

1 STATE OF NEW HAMPSHIRE
2 PUBLIC UTILITIES COMMISSION
3

4 May 21, 2008 - 10:10 a.m.
5 Concord, New Hampshire
6

7 RE: DT 08-013
8 COMCAST PHONE OF NEW HAMPSHIRE:
9 Petition to Waive Puc 431.01(d).
10 (Prehearing conference)

11 PRESENT: Chairman Thomas B. Getz, Presiding
12 Commissioner Graham J. Morrison
13 Commissioner Clifton C. Below

14 Connie Fillion, Clerk

15 APPEARANCES: Reptg. Comcast Phone of New Hampshire:
16 Cameron F. Kerry, Esq. (Mintz Levin...)
17 Stacey Parker, Esq.

18 Reptg. Kearsarge Telephone Co., Merrimack
19 County Telephone Company, Wilton Telephone
20 Company, and New Hampshire Telephone Assn.:
21 Frederick J. Coolbroth, Esq. (Devine...)
22 Patrick C. McHugh, Esq. (Devine, Millimet...)

23 Reptg. Union Telephone Company d/b/a
24 Union Communications:
Martin C. Rothfelder, Esq. (Rothfelder...)

25 COURT REPORTER: Steven E. Patnaude, LCR No. 52

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

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Reptg. Residential Ratepayers:

Rorie Hollenberg, Esq.

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Kenneth E. Traum, Asst. Consumer Advocate

Stephen Eckberg

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Office of Consumer Advocate

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Reptg. PUC Staff:

F. Anne Ross, Esq.

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STATEMENTS REGARDING PETITIONS TO INTERVENE BY:

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Mr. Kerry

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Mr. Coolbroth

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Mr. Rothfelder

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STATEMENTS OF PRELIMINARY POSITION BY:

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Mr. Coolbroth

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1 P R O C E E D I N G S

2 CHAIRMAN GETZ: Okay. Good morning,
3 everyone. We'll open the prehearing conference in docket
4 DT 08-013. On December 12, 2007, Comcast Phone of New
5 Hampshire filed an application for authority to provide
6 local exchange telecommunications services pursuant to RSA
7 374:22 in the tariff territories of Kearsarge Telephone,
8 Merrimack County Telephone, and Wilton Telephone Company.
9 We issued an order nisi granting the application on
10 April 4. April 16th the TDS Companies requested a
11 hearing, various other filings ensued, including Petitions
12 to Intervene by the New Hampshire Telephone Association,
13 the TDS Companies, Union Telephone Company. And, we also
14 have a Notice of Participation from the Office of Consumer
15 Advocate. I'll also note for the record that the
16 affidavit of publication was filed on April 28.

17 Before we hear positions of the parties
18 or any positions with respect to petitions to intervene,
19 let's take appearances for the record. We'll start with
20 Comcast.

21 MR. KERRY: Good morning, Mr. Chairman
22 and members of the Commission. I'm Cameron Kerry, of
23 Mintz Levin, for Comcast Phone. And, with me here is
24 Stacey Parker of Comcast Phone.

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1 CHAIRMAN GETZ: Good morning.

2 CMSR. BELOW: Good morning.

3 CMSR. MORRISON: Good morning.

4 MR. COOLBROTH: Good morning, Mr.

5 Chairman, Commissioners. I'm Frederick Coolbroth, of the
6 firm of Devine, Millimet & Branch, appearing today on
7 behalf of Kearsarge Telephone Company, Merrimack County
8 Telephone Company, Wilton Telephone Company, and the New
9 Hampshire Telephone Association. With me today is Patrick
10 McHugh from the firm, and we have a number of
11 representatives of the companies and the association.

12 CHAIRMAN GETZ: Good morning.

13 CMSR. MORRISON: Good morning.

14 CMSR. BELOW: Good morning.

15 MR. ROTHFELDER: Good morning. I'm
16 Martin C. Rothfelder, of Rothfelder Stern, L.L.C., of
17 Westfield, New Jersey, appearing on behalf of Union
18 Telephone Company, doing business as Union Communications.
19 With me is Darren Winslow and Benjamin Thayer of the
20 Company.

21 CHAIRMAN GETZ: Good morning.

22 CMSR. MORRISON: Good morning.

23 CMSR. BELOW: Good morning.

24 MS. HOLLENBERG: Good morning. Rorie

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1 Hollenberg, Kenneth Traum, and Stephen Eckberg, here for
2 the Office of Consumer Advocate.

3 CHAIRMAN GETZ: Good morning.

4 CMSR. MORRISON: Good morning.

5 CMSR. BELOW: Good morning.

6 MS. ROSS: Good morning, Commissioners.
7 Anne Ross, with Commission Staff. And, with me today is
8 Kate Bailey, Director of the Telecom Division, Josie Gage,
9 and Pradip Chattopadhyay, the Assistant Director of the
10 Telecom Division.

11 CHAIRMAN GETZ: Okay. Good morning.

12 CMSR. BELOW: Good morning.

13 CHAIRMAN GETZ: First off, let's just
14 deal with the Petitions to Intervene. Starting with I
15 guess you, Mr. Kerry, is there any -- are there any
16 objections to the Petitions to Intervene?

17 MR. KERRY: Yes, Mr. Chairman. We filed
18 yesterday objections to each of the Petitions to
19 Intervene. And, briefly, and this relates to Comcast's
20 position here, there is -- there is no legal issue that
21 the intervenors raised. The issues that are before the
22 Commission on an application pursuant to PUC 431.01 don't
23 call for an adjudicative proceeding. And, there are --
24 there are no issues that have been identified that

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1 represent a legal interest that the intervenors have. We
2 understand their concerned about competition in their
3 service areas, but that doesn't provide the necessary
4 legal interest to have a basis to intervene in this
5 proceeding.

