

Public Service Commission - Technical Conference
February 25, 2016

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TRANSCRIPT OF THE
PUBLIC SERVICE COMMISSION
TECHNICAL CONFERENCE

THURSDAY, FEBRUARY 25, 2016

NEW YORK LAW SCHOOL
185 WEST BROADWAY
BOROUGH OF MANHATTAN

Reported By:

Jennifer Cassella

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HEARING CONVENED AT 9:33 a.m.

PRESENT:

Moderators:

KAREN GEDULDIG, Director, Office of
Telecommunications, DPS

GRAHAM JESMER, Assistant Counsel, DPS

Also Present:

AUDREY ZIBELMAN, Chairperson

GREGG C. SAYRE, Commissioner

PETER MCGOWAN, NYS Department of Public Service

MAUREEN O. HELMER, Partner, Barclay Damon, LLP,
(Cable Association)

TODD O'BOYLE, Common Cause

JOSEPH POST, Deputy General Counsel, NY, Verizon

MICHAEL J. SANTORELLI, Director, Advanced
Communications Law & Policy Institute

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MS. GEDULDIG: So I think we're going to get started. Thanks for coming to day two of our technical conferences and again, I'm Karen Geduldig. I'm Director at the Office of Telecom at DPS. I hope you're not too sick of me. And I'm joined today with Graham Jesmer who's an Assistant Counsel in the Department's Office of General Counsel. And thank you to our panelists for joining us today. Thank you to New York Law School for hosting us. We appreciate all of your work and partnership.

And so this panel today I think is a good followup to the conversations we were having yesterday on traditional systems and broadband. We're here to explore the legal and regulatory issues, things like the reclassification of telecommunications, whether or not the markets have worked or not worked, competition, leveling the playing field, what the State's obligations are to advance telecommunications services, and so I think we're going to get started.

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So our first question, it's a little bit of an intro to it, but as the staff put forward in our Telco assessment, there are a minimum set of regulatory interests that we have, consumer protections, affordability, equitable contributions, things like that, that should be administered by the State. And given that the consumers are moving away from traditionally regulated plain old television -- excuse me, telephone service to non or semi-fixed, semi-regulated fixed VOIP and wireless providers, is there a legal basis for State oversight over interconnected VOIP and/or wireless providers? And that's a big question so we're going to break it down into chunks and start with the wireless side.

So with respect to wireless, how would the Commission's reassertion of jurisdiction over the wireless industry impact the industry and consumers? And we thought we would start that with Maureen -- oh, I'm sorry, not Maureen, with

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2 Joe Post.

3 UNIDENTIFIED SPEAKER: Karen, could
4 you introduce the panelists because we
5 can't see?

6 MS. GEDULDIG: Oh, sure. I'm sorry.

7 So today we have Maureen Helmer
8 who's a partner at Barclay -- or unless the
9 panelists want to introduce themselves.
10 That would probably be a lot better.

11 MS. HELMER: Yeah, I'd be happy to.

12 Again, my name is Maureen Helmer. I
13 am partner at Barclay Damon and I'm here
14 representing the Cable Telecommunications
15 Association of New York, which at the
16 present time, is constituted of Time Warner
17 Cable, Cable Vision and Charter
18 Communications.

19 MR. POST: My name is Joseph Post.
20 I'm Deputy General Counsel for New York at
21 Verizon.

22 MR. SANTORELLI: Hi.
23 Michael Santorelli. I'm Director of the
24 Advanced Communications Law & Policy
25 Institute here at New York Law School, and

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2 welcome to everyone.

3 MR. O'BOYLE: Todd O'Boyle. I
4 Direct the Media and Democracy Reform
5 Initiative at Common Cause, and I am here
6 in Susan Lerner's place. She is the
7 Executive Director of Common Cause New
8 York.

9 MR. MCGOWAN: And just one note, we
10 did, I think, we had invited and hoped that
11 Richard Berkley would be able to join us
12 from PULP, but due to some injuries, he was
13 unable to join us.

14 MS. GEDULDIG: So thank you for
15 that. And again, welcome panelists.

16 So back to you, Joe. How would the
17 Department or the Commission's reassertion
18 of jurisdiction over the wireless industry
19 impact both the industry and consumers?

20 MR. POST: Thank you, Karen.

21 Let me start with the observation as
22 a policy matter. Seeking to assume
23 jurisdiction over intermodal services such
24 as VOIP and wireless would simply not be
25 the right thing for the Commission to do,

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2 whatever the legalities of the situation
3 are.

4 Yesterday, a number of panelists
5 pointed out the tremendous flow of
6 investment and innovation that is resulted
7 from the historically light touch -- light
8 regulatory touch that has been applied to
9 broadband and wireless. In that
10 environment and with that experience to
11 draw on, the Commission should be very
12 cautious about seeking to extend its
13 regulatory jurisdiction to cover new
14 traditionally unregulated services.

15 On the legal end, federal law, of
16 course, places some limits on the State's
17 ability to regulate cellular wireless
18 service. Under Section 332-C of the
19 Federal Act, there are restrictions on
20 State regulation of entry and State
21 regulation of rates. Moreover, the
22 Commission's regulatory jurisdiction over
23 CMRS is expressly limited by State law.

24 Section 5, Subsection 6 of the
25 Public Service Law states that,

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"Application of the provisions of this chapter -- this chapter means the Public Service Law -- to cellular telephone services is suspended unless the Commission no sooner than one year after the effective date of this subdivision makes a determination after notice in a hearing that suspension of the application of the provisions of this chapter shall cease to the extent found necessary to protect the public interest." As of this date, the Commission has issued no such notice, has held no such hearing, has made no such determination, and in our view, for some of the policy reasons that I've already stated, I don't believe it would be justified in making such a determination.

I think it's of some interest in this context that to date, some 40 states have prohibited wireless regulation, and since 1993 when Section 332-C was put on the books in its current form, no state has introduced new wireless regulation. I should emphasize that I am talking here

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about the sort of economic regulation, I guess one might call it, that is the Public Service Commission's principle concern. I don't think anyone doubts that wireless services can be subject to the general rules restricting businesses, rules on, you know, fraudulent conduct, fair credit reporting practices and so forth.

MS. GEDULDIG: So part of that question was how does the regulation or the reassertion of jurisdiction over wireless, how would that impact consumers? So I heard a lot about --

MR. POST: I think that a lot of the, you know, Ben Aaron told us yesterday that consumers have reaped tremendous benefits from the explosion of wireless services. There's been an incredible amount of investment and innovation. I think, you know, in my view that has been one of the major contributors to that has been the light regulatory environment. So my answer -- my direct answer to your question is I think it would disadvantage

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2 consumers by suppressing to whatever
3 extent, the incentives for investment in
4 innovation.

5 MS. GEDULDIG: Todd, is there -- do
6 you have some more input on that question
7 on the consumer side?

8 MR. O'BOYLE: We have a different
9 view. From all -- I'll end up sounding
10 like a broken record today because I think
11 the answer in so many of these -- to so
12 many of these questions is the authorizing
13 statute the 96 Act envisioned, mutually
14 reinforcing and backstopping regulation as
15 a compact of federal, state joint
16 regulation and for the public interest can
17 meet the necessity of the American public.
18 That lies at the heart of the statute and
19 it balanced the needs of consumers and
20 investors and providers.

21 I'll make a few points. One, I
22 don't believe there's any clear evidence
23 that there's any strong evidence that local
24 state level consumer protection has
25 dampened investment. In fact, we've seen

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2 an explosion in investment. I think this
3 applies actually at the federal regulatory
4 level that we have not seen as regulators
5 have increasingly been awake to the needs
6 to protect consumers and promote the public
7 interest. We have seen an explosion of
8 capital investment. The AWS-3 Auction was
9 record breaking in terms of the amount of
10 capital laid out for it. The charter is
11 presently poised to spend tens of billions
12 of dollars to buy Time Warner Cable
13 including right here in New York, and
14 Altice is investing billions of dollars to
15 buy Cablevision. So I think that puts paid
16 to the idea that consumer protection harms
17 investment and it also puts paid to the
18 idea that we need some kind of national
19 rules, and we should have federal only
20 regulation and the states have no role to
21 play.

22 There are several things to note
23 here. One, the Federal Communications
24 Commission gets something on the order of
25 100,000 consumer complaints a year. They

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2 are able to touch maybe a tenth of them.
3 So it makes all the sense in the world that
4 local regulators that are most in tune to
5 local needs would regulate and respond to
6 local complaints. I think that's -- it
7 makes a lot of sense and I think it
8 actually respects of principle of
9 subsidiarity.

10 Additionally, as we have seen, there
11 is a clear need for local Public Service
12 Commissions to step in and ensure that
13 quality service is provisioned, and we see
14 this as the -- as other states have done
15 away with their carrier or provider of last
16 resort, New York has been wise enough to
17 maintain it and that's ensured that service
18 are responded to and that our providers are
19 not able to walk away from their legacy
20 requirements.

21 So I think we'll probably get into
22 all of those and I think we'll
23 probably -- I wish I were here yesterday,
24 unfortunately I was not, but I suspect
25 we -- I fear I missed something but I think

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2 there's going to be some -- plenty of
3 opportunity to dive into more of these
4 points later.

5 MS. GEDULDIG: Sure. A followup to
6 both of these points, I think we all can
7 agree that the wireless and broadband
8 industries have enjoyed an explosion or
9 revolution in innovation that we've all
10 really benefitted from. But if these
11 services are critical and wireless is a
12 substitute for telephone, how do we ensure
13 that there are coverage -- that there is
14 coverage in the spotty or unserved areas
15 for cell service if there's no assertion of
16 jurisdiction? How do you balance the
17 innovation with the need for access?

18 MR. POST: I'm not sure I agree with
19 the position that criticality is somehow a
20 sufficient basis for litigation. Water is
21 critical, food is critical, clothing is
22 critical, but they're all sold in
23 competitive markets. The market
24 mechanisms, I think, and I guess I'm going
25 to reveal my philosophical biases here, the

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2 marketing mechanism has worked very well in
3 bringing the U.S. economy to where it is
4 today. Certainly the economy is having its
5 problems but they really shouldn't blind us
6 to the tremendous accomplishments that have
7 been made over the years and decades and
8 centuries.

9 And regulation should be a response
10 not to the criticality of services but to
11 market failures. I don't think we've seen
12 anything in the wireless space yet that
13 constitutes the kind of pervasive market
14 failure that would warrant a regulatory
15 response. It's not to say there haven't
16 been some problems. It's not to say that
17 consumers haven't had complaints, some of
18 which -- some proportionate which are
19 certainly legitimate, but there are
20 mechanisms to deal with that. And to say
21 that merely because of that situation,
22 merely because of the potential for
23 problems we need to have a regulation is, I
24 think, a dangerous assumption to make. And
25 I don't use the word dangerous lightly. I

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think it's easy to fall into the habit of saying gee, why wait until problems exist, why don't we put the mechanism in place to deal with them in advance?

But there is a depressing effect to regulation. I'm not an economist. I can't speak to the empirical data, but, you know, in the two decades I've been practicing regulatory law, I've had a chance to observe its operations. I understand and appreciate the areas in which it may be necessary, but also I've had a chance to observe the impacts that it can have on businesses and the impact it can have on focus.

I honestly do not believe, and, you know, this is as much a matter of philosophy as of empirical data, although I believe it's supported by empirical data, that more regulation is necessarily better and that it's necessarily risk free. We need surgical regulation that acts only where it's necessary and appropriate.

MR. JESMER: Joe, let me challenge

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2 you just a little bit. You mentioned
3 surgical regulation and I think, you know,
4 the question we're trying to get at is that
5 the Department staff, at least, has
6 expressed a desire for some minimum set of
7 regulatory principles in the study, or the
8 assessment, I should say, which Karen laid
9 out earlier; basic consumer protections
10 affordability, equitable contributions to
11 public funding, emergency response and
12 restoration. So, you know, from my
13 perspective, anyway, I think that is a
14 relatively light touch.

15 So what I would like to challenge
16 you on a little bit is to tell us where
17 that line would be if the Commission were
18 to go ahead and institute a proceeding to
19 research jurisdiction over wireless in a
20 hypothetical scenario? What would be the
21 bright line where it would become
22 depressing investment versus ensuring that
23 New York consumers are being protected, and
24 are being given information, and have a
25 forum for complaints, etc.?

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MR. POST: Well, I think that's the problem. I don't know that you can draw a bright line saying let's regulate this, not the other, because once the line starts moving, there's a natural inertia that tends to keep it moving until you have a fairly comprehensive regulatory environment.

Some of the areas that you mentioned I think are adequately dealt with by the market, some of them are adequately dealt with by existing federal regulation. Some of them are adequately dealt with by non-regulatory legal restraints, you know, emergency response, which I think is genuinely an important issue. I think staff and the Commission have done rather well in soliciting and obtaining the voluntary cooperation, not only of the wireless industry, but of other unregulated industries.

MR. O'BOYLE: May I speak to this?

I think emergency response really hits on a key aspect of this because

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2 emergency response only really works if you
3 have universal service, and universal
4 service does not exist in a purely
5 market-driven environment. Let's look at a
6 national example. The idea that you could
7 pick up a telephone, get a dial tone in Key
8 West and reach Barrow, Alaska with ten
9 digits, the market would never provide that
10 on its own. You could do a similar example
11 here in New York, the idea that you could
12 pick up a phone in some of the northern
13 regions of the State and easily dial
14 Midtown Manhattan with ten digits. This
15 sort of point-to-point universality of
16 service only happens in a regulated
17 environment and it's because the State
18 maintained its carrier of last resort
19 jurisdiction that the State was in a
20 position to compel Verizon to rebuild in
21 Fire Island after it attempted to degrade
22 and substitute with the voice line product.

23 So if -- you know, we can talk about
24 sort of the theoretical examples of a
25 creeping regulatory state and we can talk

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2 about, you know, white board and economic
3 theory, or we can talk about the reality on
4 the ground which is that consumers need the
5 reliability of point-to-point universal
6 service and regulators need to know that
7 service will be point-to-point if
8 universal, if the emergency response means
9 anything at all.

