that are already registered. It's this VoIP provider that  
7 our prior orders would have said "you're a public utility,  
8 and you've got to follow whatever degree of regulation is  
9 appropriate", that's going to look like how we treat  
10 CLECs. If we vacate the orders, then we have the VoIP  
11 provider in this no man's lands, and we just leave it and  
12 see if somebody comes up and complains?

13 MR. McHUGH: Well, it's probably in no  
14 man's land for an extended period of time. Now, the  
15 question is, is there a great deal of harm that will come  
16 about by leaving it for some unspecified, but what I would  
17 propose is a relatively short period of time in this  
18 continued no man's land, versus taking a case that was  
19 decided on facts years ago, and trying to make it square  
20 somehow into a new legislative mandate of which, you know,  
21 there's no rules yet, really. Well, maybe not "no rules",  
22 but which require a lot of changes to your administrative  
23 rules.

24 So, it's not as though I'm saying, you

1 know, "look the other way, and, you know, ten years from  
2 now it's an issue, eh, we'll come back." I mean, it's  
3 coming. So, where is the right arena, the right docket,  
4 whatever the right phrase is, but where is the correct  
5 avenue to make these determinations, based on how I read  
6 the Supreme Court decisions as cited by Verizon/AT&T. I  
7 think the law, the regs, suggest strongly that you vacate  
8 the orders without prejudice. And, you know, maybe one  
9 avenue is that people won't like, you're going to issue a  
10 ruling that's going to go to the Supreme Court, and then  
11 they're going to decide what to do. But that's not -- you  
12 know, I'm not here to advocate your job, you're here to  
13 try and make the right decision. And, maybe one way or  
14 the other, no matter what you do, it's going up to the  
15 Supreme Court. I'm certainly concerned, and I think I've  
16 expressed it, that I view a lot of what you potentially  
17 could rule on, especially based on questions, that they  
18 are more akin to rules, I didn't have an ability to really  
19 influence the outcome of DT 09-044, that's because I, you  
20 know, intentionally made a decision, or others at  
21 FairPoint, depending on when I joined, but made the  
22 discussion that "well, that doesn't affect our company's  
23 interest." But, certainly, it didn't affect, in my  
24 opinion, FairPoint's interests too much to get into the

1 docket, or our interests, I should say, didn't dictate to  
2 me that I somehow need to get into that docket, until I  
3 read your order, which followed the Supreme Court's, your  
4 order of notice. And, I thought, "well, that's a  
5 problem." Because, you know, that's just the way I view  
6 it, and I understand people disagree, but that's the way I  
7 deal with it.

8 CHAIRMAN IGNATIUS: All right. Thank  
9 you. Any other questions?

10 (No verbal response)

11 CHAIRMAN IGNATIUS: All right. Thank  
12 you.

13 MR. MCHUGH: Thank you.

14 CHAIRMAN IGNATIUS: I think we may have  
15 a couple of follow-up questions back to Comcast or Verizon  
16 for things that have come up, and probably no very good  
17 order. But I guess the one we most recently were talking  
18 about was the question of regulatory reach that we can  
19 develop in the rulemaking, and give you an opportunity,  
20 Mr. Platzer or Mr. Moore. If I misunderstood your  
21 responses or if you were responding to a question that was  
22 different than what I was getting at, I'd like to hear it,  
23 because it sounds a little different, what I took from  
24 your answer about any degree of regulatory filing,

1 registration, you know, informational submissions would be  
2 impermissible under 48, sounds different from what  
3 Mr. McHugh's understanding was. So, do you have anything  
4 you want to help understand, either confirm or clarify?