6 CHAIRMAN GETZ: Unfortunately, I do not
7 appear to have the objections in the record. So, I didn't
8 have a chance to review them. But are you making -- are
9 you making no distinction among the petitioners, as to TDS
10 versus --

11 MR. KERRY: Well, no, that's I think a
12 very good question. And, certainly, the TDS Companies
13 stand in a different position than NHTA or Union
14 Telephone. Union Telephone does not have its -- well, its
15 service area is not involved here. And, neither are the
16 service areas of NHTA members, other than the TDS
17 Companies. And, we have, of course, a situation with the
18 same counsel representing the -- representing NHTA and the
19 TDS Companies, raising identical issues between them. So,
20 it's certainly duplicative. And, the interests of TDS
21 adequately represent those of NHTA members and of Union
22 Telephone.

23 CHAIRMAN GETZ: Well, it sounds like to
24 me that you're kind of agreeing that there is an interest

1 at least that's affected by this proceeding as it applies
2 to the three TDS companies.

3 MR. KERRY: I'm not agreeing with that,
4 Mr. Chairman. I'm agreeing that the -- I guess there's an
5 interest in the question of hearing, I mean, there's an
6 interest in the objections that they have raised. But
7 there is not a cognizable legal interest. I mean, here we
8 have an application that, you know, under procedural rules
9 of this agency doesn't call for an adjudicative hearing.
10 And, you know, a CLEC-10 application, under 431.01, is an
11 exception to the general requirement that a filing is an
12 adjudicative hearing.

13 CHAIRMAN GETZ: So, you're basically
14 saying, we don't even get to the issue of whether there
15 are rights, duties, interests, privileges affecting these
16 other parties?

17 MR. KERRY: That's exactly correct.

18 CHAIRMAN GETZ: Well, let's --

19 MR. KERRY: And, there's nothing in the
20 Petition to Intervene or the objections that identifies,
21 you know, a right, privilege, immunity that is at stake in
22 the Comcast application.

23 CHAIRMAN GETZ: Okay. Well, let's just
24 go around the room to hear responses to those, to the

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1 objection. Mr. Coolbroth.

2 MR. COOLBROTH: Thank you, Mr. Chairman.
3 This is the same Comcast Phone we believe that filed a
4 Petition to Intervene itself in the TDS Alternative
5 Regulation case. And, in that case, they said that they
6 sought to intervene "to provide evidence to correct the
7 suggestion that because Comcast's cable affiliates provide
8 broadband video and data service in some exchanges served
9 by the TDS Petitioners, that customers in these exchanges
10 have access to voice services from Comcast Phone." In
11 other words, they believed that there was a factual
12 assertion in that case that was not accurate.

13 CHAIRMAN GETZ: But it seems to me he's
14 making a different argument about a threshold issue of
15 "there shouldn't even be an adjudicative proceeding." Do
16 you have a response to that?

17 MR. COOLBROTH: We do, Mr. Chairman.
18 They have filed a petition which states that they are
19 going to provide a residential voice service that nobody
20 can buy and a resale business service that we can't
21 believe that they intend to offer. They are seeking
22 certification based on what we believe are not correct
23 assertions of what their business plan is. We believe
24 they intend to offer an IP-enabled voice service, we

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1 believe they intend to use a private carrier to provide
2 backhaul for that service, and that they haven't told the
3 Commission that. We believe that, therefore, this
4 registration really joins the issue about how this state
5 is going to regulate IP-enabled voice service, and whether
6 private carriers that provide backhaul service are
7 entitled to be certified as public utilities in New
8 Hampshire.

9 That is a basic set of factual issues.
10 There is basic policy being made that we believe the facts
11 warrant commencing an adjudicative proceeding, and that
12 this should not slide under the door.

13 CHAIRMAN GETZ: Okay. Well, we'll get
14 back to what type of adjudicative proceeding later. But
15 let's -- Mr. Rothfelder, do you have anything on your
16 Petition to Intervene and the objection?

17 MR. ROTHFELDER: Yes.

18 MR. COOLBROTH: Mr. Chairman, we do have
19 further argument on the Petition to Intervene. You asked
20 me about the adjudicative -- the need for the Commission
21 to commence an adjudicative proceeding. We have other
22 responses which we could raise at the appropriate time.

23 CHAIRMAN GETZ: All right. Well, let's
24 finish up with you then, before we turn to Mr. Rothfelder.

1 MR. COOLBROTH: In the TDS case, Comcast
2 asserted that, because it had factual information to bring
3 to the attention of the Commission, that formed the basis
4 for their intervention. They further pointed out to the
5 Commission "The PUC nevertheless may allow intervention",
6 and a quote within a quote, "at any time, upon determining
7 that such intervention would be in the interests of
8 justice and would not impair the orderly and prompt
9 conduct of the proceedings." Citing RSA 541-A:32,II. So,
10 in their case, that was the standard that they proposed to
11 the Commission.

12 They claim in this case that we cannot
13 purport to represent our customers. And, yet, in that
14 case they said "Telephone customers within the TDS
15 Petitioners' exchanges as well as current and potential
16 competitors such as Comcast Phone could be adversely
17 affected if a decision on the TDS Petitioners' petition
18 were made on an incomplete or inaccurate record."
19 Representing -- Presumably representing Comcast customers
20 in that case, which they apparently asserted that they can
21 do, but we cannot do here.