10 MR. SANTORELLI: Can I jump in?

11 MR. JESMER: Yeah, absolutely. If
12 anybody else wants to respond, feel free.

13 MR. SANTORELLI: Thank you. Just a
14 quick point.

15 So I think, at least the way it's
16 phrased in the question, it seems like you
17 might be putting the cart before the horse,
18 because it seems before you can reassert
19 jurisdiction you need to define a lack of
20 effective competition. And so it might be
21 better to, if that's the path that the
22 Commission wants to go down, to hold
23 whatever hearings are necessary to get to
24 that point and then identify the specific
25 problems that exist that constitute or

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2 contribute to what the Commission perceives
3 as lack of effective competitive and then
4 tailor regulatory responses to meet those
5 very specific needs. Because it sounds
6 like there might be already a framework in
7 mind that would kind of blanket the
8 industry when in fact there might be very
9 narrow problems that need to be addressed
10 and can be addressed in much more or less
11 intrusive ways.

12 And so, but I think also the
13 assessment and lots of other data already
14 highlights some of the problem areas,
15 getting back to the question about
16 availability. You know, there are
17 challenges still out there to deploying
18 that works, and we heard about this a lot
19 yesterday from Ben, from the CTIA and
20 others. You know, when we think about
21 where wireless isn't available in this
22 State it's usually in, you know, parks or
23 very densely -- or areas where there are
24 topographic challenges. A lot of those
25 areas have very restrictive policies when

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it comes to infrastructure deployment, where you can place a tower or an antenna. So those are areas that are right maybe for, or maybe even beyond the Commission's purview to, you know, maybe even at the local level to address those, to facilitate deployment in these challenging areas.

There might also be areas that are outside of those topographically challenging ones that have restrictive zoning ordinances. I know here in New York, for example, after Hurricane Sandy highlighted the fact that having your backup generators in the basement was not a good idea because they flooded, but zoning ordinances prevented the carriers from having their generators on top of buildings. I think that's changed since then but that highlighted the problem that needed to be addressed because that was also at the local level.

So from a regulatory standpoint, I think if there -- having again, going in a very deliberate manner and identifying the

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2 challenges that need to be addressed and
3 figuring out narrow solutions to those, but
4 I would just say that having the Commission
5 make the determination that there's a lack
6 of effective competition in the wireless
7 space I think would be a pretty shocking
8 conclusion, even if it does go through the
9 process of having hearings and gathering
10 information because assessment as well as
11 even the FCC, which has declined to label
12 the national market effectively
13 competitive, but it hasn't said that it's
14 not competitive or that it's uncompetitive.
15 They both need assessment and federal
16 wireless studies. There's a rich amount of
17 data to show that there is in fact
18 effective competition, but if there are
19 instances again, where there are narrow or
20 specific challenges or issues that need to
21 be addressed, then the better approach,
22 arguably, is to target those rather than do
23 a sort of blanket approach.

24 MS. HELMER: This issue obviously
25 applies to the VOIP side of the house as

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2 well as the wireless side of the house, so
3 my comments I guess are a little more
4 addressed to the VOIP side. But I agree
5 with Joe's comment about the potential for
6 regulatory creep, but I think almost as
7 importantly the idea of regulatory
8 uncertainty is very problematic. You've
9 had two industries, the VOIP industry and
10 the wireless industry that have invested
11 billions of dollars -- and if I get
12 repetitive from yesterday I apologize in
13 advance -- billions of dollars based on a
14 particular regulatory scheme at the State
15 and Federal level.

16 Mike's paper on 706 which is
17 excellent and I commend it to everybody's
18 reading, makes an interesting point,
19 actually in the context of 706 and the way
20 the FCC decided to reinterpret 706. And
21 one of the cautions was particularly in a
22 place where a lot of investment has been
23 made in reliance upon a particular
24 regulatory paradigm.

25 Regulators need to be very, very

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2 careful as they go forward and I think
3 Michael, you know, continued verbally about
4 the fact that, you know, you have to be
5 surgical, you have to have, I like his
6 expression, a certain level of humility as
7 you approach these issues, and the extent
8 to which you don't know the future, and you
9 don't know how technology is going to
10 evolve, and you don't know how innovation
11 is going to evolve, to make sure that you
12 don't hinder those things. Because one of
13 the things that we have seen in both of
14 these industries is a lot of
15 cross-pollinization between different
16 sectors in the industry which you didn't
17 have before. And so, you know, aspects of
18 the internet are dealing with aspects of,
19 you know, the various wireline and wireless
20 carriers and both the innovation and also
21 the cooperation in terms of, you know,
22 responses to emergencies has really been
23 stellar.

24 So, you know, I would caution that
25 the Commission look very carefully before

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2 it thinks about revisiting some of these
3 issues that have just worked very well,
4 especially with respect to, you know,
5 affordability. Affordability, I don't know
6 how you address "affordability" without
7 getting into some kind of price regulation,
8 and both the uncertainty of regulation and,
9 you know, certainly the cost of regulation
10 and all these things have costs, add to the
11 cost of investment and uncertainty as to
12 the cost of investment, and, you know, we
13 want folks to invest in this State.

14 MR. JESMER: Maureen, you touched on
15 VOIP and I'll turn to the second part of
16 the question and stick with you for a
17 minute. I think everybody up here's
18 probably aware of the recent Minnesota
19 decision to sort of almost reclassify VOIP
20 service as a local service. Without
21 getting into an opinion on it myself, you
22 know, I'll kind of ask the whole panel if
23 they could, to sort of give us their take
24 on what Minnesota's done and if there is a
25 legal basis for New York to follow suit at

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2 any point in the future?

3 MS. HELMER: I'm going to avoid the
4 legal basis question. I think that this is
5 an area which requires some federal
6 guidance at least. You know, the feds
7 have, in their own regime, created a very
8 lightened regulation approach to VOIP and I
9 think we should wait for some guidance
10 before we as a State and regulators look at
11 putting in, you know, 50 different
12 constructs.

13 MR. JESMER: Anybody else?

14 MR. SANTORELLI: Well, the Minnesota
15 example is interesting. I mean, it's being
16 challenged in court so we'll have to see
17 how that works itself out. If history is
18 any guide, I think it kind of faces a steep
19 climb, just based on the, again, as Maureen
20 mentioned, there's been a federal kind of
21 preference for regulating that service and
22 that goes back over a decade to cases that
23 came up, again, in Minnesota and some other
24 places attempting to regulate nomadic VOIP,
25 and those were preempted by the FCC and

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upheld in court, and it will be interesting to see if the federal court in Minnesota strikes down -- or overrules or finds contrary to the Minnesota Commission.

I mean, what's interesting also is that other states have tried or have come to those conclusions. I think Maine and New Hampshire have as well, but then their state legislatures came and then removed jurisdiction from the Public Service Commissions, and I think to date, over -- I think it's over 30 states have passed legislation removing jurisdiction over VOIP services from the PSCs expressly and very few others have asserted or tried to assert jurisdictions. It's just been a handful of states. I think Vermont also is in the process -- it's been a multiyear process of evaluating VOIP. I think they came to a factual determination that it was a telecom service but they're still -- that was the first part of the proceeding. Now in the second part of the proceeding I believe that they are figuring out if there is a

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2 legal sort of basis for extending
3 regulation to it, and I'm sure they'll look
4 to the Minnesota case and some of the other
5 precedent that has been set at the federal
6 level and at the FCC when making that
7 determination.

8 But I think sort of just looking at
9 the arc of regulatory and legal precedent
10 in the VOIP space over the last dozen years
11 or so, I think it is -- it tilts much
12 further to the federal side, even if the
13 FCC has had a docket open on the specific
14 issue of whether VOIP is an
15 IP -- information service or telecom
16 service since 2004, it still hasn't made a
17 determination but it kind of has reserved
18 the right for itself to make that
19 determination later as well as to kind of
20 dictate how the regulatory framework
21 proceeds going forward because they have
22 preempted states in the past, they've tried
23 to regulate VOIP but also they've also kind
24 of layered on some additional, I guess
25 legacy requirements on VOIP from

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contributing to the Federal Universal Service Fund to providing 911 service. So it's kind of carved out some requirements for VOIP on its own while it's reserving power authority to itself for those kinds of issues.

COMMR. SAYRE: I'd like the panel to address one narrow possible expansion of regulation to address a very specific problem, the digital divide. What does the panel think of asserting jurisdiction, assuming we get over issues like current federal preemption, over cellular and VOIP broadband services for the purposes of a State Universal Service Fund that would provide subsidies for broadband service that would, of course, be portable into the industries that are paying into the fund?

MS. HELMER: As usual, Commissioner, you've put us all right in the spotlight. Let me make a couple of comments with respect to that.

First of all, there are a lot of programs out there, both private programs

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2 and public programs. Are you talking more
3 about, you know, line extension type issues
4 or getting computers in a classroom?

5 COMMR. SAYRE: Actually, I'm talking
6 about the home broadband service.

7 MS. HELMER: So you're talking about
8 getting lines into the home?

9 COMMR. SAYRE: Or cellular broadband
10 service.

11 MS. HELMER: Well, you know,
12 again --

13 MR. MCGOWAN: A lifeline service.

14 COMMR. SAYRE: This is lifeline.

15 MR. O'BOYLE: So I have something I
16 can share. I think that there's -- it's
17 clear that the state can be involved.
18 California Public Utilities Commission has
19 been very much a leader and an innovator in
20 how to work within its own state lifeline
21 framework. It offered -- the State has
22 seen fit to offer a top-up and a match to
23 the Federal 925 so now the State level
24 contribution is something on the order of
25 \$20, and as we know, lifeline modernization

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2 is moving forward at the federal level, it
3 seems like next month. I think that
4 there's a good model there to follow, that
5 if the State should in its wisdom identify
6 universal service as a -- and digital
7 divide as a problem, which it clearly is,
8 that the State can move forward with
9 repurposing its Universal Service Fund.

10 MS. HELMER: Well, I agree the State
11 should move forward and, you know, we heard
12 Jeff yesterday talk extensively about the
13 broadband office program which is -- it's
14 no -- it's nothing to sneeze at. It's, you
15 know, half a billion dollars that's going
16 to be invested throughout the State, and
17 just from my perspective, I think that's
18 the appropriate place that that should sit.

19 MR. POST: I think Maureen's hit
20 upon a very important point. I don't think
21 anyone here disputes that the digital
22 divide is a serious social problem. I
23 think it, you know, to the extent it can be
24 solved by money, the money should be raised
25 on as broad a base as possible. It's a

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social problem and it should be socially funded. I don't think that imposing the costs of that program narrowly on the telecommunications industry and its customers is necessarily the best approach.

No one likes to talk about taxes, but, you know, I think the Governor's broadband program is good not only because of its own merits but because it introduces the model of public funding as opposed to industry funding for achieving these social objectives.

MR. SANTORELLI: Just a quick additional point. So I think the question of lifeline State and Federal is a good one. I think the FCC is going to act I think next month to vote on its reforms of lifeline and to extend it to broadband I think is 925. So that will certainly give the State some guidance and additional context for it.

But from the perspective of founding a State level lifeline program, it kind of -- I know it's separate from the State

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2 Universal Service Fund but then it runs
3 into the issue of whether the State can
4 assess broadband providers for that
5 purpose. In the FCC's Open Internet Order,
6 it makes a point of saying that the State
7 Commissions are bound by its forbearance
8 regime and as the sole example that they
9 give is with respect to broadening State
10 and Universal Service Funds.

11 And the quote -- specific quote is
12 that, "The imposition of state level
13 contributions on broadband ISPs that do not
14 presently contribute would be inconsistent
15 with the FCC's decision in the Open
16 Internet context to forbear for mandatory
17 federal use of contributions and therefore
18 it would preempt any state from imposing
19 any new state USF contributions on
20 broadband." So that's a consideration as
21 well to --

22 COMMR. SAYRE: But we have to get
23 past that. Assuming that the FCC and its
24 reform of its own lifeline program allows
25 the states to supplement the federal

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2 program with the same kind of contribution
3 base, should we?

4 MR. O'BOYLE: I see no reason why
5 not to. And I think, actually to the
6 question of -- so I think in a sense we
7 have -- I'll borrow your phrase, the cart
8 before the horse, I think there's an issue
9 with a premise here which is that, yes,
10 everyone wants investment, everyone wants
11 regulatory certainty, but I think the
12 premise here should start from consumer
13 certainty and the idea that I'll
14 get -- that consumers will have advanced
15 telecommunications services deployed in a
16 reasonably timely fashion and that they'll
17 have access to them on reasonably reliable
18 terms, and they'll be able to purchase them
19 in a reasonably affordable manner, and we
20 should really be beginning our entire
21 analysis from a consumer perspective,
22 rather than a, would this overly
23 inconvenience one provider or another, or
24 might this unintentionally theoretically
25 help one class of providers over another

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2 class of providers.

3 You know, the job of the public
4 interest is to -- the job of Public
5 Interest Regulation is to advance the
6 public interest, not to advance the
7 convenience of providers.

8 MR. SANTORELLI: If I could, sorry,
9 weigh in again. Just to build on your
10 point about consumers and that's critically
11 important because the lifeline is to focus
12 on consumers, getting more people on line,
13 but I'll go off on a policy tangent for a
14 second if that's okay. You know, the
15 notion -- the Lifeline Subsidy Program at
16 the federal level, state level, it
17 addresses an important issue because, as we
18 know, there's lots of data out there
19 showing that there's a socioeconomic, a big
20 socioeconomic component of the digital
21 divide. But I would argue, and we've done
22 a lot of work on this at our program,
23 looking at sort of the broad array of
24 factors that go into broadband adoption,
25 and it's a lot more than just cost. And I

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think Susan Crawford mentioned this
yesterday, looking at things like
relevance.

And so, you know, it's certainly
within the toolbox of regulators to do
things like lifeline, sort of shift funds
around and target them at newer services,
but in New York, I think the Governor has
made a huge commitment to broadband,
certainly, I mean, that's without question.
But then the question is whether there are
opportunities for using funding sort of
across the board for additional outreach,
education, training, digital literacy,
things like that, to make sure that more
people are -- see the relevance of
broadband and getting on line, because
lifeline is not going to cover or solve
this problem on its own. Not everyone's
aware of lifeline, not everyone is
eligible, not everyone wants to go through
the process of having to sign up for it.
You know, if someone sees that I have to do
all this work just for \$10 a month, they

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2 might not see the value of doing it. So if
3 there are more, sort of granular local
4 level outreach efforts to get more people
5 aware of the benefits of broadband, then
6 that could drive either more lifeline
7 applications to the federal level, state
8 level, both, or sort of organic broadband
9 subscriptions on their own paying -- seeing
10 the value of investing scarce dollars on
11 correction as long as they see the
12 relevance and meaning and value to their
13 lives.