5 MR. PLATZER: Well, certainly, we  
6 believe that the appropriate venue to be addressing  
7 questions of that sort is not this docket. But, if  
8 there's -- if the Commission wants to address those types  
9 of questions as part of a rulemaking, and then we can make  
10 an assessment as to whether there are any rules that the  
11 Commission there under the rulemaking decides to apply to  
12 us that we want to challenge, if there are things we want  
13 to challenge, either under state law or as federally  
14 preempted. And, then, in the event we disagree with  
15 something that the Commission does in the context of that  
16 rulemaking, we'll have a live disagreement that we can  
17 take up to the court and a challenge that wouldn't be  
18 moot.

19 Certainly, our position here is that  
20 this particular docket is a very -- it's a very bad venue  
21 for adjudicating those kinds of questions, because we  
22 don't seem to have any remaining disagreement now about  
23 whether or not we are complying with what's -- sort of  
24 what's left over in the savings clause. But, if the

1 Commission wants to further investigate or give further  
2 thoughts to sort of what regulations are still in place  
3 and what the -- sort of the regulations might look like in  
4 light of SB 48.

5 I think that vacating the orders in  
6 09-044, and then taking them up somewhere where we can  
7 make an assessment as to whether or not we want to  
8 challenge them, is the better way to go about it. And, I  
9 know, Chairman Ignatius, you expressed concern about this  
10 idea of sort of leaving -- leaving it unresolved until  
11 that rulemaking what the regulatory status of VoIP  
12 providers in the state is, whether they're public  
13 utilities or not. And, I think it sort of bears  
14 mentioning there that, and it's that -- that no man's land  
15 certainly existed for several years before the Commission  
16 resolved the question in 09-044, the way it did with those  
17 orders. And, VoIP providers aren't subject to state  
18 public utility regulation at all in I believe about 20  
19 states or so. And, the sky has not fallen down in those  
20 places. So, the idea that there might be some sort of  
21 academic regulatory uncertainty before the Commission  
22 takes this up in a rulemaking, doesn't strike us as  
23 something that's particularly problematic.

24 And, also, I believe, as we argued in

1 our brief as well, the statutory authority under which the  
2 Commission initiated the docket to begin with presupposes  
3 that there's some past act or conduct or proposal that  
4 would put Comcast out of compliance with the Commission's  
5 regulations. So, it mirrors or -- while I certainly  
6 understand the desire to sort of have everything cleanly  
7 categorized under the law, the Commission's own  
8 authorizing statutes for the investigation presupposes  
9 that there are some actual disagreement or some actual  
10 accusation that we in somehow acted out of compliance with  
11 the law, and there's no such accusation before the  
12 Commission now.

13 CHAIRMAN IGNATIUS: I don't -- I am not  
14 sure I can agree with that. I don't know that there is or  
15 isn't, and we're certainly not -- we haven't been asked to  
16 do that from the Supreme Court.

17 Mr. Moore, any other thing you'd like to  
18 add on that issue?

19 MR. MOORE: Just a small point. That,  
20 even in a rulemaking, you wouldn't have to get to this  
21 issue about whether VoIP is a public utility or not. You  
22 would make the rules that you deemed fit to make. You  
23 may, for example, have a rule that says "all  
24 telecommunication providers must register with the

1 Commission." Well, Verizon, we've already registered;  
2 we're fine. So, there may not be any dispute or any  
3 reason to look at that issue, until and unless some  
4 carrier comes into the state and says, "well, we don't  
5 have to register, because we're a purely VoIP provider."  
6 And, then, the issue comes to you, someone brings a  
7 complaint that says "you should make these folks  
8 register." And, even if all those things come to pass,  
9 the first issue you would look at is "well, what does the  
10 statute say?" You might never even reach the question  
11 even then about whether they're a public utility, because  
12 you might say "The statute says, a public utility or not,  
13 there's an exception for VoIP providers, and I decide  
14 whether I'm allowed to regulate a VoIP provider."