22 Comcast asserted that the result in that
23 case "would affect Comcast's interests in obtaining
24 interconnection agreements with the TDS Petitioners to

1 expand local exchange competition in New Hampshire." And,
2 then, finally, they said "Because their intervention will
3 provide material evidence on a central issue before the
4 Commission and will not delay the proceeding, Comcast
5 Phone should be permitted to intervene." We assert the
6 identical thing in this case.

7 Comcast says that we do not have "a
8 cognizable legal interest in the outcome." They believe
9 that we are here based on our "curiosity". Well, this
10 couldn't be further from the truth. As I pointed out, we
11 believe fundamental issues of telecommunications policies
12 are implicated in this petition.

13 And, in terms of legal interests, they
14 intend to provide service certainly in the TDS service
15 territory. If we expect, as we expect their legal
16 position is, their IP-enabled service is not a
17 telecommunications service, a determination, at least
18 indirectly, that that's the case would enable them to
19 commence providing services in the service territory of
20 Granite State Telephone and other NHTA companies. They
21 intend to take business away from incumbent carriers.
22 And, they intend to do so on a different regulatory basis
23 from the incumbent carriers. They intend also to
24 implicate and create the rights to obtain wholesale

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1 services from incumbent carriers. They are using -- we
2 expect intend to use this certification to obtain
3 interconnection, perhaps to obtain unbundled elements,
4 network elements, certainly to obtain numbering resources.

5 In stating their position, the Comcast
6 response relies heavily on the Commission's decision in
7 the North Atlantic Energy Corporation case, the
8 Commission's Order Number 24,007. And, I remember the
9 North Atlantic Energy case. That was the case related to
10 the sale of Seabrook Station. I represented United
11 Illuminating Company in that case. And, the proposed
12 intervenor in that case, the Commission will remember, was
13 the Aziscoos Lake Campers Association, which had a
14 disagreement with FPL over the management of water levels
15 in the Aziscoos Lake in northern Maine, and were obviously
16 using the Seabrook sale proceeding as leverage to gain
17 concessions from FPL with respect to water levels on the
18 Aziscoos Lake. The Commission correctly determined that
19 the Aziscoos Lake Campers Association did not have a
20 legally cognizable interest in the sale of the Seabrook
21 Station. This is nothing like that case.

22 We believe that this -- that the issues
23 raised by this registration affect who can enter the
24 market, what rules will govern entering into the market,

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1 and what intercarrier obligations will be owed to these
2 new interests. We think this is the case that warrants
3 the petition of the participation of these parties and
4 warrants adjudication by the Commission. Thank you.

5 CHAIRMAN GETZ: Thank you.

6 Mr. Rothfelder.

7 MR. ROTHFELDER: Thank you. On behalf
8 of the Union Telephone Company, we're also not here as a
9 matter of curiosity. Counsel for Comcast said that --
10 previously said that we don't have a legal interest,
11 focusing on legal, well the statute talks about
12 substantial interests, not legal. And, we believe we meet
13 that standard. No, this petition does not involve our
14 service territory. But this petition is a matter of first
15 impression for this Commission. It's a petition for CLEC
16 status in an area that is served by an entity with less
17 than 25,000 access lines and for entities that are under
18 the Rural Company Exemption in the federal Telecom Act.
19 Union Telephone Company also fits into those categories.
20 Because it's a case of first impression, and for all the
21 reasons that Attorney Coolbroth indicated, this case, in
22 essence, is setting telecom policy in New Hampshire, will
23 be the precedent, the mold, the way that it's looked at
24 and perceived as future such competitive applications are

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1 made.

2 Union Telephone Company has substantial
3 interest in how this telecom policy is developed. That's
4 why we're here today and why we seek to be an intervenor.
5 And, we could go on about the issues that we intend to
6 raise, but that, in a nutshell, or, you know, today later,
7 assuming we are an intervenor, we're going to be saying as
8 a preliminary matter what some of the issues are. We
9 think some of them will include some of those raised by
10 Attorney Coolbroth. We think jurisdictional issues of the
11 Commission need to be addressed when you take this action,
12 potentially looking at certification in an area with less
13 than 25,000 access lines, when the New Hampshire
14 Commission -- statutes expressly direct the Commission to
15 treat those areas differently. How does the Commission
16 address that statute? This is the first time in a formal
17 proceeding that that's addressed. And, even if it has
18 through rulemakings touched upon that, jurisdiction is
19 always open to review and look at whenever the Commission
20 takes an act. This being a matter of first impression, we
21 think it's appropriate for Union Telephone to be here,
22 it's in our interest, and providing our intervention is
23 indeed essential.

24 CHAIRMAN GETZ: Thank you.

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1 Ms. Hollenberg.

2 MS. HOLLENBERG: Thank you. Generally
3 speaking, the Office of Consumer Advocate supports the
4 entry of competitive telecommunications providers in
5 service territories of incumbent providers, particularly
6 those which seek to serve residential customers. At this
7 time, the Office of Consumer Advocate supports Comcast's
8 application.

9 CHAIRMAN GETZ: Well, let's just speak
10 to Petitions to Intervene. Do you have any?

11 MS. HOLLENBERG: I'm sorry. We don't
12 take a position.

13 CHAIRMAN GETZ: And, Ms. Ross, any?

14 MS. ROSS: Staff does not object to any
15 of the Petitions to Intervene.

16 (Chairman and Commissioners conferring.)