14 I think that's potentially something
15 that the Governor's broadband program could
16 address maybe in the second round, maybe
17 make some funds available for those sorts
18 of programs, because I think it has to be
19 kind of an all of the above approach to
20 getting -- to closing the divide because
21 this divide has been around for -- ever
22 since the broadband -- since the internet's
23 been around.

24 I mean, the contours are almost the
25 same since the 90's, socioeconomic

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2 components, there are the minority groups
3 have been behind adoption levels since the
4 90's, educational levels differ when it
5 comes to adoption rates. So we know the
6 problems -- but so long story short, there
7 are lots of other things that could be done
8 beyond subsidies and perhaps the Public
9 Service Commission could highlight those.
10 I don't know if it could actually do much
11 on its own to address those, but
12 highlighting the importance of those within
13 the sort of package of things it does
14 around the digital divide could be
15 potentially powerful.

16 MR. O'BOYLE: Actually, I have just
17 one very short thing to say to the question
18 of relevance. I don't think anyone is
19 saying that we should not be digital
20 inclusion or digital literacy at all. In
21 New York, we have some really fantastic
22 examples here. Tom Kamber's OATS, Older
23 Adult Technology Service, really is a
24 national exemplar in how to teach digital
25 literacy and digital relevance to older

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2 adults, and if you haven't ever had one of
3 his seminars, sit down with him, it's
4 amazing.

5 However, I think as -- putting on my
6 social scientist cap, there are a couple of
7 problems with the way that we -- the
8 surveys that say that relevance is one of
9 the chief barriers. One, lower income
10 people are more likely -- this is me just
11 being a -- critiquing the research
12 here -- there is shame in saying I am poor
13 and can't afford that. It is a lot easier
14 and socially, there is a stigma attached
15 there. It's easier to say that's not
16 relevant to me, I don't need it.

17 Second, to the extent that relevance
18 is an issue, changing the cost structure
19 changes and introducing a subsidy changes
20 the cost benefit analysis. The entire
21 relevance calculation then shifts when
22 we've got a numerator and a different
23 denominator.

24 So I think while we absolutely
25 should be investing and finding ways to

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2 teach digital literacy and digital
3 inclusion, I think the Mayor here in
4 New York is doing some really exciting work
5 in that area as well. I think, you know,
6 Susan Crawford is a great friend, but I
7 think sometimes we use the word "relevance"
8 without really digging in to what does it
9 mean, and I think there are -- there's
10 maybe some problems on the social
11 scientific standpoint with the research
12 that says that relevance is the chief
13 issue. I think it's superficial and
14 doesn't get to the heart of the matter.

15 MR. JESMER: So I think we'll come
16 back to some of the broadband issues later
17 in the day.

18 MR. POST: Can I just add one thing,
19 Graham?

20 MR. JESMER: Sure, Joe.

21 MR. POST: I think the discussion of
22 adoption relevance is very interesting. I
23 take your point in that it is indeed
24 interesting that probably hasn't been
25 considered enough, but I'd like to use

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relevance as a jumping off point for considering other nontraditional approaches that probably don't receive as much consideration as they should for expanding broadband deployment.

One tremendous problem that providers face is access to public and private rights-of-way. And although this may not be a role particularly for the Commission, it's certainly a role for the State in easing the current barriers that make it difficult for providers to build facilities, particularly in some of the underserved areas of the State. And I'm referring here not only to public rights-of-way but to issues relating to private rights-of-way, particularly in a multiple dwelling unit environment as well.

Another area that should be thought of, again, not particularly in the Commission context, but certainly by the State is tax policy and its impact, both depressing and stimulatory to investment. I won't go into this in detail here, it's

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2 probably a subject for a whole other forum,
3 but there are a number of steps that the
4 State could take to increase incentives for
5 broadband investment.

6 MR. JESMER: So I think at this
7 point, and it's not a great transition, but
8 we'll turn to our next question. We heard
9 a lot yesterday about the IP transition and
10 how IP providers, whether fixed or
11 automatic, have really, you know, exploded
12 in terms of consumer adoption. So, and I
13 know this is a question close to
14 Commissioner Sayre's heart, so we wanted to
15 touch on whether and how the PSC could
16 oversee the filing and adoptability of IP
17 to IP interconnection agreements. The FCC
18 has seemingly, at least, allowed a State
19 role under Section 252 of the
20 Telecommunications Act.

21 So I think we'll stick, Joe, with
22 you to touch on this, if you'd like.

23 MR. POST: Thank you, Graham.

24 As a starting point, when I was
25 reading over these questions last night, it

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2 occurred to me there was an ambiguity and
3 my understanding is that what we're talking
4 about here is interconnection for purposes
5 of exchanging VOIP traffic as opposed to
6 peering and transiting arrangements for
7 internet access traffic.

8 COMM. SAYRE: Yes, that is correct.
9 VOIP or even POTS that's been translated
10 within the network to IP.

11 MR. POST: So my view of this as a
12 legal matter is that exchanges of voice
13 traffic in IP format are not subject to
14 either the substance of that obligations,
15 or Section 251 of the Act, or the
16 negotiation procedures of Section 252.
17 This is another one of those issues that
18 the FCC has under review. To my knowledge,
19 it's never interpreted. The incumbent
20 interconnection obligations of 251(c)(2)
21 either to allow a carrier to demand
22 IP-to-IP interconnection or to require
23 interconnection for the exchange of traffic
24 that never touches the public switch
25 telephone network.

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2 In fact, the FCC recently confirmed
3 in an appellate brief that it had not yet
4 taken action in this area. Last year, it
5 declined to mandate VOIP interconnection
6 arrangements because "The
7 Commission -- meaning the FCC -- is
8 currently considering the appropriate
9 policy framework for VOIP interconnection
10 and pending proceedings."

11 I won't pretend the FCC is preempt
12 of this area, but I think cooperative
13 federalism works in both directions and I
14 think this is an appropriate area for state
15 forbearance while we're waiting for the FCC
16 to set a national policy in this area,
17 which is clearly on its current agenda.

18 The 252 process for negotiation
19 interconnection agreements was created in a
20 very different environment. You know, now,
21 ILECs are just one of the many players in
22 the marketplace. They have no special
23 historic advantages in the provision of
24 VOIP service. I don't have the figures
25 with me, but I'd be very surprised if in

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New York is elsewhere. The ILEC share of the VOIP market is far smaller than the cable company share. Under these circumstances, I think that, you know, at the minimum, state should await guidance from the FCC.

More importantly, and I know I'm beginning to sound like a broken record on this point, I think it would be bad policy. I think that commercial negotiations are a good mechanism for achieving IP-to-IP connection. The internet ecosystem has flourished under a regime of negotiated commercial traffic exchange arrangements and I think the same is true -- could be true in the VOIP area. Government should really avoid prescribing the terms that will govern complex and evolving relationships among different providers, and there's always the factor that state regulation is going to impose a crazy quilt of disparate regulations on what in most cases are nationwide or, in any event, multistate arrangements.

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2 My clients, the Verizon companies
3 have been industry leaders in negotiating
4 IP and IP interconnection agreements.
5 We've entered into them with partners of
6 different sizes and types. Some providers
7 are, you know, in our view are not serious
8 about negotiating agreements with us.
9 Others appear to be uninterested in
10 establishing IP-to-IP interconnection
11 arrangements. But from my seat, the
12 commercial agreement mechanism is working
13 and as yet, there's no reason for
14 intervention, certainly state intervention
15 in the process.

16 MS. HELMER: I only very cautiously
17 and rarely disagree with Joe, especially
18 about the law --

19 MR. POST: That's wise, Maureen.

20 MS. HELMER: -- but we do feel that
21 251(c) does allow for a state involvement
22 in this issue. We do acknowledge and
23 appreciate the fact that the FCC does have
24 an open docket on this and we are watching
25 it very carefully and participating in it

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2 carefully, but I would also like to
3 distinguish these kinds of regulations
4 versus the other kinds of things that we've
5 been talking about this morning.

6 I felt very strongly for a long time
7 that the states and the feds, but the
8 states kind of play a very important role
9 in wholesale issues and
10 business-to-business issues. And again,
11 it's -- and we've even seen this evolve on
12 the regular voice interconnection front,
13 most of the time it is just
14 company-to-company, but to have the
15 Commission there as a backstop to be of
16 assistance and to help negotiate, I think
17 is very helpful to businesses. So, you
18 know, again, we are also watching what
19 happens at the federal level on this issue
20 but we are hopeful that the states will
21 play a role in this.

22 MS. GEDULDIG: So we're lucky enough
23 to have another -- we're going to go off
24 panel for just a second, but Joe Gillan is
25 here today and has a lot of expertise in

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2 this particular area, so we're going to ask
3 him for his comments on this topic as well.

4 MR. GILLAN: See, we've already had
5 an interconnection problem.

6 As indicated, my name is Joe Gillan.
7 I've been -- I'm a economist, been working
8 in the area of telecom policy technology
9 state issues for unfortunately about
10 30 years. I have specifically been working
11 on issues relating to what happens when the
12 network goes from a TDM technology to an IP
13 technology in terms of making sure the
14 competitive opportunities and network
15 interoperability continues. So I probably
16 have the longest running involvement with
17 IP-to-IP interconnection of anyone in the
18 country. I measure my success in small
19 increments.

20 Now, first I want to make a comment
21 about your program that will tie into this.
22 There are three markets in the
23 telecommunications industry. There's the
24 residential market, there's the market of
25 business service, and there's the wholesale

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market. And I put quotes around the word "wholesale market" because it really doesn't exist at all, but there are a set of wholesale issues that would otherwise be market issues if there's any true competition creating that.

Your program has been excellent, but one thing I need to point out is that with very rare exception, this entire discussion over the past day and a half has focused on the residential marketplace. If you were to -- this is not the conversation you would have if you were asking the same questions you were asking, but the panel was focused on what are the conditions in the market for business services. That looks very, very different. And I'm not going to go into those differences, I just wanted to make that point that you have been, quite many of these programs, sort of sucked into the black hole of the residential marketplace and all of the issues unique to that. And this is the only thing that you've sort of broken out

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to talk about at least the wholesale market.

Now, on the question of interconnection, the 96 Act embodied in it a really critical principle and that principle was competitors have rights with incumbents in terms of interconnecting and exchanging traffic. They were going to be co-carriers to the incumbent, not customers of the incumbent, and those co-carriers have rights to be treated as equals even if they were vastly different in size. So when you really lay out this issue, what you discover is that by and large, it's not a question between competitors and ILECs, it's really a question between people who are relative -- are small relative to the incumbent and everyone -- and the incumbent. And so you oddly find in this issue that CLECs, and rural telephone companies, and small independent telephone companies, and virtually all cable companies all line up on the view that the 251, 250 structure -- 252 structure does

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not disappear merely because the calls are going to IP.

Now, why is that so important?

Well, there's really two reasons. One is a fear of discrimination. If you let discrimination creep into interconnection so that big players can get better traffic exchange agreements than small carriers, you are going to create the seeds for unrelenting concentration. And as a practical matter, one of the things I heard over the past couple of days is people aren't generally satisfied with the degree of concentration that exists already. Oh my God, why would you promote additional concentration?

Secondly, not only do you have this discrimination protection which, by the way, is fundamentally protected by the fact that the contracts have to be made public and the State Commission's role isn't to hamper negotiation, it's just to make sure that the contract when it's filed and is public, other parties have an opportunity

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2 to say hey, that's discriminatory or this
3 provision's not in the public interest, but
4 it's a transparency role that the State
5 Commission plays with a second critical
6 component and that's opt-in. The Telecom
7 Act gives you the opportunity not to sit
8 down in a dark room not knowing none of the
9 other deals that Verizon or some incumbent
10 has cut with other players, but you
11 actually get before you go to the
12 negotiator and you get to look at the
13 contracts that already exist and say yup, I
14 can live with that, I want it, I want to
15 opt-in. And when you look at this
16 industry, 90 percent of the agreements in
17 every state I've ever been in or any
18 process I've been involved in are opt-in.
19 The foundation of this industry isn't
20 arbitration and conflict, it is opt-in; let
21 me have that contract and then I will
22 conform my business to its requirements and
23 I will move on.

24 So we have this system, 251, 252,
25 that is designed to prevent discrimination

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2 and give you opt-in. Now, what do those
3 agreements really look like? The
4 Telecom -- the FCC has been very clear in
5 providing guidance that just says look, if
6 these agreements address, and there's a
7 list, I don't have all of them memorized, a
8 list of duties or activities and they
9 resale and they involve number portability,
10 they involve reciprocal compensation, and
11 they involve interconnection, then these
12 are interconnection agreements under the
13 Act and they have to be filed.

14 I will tell you, contracts don't
15 hide what they're about. So if you get to
16 look at a contract, you can pretty easily
17 see does it address these activities. And
18 who is it that's supposed to decide whether
19 they have to be filed or not? It is not
20 the incumbent, it is not Verizon. The law
21 is quite clear. The FCC Orders are quite
22 clear. It is the State Commission. To the
23 extent there's any dispute about whether
24 something should be filed, the State
25 Commission, not the FCC, the FCC expressly

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2 states in an Order called Quest Declaratory
3 Ruling, the entity of -- the first review
4 on this question of whether something
5 should be filed is the State Commission
6 because the State Commission is closer to
7 the process of being able to review the
8 contract.

9 Now, why is this such a big deal and
10 where are we? The reason it's such a big
11 deal is Verizon has been a leader and yeah,
12 they got a half dozen or a dozen contracts.
13 This all comes out, quite honestly, of a
14 California proceeding, but there are two
15 that are the most critical that people want
16 to see and be made public so they can
17 determine whether to opt-in. Verizon
18 reached an agreement with Comcast at around
19 the same time that Verizon and Comcast were
20 agreeing to do joint marketing of their
21 services. It wasn't really arrived at in
22 an adversarial tone.

23 Secondly, Verizon has a contract
24 with Verizon Business, its own affiliate.
25 Other carriers want to know what do those

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2 agreements look like and can I opt-in to
3 them. In terms of state authority, by the
4 way, Michael pointed out that there's about
5 30 states that have removed VOIP
6 jurisdiction. In each and every one of
7 those laws that I've seen, and I will admit
8 I have not seen all 30 but I only probably
9 missed one or two, every single one of them
10 I've ever seen always has a reservation
11 clause in it that says, we are removing
12 from the Commission authority over VOIP
13 except the Commission still has authority
14 to fully do its duties under 251, 252. So
15 there's never been a question as to whether
16 or not states had the continuing authority
17 to look at these just because they went to
18 IP.