15 And, the Legislature chose not to change  
16 the definition of "public utility". The Legislature went  
17 about this in a different way. So, you may have to do a  
18 functional analysis and look at the statute first. So, it  
19 may not come up. Or, and if it does come up, then at  
20 least the Commission will have the benefit of having a  
21 particular fact situation in front of you. For example,  
22 you may say "is this person even providing VoIP?" Like  
23 question one that you've lined up here. The first one may  
24 be "This service that you're offering doesn't even look

1 like VoIP. So, you need to register."

2 So, whether Comcast is a public utility  
3 is not a live issue now, and it may never come up. It  
4 might come up in the context of somebody else. It might  
5 come up in the context of somebody else on a particular  
6 aspect of regulation. But it's easier for the Commission  
7 to make the proper decision when it has the actual facts  
8 in front of it.

9 CHAIRMAN IGNATIUS: Can I get a  
10 clarification from both Comcast and Verizon on how you  
11 define "broadband"? Because I think we've got some  
12 different interpretations, and they relate to how we  
13 interpret the statute. It isn't just out of curiosity  
14 about how you define "broadband". But it's as to the  
15 relationship between the statute's definitions of "VoIP"  
16 and "IP-enabled services" and the services that are being  
17 offered in this docket.

18 So, when you look at, Mr. Platzer, when  
19 you look at the services of CDV VoIP -- or, CDV, and you  
20 put it in the category of calling it "VoIP", as opposed to  
21 "IP-enabled", what is the -- when you referred to  
22 broadband as part of that service, how are you defining  
23 broadband there?

24 MR. PLATZER: If I could just confer for

1 a moment?

2 CHAIRMAN IGNATIUS: That's fine.

3 (Atty. Platzer conferring with Atty.  
4 Geiger and Atty. Parker.)

5 MR. PLATZER: I don't know if we sort of  
6 have an official definition of the term "broadband" here.  
7 But, if I could help a little bit with where I think your  
8 concern is, the reason that we think that we fall under  
9 the "VoIP" definition, rather than the "IP-enabled  
10 service" definition, is not about the broadband  
11 requirement in 362:7, I(d)(2), but rather the real-time  
12 two-way voice communications element of (d)(1). And, the  
13 reason that we had taken the position that our VoIP  
14 service falls under the "VoIP service" rather than  
15 "IP-enabled service" definition is that the VoIP calling  
16 features enable two-way simultaneous voice calling,  
17 whereas, the other -- the other features of the same  
18 communications suite, like the ones that you access over  
19 your handheld device or through your Internet connection,  
20 those don't have simultaneous two-way voice calling as the  
21 element, which is the why we have the ancillary parts of  
22 the service in the "IP-enabled services" category.

23 Certainly, under federal -- federal law  
24 also incorporates the broadband connection requirement as

1 part of the federal definition of an interconnected VoIP  
2 provider. And, we don't believe that there's any  
3 controversy that we -- that our VoIP service falls under  
4 the federal definition, we certainly are subject to all of  
5 the federal regulations that go along with being an  
6 interconnected VoIP provider under federal law, such as  
7 federal USF and number porting and E911 and all of those  
8 requirements. So, you know, we hadn't viewed that as a  
9 subject that was in dispute here today.

10 CHAIRMAN IGNATIUS: Does your service --  
11 your broadband connection necessarily connect to the  
12 internet?

13 MR. PLATZER: Not necessarily, no. A  
14 customer -- yes, certainly, the private IP network is used  
15 for the calling features itself. Almost all customers who  
16 have the CDV service that runs over the Comcast cable also  
17 subscribe to broadband, high-speed broadband Internet  
18 service, which connects to the public Internet. But it's  
19 not a requirement that a customer subscribe to the  
20 Internet service in order to purchase the CDV service.  
21 And, the CDV service doesn't -- you see, well, the voice  
22 calling features in the CDV service do not utilize the  
23 public Internet, although a lot of the other  
24 communications features of the CDV service, like the ones

1 that go over your handheld device or through like the  
2 Web-based portal, those do use the public Internet.