17 CHAIRMAN GETZ: As a matter of process,
18 what we're going to do is we're going to hear the
19 positions of the parties as we would normally do, and that
20 may be helpful in informing our decision on the Petitions
21 to Intervene, and then take a few minutes recess so I can
22 read through the objection from Comcast. And, then, we'll
23 come back and make our ruling on the Petitions to
24 Intervene and see where we go from there. But, in terms

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1 of statements of the positions of the parties, let's start
2 with TDS, Mr. Coolbroth, you have made the motion for the
3 hearing. And, then, we'll go to, if NHTA has something
4 separate, then to Union, the Consumer Advocate, Staff, and
5 then Comcast will have the opportunity to go last on
6 statements of positions. So, Mr. Coolbroth.

7 MR. COOLBROTH: Thank you, Mr. Chairman.
8 As I indicated in my remarks regarding intervention, the
9 New Hampshire Telephone Association and the TDS Companies
10 believe that this case raises very serious issues
11 regarding the telecommunications policy and regulation in
12 New Hampshire. And, it arises in the context of a filing
13 by Comcast that we believe is grossly flawed. Comcast has
14 presented the issues as though Comcast were planning to
15 provide its digital phone service, they provided a tariff
16 to the Commission related to residential service, which
17 lists down basic exchange and provides a whole bunch of
18 terms and conditions. And, then, at the end, notes that
19 anybody trying to sign on after a date in 2001 can't have
20 that service. Since Comcast has never provided that
21 service in the TDS exchanges, that service is, obviously,
22 not available to the TDS customers. So, there is no
23 holding out in the filing by Comcast that it intends to
24 provide to the public telephone service. Although Comcast

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1 would have the Commission narrowly focus on the form for
2 registration that's in the Commission's rules, what
3 Comcast does not also point out is that fundamental to a
4 certification by the Commission is a determination that
5 they should be entitled to be treated as a public utility
6 under New Hampshire law. And, central to that issue is
7 whether or not they're providing telephone service for the
8 public. So, they have not indicated in their filing, have
9 not provided an indication that they intend to provide any
10 residential exchange service in New Hampshire. Their
11 tariff does include a business service offering, which,
12 from what we can tell, appears to be a resale offering to
13 resell TDS Telecom's business service. We highly doubt
14 that they have any intention of doing that, but that's
15 what they have put in their tariff.

16 We believe that, first of all, the
17 Commission should explore factually whether they intend to
18 be a reseller of TDS's telecommunications service in the
19 TDS exchanges. We doubt it, but they should tell the
20 Commission one way or another whether that's what they
21 plan. And, if so, then their certification should be as a
22 reseller, and that makes a difference. If they're not
23 facilities-based, they don't get interconnections, they
24 don't get numbers, and so forth. If they're going to

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1 provide a facility-based service, whether it be to
2 business or to residential customers, they should tell the
3 Commission what that service is. The Commission and the
4 parties shouldn't be left to guess what Comcast intends to
5 provide. We believe that they should start over and file
6 with the Commission a petition that says what it is they
7 plan to do. They have started a similar proceeding in
8 Vermont, and in Vermont they have explained what it is
9 they plan to do. They plan to offer digital voice
10 service, which they claim is an IP-enabled service that
11 you don't regulate. And, they plan to have an affiliate
12 that provides backhaul to the IP voice company. If that's
13 what they're proposing in New Hampshire, they should file
14 an appropriate filing with the Commission that sets that
15 out, and then the Commission and the parties and the Staff
16 can review what the legal and regulatory implications are
17 of that service offering.

18 Therefore, our view is that Comcast
19 should either withdraw or the Commission should reject the
20 filing that they have made, and we should start over and
21 properly frame the issues with a filing that says what it
22 is Comcast, in fact, claims to do. Thank you.

23 CHAIRMAN GETZ: Is that for both TDS and
24 NHTA?

1 MR. COOLBROTH: Yes, it is.

2 CHAIRMAN GETZ: Mr. Rothfelder.

3 MR. ROTHFELDER: Thank you, Chairman
4 Getz. Union Telephone similarly would support an
5 investigation of exactly what services are actually being
6 proposed to be provided, and would plan to participate in
7 reviewing that, whether actively pursue that or just
8 review the data and the service, that would remain to be
9 seen in the proceeding.

10 Again, you've asked for preliminary
11 statements of issues. We think the jurisdiction issue is
12 something, at least as a preliminary matter, is worth
13 raising. RSA 374:22-f explicitly states that there should
14 not be certification in such territories and facilities
15 and services unless the utility consents to it. The
16 Commission may not like that statute, there may be federal
17 preemption arguments related to that statute. But, as a
18 jurisdictional matter, the question is, does this
19 Commission have the authority to say "The Legislature got
20 it wrong in 374:22-f, and we have the right to override
21 that." The flip side is to say "No, we don't have that
22 authority. Federal preemption arguments, to the extent it
23 exists, deals with the entire State of New Hampshire, not
24 just the Commission. And, what I guess I'm saying is, the

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1 Commission is a creature of statute. It's not clear it
2 has the right to make that call and say that it's going to
3 ignore 374:22-f and/or rewrite it. To the extent the
4 Commission rejects that argument, the question is, is
5 there any aspect of what's in 374:22-f which would require
6 the Commission to give this matter additional review,
7 consideration, or thought, or, in its rewriting of the
8 statute, it totally obliterates it. We think that's,
9 again, as a preliminary matter, an issue for this
10 Commission to address that the other parties have not yet
11 picked up on.