19 Now, word is, has the FCC left it?
20 The FCC left it where they said
21 unambiguously, that all VOIP calls are
22 subject to 251, 252 as a call because they
23 brought VOIP to PSTN, PSTN to VOIP, and
24 VOIP-to-VOIP calls into the Intercarrier
25 Compensation Order into Section -- to the

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2 provisions of the reciprocal compensation.

3 Now, they left a hanging chad. They
4 said we're making this decision for all
5 the -- for everything that's -- where it's
6 exchanged in TDM but we're going to keep
7 looking at it for IP. But think about this
8 for a minute. If the calls are subject to
9 the Act and the only thing that changes is
10 that you exchange the traffic in IP instead
11 of TDM which, if done correctly, should be
12 completely transparent to the customer,
13 there's no way to cobble together an
14 argument that says that this one little
15 event, I exchanged the traffic in IP
16 instead of TDM, somehow changed the nature
17 of the call when the FCC has already made
18 the tough decision which is the call itself
19 is subject to the Act. Why did the FCC
20 leave a hanging chad? I will come to that
21 last. If anyone wants to know you have to
22 ask me because it will take me a little off
23 the point because I want to come back to
24 those two contracts.

25 These two contracts are being

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1 transferred from Verizon to Frontier as
2 part of a California merger. We finally
3 had a break in the wall of confidentiality
4 because the California Commission ruled,
5 hey, as the -- before the contrast can be
6 transferred to Frontier, they got to be
7 filed. So we expect them to be filed under
8 252 in California Friday, maybe Monday,
9 unless there's some super game about to be
10 unfolded, which I don't expect.

12 Once they're public, it will be much
13 easier for State Commissions to answer this
14 question, because again, contracts don't
15 hide what they're about. You'll be able to
16 look at it, you'll be able to determine if
17 it applies in your stay, you'll be able to
18 determine whether it addresses things like
19 number of portability, reciprocal
20 compensation and interconnection, and
21 you'll be in a position to do your duty
22 under the act that the FCC gave you to tell
23 Verizon, hey, file this. Why? Because
24 competitors actually want the same thing
25 Verizon wants which is not a patch or

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quell. Competitors want the opportunity to see what deal did these two carriers get and whether they can opt-in.

Because if it's discriminatory, you've got a world of problems about to descend on you if this whole industry moves over to IP and the core wholesale protection of nondiscriminatory interconnect gets lost in the shuffle. It's not something that you want to lose and that's what I go back to in terms of you got three markets here; wholesale, business, residential. You should actually have one these programs on business and wholesale. Completely different speakers, completely different problems, you'd hear a lot more about last file access because the people who are competing in the business market require it, but in terms of this one question, you have a clear duty, you have a clear problem. These are contracts that Verizon signed with friendly entities that carriers would like that opportunity to at least opt-in to. Unfortunately, they're

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2 about to become public so that this
3 conversation can deal with hard facts.

4 MR. POST: You know, listening to
5 your presentation, I'm amazed to
6 contemplate the fact that 99.9 percent of
7 the American economy vertical and
8 horizontal arrangements between producers
9 are not publicly filed, are not governed by
10 substantive obligations, anything remotely
11 those of 251. In fact, I can only think of
12 one example that even comes close to that
13 regime and that's liquor industry which
14 obviously has social and historical
15 components that telecommunications doesn't
16 have.

17 So why is telecommunications
18 special? Why was this regime established
19 in 1996? Well, I mean, I don't think
20 there's any doubt what the answer to that
21 is. It was in recognition of what was
22 perceived to be the special market position
23 of the incumbents. I heard words during
24 your presentation like big, large,
25 concentration, market power. I don't think

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we need to debate here whether those were appropriate in the TDM market as applied to what we now call incumbent LECs.

I do dispute though, that that regime has any policy relevance and I would say any legal relevance to the position of the incumbents and their competitors with respect to the exchange of VOIP traffic. As I said, we're hardly a dominant player and actually rather smaller, far smaller player than most market participants in the VOIP market. So the idea that somehow vertical agreements can't be negotiated but with a 252 type mechanism in place because otherwise, God knows what parade of horrors will follow. It just can't be sustained. That's the policy argument.

On the legal argument, I really didn't hear you disputing that the FCC hasn't decided this issue. You indicated that you have a theory about why it hasn't decided, and you indicated you thought it should have decided it and that it will decide it in a certain way, but the issue

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2 is up in the air and I think my comments of
3 cooperative federalism are still to remain.

4 We could spend the rest of this
5 forum and a whole other one arguing about
6 the details of 251 and 252 but I think it
7 probably is appropriate in a forum like
8 this to focus on the policy issues, and to
9 my mind, they point more in the direction
10 of abstention than of act of regulation and
11 trying to extend the 252 regime into an
12 area where it's very ill-suited.

13 MR. GILLAN: The 252 regime has
14 already been extended and it was extended,
15 quite honestly, at the urging of large
16 carriers like AT&T and Verizon who wanted
17 to get rid of reciprocal compensation and
18 access charge obligations relating to the
19 termination of their traffic. And so the
20 FCC in the Intercarrier Compensation Order
21 did what the large carriers asked and
22 brought all VOIP to PSTN, all PSTN to VOIP,
23 and all VOIP to VOIP traffic into an
24 intercarrier compensation regime that meant
25 everybody had to step down towards bill and

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2 keep. And that whole regime was designed
3 to basically benefit carriers that have
4 large terminating volumes at the high end
5 of the market which was basically AT&T,
6 Verizon, the collateral beneficiaries were
7 Sprint and T-Mobile, and the people who
8 ended up having balance sheet or income
9 statement issues from the decision were
10 cable companies, CLEC, small ILECs, and
11 other people that were opposed to it, but
12 it happened and it happened to bring that
13 traffic in.

14 Now the question only is, in this
15 one little area about what technology is
16 used to swap the call, should that somehow
17 excuse carriers out of that entire regime
18 which, as a basic matter, fundamentally is
19 required disclosure and opt-in rights?

20 MR. POST: I don't think
21 interconnection is a subset of intercarrier
22 compensation. Intercarrier compensation,
23 you know, that 900 paragraph or whatever it
24 was --

25 MR. GILLAN: 956.

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2 MR. POST: -- 956, thank you, was
3 very deeply rooted in a very specific
4 history, and policy factors and economic
5 factors of intercarrier compensation. They
6 don't necessarily provide guidance on the
7 very separate issue of interconnection and
8 the FCC itself indicated that for reasons
9 that you apparently believe are inadequate.

10 MR. GILLAN: No, no, no. That's
11 actually not true. I mean, interconnection
12 is just the linking of two networks and is
13 a physical --

14 MR. POST: It involves physical
15 arrangements.

16 MR. GILLAN: Hold on a second. The
17 movement of traffic across that
18 interconnection is reciprocal compensation.
19 You cannot address reciprocal compensation
20 without also affecting interconnection
21 because you have to link the network for
22 the traffic to flow across in both ways.
23 All right. Now, that's --

24 MR. POST: That doesn't seem to
25 be --

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MR. GILLAN: That Order did already take the step that you have a policy argument against, but Verizon didn't argue that policy argument very vociferously when it forced everyone's prices towards bill and keep where fundamentally, you were one of the beneficiaries of that.

This is also not just quite honestly, you know, an ILEC obligation. It's also useful to note that the FCC put the wireless industry under this system too for if, in fact, an incumbent ILEC was having difficulty negotiating interconnection agreement with a wireless carrier. In the T-Mobile decision, the FCC said that ILECs could use the 251, 252 process to gain interconnection and traffic exchange contracts with wireless carriers.

So it's -- the FCC has been -- the system is what the system is. I will agree, the FCC left this hanging chad. I will also say that the only reason it left that hanging chad is it was because it was trying to move an order through an

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2 intercarrier comp and all the USF. I mean,
3 that 956 -- I actually, I'm 80 percent
4 certain that's the number, but I could be
5 off --

6 MR. POST: Are you counting the
7 Paperwork Reduction Act there?

8 MR. GILLAN: No. The Paperwork
9 Reduction Act section, that is the same in
10 every FCC Order. You know, that was part
11 of a giant deal, or a giant proposal -- I
12 won't use the word deal -- crafted by the
13 largest ILECs and some mid-sized ILECs to
14 take care of some intercarrier compensation
15 issues and to create a new universal
16 service system.

17 This didn't get resolved because the
18 FCC at the time could not add another issue
19 into the pot. Is this issue going to be
20 resolved by the FCC? Not any time soon.
21 It's not on their agenda. Yeah, they got
22 an open docket. So what? They ain't
23 moving it. This administration has ten
24 months left and they don't need to move it.
25 They're well aware of the fact that these

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2 contracts are now going to be filed in
3 California. They're well aware of the fact
4 that the states can resolve this, and
5 there's no indication that they've ever
6 given that they ever intend to lift a
7 finger to change any of this. The
8 contracts will, thank God, get filed,
9 presume -- unless that Order -- unless
10 something really weird happens, they'll be
11 filed very soon. They'll be public, and
12 states, where they're applicable, will have
13 to make a decision, are we going to walk
14 away from our responsibility, because it's
15 your responsibility under the Quest
16 Declaratory Ruling to make the decision as
17 to whether these should be filed, these
18 interconnection agreements, and the
19 standard is pretty clear.

20 MR. JESMER: I think that's as good
21 a place to leave it from the moment as any.
22 I think what we've learned is that maybe we
23 should look at having a wider conversation
24 about some of these wholesale issues.

25 Right now, I think we're going to

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2 take a 15-minute break until, let's call it
3 11:00, and then we'll come back and talk
4 about some of the broadband issues
5 surrounding the Open Internet Order and
6 Section 706 of the Telecommunications Act.

7 (Whereupon, a recess is taken.)

8 MS. GEDULDIG: So we're going to get
9 started back up with the panel, and we have
10 a slight change to the schedule. Instead
11 of breaking for lunch at 12:30, I think
12 we're going to just do another 15-minute
13 break and then come back and do next steps.

14 So to jump right back into it, on
15 the legal and policy side, the FCC has
16 recently reclassified broadband as a
17 telecommunications service in its Open
18 Internet Order. So what are the bounds of
19 the State's jurisdiction over the service?
20 Who should they be and how should the State
21 react to that important reclassification of
22 broadband as a telecom service? And I
23 think we'll start with Michael.

24 MR. SANTORELLI: Great. Thank you.

25 So the question is phrased how

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should the PSC treat broadband now that's it's being reclassified, I think my one word answer would be carefully because it's, as so many things are in this space, it's a lot of gray area and uncertain at this point, but I'll just go through kind of some of the notes I took on what the Order says and how it might be construed.

So the first thing to keep in mind is that just because it's being reclassified as a telecom service doesn't give anyone a sort of a blank check to regulate the service. As a telecom service, the FCC was clear in its Order that it tailored its approach to broadband as a common carrier service. I think it use the term 21st Century common carrier regulation which, to me, is a little oxymoronic because common carriage goes back to, you know, the middle ages. But the FCC tailored its approach and so, as I mentioned before, the states are bound by that forbearance regime.

Second, the Order is being

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2 challenged in court. I think everyone
3 knows that. The DC Circuit should be
4 ruling pretty soon I imagine. The oral
5 argument was in December. A decision
6 should probably come out in the next month
7 or so. That will probably be appealed soon
8 thereafter either to the full DC Circuit or
9 to Supreme Court. That will play out over
10 the next year. So there's uncertainty
11 there.

12 There's debate certainly over
13 whether the FCC had legal authority to do
14 what it did in the Order reclassifying and
15 doing everything else it did in the Order,
16 but I think there's pretty wide agreement
17 amongst everyone who follows the case that
18 whatever the DC Circuit rules will be very
19 complex, and it could be the case where it
20 holds parts of the Order, strikes down
21 parts of the Order, remands certain parts
22 back for further proceeding, so it will be
23 messy, to put it lightly.

24 But just looking at the Order
25 itself, it does address the issue of State

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1 authority in several instances and it's
2 clear for the most part that State
3 authority is limited, except when it says
4 that it's not. So just to go through a
5 couple of examples about the limits of
6 State authority in the Order. So -- and
7 there's a section, a dedicated section in
8 the Order on this issue.

9
10 So one of the first limits is that
11 the FCC affirms and makes clear that
12 broadband is jurisdictionally interstate,
13 so that automatically puts it beyond the
14 reach of Public Service Commissions.
15 Second, as I mentioned before, states are
16 bound by the forbearance regime that the
17 FCC put in place. So the FCC forbore --
18 forbore --

19 MR. POST: Forbore.

20 MR. SANTORELLI: -- forbore from
21 dozens of statutory provisions and hundreds
22 of rules and selected about a dozen or so
23 specific provisions to apply. The states
24 are bound by that regime so the states can
25 engage in things like rate regulation,

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2 which is beyond the scope of the FCC's
3 regime, something of the USF limitations
4 that I mentioned earlier, that they might
5 roll back the lifeline context as we
6 discussed before.

7 The FCC also makes clear and says
8 pretty explicitly that it won't hesitate to
9 preempt states if they go beyond their
10 regime or they try to implement policies or
11 obligations that are inconsistent with the
12 Order or with federal policy. Generally
13 that's a pretty basic conflict preemption
14 that the FCC has invoked many times in the
15 past, much to the chagrin of states but
16 that's -- there's pretty long precedent
17 there.

18 But interestingly, in several parts
19 of the -- other parts of the Order, the FCC
20 acknowledges that of course the states have
21 a role with respect to broadband. So it
22 kind of carves out this very gray area for
23 states. One quote is that, "Finding out
24 the services is jurisdictionally interstate
25 does not by itself preclude all possible

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2 state requirements regarding the service."

3 And that's in the footnote, footnote 1276
4 if anyone's following at home.

5 And then the example cited in that
6 footnote was data collection. There's an
7 Order from a couple of years ago around
8 data collection. And then in a paragraph,
9 a hundred paragraphs later there's another
10 mention of states where the Commission
11 notes that, "As part of its forbearance
12 regime, it does not forbear with respect to
13 provisions of the Act insofar as they
14 merely reserve State authority." So there
15 are other parts of the Act that reserve
16 authority to states and those things
17 include ETC designation which might change
18 possibly in the lifeline context, Section
19 253 around rights-of-way management,
20 Section 332 when it comes to sort of
21 wireless carveout for states, and then also
22 Section 706 which I think we'll talk about
23 in a little bit. But that's kind of what
24 the Order says and that doesn't really
25 provide all that much clarity.