3 CHAIRMAN IGNATIUS: Mr. Moore, anything  
4 that you would want to add to or note on that issue?

5 MR. MOORE: Just that the statute  
6 doesn't require an internet connection. The definition of  
7 "VoIP" requires broadband, but not -- doesn't say anything  
8 about "connected to the Internet". And, I think, under  
9 federal law, there's argument that Internet -- the word  
10 "Internet" can include private data transfer systems, not  
11 necessarily just the public Internet. But you don't need  
12 to get into that. Because all you need here just to find  
13 that something is a VoIP service on that element is that  
14 it includes broadband. And, I think, under the federal  
15 level, it distinguishes that from other data transfer by  
16 speed. So, you just need to look at whether the speed of  
17 the transfer is appropriate.

18 CHAIRMAN IGNATIUS: So, you would say  
19 that the use of broadband in that (d)(2) is a speed  
20 definition only?

21 MR. MOORE: Well, yes. Data transfer at  
22 a certain -- faster than 760 kilobits a second, I think is  
23 the limit, or at least somewhere around there. I believe,  
24 at the top of Page 3, in our brief, we had a little

1       parenthetical clause there, where we referred to, the  
2       first full paragraph, we referred to just a "broadband  
3       connection", and we said "namely, high-speed packetized IP  
4       transport from the subscriber's location." So, it's  
5       really data transfer past a certain speed. And, I also  
6       think that, Harry can correct me if I'm wrong, I think the  
7       Rurals agree that Comcast service, in this case, qualifies  
8       as VoIP under the statute.

9                       CHAIRMAN IGNATIUS: I know that was  
10       Mr. Malone's statement before.

11                      So, Mr. Platzter, I know you had said  
12       that, in your view, the definitions of "IP-enabled" and  
13       "VoIP" in our statute are "mutually exclusive", am I  
14       saying that right?

15                      MR. PLATZER: Yes.

16                      CHAIRMAN IGNATIUS: And, that you fit  
17       within VoIP, and therefore not within IP-enabled. If it  
18       weren't for a requirement that you have to be one or the  
19       other and can't be both, would you also consider yourself  
20       to meet the definition of "IP-enabled"?

21                      MR. PLATZER: If it weren't for the last  
22       clause of Subpart (e), which says that you can't -- it  
23       says you can't be IP-enabled if you're VoIP, then, yes, we  
24       do otherwise fall within the definition of "IP-enabled".

1 And, certainly, as we said, a lot of the features of the  
2 service do fall within the "IP-enabled" definition.

3 CHAIRMAN IGNATIUS: And, the final thing  
4 I wanted to ask you, Mr. Platzer, is you had said that,  
5 both in your brief and this morning, that it was necessary  
6 to appeal certain findings of the prior orders. Can you  
7 explain again which findings that are there that you think  
8 are critical for you to have to appeal?

9 MR. PLATZER: By far, the most important  
10 one to us, and which really is sort of principally driving  
11 our need to appeal those orders, are the determinations  
12 under federal law. And, especially, in the first of the  
13 three orders, the determination that "Comcast CDV service  
14 is a telecommunications service for federal purposes,  
15 rather than an information service for federal purposes."  
16 So far that the weight of the federal authority on that  
17 point goes in the other direction. And, due to at least  
18 the risk of exposing ourselves to arguments about  
19 collateral estoppel in other cases, other states, other  
20 venues, we believe it's necessary for us to appeal that  
21 determination to the Supreme Court.

22 We also believe that, as a matter of  
23 prudence, the fact that that finding is now so clearly  
24 unnecessary to the Commission's orders, should, at a bare

1 minimum, that that should be vacated, even if the  
2 Commission wants to leave in place its holdings under  
3 state law.

4 And, then also, in addition, the  
5 categorization. There's the federal law analysis about  
6 the preemption under federal law that flows from that that  
7 we believe we need to appeal.