12 Finally, if the Commission is to certify
13 in these areas, the services that have been provided and
14 the basis that they're being allowed to be provided is
15 important as far as equitable treatment of carriers, and
16 as far as whether there are barriers to entry all of a
17 sudden to the incumbent to provide the services on the
18 terms and conditions it would like to and that its
19 competitors are allowed to. Those are both federal
20 telecom issues and equitable treatment under the state
21 statutes. We think all those, and this is a preliminary
22 matter again, are things that Union sees in its first
23 blush with Union counsel, first blush review of this
24 matter, whether, you know, you can aggressively pursue all

1 those issues or not or this matter settles is something
2 for another day. But you asked us to note issues on a
3 preliminary basis, those are what we see out there. Thank
4 you.

5 CHAIRMAN GETZ: Thank you. Did you have
6 anything additional, Ms. Hollenberg?

7 MS. HOLLENBERG: No thank you.

8 CHAIRMAN GETZ: Ms. Ross.

9 MS. ROSS: Thank you. With regard to
10 the application, Staff supports the Comcast application.
11 Comcast is already serving as a CLEC in most areas of the
12 state that are now served by FairPoint. We believe that
13 374:22, which is the general franchise provision of our
14 statutes, gives the Commission statutory authority to
15 grant an operation in a -- a Telecom CLEC operation. We
16 believe that the Commission's order nisi got it right with
17 regard to 374-F. That, because of the federal -- 1996
18 Federal Telecommunications Act, no state can impede the
19 entry of competitors into any service territory,
20 regardless of whether it is an exempt rural service
21 territory under that statutory scheme.

22 With regard to the arguments by TDS
23 that, if the business service offered by Comcast is a
24 resale service, that somehow that should affect the CLEC

1 registration, our rules -- the Commission's rules do not
2 distinguish, in CLEC registrations, between resale
3 services, leased facility services, or owned facility
4 services, all CLEC registrations are granted regardless of
5 the underlying type of competitive service that's offered.
6 And, the Commission has not differentiated in its orders
7 approving CLEC applications between those services.

8 The discussions of all of Comcast's
9 other service offerings Staff believes are irrelevant.
10 The business service alone is a sufficient basis for the
11 Commission to grant the CLEC registration. And, in
12 addition, as indicated in the order nisi, Comcast has two
13 years to come, to actually offer what we consider a
14 qualified competitive telecommunications service to
15 customers in the franchise areas that it's requesting
16 registration in. And, it isn't necessary to try to
17 litigate today what Comcast may or may not offer in the
18 next two years. If, at the end of two years, Comcast has
19 failed to offer a telecommunications service, any party,
20 and the Commission on its own motion or its Staff
21 recommendation, could terminate its registration.

22 With regard to issues of whether or not
23 Comcast IP-enabled services are telecommunications
24 services or information services under the federal

1 regulatory scheme is a question that this Commission has
2 not determined, and it is not a question that the
3 Commission needs to take up at this point. Registration
4 of a CLEC is simply allowing that CLEC the opportunity to
5 provide appropriate services within our New Hampshire
6 service territories. And, the permissive approach to that
7 registration that this Commission has consistently
8 followed and as reflected in its rules is consistent with
9 the federal policy encouraging telecommunications services
10 within the states. And, for those reasons, we agree with
11 Comcast that it's not necessary to have an adjudicative
12 hearing on the issues raised, and that there's sufficient
13 information in the CLEC application for the Commission to
14 simply approve the registration and take up issues
15 regarding disputes over interconnection rights and
16 obligations or disputes over whether services are being
17 offered within the two year time frame in separate
18 proceedings.

19 CHAIRMAN GETZ: Thank you. Mr. Kerry.

20 MR. KERRY: Thank you. Mr. Chairman,
21 I've listened to the incumbents, and I have to say that
22 we're still puzzled by why we're here. Other than the
23 statement that "Comcast intends to take business from the
24 incumbents", we have not heard a basis for the proceeding

1 that these would-be intervenors are seeking. As I said
2 before, this is a simple registration statement. And,
3 under PUC 202.01, that is an exception to an adjudicative
4 proceeding. So, it is not clear why this simple
5 application to carry forward in these territories the same
6 carrier that provides service and provides service under
7 the statement of rates and charges that were submitted
8 with the CLEC-10, you know, why that shouldn't extend
9 beyond what are now the FairPoint territories into other
10 parts of the state. And, PUC 431.02 spells out the
11 grounds for denial of that sort of registration. And,
12 there's nothing that TDS or any of the other incumbents
13 have alleged that says "there's one of those grounds that
14 is presented here." Instead, we've heard, and in the
15 papers, by my count, there's about two dozen issues that
16 they seek to raise. As Ms. Ross said, those are issues
17 that can be dealt with, if they arise, as Comcast Phone
18 begins to unfold service in those territories. It is
19 premature to deal with those at the entry stage.

20 And, you know, the only thing that has
21 any relationship at all here in the issues that we've
22 heard to the content of that CLEC-10 is the allegation
23 that somehow service that would be provided may be
24 different from what was in the statement that Comcast

1 Phone has filed. And that statement represented the
2 services that were offered by Comcast Phone at the time
3 that it filed that application. The same services that it
4 provided then within the FairPoint territories. And, as
5 Ms. Ross indicated, under the terms of the nisi order,
6 Comcast Phone has two years to begin providing service
7 within those territories. So, certainly, the PUC
8 regulations, the order, and the regulations relating to
9 the filing of statements of charges by a CLEC all
10 contemplate that those services can change over time. So,
11 there's no basis under the entry requirements to try to
12 deal with those issues, as the incumbents are trying to
13 propose here, to deal with those issues before Comcast
14 Phone ever provides service within those territories.