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2 You could -- one could interpret it
3 as a blanket prohibition on what states can
4 do on lesson until the FCC tells them that
5 they can do something like in the case of
6 USF reform, or one can interpret it as the
7 FCC acknowledging that there are gray areas
8 and that the states could probe those outer
9 limits of its jurisdictional -- new
10 jurisdiction over the service in light of
11 the Open Internet Order but that the FCC
12 reserved the right to kind of manage how
13 the states do that with the looming threat
14 of preemption.

15 And there's also legal precedent on
16 the books showing -- or underscoring that
17 the FCC has pretty broad authority to
18 manage how states implement -- or interpret
19 and implement, especially under Title 2,
20 and that goes back to the aftermath of the
21 96 Act when there was considerable
22 uncertainty about the interplay of State
23 Commissions and the FCC when it came to
24 things like unbundling and interpreting the
25 complex array of obligations that were

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2 included in the Act. The seminal case of
3 the Iowa Utilities Case from 1999
4 underscored that the FCC even when there
5 are clear delegations to State can still
6 manage their interpretations and
7 applications of provisions of the Act that
8 have sort of federal consequences.

9 So with all of that said, I think,
10 you know, being careful in interpreting and
11 applying this seemingly, you know, new
12 grant of authority might be the wisest
13 course of action because it seemed like the
14 FCC opened the door to more regulation of
15 broadband under Title 2 but there's only
16 really room for the FCC to go through it at
17 this point. But the legal challenge might
18 cast some doubt on that, subsequent orders
19 might loosen up some of the requirements,
20 subsequent FCC's could unforbear from
21 certain provisions. So I think time will
22 tell, but I think right now there is still
23 considerable uncertainty about what would
24 happen if a state kind of tried to probe
25 what this means in practice.

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MR. JESMER: I like the term "carving out a gray area". I think that's -- that's sort of a good take on how unclear some of the provisions of this Order might be.

Maureen, I'd like to turn to you since the cable providers are currently the State's dominant broadband providers. What's the interpretation from that perspective of the Open Internet Order and what it might mean for State regulation?

MS. HELMER: Well, I would second everything that Michael said about the federal limitations that will still be in place with respect to these services, but I would add one more limitation and that is State law. The Public Service Law, from my perspective, does not give the Commission the power to regulate broadband. It's pretty clear from case law that, you know, the simple fact that the FCC allows a state to regulate something does not give an independent basis to regulate that thing. So I think in addition to seeing how this

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2 plays out in the litigation and then
3 subsequently how it's implemented by the
4 FCC, we need to look at the State law and
5 how that applies.

6 The question is written
7 interestingly because it's what are the
8 limits of the State's jurisdiction and what
9 I just discussed relates to the Public
10 Service Commission, not necessarily the
11 entire State. And I think Joe mentioned a
12 couple of things that the State could do in
13 terms of tax incentives. We've seen what
14 the broadband office has been able to do.
15 There are plenty of things that the State
16 can do which the Public Service Commission
17 obviously is very integral in assisting
18 with. I know they work very closely with
19 the broadband office on its programs.

20 So I do think there is a role for
21 the State in these issues but I don't think
22 that the -- this Order in and of itself
23 grants the Public Service Commission the
24 ability to regulate broadband.

25 MS. GEDULDIG: So I'm a half glass

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2 full kind of person. So when I hear gray
3 areas that's okay. So I'm curious to focus
4 a little bit less on the limitations in the
5 Order because I think those are pretty
6 clear and I think we all accept them.

7 So what areas are unclear, and I
8 mean that in the best possible way, where
9 the states and the feds have alignments on
10 policy on things like universal access and
11 reliability, especially when it comes to
12 emergency response, where there's an
13 alignment of federal policy and State
14 policy and a gray area, what does that
15 mean?

16 Yeah. Joe.

17 MR. POST: Actually, I was raising
18 my hand because I -- and if you'll indulge
19 me for just a minute -- I wanted to expand
20 on what Maureen said about the role of
21 State law here.

22 Maureen is quite right that the
23 question of whether the FCC is preempted
24 jurisdiction or reserved State jurisdiction
25 is secondary to the question of whether the

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2 New York State legislature has conferred
3 that jurisdiction on the Commission. And
4 aside from the issue that Maureen mentioned
5 that there's no explicit grant of subject
6 matter jurisdiction over broadband service
7 in the Public Service Law, there's another
8 important aspect of the internet -- of the
9 Open Internet Order which is that it very
10 explicitly classifies broadband internet
11 access as an interstate service and that
12 has implications for State law because
13 Section 90, Subsection 2 of the Public
14 Service Law limits the Public Service
15 Commission's jurisdiction over telephone
16 services to communications between one
17 point and another within the State of New
18 York which is an old fashioned way of
19 saying intrastate service.

20 So I think the implications of the
21 FCC's classification of broadband internet
22 access as an interstate service go well
23 beyond the various gray areas, preempted
24 areas and non-preempted areas that are
25 delineated in the Order.

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As for looking at the glass half full and what the State can do, I agree with Maureen on this point too, that the most promising approaches are approaches that are more directed towards the State -- more calls for action for the State legislature than for the Commission, and they include, as previously discussed, state taxation, adoption programs. The very critical area of rights-of-way, and, you know, I'm sorry we don't have time here to give that more -- give that issue what it deserves, but rights-of-way are a very critical issue. There are also many areas of cable television regulation whereby relaxing its current regulatory framework and to some extent this would have to come from the legislature, although in part it grows out of Commission regulations, the Commission could remove disincentives to deploying cable television networks and therefore to deploying video capable broadband networks.

MR. O'BOYLE: I would say that

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2 there's a whole other aspect of this
3 conversation that nowhere -- I too see it
4 as a glass half full, not a carving out a
5 gray area, although I do like that term or
6 phrase.

7 The -- it might be good now to
8 discuss 706. The classification of
9 broadband as a telecommunications service
10 doesn't change the fact that 706-A is still
11 the law of the land, and 706-A
12 unambiguously grants the State the
13 regulatory jurisdiction to work to deploy
14 advanced telecommunications in a reasonably
15 timely manner and/or move barriers to
16 entry, which I'm sure would satisfy some of
17 the concerns that Joe's raising while also
18 addressing important public interest in
19 universal service concerns.

20 So I don't see the Open Internet
21 Order as overly constraining the State from
22 doing -- the State Commission for doing its
23 job.

24 MR. SANTORELLI: Well, I
25 think -- I'm sorry. I do think 706 is the

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2 biggest gray area that is kind of somewhat
3 implicated in the Order by -- I see
4 Commission Sayre getting ready to ask a
5 question so --

6 COMMR. SAYRE: I was just trying to
7 turn this power on. Go ahead and finish
8 your answer.

9 MR. SANTORELLI: I think Section 706
10 is a huge gray area, but even there it's
11 still -- I -- arguably, it's not a blank
12 check to the State. There are still
13 limitations. I think we'll probably get to
14 that later, but even 706 is limited to the
15 narrow issue of deployment and
16 infrastructure investment so, you know,
17 trying to build a regulatory regime around
18 outages, or emergency response, or consumer
19 complaints, to 706 I think would
20 be -- require some creative legal arguments
21 to tie it to the narrow mandate of
22 deployment and in infrastructure investment
23 under 706.

24 MR. O'BOYLE: I wouldn't disagree in
25 your analysis -- with your analysis because

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2 I think the Verizon court found quite
3 clearly that the virtuous circle is a real
4 thing and that lots of things go into
5 investment, go into adoption, go into the
6 deployment and the virtuous circle that
7 drives investment and the -- sort of the
8 broader ecosystem of communications, you
9 know, the Verizon court found that the
10 FCC -- that providers have an ability and
11 an incentive to interrupt that virtuous
12 circle and that there is an important role
13 for regulation to maintain that virtuous
14 circle. It only found that Section 706 was
15 not sufficient to sustain common carrier
16 regulation and then that's why we went
17 through everything we did through to get to
18 the Open Internet Order of 2015.

19 So I would respectfully disagree. I
20 don't think actually -- I think 706 is
21 about more than just deployment in lower
22 case. It's about the entire virtuous
23 circle of the ecosystem of investment, and
24 innovation and adoption.

25 MR. SANTORELLI: Right. The court

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2 did agree with the FCC's use of virtuous
3 cycle and that analysis, but, you know -- I
4 mean, well, one could argue that it's very
5 expansive but within that context it
6 was -- the virtuous cycle, circle?

7 MR. O'BOYLE: They use both
8 interchangeably in the program so we will
9 too.

10 MR. SANTORELLI: So the cycle I
11 guess is a good one. So the virtuous cycle
12 in the Order and well, in the 2010 Order,
13 the Verizon case and in the 2015 Order
14 looked at the narrow kinds of relationships
15 between the service providers and the edge
16 companies. And, you know, the FCC
17 interpreted the cycle as moving in one
18 direction from the carriers to the edge and
19 the carriers having the incentive and the
20 ability to harm edge companies, so that
21 impacted the virtuous cycle. But within
22 the specific context of things outside of
23 that narrow context, I think it would
24 be -- it would be plowing new ground to
25 make a legal argument that again, like a

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2 new regulatory regime on consumer
3 complaints or something else that is being
4 contemplated would require new arguments.

5 I mean, even to fit within that
6 virtuous cycle framework that the FCC
7 didn't contemplate that in their original
8 interpretation and application, and when
9 they did so in the 2015 Order, they
10 grounded it in Title 2 and not 706 so --

11 MR. O'BOYLE: But 706 is still the
12 law of the land.

13 MR. SANTORELLI: Right.

14 MR. O'BOYLE: So actually, perhaps
15 we should defer to Commissioner Sayre's
16 question.

17 COMMR. SAYRE: Is the panel at risk
18 of highjacking the next question? Does the
19 panel have a position under the Public
20 Service Law, not 706, but the Public
21 Service Law itself as to whether we could
22 mandate pole attachment capabilities on
23 behalf of pure played broadband providers
24 that don't have a CPCN and are not cable TV
25 providers?

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MS. HELMER: Honestly, I haven't thought about it. I think that's a really interesting question.

MR. POST: I must admit I'm in the same position.

MR. JESMER: Let me --

MS. HELMER: Well --

MR. JESMER: Sorry. Go ahead.

MR. O'BOYLE: Let's marinate on that.

MR. JESMER: Let me then try to get at some of the contours around 706. So everyone's aware of the Commission's Charter Time Warner Order and the requirements in that Order. Outside of that context, outside of the merger context so to speak, what are the concrete steps that you folks envision the Commission might be able to take or can take to fulfill its role to mandate or encourage the deployment of broadband networks?

I'm just going to throw some examples out there to get the conversation going. Is it about, you know, coming up

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2 with a, you know, I don't want to say
3 franchising because that's not the right
4 word, but a sort of clearing house to be
5 able to get on poles as a broadband
6 provider, or is it about, jumping into the
7 broadband lifeline space, what can and
8 should the Commission do to fulfill its
9 role in this regard?

10 And I'll start with Maureen and
11 we'll work our way down.

12 MS. HELMER: I hate when I sit at
13 the end of the table.

14 I would repeat what I said earlier
15 in terms of, and what other people have
16 said earlier, in terms of the remaining
17 federal preemption issues and State law
18 issues, but I would also like to bring your
19 attention back to the second half of that
20 paragraph, the -- not just this State
21 Commission but the State Commissions
22 generally and others tend to focus on this
23 mandate to encourage deployment on a
24 reasonable and timely basis. But the
25 second half of that paragraph, and, you

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2 know, I think Michael makes the argument
3 that it's not exclusive, but I think it
4 does give you a flavor for the kind of
5 things that if states are going to dip
6 their toes into this, that they should be
7 focusing on "public interest convenience
8 and necessity, price cap regulation,
9 regulatory forbearance, measures that
10 promote competition in the local
11 telecommunications market, or other
12 regulatory methods that remove barriers to
13 infrastructure investment."

14 Now, we can have an argument about
15 whether that last portion limits all of the
16 others, but whether you accept that
17 argument or not, I think the intention of
18 this paragraph is to provide a regulatory
19 environment that encourages investment and
20 does not add the kind of regulatory burdens
21 that have typically been applied to
22 monopoly local exchange companies.

23 MR. POST: I agree with that. I
24 think it's incredibly significant that
25 Congress specifically listed regulatory

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2 forbearance as a Section 706 strategy.

3 The second phrase that Maureen
4 quoted, "removing barriers to
5 infrastructure" appears in both A and B and
6 is equally important and to a large extent,
7 goes to the right-of-way issues that I
8 raised previously.

9 MS. GEDULDIG: So I think yes -- I'm
10 sorry. I'm going to ask a followup
11 question. Removing barriers to
12 infrastructure investment whether it is the
13 sole part of 706 or a piece of 706, I think
14 we all agree that that's a good place to
15 be. I hear some commentary that regulatory
16 forbearance gets us there but yesterday's
17 panel we talked a lot about the need for
18 more build out, at least there's a
19 significant -- or a significant to New York
20 State, there's a significant enough lack of
21 build out in our State that we have a
22 concern.

23 So where can the State in support of
24 removing these barriers to infrastructure
25 investment, what can we do to generate the

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2 investment in the areas where there hasn't
3 been any to date?

4 MR. POST: Well, I think the
5 Governor's program is an example of exactly
6 what the State should be doing.

7 MS. GEDULDIG: Okay. Anything else?

8 MS. HELMER: And I think the list
9 that Commissioner Sayre put out yesterday,
10 although I may not agree with every subpart
11 of it, and Joe's illusion to right-of-way
12 access pole attachment issues, you know,
13 the parts of the State that we're still
14 talking about kind of fall into two
15 buckets. You know, one are inner city
16 areas that are -- not even inner city, but
17 areas of the city where building access is
18 an issue. Every Commission session now you
19 see 20 or 30, you know, orders of entry
20 from Verizon or others where they're having
21 difficulties getting into buildings and,
22 you know, the Commission has been -- and
23 maybe Joe can opine on this on his
24 end -- but the Commission seems to have
25 been very helpful in terms of getting into

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2 these buildings.

3 And then of course on the rural
4 side, it's getting to the facilities,
5 whether they're business facilities or
6 residential facilities, and, you know, as
7 we mentioned yesterday, sometimes that
8 requires connecting parts of your network
9 that are separated by either other
10 franchises or by no franchises. It deals
11 with, you know, kind of the highjacking
12 that certain entities will do when you try
13 to get onto their poles and have them, you
14 know, have them ask you to replace all
15 their poles in order to get on their poles,
16 or putting undue burdens in terms of cost
17 onto pole attachers that make ready issues.