8 To a lesser extent, we also had similar  
9 concerns about the state law holdings on the merits that  
10 CDV service is a public utility. Again, because of the  
11 possible precedential or collateral estoppel effects in  
12 future proceedings in the state, and, in the event that we  
13 are forced to appeal the orders here, we would also see a  
14 need to challenge that determination on the merits. But I  
15 will be lying to you if I claim that we view that issue as  
16 critical as the federal analysis, which is really the  
17 principal driver here.

18 CHAIRMAN IGNATIUS: I appreciate the  
19 candor. I guess that what I'm not quite following is, if  
20 you said today you're not -- it's not even really that  
21 important to determine if you're a public utility or not,  
22 and haven't really wanted to be pinned down on whether you  
23 consider yourself a public utility or not, then why -- how  
24 does that square with the statement that one of things you

1 need to appeal is the determination of being a public  
2 utility? It sounds like you do believe you are not a  
3 public utility, and would want to convince the Supreme  
4 Court of that?

5 MR. PLATZER: We don't believe that it  
6 ought to matter whether or not we're a public utility  
7 under the way that we read Senate Bill 48. We would, for  
8 instance, we would hope that the Commission shares our  
9 views of what Senate Bill 48 means and what it does to the  
10 significance of a public utility holding. But, in the  
11 event the Commission were to take a more expansive view of  
12 the types of regulatory requirements that attach onto a  
13 "public utility" designation, we would want to reserve our  
14 rights to challenge the determination that we're a public  
15 utility to begin with.

16 Certainly, in the event the Commission  
17 were to share our view that Senate Bill 48 effectively  
18 removes most of the significance of that determination, it  
19 might ultimately matter less as a practical matter. And,  
20 certainly, there's also the reality that in no other state  
21 where we currently operate is our VoIP carrier regulated  
22 as a public utility. And, so, the unique nature of that  
23 holding, I mean, concern about future precedential  
24 effects, in the event that the Commission were to disagree

1 with us about what we think Senate Bill 48 does, that  
2 would be -- we would ask to make the appeal of this part.

3 CHAIRMAN IGNATIUS: Follow-up question?  
4 Commissioner Harrington.

5 CMSR. HARRINGTON: Yes. I wanted to  
6 just follow up on this issue of public utility. Going  
7 back to what Ms. Chamberlin, from the OCA's Office said,  
8 she said that, basically, "SB 48 changed the consequences  
9 of being classified as a public utility, but did not  
10 really change the threshold for determining that fact."  
11 Do you agree with that or not?

12 MR. PLATZER: I certainly agree with the  
13 first part of that, which is that "SB 48 changed the  
14 consequences of being a public utility". Don't believe  
15 it's necessary for the Commission to answer the second  
16 question, which is "whether or not Senate Bill 48 changed  
17 what it means to be a public utility?" I think you can  
18 make reasonable arguments under the statute either way.  
19 But we don't think it's necessary to make that decision  
20 here, because that only in the event that the consequences  
21 of being a public utility were to present a real case or  
22 controversy would it become necessary to resolve that  
23 question.

24 CMSR. HARRINGTON: But would you agree

1 that Senate Bill 48 that defines the "Voice over Internet  
2 Protocol" and the "IP-enabled service", and then has the  
3 paragraph that's been much quoted here about exempt --  
4 "Except as set forth in Paragraph III, notwithstanding any  
5 other provision of the law to the contrary", and I won't  
6 read the whole thing, that's in the section of the law  
7 called "362:7 Telephone Utilities", which is under the  
8 general statute of 362, which deals with public utilities'  
9 "Definition of Terms". So, if you're not a public  
10 utility, then why would all this information that you're  
11 saying applies specifically to you, and the exemption of  
12 things apply in the statute that has to deal with  
13 telephone utilities?