15 And, as far as I'm aware, there's no
16 CLEC registration that has ever been subject to a hearing
17 prior to entry. So, what is the basis here for treating
18 Comcast Phone differently? The only basis that we have
19 heard today is Mr. Rothfelder's argument that, because
20 this involves rural territories, that there's a basis
21 under 374:22-f to treat Comcast differently. And, it's
22 not something, interestingly, that TDS or NHTA have
23 raised. And, I don't think there's any question that read
24 literally is requiring the consent of an incumbent, that

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1 that statute is preempted by federal law, both by
2 Section 253, as an unreasonable barrier to entry, and by
3 Section 251-F, which establishes a mechanism for dealing
4 with rural ILECs and for establishing interconnection
5 obligations of those -- of those ILECs. But, you know,
6 this Commission has harmonized that statute with federal
7 law and with the other entry provisions of New Hampshire
8 law in the nisi order, and, as Ms. Ross said, "the
9 Commission got it right."

10 And, in addition to that, of course, the
11 Legislature has passed the repeal of 374:22-f. That's
12 before the Governor. And, so, any -- that aside, any
13 conceivable claim to any basis for the hearing evaporates.
14 But repeal or no repeal, this Commission is headed down a
15 very troublesome road if it conducts a hearing here and
16 accedes to the notion that a group of incumbents can come
17 in and raise a host of questions about a potential
18 entrant's business plan or its technical plans or all of
19 the other issues that these incumbents seek to raise.

20 There's no question that an outright
21 veto of competition is an unreasonable barrier to entry,
22 but so are procedures that give incumbent ILECs an
23 effective veto by allowing them to throw up this sweeping
24 array of issues and say, you know, "we've got to conduct

1 this adjudicative hearing, you know, from now until we get
2 to the bottom of all these things", and thereby delay
3 entry.

4 I'm confident that Comcast Phone doesn't
5 have to pursue any of those federal issues, because this
6 Commission has been very clear that competition is the
7 best telecommunications policy. And, it's been very clear
8 in its entry procedures, as Ms. Ross described. And,
9 that's a process that Comcast has followed here. It is
10 the process that this Commission followed in its nisi
11 order. And, that is the process that this Commission
12 should continue to follow. Thank you.

13 CHAIRMAN GETZ: Thank you.

14 MR. ROTHFELDER: If I could briefly
15 respond?

16 CHAIRMAN GETZ: Well, we're going to
17 give Mr. Coolbroth, who started this round, he gets an
18 opportunity to rebut, based on the normal procedures of
19 the Commission. Did you have something, Mr. Coolbroth?

20 MR. COOLBROTH: Yes, Mr. Chairman, just
21 briefly. The filings that initiated this proceeding we
22 say do not accurately reflect what the proponent plans to
23 do. We don't file pleadings like that. We think that
24 makes this case different, number one. They have filed

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1 their tariffed service for digital phone is a service that
2 they have applied to the FCC to discontinue completely,
3 and that's been filed. I did not hear Mr. Kerry suggest
4 to this Commission that Comcast intends to engage in the
5 business of selling business exchange service as a
6 reseller of TDS Telecom service. That's what's in their
7 filing. We don't think that's accurate, but we don't
8 think that's what they intend to do.

9 With regard to 374:22-f, Mr. Kerry did
10 mention the repeal statute. What he didn't mention is
11 that that statute, when the Governor signs it and when it
12 becomes effective, sets a set of standards that the
13 Commission will use in determining the entry of
14 competitive carriers. So, it's not simply a repeal of
15 374:22-f. It's a new statutory framework, with new
16 standards for the Commission to use in evaluating such
17 petitions.

18 Finally, we ask if the issue of
19 regulation of IP-enabled services, when we know that's
20 what they plan to do, is not to be adjudicated here, when
21 will it be adjudicated by the Commission? We believe that
22 this is an important issue with telecommunications policy
23 in New Hampshire, and we believe that the Commission
24 should address it. That that's what this proceeding, this

1 petition is all about, and we should address that issue.

2 Thank you.

3 CHAIRMAN GETZ: Do you have one point to
4 make, Mr. Rothfelder?

5 MR. ROTHFELDER: I think so. I heard
6 Commission Staff, as well as Comcast counsel, say "the
7 Commission got it right" and talk about the federal
8 preemption arguments. I didn't see in the Commission's
9 order or any of the statements today or any filings any
10 citation to indicate that, if that argument is correct,
11 that this Commission has the right to ignore the statutes,
12 to override the statutes, based on federal law. That is a
13 different argument.

14 What I'm saying is, this Commission is
15 bound by its statutes --

16 CHAIRMAN GETZ: But, basically, you're
17 repeating the argument you made in the first instance?

18 MR. ROTHFELDER: No, if you give me two
19 more sentences.

20 CHAIRMAN GETZ: Okay.

21 MR. ROTHFELDER: That what I didn't say
22 was that, to the extent there is the federal preemption,
23 they need to go to the Legislature, to the Governor, or to
24 the court of jurisdiction to address that, not to this

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1 Commission.

2 CMSR. BELOW: I have a question for Mr.
3 Coolbroth. Under what statute or PUC rule precisely would
4 you assert that we should turn this non-adjudicative CLEC
5 application into an adjudicated proceeding?