18 There is a lot of room for public
19 involvement and I think you mentioned,
20 Graham, you know, some kind of a clearing
21 house assistance or pole attachment, you
22 know, would be a terrific idea, but it's
23 also other State agencies. You know, the
24 park -- we talked yesterday about the parks
25 and how tough it is to get through the

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2 parks. Again, you know, in the rural
3 areas, those are the kinds of issues you're
4 dealing with, is stringing wire across long
5 terrain.

6 MS. GEDULDIG: So I hear -- we hear
7 that, and we heard that a lot yesterday. I
8 think it's really interesting about there's
9 a lot of herding cats in different
10 stakeholders, but we've heard also that
11 there's not an economic incentive to go to
12 those remote areas. So if the State, PSC
13 and its various stakeholders were to assist
14 in reducing those barriers on pole
15 attachments and zoning -- and I think Jeff
16 talked a lot about this yesterday
17 too -- will you come?

18 MS. HELMER: Well, you're
19 fundamentally reducing the cost of entry
20 when you get rid of those barriers because
21 every one of those things is time and money
22 and increases the cost of going to those
23 areas. And what you've seen over time, and
24 again, I can only speak from the cable
25 perspective, what you've seen over time is

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2 as you've added more services that are
3 available to an individual
4 company -- excuse me, customer, so you're
5 not just selling one voice service, you're
6 selling voice and cable and broadband. The
7 areas of the State that are attractive to
8 serve are ever increasing and the
9 population or the density or the distance
10 that you have to go changes over time as
11 the economics of the products change over
12 time.

13 So, you know, are you saying if you
14 took care of all these things today would
15 we solve the problem tomorrow? No, but
16 over time, I think to the extent that you
17 can reduce the cost of entry, you will
18 increase the possibility these areas will
19 be served. The companies want more
20 customers. It's, you know, it's a very
21 simple calculus.

22 CHAIR ZIBELMAN: Can I followup on
23 that? Because it seems to me and this
24 is -- that what we're hearing is that the
25 State can make efforts to obviously reduce

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the cost of acquisition but that we can't really control the pace of acquisition because that's where the providers are saying we're without jurisdiction.

And just a followup on Karen's issue, this is the -- and legislation is never immutable. What we don't have authority around -- about today, we could get authority about on a State basis. So I don't see that as a barrier if it's the right thing to do. From a policy perspective, the struggle, isn't it, is that as we start to move to broadband as sort of the base technology for services we traditionally regulated like voice communications, and increasingly see the need for other forms of communication, is it the challenge and policy concern that we have a gap in regulatory authority about is that the State has a very peculiar interest to make sure that there isn't people who are unserved because the pace of competition may not be sufficient or because they can't afford base service, and

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then what do we do then? Are you simply saying too bad, that's the way it is?

MS. HELMER: No, not at all. You know, I think the point is important that the State itself has tools and the State itself is using those tools, and if there are indeed customers that are really not marketable -- and, you know, you also have to ask the question whether the customers want the service. I mean, there are, and we've talked about this many times, you know, cabins up in the Adirondacks where, you know, people move there because they don't want service. But, you know, putting those aside, to the extent that there that are communities that are just fundamentally uneconomic because they're so far off the beaten path or so far from the networks that are out there, that it will never be economical for a particular company to serve them, that's when the State steps in and provides an incentive. And if there's a third party or if there's a local ILEC or what have you that's willing to step in and

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2 take that role, then that's an appropriate
3 role.

4 MR. O'BOYLE: I'd like to add
5 something. I would just sort of agree in
6 part, and sort of concur in part and
7 dissent in part with Maureen. I think
8 there are important things that the State
9 can do to promote policies like "one-touch"
10 make-ready or "dig once" that can assist
11 with and facilitate deployment.

12 We need to be very careful to resist
13 the temptation. Let's keep it "surgical" I
14 think was the term this morning. It's
15 really easy to throw away a lot of
16 important longstanding hard one and
17 meaningful consumer protection in the
18 effort to just sort of, quote unquote,
19 clear out the regulatory underbrush and do
20 away with important protections.

21 In other states the -- including my
22 own home in North Carolina, we've seen
23 things like franchising law get wiped away.
24 We've seen things like carrier of last
25 resort get wiped away, and the promise is

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2 always if you deconstruct it, if you
3 deregulate, we will invest. And I think if
4 you look on a state-by-state level, there's
5 not very much. You know, there's barely
6 any correlation between State X deregulated
7 and a thousand followers bloomed. If you
8 look, it's a patchwork based on broader
9 macroeconomic concerns. Does it make sense
10 to invest here? Yeah, more or less it
11 does. Does it make sense to invest there?
12 No, it doesn't. Does that have anything to
13 do with whether we have a local franchising
14 law? Does that have anything to do with
15 whether we have a Public Service Commission
16 with teeth? Does that have anything to do
17 with whether -- with access to public lands
18 and parks? On the whole, no. And so I
19 think we need to be awfully careful about
20 doing away with a lot of very good, you
21 know, meaningful and common sense consumer
22 protection in the name of chasing capital
23 investment.

24 As Maureen said, you know, you're
25 facilitating it and making it a little

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2 bit -- the cost to acquire that household
3 or that consumer marginally less, but
4 there's a difference between that marginal
5 here, right? At what cost? And if that
6 consumer is still not economically
7 advantageous to serve, they're not going to
8 be served, even if the cost is marginally
9 less.

10 So I would urge caution when it
11 comes to doing away with important consumer
12 protections. As I said earlier, the State
13 here was wise enough to leave standing its
14 carrier of last resort and that's why you
15 were able to exert your jurisdiction, and
16 you were able to hold hearings in Fire
17 Island a few years back and have people
18 come out and say your voice link is not
19 sufficient for my small business, it's not
20 sufficient for my life alert, it's not
21 sufficient for my home phone. And so think
22 about where you might be if the State
23 looked up and realized, oh, we took all of
24 these measures to facilitate capital
25 investment, just like, you know, I think

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2 Pennsylvania, for instance is deregulated
3 in large part. I don't think the broadband
4 picture there is much better or worse.
5 It's patchwork just like it is across New
6 York State.

7 And I'll add, the only other point
8 where I'm going to disagree with Maureen
9 is, you said there's sort of two buckets.
10 I'm not really sure there's two buckets
11 between the inner city and then sort of the
12 outline areas.

13 MS. HELMER: Well, in terms of the
14 problem I was talking about.

15 MR. O'BOYLE: Well, but I think if
16 you look at a place like Syracuse, we don't
17 have -- you know, getting FiOs in Syracuse
18 has been a fight and I don't think you
19 can -- I don't think that really fits in
20 your nexus.

21 MS. HELMER: You're right. It
22 wasn't over simplification. And one other
23 clarification, Todd, we're not suggesting
24 wiping out regulation. You know, the theme
25 yesterday and I think the theme today is to

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2 say that a lot of private capital was put
3 into the State I will say by the cable
4 companies, others as well, based on a
5 certain regulatory regime which has worked
6 pretty darn well, and what we're cautioning
7 against is to be very careful to change it.
8 And frankly, one way or the other.

9 MR. MCGOWAN: Can I ask a question?
10 Because yesterday and elsewhere, a proposal
11 has been made for the Commission to change
12 the definition of basic service
13 requirements to include, as I understand
14 it, I think the proposal is to include
15 broadband as a part of our basic service
16 requirement. So is that a proposal
17 and -- so I guess my question is, what
18 would that proposal look like and how would
19 it fit in this carved out gray area?

20 MR. O'BOYLE: Well, I think this is
21 one case where reclassification actually
22 makes it quite clear. You have the
23 protection that traditionally you -- you
24 have the jurisdiction that was
25 traditionally afforded to you for basic

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2 telephone service. Now you have for basic
3 broadband.

4 MR. SANTORELLI: Well, that's not
5 quite the case. I mean, as I mentioned
6 before, the FCC is pretty clear in the fact
7 that it's not -- it's kind of like -- it's
8 Title 2 light or what they call Common
9 Carriers Light. It's not the full bore.

10 So the FCC said that broadband to
11 telecom service would only in this narrow
12 statutory construct and it kind of carved
13 out of Title 2, and a lot of those
14 authorities were kind of cited to uphold
15 its Open Internet rules. You know, that's
16 pretty much the universe of that legal
17 regime exists within the Open Internet
18 context. So for a state to leverage that
19 into layering on legacy POTS regulation
20 onto broadband, I don't know if that would
21 be legally viable. I think that might be a
22 little bit beyond the scope of the Open
23 Internet Order which is, again, the context
24 within which the Common Carrier -- the new
25 Common Carrier regime exists.

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MR. POST: Peter, we've talked quite a bit about, you know, broadband availability and what should be done about it and I don't want to repeat all of that. I do think though, that there's an important point here which is that classifying broadband as a basic service is a very blunt tool and I don't know that it is even meaningful, I mean other than as an aspiration. What would that mean? Would that mean that a regulated provider couldn't offer service unless it also offered broadband, and what kind of broadband are you going to force it to offer? I think that's exactly the direction the State doesn't want to go on, because if you want a robust multi-carrier facilities-based competitive environment, you want to leave enough room for carriers in response to their customers demands to offer a lot of different service models.

And, you know, simply classifying broadband as a basic service is not really going to enable you to avoid the hard

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2 questions of what should we do to encourage
3 broadband, and in some cases it's going to
4 lead you, as I said, in exactly the wrong
5 direction by encouraging overly blunt
6 approaches that are going to inhibit
7 facilities-based competition rather than
8 foster it.

9 MR. JESMER: So Joe, you mentioned
10 facilities-based competition, and we heard
11 a lot yesterday from folks who don't think
12 that there's competition in the broadband
13 market.

14 So I guess I want to tie back into
15 706 by asking, what should the role of the
16 Commission be or what can the role of the
17 Commission be in encouraging the overbuild
18 that folks seem to want to ensure that that
19 competition exists?

20 And I'll start with you, Joe, and
21 then I think I'll turn it over to Todd
22 because I think he's got something he wants
23 to say on that.

24 MR. POST: I'm not sure I have
25 anything startling to say that I haven't

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2 said before. I think basically what the
3 Commission can do is adopt it in the words
4 of 706, think about regulatory forbearance
5 and removing barriers to infrastructure
6 investment, but I think as far as
7 affirmative measures that will encourage
8 broadband deployment, they would
9 appropriately be addressed to the State as
10 a whole and to other agencies of the State,
11 and, you know, we've surveyed some of them,
12 tax policy, right-of-way management and so
13 forth and so forth.

14 To the extent the issue is economic
15 unviability of the service, I don't think
16 commanding control regulation is going to
17 resolve that issue. What will resolve that
18 issue is the targeted, smartly targeted
19 expenditure of public money which should be
20 raised, because this is a broad social
21 problem, should be raised -- should be
22 funded through revenues obtained from the
23 broadest possible base in the State and not
24 placed on the back of a, you know, a small
25 number of regulated companies.

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MR. O'BOYLE: At the risk of being the skunk at the party, I think the Commission may have recently put itself -- made some decisions that are cross purposes with its goals of promoting facilities-based competition to wit. Blessing the Charter Time Warner Cable Merger was a mistake. The acquisition -- you know, the heavily leveraged debt-heavy acquisition of Time Warner Cable by Charter which has been provisionally approved in the State level, it only makes overbuilding less likely. The larger the incumbent, the harder it is to be a new entrant. The more benefits of scale that you accrue to the incumbent, the more challenging you make it for a new market entrant.

And so to the extent that there are -- that there are ILECs that are thinking about investing, that there are competitors that are thinking about entering the market, their whole calculation about will it be smart for me

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2 to invest in this geography is driven in
3 large measure by what's the other guy's
4 business model? Oh, he's able to purchase
5 content at a much lower rate than I am; his
6 programming costs are so much lower than
7 mine per unit; I'm never going to be able
8 to compete with his programming costs
9 because I'm a new market entrant and I
10 don't have the benefits of scale. So
11 actually the larger you make the incumbent,
12 the harder you make it for the next guy to
13 enter the market. And to use a crude
14 analogy, you know, the bigger the bully on
15 the block is, the harder it is to -- you
16 know the less likely you are to come
17 around.

18 And so I would -- if there's
19 anything the Commission could do to
20 encourage overbuilding, one, the era of
21 cartel like turf between cable companies
22 should be over. The supposition that cable
23 will never compete on a
24 household-by-household basis is they should
25 be cast the dustbin of history like the

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2 relic that it is.

3 Two, let's put the breaks on these
4 mergers that are not in the public
5 interest, and the Commission has another
6 one pending right before it as we speak.
7 Let's think long and hard before we bless
8 any further cable mergers that make it that
9 much more difficult for new market entrants
10 to enter because our, you know, any
11 anti-trust decision, any merger, not
12 acquisition decision, shouldn't be
13 predicated just on an analysis of the
14 market situation today, but should be
15 forward looking in thinking about what
16 competition are we foreclosing in the
17 future, and I think I'll leave it at that.

18 MR. SANTORELLI: Can I?

19 MR. JESMER: Sure.

20 MR. SANTORELLI: So to tie all the
21 questions together, I think it's -- the
22 issue we're discussing is -- well, two
23 problems that are looking to be solved.
24 One is bringing broadband to unserved
25 areas, and two, addressing what some would

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2 describe as a lack of competition in other
3 areas. And so it's -- how do you solve
4 either of those problems?

5 And so on the unserved areas issue,
6 from the Public Service Commission's
7 perspective, you know, the traditional
8 route has been universal service funding,
9 but in the State, at least according to the
10 assessment, it's a tiny amount of money.
11 The Governor's program has stepped in with
12 something like 40 times the amount of
13 funding available in the State Universal
14 Service Fund as a way to attract what they
15 hope to be one-to-one matching topping it
16 up to a billion dollars, and that's an
17 enormous commitment of money to address
18 unserved areas in the State which are
19 relatively small in number, purely unserved
20 areas, at least according to the State's
21 definition.

22 So that piece, I mean, that piece is
23 working. I mean, it's on track. The
24 Governor's programs up until this point
25 have allocated tens of millions of dollars,

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2 has succeeded in attracting private
3 partners to build out to these unserved
4 areas, certainly when we think that
5 offering even more money under this New
6 York Program will help to bring more
7 broadband to unserved areas. And it's
8 worth noting that, and I'll jump ahead to
9 part of another question about whether the
10 State can mandate certain types of network
11 architecture or things, unilaterally no,
12 but within these grant programs, the State
13 is free to attach or to craft them in such
14 ways that they effect certain outcomes. So
15 the new New York Program Phase 1 has been
16 structured in a way that has certain
17 requirements included in it that will, in
18 theory, result in certain outcomes in terms
19 of speeds and things like that. It doesn't
20 require so much a specific network
21 architecture but by defining speeds at a
22 certain level, you kind of narrow the
23 playing field a little bit to certain types
24 of providers.