14 MR. PLATZER: Well, Commissioner, that  
15 same section of the statute also talks about "IP-enabled  
16 services".

17 CMSR. HARRINGTON: Uh-huh.

18 MR. PLATZER: Things like your  
19 broadband/Internet connection or the applications that you  
20 use on your -- applications you use on your mobile phone.  
21 It's inconceivable that the Legislature intended to make  
22 IP-enabled services into public utilities or telephone  
23 utilities under the statute simply because that's the  
24 statutory subsection in which it put the definition. So,

1 we don't believe that it would be appropriate to read the  
2 mere placement of the "VoIP services" definition in the  
3 statute, as amended by Senate Bill 48, as indicating  
4 anything about the Legislature's intent to designate VoIP  
5 services as a public utility. That argument, in our view,  
6 would prove to much.

7 CMSR. HARRINGTON: Okay.

8 MR. PLATZER: Because it would mean the  
9 same thing for IP-enabled services.

10 CMSR. HARRINGTON: And, going forward on  
11 that same section then, this is Section III, with "The  
12 prohibitions of paragraph II shall not be construed to".  
13 And, then, in (e) there's a whole list of statutes that  
14 would say it "Affects or limit the application or  
15 enforcement of", and I'm not going to read them all, you  
16 can do that.

17 So, you're saying, or I guess I'm trying  
18 to figure out what your position is, is the applicability  
19 of these two, as you've determined yourself, as a VoIP  
20 provider. So, it would appear that these only -- would  
21 only apply to a VoIP provider if the VoIP provider isn't  
22 indeed classified as a "public utility". Would you agree  
23 with that or not?

24 MR. PLATZER: No, we don't. You have to

1 look sort of statute by statute at the criteria, in each  
2 statutory provision, as to what triggers the application  
3 of the statute. And, there are some instances where a  
4 "public utility" designation is relevant to these  
5 provisions that are in III. For instance, the Dig Safe  
6 regulations or the herbicide use ones, you have to be a  
7 public utility first in order for these regulations about  
8 where -- how to dig safe and whether or not to use  
9 herbicide to apply.

10 But, other provisions, such as being an  
11 attaching entity onto a pole or prohibitions against  
12 slamming, they don't apply to public utilities as such,  
13 they have different sets of criteria for what kinds of  
14 entities are covered in the first instance. So, some of  
15 these provisions in the savings clause apply to public  
16 utilities, others apply based on independent criteria such  
17 that public utility status doesn't matter. And, we tried  
18 to break those out in our brief, which fell into which  
19 category.

20 But the mere fact that those -- that the  
21 savings clause includes both kinds of statutes, both the  
22 kinds that apply to public utilities and the kinds where  
23 it doesn't matter whether or not you're a public utility  
24 for the statute to apply, the fact that they are

1 commingled in the savings clause in that way is a further  
2 counsel against the view that VoIP providers are  
3 automatically public utilities just because of the  
4 particular section of the statute that the definition is  
5 placed into.

6 CMSR. HARRINGTON: Well, then, let's  
7 look at the ones that specifically do require or do apply  
8 only to public utilities, like the herbicide one, for  
9 example. So, would you say then, as not a public utility,  
10 that the provisions of, and I'm not sure which law it is,  
11 but it's one of those on there, it calls for notification  
12 to people in the use of herbicides, and given the option  
13 to use cutting of the foliage rather than the herbicide,  
14 it simply doesn't apply, and that your company could go  
15 out and do that without implementing that law -- or,  
16 following that law?

17 MR. PLATZER: We think it doesn't apply  
18 to us for an entirely different reason, having nothing to  
19 do with the "public utility" designation, which is that  
20 it's our cable affiliates who actually -- who actually own  
21 the cable and the conduit. So -- and that the law clearly  
22 does apply to them, insofar as it applies to cable  
23 providers. So, since we don't actually -- our VoIP  
24 provider doesn't actually own or operate physical

1 facilities that would be necessary to trigger those types  
2 of requirements, that it doesn't apply. But the reason it  
3 doesn't apply has nothing to do with the categorization of  
4 the service.