6 MR. COOLBROTH: RSA 362:2 defines what a
7 public utility is. The case of Appeal of Paul Zimmerman,
8 141 New Hampshire 605, states that "The central inquiry is
9 whether Zimmerman offers his telecommunications service to
10 the public without discrimination." That basic
11 proposition of what it takes to be certified as a public
12 utility in New Hampshire is what I'm relying on.

13 CMSR. BELOW: Okay.

14 CHAIRMAN GETZ: I think, at this point,
15 we will take the recess I referred to previously. And,
16 I'm going to refrain from making a estimate of how long
17 that recess will actually be, but we will return as
18 promptly as we can.

19 (Recess taken at 10:52 a.m. and the
20 hearing reconvened at 11:53 a.m.)

21 CHAIRMAN GETZ: All right. I'm going to
22 address basically several motions first. With respect to
23 the Petitions to Intervene, RSA 541-A:32 gives agencies
24 broad discretion, and we find that the Petitions to

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1 Intervene should be granted, inasmuch as the parties have
2 demonstrated rights, duties, privileges, immunities, or
3 other interests that would be affected by this proceeding.

4 Secondly, with respect to the TDS motion
5 to reject the application and essentially start the
6 proceeding over, we deny that motion. With respect to
7 whether there should be or could be a hearing, Comcast
8 argues, based on PUC 202.01, that, and it would be
9 202.01(e), concerning request for Commission
10 determinations, which turns a competitive local exchange
11 carrier to PUC 4 -- Part 430, the argument is that, not
12 only is a hearing or adjudication not contemplated, but I
13 take the argument that it's precluded. And, we conclude
14 that you have to read PUC 202.01 and Part 430 in the
15 context of RSA 374:22, which goes to commencement of
16 business as a public utility under any franchise not
17 therefore -- actually, theretofore exercised in a
18 particular area. Which necessarily leads to RSA 374:26,
19 which requires "The Commission shall grant permission
20 when, after due hearing, determines that the exercise of
21 right, privilege, or franchise would be for the public
22 good."

23 So, we do conclude that some form of
24 hearing is appropriate in these circumstances. What we're

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1 going to do at this point is I'll give the parties an
2 opportunity to discuss what type of hearing or what extent
3 of hearing they believe should be conducted in this case.
4 I want to say, in the first instance though, from what
5 I've heard so far and from what we've read in the
6 documents, there seems to be three different types of
7 issues being raised here. One is, "does Comcast qualify
8 in the first instance and should it be approved, its
9 registration as a CLEC?" There are some other issues that
10 seem to have been raised by the parties about what might
11 happen or might not happen in the future, which really
12 seems to be an enforcement issue, that doesn't go to the
13 issue of whether they should be approved in the first
14 instance.

15 And, there seems to be another set of
16 issues that go to jurisdictional issues about other types
17 of operations Comcast may or may not have with respect to
18 Internet services that would not be part and parcel to
19 this CLEC application. And, maybe there should be another
20 hearing, maybe not, but that would be something we would
21 deal separately from the issue of whether they should be
22 qualified as a CLEC in New Hampshire.

23 With respect to the issues of them
24 qualifying in the first instance, there's apparently some

1 legal arguments. There seem to be perhaps some subset of
2 issues that might be arguably construed as factual issues.
3 But, at this point, I'm not understanding why this -- such
4 a proceeding couldn't be abbreviated through a set of
5 stipulated facts or even some, and I'm particularly
6 thinking of some of the issues that TDS raised, what they
7 think or suspect might be happening, couldn't be addressed
8 in the technical session today.

9 But, with that context, and I don't
10 know, is there anything else from the Bench?

11 CMSR. BELOW: No.

12 CHAIRMAN GETZ: All right. Then, we'll
13 start with TDS, in terms of -- I want to get a better idea
14 of what type of proceeding TDS and NHTA thinks we should
15 be conducting.

16 MR. COOLBROTH: Thank you, Mr. Chairman.
17 We believe that, first of all, the Commission should
18 determine what forms the basis of the application by
19 Comcast to engage in business as a public utility. We say
20 that --

21 CHAIRMAN GETZ: You mean other than what
22 they have already set forth in their application?

23 MR. COOLBROTH: Yes.

24 CHAIRMAN GETZ: Or, is it an issue of --

1 what I really need to understand, are you saying, are they
2 legal issues or is it things that they say in their
3 application that you don't think are accurate or are
4 things that they should have said that they didn't say? I
5 really need to understand, and I really think this should
6 be a very focused and abbreviated type of proceeding.
7 And, if you think it's otherwise, then I've got to hear a
8 good argument why something else should be gone.

9 MR. COOLBROTH: I'll try to do this.
10 The authorization to engage in business as a public
11 utility entails telephone service to the public. They
12 have made representations to the Commission regarding
13 certain telephone services that their petition suggests
14 that it would provide to the public. One of which, by its
15 terms, is not available. The other of which we believe we
16 have a factual dispute as to whether that they -- they
17 will hold themselves out to provide that service.

18 Apart from that, factually, our
19 understanding, based on Comcast's business plan elsewhere
20 within New Hampshire, and what they have testified or
21 presented prefiled testimony on in Vermont, indicate that
22 they are -- what they really are going to do is something
23 different, it's IP-enabled, and it raises a whole
24 different set of issues. And, with respect to those

1 issues, what -- they take the position that the IP-enabled
2 service is not a telecommunications service, which merits
3 no action by this Commission. That's their position.
4 They have a backhaul service, which, from what we can see
5 is a private carriage service, which is not a public
6 utility service. So, what we see is an application with
7 --

8 CHAIRMAN GETZ: Okay, we've heard these
9 arguments. But how are you proposing we address these
10 arguments? Are you proposing prefiled testimony by
11 witnesses on both sides, discovery, briefs, six month to a
12 year proceeding? Rather than just hearing the arguments,
13 I want to understand what type of procedure we should
14 employ.