25 So if you have a target of 100

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2 megabits per second say, or 50 or 25, then
3 that narrows the field and kind of cuts
4 away fixed wireless, for example. And so
5 that raises the policy question of whether
6 getting some broadband to an area is good
7 now or if we want to narrow the field and
8 have certain types of providers. So would
9 fixed wireless now make sense and then
10 making the business case and showing that
11 there's demand in certain areas to attract
12 further investment or if, through this
13 program, want to get to a certain type of
14 network architecture. It seems like in
15 Phase 1 it's more towards the latter half.

16 On the issue of perceived lack of
17 competition, what can the PSC do, I think
18 it goes back to what I think Maureen
19 discussed and we heard a lot about
20 yesterday when it comes to barriers to
21 deployment that's under 706, what does the
22 PSC have specific authority to do to remove
23 these barriers and things like the not very
24 sexy things around pole attachments and
25 things like that are, it sounds like, at

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least from the providers that that's something that would potentially make them invest more.

But, you know, the Public Service Commission, for example, can't mandate on bundling of networks. That's something that the FCC could theoretically do if its reclassification survives legal challenge and they unforbear from those provisions, but the State can't do that. But, again, if in tailoring a grant program or something that would require or heavily sort of tipping the favor of subsidizing build in certain areas that have to be open access, I mean, that's what the federal government did in the stimulus program when they funded open access middle mile networks. But that's more of a policy choice of whether the State wants to subsidize open access networks or subsidize overbuild when there are these clear needs in these unserved areas.

MS. GEDULDIG: And I think there is a connection between the unserved -- the

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2 unserved and the lack of competition, and
3 it does come back to the percentage of
4 people where there is no economic value to
5 build there, or to maintain, and upgrade
6 and innovate those networks, and I think
7 the upgrade and innovate is important. You
8 might get some money to build out there and
9 you might grant dollars to build the
10 systems, but you also need the incentive to
11 continue to innovate and upgrade them.

12 So that's the pocket of people where
13 we're really challenged, is getting the
14 networks out there, providing some public
15 dollars or incentive to do it, but then to
16 continue that in this space which we keep
17 seeing is growing, is expanding at such a
18 fast rate, ensuring the sustainability that
19 the innovation and the upgrades will
20 continue both on the public side and on the
21 private side.

22 MS. HELMER: It's happening, Karen.
23 You know, especially, you know, again, from
24 the cable perspective, these networks,
25 there isn't a voice network, and a

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2 broadband network, and a cable network.

3 It's one network, and each of those
4 subparts are competing against different
5 entities. So whether it's a new innovation
6 on the video side that requires them to
7 upgrade their system for that part or one
8 of the other two parts, they're
9 consistently reinvesting in the network,
10 and it's one of the points that they've
11 made is the fact that it's not enough that
12 we have -- there was this -- and it wasn't
13 one shop, it was an ongoing infusion of
14 billions of dollars.

15 You know, factually speaking, the
16 companies are continuing to invest in their
17 networks, they're continuing to push out
18 fiber farther and farther into the
19 tentacles of their networks, they're
20 continuing to invest in new electronics to
21 make these networks smarter and the
22 connections to the house smarter. It is
23 happening. You know, the argument
24 yesterday that companies don't have an
25 incentive to invest in their networks is

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2 just completely false.

3 MR. O'BOYLE: I would agree that
4 companies have an incentive to invest in
5 their networks as they stand, but they
6 don't have an incentive to invest in the
7 areas that don't yet serve. And the
8 question here is the underserved areas and
9 I think that if, you know, if we want to
10 talk about facilities-based competition,
11 again, I'm going to sound like a broken
12 record here, but if a company like Charter
13 has tens of billions of dollars to expend
14 on entering the New York market, they
15 should come and fight Time Warner Cable and
16 Verizon on a household-by-household basis
17 and compete, the facilities-based
18 competition. Instead of blessing merger
19 after merger, we should be looking at ways
20 to actually bring competitors into the
21 market.

22 MR. SANTORELLI: So maybe that
23 implicates things like franchise reform. I
24 mean, as we heard yesterday, the Google
25 Fiber Model has kind of highlighted how

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2 antiquated in a lot of ways the franchising
3 model is with build-out requirements and
4 things like that. I mean, maybe that's
5 something to look that.

6 MR. JESMER: So what would a new
7 franchising model look like that, in your
8 opinion at least, would encourage this
9 facilities-based competition?

10 MR. POST: Eliminating build-out
11 requirements, eliminating the level playing
12 field rule.

13 MR. O'BOYLE: I didn't mean to
14 interrupt you, but I think we can have a
15 conversation about franchising and I think
16 there's always been an understanding that
17 non-dominant carriers and new market
18 entrants might be afforded a phase in that
19 they might not have to serve all households
20 on day one that they like their network,
21 but they might have a time stagger that
22 they can progress through and maybe serve
23 some of the more valuable customers and
24 then as they get to farther out, but I
25 wouldn't want to throw out all franchising

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2 at once.

3 I would say though, just to pushback
4 on your point, the idea that Google doesn't
5 invest Google Fiber in states that still
6 have franchising is blind by the fact that
7 just yesterday they announced they're
8 delivering Google Fiber to their hometown
9 in San Francisco and --

10 MR. POST: Over using existing
11 fiber. They're not building new fiber.

12 MR. O'BOYLE: Well, as with
13 Huntsville, they're exploring, you know, a
14 variety of models that make sense in a
15 variety of different geographies based on
16 anything from local market conditions to
17 the local policy framework and --

18 MR. POST: Why should that not be
19 permitted for carriers that don't happen to
20 be named Google?

21 MR. O'BOYLE: I have never asserted
22 that Google deserves any kind of special
23 status because they are Google and I
24 wouldn't.

25 MR. POST: Okay.

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2 MR. SANTORELLI: At the very least,
3 it raises interesting questions about the
4 need maybe for modernizing franchise
5 processes in states, as well as -- I mean,
6 and to raise it up even to a larger level,
7 revisiting -- because franchising process
8 is -- has been around for a long time and
9 that specific model has been around for a
10 long time. Maybe it's time to revisit,
11 maybe not. I don't know. But I'm not
12 advocating either way, but it just -- it's
13 interesting to see that towns and cities
14 have fallen over themselves to cater to
15 Google in a lot of ways. I think someone
16 mentioned yesterday the phrase and notion
17 of redlining around their demand
18 aggregation strategy, which would not play
19 well at all in New York if a carrier tried
20 to do that. But, you know, towns are
21 willing to let Google do that and, I mean,
22 it's still very popular and cities are
23 still trying to get them in. So, I mean,
24 maybe looking at that model could
25 potentially, I don't know, maybe raise some

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2 interesting things that could be considered
3 here.

4 And then also again to the bigger
5 issue of looking back at these legacy and
6 historic models that might need to be
7 revisited because they were crafted in
8 completely different contexts, seeing as
9 how the franchise model came out of a
10 completely different context than what
11 we're seeing today with Google kind of
12 highlighting that very stark contrast.
13 Maybe there are other regulatory regimes,
14 statutory regimes that need to be looked at
15 that might be holding back investment, pole
16 attachments, things like that. So -- so,
17 I'll just stop there.

18 MR. O'BOYLE: A fruitful example
19 might be Los Angeles' RFP for fiber
20 investment, not the first RFP that went
21 more or less -- that didn't really work out
22 but they went back to the drawing board,
23 re-crafted it and addressed several of
24 these questions in a way that I think
25 actually strikes a meaningful and equitable

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2 balance that really avoids a lot of the
3 redlining concerns. And I know we're not
4 here to debate Los Angeles, but it might,
5 you know, be worth review.

6 MR. JESMER: So Joe, you mentioned a
7 few things in the current franchising
8 process that you could see removing,
9 eliminating. There is, however, some proof
10 out there that going to a statewide
11 franchise and removing some of these
12 barriers doesn't actually do that much.
13 There's a study out of Minnesota, I think
14 it is, that essentially indicates that the
15 investment that folks thought was going to
16 come with statewide franchising didn't
17 appear in a meaningful way.

18 So from, I guess your perspective,
19 you know, at Verizon, and Maureen from the
20 cable industry, was it something about
21 those statewide franchising laws themselves
22 that didn't work or is it more about a
23 surgical approach to reforming franchising
24 rather than than a blunt construct?

25 MR. POST: Well, I'm not familiar

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2 with statewide franchise laws anywhere else
3 than in New York. I've looked at a number
4 of them that have been proposed to this
5 State's legislature and as soon as the
6 concept was introduced in the legislature,
7 immediately everyone had a list of I want
8 this, I want that. So they were larded
9 about with dozens of different mandates and
10 requirements, build-out -- you know,
11 statewide build-out requirements with the
12 next year's benefits to municipalities, et
13 cetera, et cetera, et cetera, none of which
14 created a very attractive environment for
15 investment.

16 I think to the extent that, you
17 know, you've heard Bob Puckett and others
18 argue for statewide franchising, that's not
19 the construct they have in mind. Whether,
20 you know, that kind of construct could
21 ever -- a more desirable statewide
22 franchise construct could ever get through
23 the State legislature, I don't know. I was
24 talking about more limited measures.

25 I think the existing regulatory

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2 scheme in the State which is partly
3 statutory, partly regulatory, does create
4 disincentives to build-out. I know in our
5 case, we would have been happy to build out
6 in certain communities on a limited basis,
7 and, you know, not a redline bases, not
8 disadvantaging anyone based on income or
9 socioeconomic criteria or ethnicity, but
10 just, you know, building out in more
11 limited areas than a municipality which is
12 an arbitrary, you know, geographic entity
13 anyway. And the Commission has taken an
14 approach that's varied in stringency from
15 time to time, but the bottom line is that
16 that has not been a feasible model under
17 the current regulatory framework.

18 MS. HELMER: Well, and the reason is
19 the Commission has leveled playing field
20 rules which, you know, we are supportive
21 of. The things that I think were being
22 referred to a minute ago in terms of the
23 legislature are kind of exactly what I was
24 responding to Commissioner Sayre about
25 yesterday when I said that statewide

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2 franchising is just -- politically is a
3 very difficult thing to do. I mean, aside
4 from the regular legislative process,
5 you've got a lot of municipalities that,
6 you know, simply don't want to have their
7 positions unserved. And, you know, I don't
8 like to say don't do something because it's
9 difficult but when it comes to legislature,
10 I do worry that, you know, where you start
11 out with and what you want to begin with
12 may not be what you end up with.

13 MS. GEDULDIG: So I think we've had
14 a lot of conversation about the Open
15 Internet Order and 706, and some
16 conversation about how to balance those two
17 things, but I thought I'd crystalize that
18 question. How -- what are some examples of
19 how the State and/or the PSC can balance
20 the instructions, and the gray areas, and
21 the Internet Order, and the instructions
22 and limitations, or lack thereof, in
23 Section 706?

24 And we'll start at this end this
25 time, Maureen, and we'll work our way down

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2 to you.

3 MR. O'BOYLE: I think Michael and I
4 maybe disagree on which part is gray, which
5 area is gray, but --

6 MR. SANTORELLI: There's a lot of
7 gray.

8 MR. O'BOYLE: There is a lot of
9 gray.

10 And what a mixed metaphor is maybe I
11 think the glass is half fuller than --

12 MS. GEDULDIG: I like gray too so
13 it's okay.

14 MR. O'BOYLE: I will say this, I
15 think that we should see this as an
16 opportunity and not a challenge that,
17 again, to reiterate the 96 Act and going
18 all the way back to the 34 Act, envisioned
19 interlocking and at times overlapping
20 jurisdiction between state and feds, that's
21 a good thing. That means consumers have
22 more eyes on the, you know, more eyes on
23 the problem, that they have people that are
24 closer to local concerns and can address
25 local issues more responsively, that this

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is not -- that, you know, again to your point, state variability and regulation doesn't have a whole lot of impact on capital development but it does have a lot of impact on consumer protection.

So I think that -- I would encourage the Commission to be bold and look for as muscular representation for consumers as it can.

MR. SANTORELLI: I think there's an opportunity given the uncertainty, gray areas, what have you, and the potential, likely potential for litigation and things being gummed up in the courts, which for law students is a great thing and I always try to convince students that this is a fun area of law to work in because there's so much going on but --

MR. POST: Do they buy that?

MR. SANTORELLI: No, they don't. They inevitably gravitate towards the edge, the issues like IP and things like that.

Anyway, but I think there's an opportunity given all the, you know, I

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2 think most people will agree there's some
3 uncertainty and some areas of gray and the
4 potential for litigation, but there's an
5 opportunity to kind of look beyond the
6 specific wording of 706 but still keeping
7 with its spirit. And so thinking more
8 broadly about the issues of broadband
9 deployment and not being fixated on what
10 can the Commission do or can it regulate a
11 specific outcome, but thinking broadly.
12 And when you look at the sort of cornucopia
13 of things that the State is doing around
14 broadband deployment which is the specific
15 mandate in 706, the State's doing some
16 really interesting things.

17 And so arguably, that would satisfy
18 the requirement of broadband being deployed
19 reasonably and timely in the State, the
20 sort of totality of circumstances I think
21 the State would argue in favor of the
22 circumstances, meaning the statutory
23 requirement. So thinking broadly and
24 positioning the Commission as the kind of
25 hub for working across agencies or

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government to not so much tell what other folks should be doing because I don't think that would work all that well, but to see if there are gaps in what's being done in furtherance of broadband deployment.

So on the issue of brining broadband to unserved areas, the broadband office is doing some really great and interesting things. Perhaps there might be opportunities in the next phase of grants for the Commission to opine on requirements that should be potentially included. They can't direct the broadband office to do that I don't think, but they can probably offer their opinion on what should be in there and things like that. But -- and then focusing specifically on what there is clear authority to do, generally, and it seems like there's some consensus around the notions of things like pole attachments again, removing those barriers to investment that is a clear grant of authority in the -- in 706.

And then the issue -- so thinking

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2 broadly I think is generally a good thing,
3 and I think there is potentially a huge
4 opportunity for the Commission to position
5 itself as some sort, of cross government
6 facilitator of some sort and to be
7 the -- it is the expert agency on these
8 issues, so to offer its guidance and advice
9 on some of these issues. And then removing
10 barriers to deployment.