5 CMSR. HARRINGTON: Well, let me see if I  
6 can maybe rephrase that. You're saying "the law would  
7 apply if you were to perform those activities, but, since  
8 you don't perform those activities, it really doesn't make  
9 any difference what the law states"?

10 MR. PLATZER: That's perhaps going a  
11 little bit farther than I would have gone.

12 CMSR. HARRINGTON: Okay.

13 MR. PLATZER: Which is that, because the  
14 law doesn't apply to us, because we don't own those  
15 facilities, the Commission has no need to reach the  
16 question of whether the law would apply to us in a  
17 hypothetical world where our VoIP provider owned cables  
18 and conduits.

19 CMSR. HARRINGTON: Well, I guess I'm  
20 asking for that question on that hypothetical world then.  
21 If you were not a public utility, then, if you were to  
22 engage in those activities, such as specified in the thing  
23 on herbicide or pole attachments or Dig Safe, those laws  
24 would not apply to you, because you're not a public

1 utility?

2 MR. PLATZER: Then, the Commission -- if  
3 that hypothetical situation were to arise, then the  
4 Commission would have before it sort of an actual live  
5 question about where it would actually matter for our  
6 service whether or not we are categorized as a "public  
7 utility" or not. And, certainly, it's not this case  
8 today. In the event that case were to come up, I think  
9 Comcast's position would be the same one we took in DT  
10 09-044, which is that "we are not a public utility under  
11 the statute." But we don't believe that the Commission  
12 needs to resolve that question on the merits here today.

13 CMSR. HARRINGTON: So, for the time  
14 being, until actually an actual incident comes up or it's  
15 addressed in the rules or something, your position is that  
16 you should -- the orders should be vacated, and the  
17 question as to whether you're a public utility or not just  
18 should not be addressed and not decided one way or the  
19 other?

20 MR. PLATZER: That's correct.

21 CMSR. HARRINGTON: All right. Thank  
22 you.

23 CHAIRMAN IGNATIUS: Anything further?

24 (No verbal response)

1 CHAIRMAN IGNATIUS: If not, then thank  
2 you, everyone, for your attention and sticking with us  
3 through a lot of questions as we've tried to sort out what  
4 I find to be a very complex statute. Mr. McHugh, yes?

5 MR. MCHUGH: My apologies, Chair  
6 Ignatius. I do want to follow up, though, on that last  
7 point, because it sort of gets to the heart of my concern,  
8 the dialogue between Commissioner Harrington and Comcast's  
9 counsel. We can't, in this, through this docket, solve  
10 for every possible hypothetical. So, -- because you're  
11 not also considering what other statutes might apply.  
12 And, let me give what I --

13 CHAIRMAN IGNATIUS: We understand your  
14 point. I don't know if you need to go further. I think  
15 --

16 MR. MCHUGH: We're good. Thank you.

17 CHAIRMAN IGNATIUS: -- you've made that  
18 clear that this isn't a generic rulemaking.

19 MR. MCHUGH: Thank you.

20 CHAIRMAN IGNATIUS: All right. Then,  
21 it's almost 1:30. Thank you, everyone, for a -- working  
22 hard to go through it this morning. Mr. Platzer?

23 MR. PLATZER: Yes. Would the Commission  
24 find it helpful for the parties to submit any kind of post

1 hearing brief, post hearing briefing on these issues?  
2 And, we're certainly prepared to, if the Commission would  
3 like us to.

4 CHAIRMAN IGNATIUS: Thank you. We had  
5 talked earlier. We didn't think we needed to have that  
6 done. Any change in that? No. I think we've got enough  
7 to read and we just have to sort it through. So, thank  
8 you.

9 We stand adjourned. We will take it  
10 under advisement.

11 **(Whereupon the hearing was adjourned**  
12 **at 1:26 p.m.)**

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