15 MR. COOLBROTH: I'm sorry, Mr. Chairman,
16 the process. We think, starting with the technical
17 session, that that's the best way, and from that we would
18 be able to make a recommendation.

19 CHAIRMAN GETZ: So, then, at this point,
20 you don't have a position on whether it could be an
21 abbreviated procedure, based on stipulated facts, or it's
22 going to require expert testimony from multiple persons?

23 MR. McHugh: Take one minute, Mr.
24 Chairman.

1 (Atty. McHugh and Atty. Coolbroth
2 conferring.)

3 MR. COOLBROTH: We need to have a basic
4 understanding, Mr. Chairman, about what it is Comcast
5 proposes to do, and from that we could make a judgment
6 about what procedure is required. We had proposed that it
7 be done with a refiled petition that sets forth
8 straightforward what they intend to do. Perhaps this can
9 be done through some other procedural means. I think
10 that, in a technical session, if we can explore what it is
11 they plan to do, the parties working together can come up
12 with solutions, identify what the factual issues are that
13 arise from that, and make -- prepare a recommended
14 schedule for the Commission. I think a technical session
15 is an appropriate vehicle to be able to flesh that out.
16 We don't have enough information from Comcast to be able
17 to tell you at the moment.

18 CHAIRMAN GETZ: Okay. Thank you. Mr.
19 Rothfelder?

20 MR. ROTHFELDER: We have nothing to add
21 to that. Thank you.

22 CHAIRMAN GETZ: Ms. Hollenberg?

23 MS. HOLLENBERG: The OCA would defer to
24 the Commission in terms of its decision about how the

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1 process should proceed.

2 CHAIRMAN GETZ: Thank you. Ms. Ross?

3 MS. ROSS: Staff will defer to the
4 Commission as well.

5 CHAIRMAN GETZ: Well, we like the sound
6 of that so far.

7 (Laughter.)

8 CHAIRMAN GETZ: Mr. Kerry.

9 MR. KERRY: Well, since we didn't think
10 any hearing was required, I'm not sure I could go so far
11 as to say "we'll defer". But we certainly agree, if there
12 is a hearing, it should be, as you said, one that is very
13 focused and abbreviated. And, I think, in terms of the
14 issues that you've identified, I'm hearing from Mr.
15 Coolbroth issues that go beyond that. And, when he's
16 asking to look into things that have been filed in
17 Vermont, in terms of what it is that Comcast broadly, not
18 Comcast Phone, is going to do in terms of IP-enabled
19 services, etcetera, I think that sounds to me like it's
20 trying to shoehorn in the category of issues that the
21 Commission has indicated are not part and parcel of this
22 proceeding, and, you know, maybe for some later
23 proceeding.

24 You've identified an issue that "does

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1 Comcast Phone qualify as a CLEC?" And that, it seems to
2 me, is a very simple and narrow issue. Is there some
3 service that Comcast Phone, Comcast Phone, that's the
4 registered CLEC here, is going to provide that is a common
5 carrier service? I think it's something, frankly, that
6 the Commission has already addressed by certifying this
7 same entity as a common carrier to provide service in the
8 rest of the state. But that is a very narrow issue, and
9 it goes beyond what Mr. Coolbroth is suggesting. I don't
10 think there's any great mystery about that issue. TDS --

11 CHAIRMAN GETZ: Let's return back to the
12 process --

13 MR. KERRY: Let me just finish, because
14 I think it's an important fact. TDS has signed an
15 interconnection agreement with the Comcast Phone entity in
16 Vermont. It is negotiating an interconnection agreement
17 voluntarily here in New Hampshire. And, I think, given
18 the Commission's ruling in the Alt. Reg. proceeding, has
19 an interest in pursuing competition. And, so, I think, in
20 that context, it has plenty of information about the
21 services that Comcast is providing in the facilities that
22 it needs to provide those services.

23 CHAIRMAN GETZ: Okay. But, in terms of
24 process, I guess you're saying that you're seeing

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1 something more abbreviated and focused.

2 MR. KERRY: Yes, I think --

3 CHAIRMAN GETZ: But are you prepared to
4 move into the technical session and see if there can be
5 some agreement among the parties on a recommended --

6 MR. KERRY: I would be willing to do
7 that. But I think these are pretty narrow legal issues,
8 and I think we can see in the technical session we can
9 define what the factual parameters are for those and what
10 it takes to move forward on that, to get those legal
11 issues before you.

12 (Chairman and Commissioners conferring.)

13 CHAIRMAN GETZ: Okay. Is there anything
14 else anyone wants to bring up this afternoon?

15 (No verbal response)

16 CHAIRMAN GETZ: Okay. Hearing nothing,
17 then what we'll do is let the parties proceed into a
18 technical session, recognizing that there's some potential
19 for a dispute on what the procedures might be. We'll wait
20 and hear back whether there's a joint proposal, and
21 failing a joint proposal, ask that the parties set forth
22 their positions. And, based on whatever is submitted to
23 us, we'll make a determination as to the process for
24 prosecuting this proceeding. And, it appears there's

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1 nothing else, so we'll close the prehearing conference and
2 await a recommendation from the parties.

3 MR. KERRY: Thank you.

4 CHAIRMAN GETZ: Thank you, everyone.

5 (Whereupon the prehearing conference
6 ended at 12:08 p.m.)

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