

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

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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

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and Comcast IP Phone II, LLC:
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Stacey Parker, Esq. (Comcast)

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

Reptg. Northern New England Telephone
Operations d/b/a FairPoint Communications:
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Court Reporter: Steven E. Patnaude, LCR No. 52

ORIGINAL

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P R O C E E D I N G

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

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

Let's begin with appearances, and then I'll talk about the game plan for how we're going to work 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. Platzner, 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. Platzer, 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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