11 And the other point I was going to
12 make is with respect to reconciling 706
13 with the Open Internet Order. You know, I
14 again, don't think that that conveys all
15 that much new authority to states from the
16 perspective of traditional -- layering on
17 traditional regulatory requirements that
18 used to attach to telecom services. There
19 are a huge number of limitations outlined
20 in the Order that would I think prevent
21 those sorts of actions.

22 MR. POST: I'm just going to briefly
23 touch on some of the themes that I've
24 developed at more length through the
25 discussion today: Harnessing the power of

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2 private investment; not creating
3 disincentives to such investment;
4 eliminating regulatory barriers;
5 eliminating, to the extent the State can,
6 problems related to acces to public and
7 private rights-of-way; a favorable tax
8 policy; smart targeted expenditures of
9 public funds to alleviate market failures
10 in cases where they exist. These are the
11 measures that I think the State should take
12 and to some extent is taking to encourage
13 broadband deployment.

14 MS. HELMER: I would agree with all
15 of those, and just to pick up on a theme
16 that Michael was talking about, you know,
17 the Commission has always had a real sweet
18 spot in terms of being an honest and expert
19 broker, whether it's with municipalities,
20 whether it's with other state and public
21 entities, whether it's with companies. So
22 I would encourage -- I would encourage the
23 Commission to continue to be involved in
24 those issues. I think everything else got
25 covered.

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COMMR. SAYRE: Picking up on a couple of those points, could you opine on the issue of if we're being an honest broker and some people are looking at possible market failures and even though it might be outside of our area of jurisdiction, what does the panel think about the situation where a municipality believes that there has been a market failure because the prices and the services of the incumbent are inadequate and it wants to create its own broadband municipal district and use public funds to do so?

MR. O'BOYLE: I think that the -- a couple of things. One, we have a -- you know, Common Cause supports municipal broadband and opposes a state level policy to limit or curtail it. We filed as intervenors in support of the FCC and its preemption decision.

I'll say at that, that municipal broadband is an important -- is important for a couple of reasons. One, it is a source of competition, obviously, but also

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the threat of municipal deployment is often enough to, in terms of leverage, to encourage sort of another kind of preemption which is incumbents investing more because they fear the competition may be on their doorstep, to ward off municipal investment.

Two, I don't see any particular problem with the -- the municipalities have funds, they should be expending them to meet public needs. Universal broadband service, affordable fast broadband service is a public need and if the municipality decides that they are not being adequately served, irrespective of whether this is a market failure, quote unquote, if the city decides that this is what it needs to do to serve the needs of its citizens, I see no reason why anyone should stop them.

Lastly, on the broader point of market failure, I think sometimes we have this false schema where the public sector is only supposed to act, only supposed to intervene in times of "market failure",

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2 we're only supposed to regulate when
3 there's a market failure. Well, I don't
4 buy that because there are all sorts of
5 critical public interests and consumer
6 protections that we want, that we regulate,
7 that we legislate because they're the right
8 thing to do, irrespective of the
9 competitive landscape.

10 A great example, we have laws that
11 prevent discrimination in the provisioning
12 of hotel rooms, right, because they're
13 public callings. That goes back a long,
14 long time. Why -- we have a very
15 competitive hotel market, but the simple
16 fact that we have -- you know, it's not
17 like this is an either or. We still want
18 laws that prevent discrimination in the
19 hotel industry because it's the right thing
20 to do. And, you know, we often sort of
21 proceed from this idea that we only have
22 consumer protection or we only have public
23 interest intervention at times of market
24 failure, but broadly speaking, I know this
25 goes beyond your question, I don't buy

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2 that.

3 MR. SANTORELLI: Just on the
4 specific question of municipal broadband,
5 we've done a lot of work on that issue and
6 we have a pretty lengthy report out on it,
7 we presented it before and
8 Commissioner Sayre has heard it, I believe,
9 but on the specific issue of if a
10 municipality decides that it wants to build
11 its own system, I would urge any city
12 that's looking at this issue to make
13 informed decisions about it because it is a
14 very complicated thing to do and it's also
15 a very expensive thing to do. So to be
16 able to either dedicate existing funds or
17 to assume more debt to build a network, you
18 know, that's a pretty big step for a
19 municipality to take, especially some of
20 the smaller ones that have very tiny
21 budgets and, you know, debt limits and
22 things like that.

23 So, you know, the only thing I would
24 argue would be for municipalities to take a
25 couple of steps back and to really think

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2 about it and to see whether there's a real
3 need, if they already thought that there's
4 a market failure or have they gone through,
5 you know, a litany of other things that
6 they could do to attract a competitor,
7 potentially, if it's -- some of the things
8 are on the Google Model, kind of tweaking
9 some of their requirements to maybe attract
10 a new competitor, things like that. And
11 then also looking at the business case
12 because there's been a pretty long history
13 of some cities that had built these
14 networks and failed because of either very
15 tepid demand for the system, even if it
16 does offer comparable services at
17 comparable prices to the incumbents. In a
18 lot of businesses, people just stay with
19 the provider that they have.

20 And also, there have been other
21 instances where the incumbent has stopped
22 responded by cutting prices and kind of
23 driving the municipal's network out of
24 business because the municipalities
25 generally aren't as nimble as a private

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provider. I've heard some people argue that that's actually a good thing, that all of that work was good to nudge the incumbent to lower its prices, but that's a pretty costly investment to get to that point.

So, I mean, ultimately, my personal purview on this is that, I mean, this should be the absolute last resort in, especially in areas where there's already services. There's a more compelling case in areas that aren't served, but in areas that are already served, I think it should be less.

MR. O'BOYLE: I'll tell you a quick story, if I may. I grew up in Wilson, North Carolina which is famous for its fiber municipal broadband network and I've talked at length with the city about how they came at the decision to build a municipal broadband network. And it really is the pride of my hometown, they they have the fastest broadband in the state. They're very excited.

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There was a traditional tobacco and textile economy and somebody looked up and realized and said the days of big tobacco are over, so what are we going to do. And they asked the local cable incumbent, in this case it was Time Warner Cable, would you be willing to upgrade. We've heard demand from our small businesses, we want faster service. And the mayor of the town called one of the local, I don't know if it's regional vice presidents or whoever it was, from Time Warner Cable and they said this is our idea, we want gigabit connectivity in Wilson, North Carolina. And Time Warner Cable, I'm not making this up, this is a matter of public record, literally laughed in their faces. So there's no -- you don't need that. They literally laughed in their faces. The meeting was over in less than ten minutes because they said we're not interested in serving you, we don't care what you say, we don't care that you report that there's demand, we don't believe it.

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So then the city went to the other incumbent which was, at that time called Embarq but, you know, through mergers and oppositions and name changes and all it's not Embarq anymore, and Embarq was much more open to a public private partnership. They didn't want to build a municipal fiber optic network. This really was a last choice. And they worked with Embarq and they had a memorandum of understanding that the city was going to lay fiber, that they were going to manage customer relationships through their existing municipal utility, and that they were going to run the service trucks. They were going to handle most of it. Embarq was going to handle the telephone, because, as we all know, telephone is complicated. It seemed like a pretty good balance of risk and reward and responsibilities.

They had an MOU that went all the way up to the southeastern regional vice president at Embarq who -- and they actually, they had the local folks come out

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2 to the City Council meeting and address the
3 city and tell the Mayor and the council
4 members what an exciting new thing they
5 were doing and this is going to be a model
6 throughout the southeast. It went all the
7 way up to a regional vice president who
8 said we can't have that, margins aren't
9 good enough, we're going to shoot that down
10 right now; this stops at my desk and goes
11 no further. Because they were worried of
12 exact -- they were worried that it would be
13 successful at margins that weren't
14 acceptable and that it would be duplicated
15 in other communities.

16 And again, there was money to be
17 made there but not enough, and so they said
18 no, no, no, the status quo is better for
19 our margins so they shot it down, and it
20 was only then that the city said fine,
21 seeing no other alternative we will build
22 our own network, and it has been by all
23 accounts pretty successful. Their take
24 rates are way ahead of their initial
25 projections. They are -- they were

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2 revenue -- or they were -- they realized an
3 operating profit years ahead of schedule
4 and I'll add, they serve every address in
5 the city. There is no redlining because
6 any household within the city limits that
7 requests service even if you're a farmhouse
8 that lies within the incorporated limits,
9 even if you're a, you know, a half a mile
10 off of the road and it is extremely capital
11 intensive to wire that home, by charter, if
12 you live in the city limits you get
13 service.

14 And I'm a little proud because it's
15 my hometown, but I think the idea that they
16 sort of like rushed into this bullheaded
17 and that they didn't do their due diligence
18 belies the facts, right, and I think it
19 also speaks to, you know, everybody throws
20 around the words "public private
21 partnership" like it's an easy thing to get
22 done, but sometimes you find really willing
23 partners on the public side and no one
24 wants to work with them.

25 MR. POST: There are two levels of

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2 issues here. One is the legal issue and I
3 don't pretend to be an expert in municipal
4 law so I couldn't tell you whether
5 municipalities in New York have authority
6 to, under State law, to build broadband
7 networks, but that's certainly an issue
8 that would have to be investigated. As a
9 policy matter, I think I lean more towards
10 the nuanced approach. I'm glad this worked
11 out for Wilson, North Carolina, but for
12 every story with a happy ending there's a
13 horror story of a municipality that got in
14 over its head and made unwise investments
15 and compromised the provision of, you know,
16 other perhaps more important municipal
17 services.

18 It's -- I don't think there's any
19 bright line answer. There's a lot of
20 things, just as a business has to evaluate
21 a lot of things and deciding whether to
22 make an investment, a municipality needs to
23 evaluate a lot of things and needs to look
24 at feasibility, management, whether they
25 can ensure the continuity of service, the

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2 financial aspects for the municipality.
3 Sometimes it will work, sometimes it will
4 not work, and I don't think you can say
5 that this is either a, you know, a good
6 thing or a bad thing. Sometimes it will,
7 if it's in the wrong environment, it could
8 create an unsustainable municipal system
9 while creating disincentives to private
10 investment, which in the long run is not a
11 good thing for the municipality. So it's
12 something that, as I said and I think as
13 Mr. Santorelli said, requires a very
14 nuanced approach.

15 MS. HELMER: And I would just also
16 urge that you look at the electric
17 experience because there was a period of
18 time, I'm going to say 10, 15 years ago
19 where there were a couple of consultants in
20 particular that just went from town to town
21 on the electricity side and said, you know,
22 you can build your own cogeneration plant,
23 you'll save all this money compared to, you
24 know, X, Y, Z utilities bills, gave them
25 half the story.

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And, you know, to answer your specific question, Commissioner, that may be a place where the Commission can come in and at least ask the municipality or have access to staff so that they can ask the staff, you know, what are the things we should be thinking about, what are the risks, what are the kind of issues that we may face down the line in terms of our own stranded costs and so forth, and at least have some balance if folks like that do start going out and essentially selling their wares to these municipalities.

CHAIR ZIBELMAN: Just to pull us back a little bit because we've been talking about getting competition and I, you know, it seems to me that before we worry about getting competitive suppliers, that the first thing we should be worrying about is getting access to everyone. And I, you know -- and so the concern is really how do you address the issues around things like Albany and Syracuse where there are portions of the community that have access

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2 to broadband and portions that don't. And
3 certainly our concern, despite Common
4 Cause's comments in the merger, was the
5 opportunity to actually build out the
6 system where it wasn't being built out and
7 I think that that might continue and we
8 don't need to debate it, but I think that
9 for the people who aren't getting served
10 today and will get served if -- once
11 the --- if the merger charter gets
12 ultimately approved, I think they'll be a
13 lot happier in thinking at some point in
14 the future there might be a competitive
15 supplier coming in.

16 But I think the, you know, the goal
17 of the State is to at least get a minimum
18 amount of access, a minimum amount of speed
19 and I appreciate everyone's thoughts on
20 that regard. I would say that the
21 broadband office and the Commission are
22 very close collaborators, we do work very
23 closely together to take a look at how to
24 expedite on that process.

25 But the real question for me is, is

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2 in these communities where we have
3 providers and there is a franchise and yet
4 we still have portions of the community
5 that are being unserved, what could and
6 should the Commission be doing to address
7 those issues? Because that is the level
8 playing field issue has become an issue
9 obviously before us in terms of providers
10 coming in and only wanting to serve a
11 portion of the community, and then the
12 other aspect is where we have situations
13 like Syracuse, like Albany, where you have
14 basically people who seem to be wealthy are
15 getting services, and people who are in
16 less wealthy communities are not. And
17 those are the things that I continue to
18 come back to. How do we as a Commission
19 address it? Because it seems to me that's
20 the heart and soul of what a Public
21 Utilities Commission should be looking at.

22 Any thoughts? Any -- where 706,
23 where FCC, because ultimately that's what
24 the public looks to us to do.

25 MR. O'BOYLE: Well, I think it

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2 starts with the public hearings. I don't
3 think the Public Utilities Commission can
4 or a Public Service Commission can hear
5 enough from the public when it comes to
6 maybe being public interest decisions. And
7 so, you know, Susan, our Executive Director
8 here did a great job of organizing with our
9 friends CWA, the public hearing on Fire
10 Island a few years back. I'm pleased to
11 see that the, you know, the public sector
12 is taking serious franchises and reviewing
13 things like the FiOs franchise here.

14 I think that separate and apart from
15 the law is just simply hearing from people,
16 and hearing from small business owners, and
17 hearing from competitors that would like to
18 enter the market but can't, or hearing from
19 school children or -- you know, you name
20 it -- actually, 706 does specifically
21 mention schools. So the listening tours
22 and the public hearings are -- you can
23 never do enough of those, and I think that
24 they can only redound to the benefit of the
25 public interest.

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2 MR. SANTORELLI: Well, I think on
3 the issue of enforcing franchises, I mean
4 they are contracts essentially, between
5 cities and providers. So if there is
6 determined to be a breach of that contract
7 then there are remedies available.
8 Certainly, and I think most franchises have
9 remedies included within the contractual
10 language, and so it arises to that issue
11 and certainly those remedies should be
12 invoked.

13 I won't presume to talk for Verizon
14 but I think part of the issue around the
15 FiOs discussion is around interpretations
16 of contractual language. So it is -- it
17 comes down to this being a contractual
18 issue, but I'll talk about -- and it turns
19 into having the players who -- parties to
20 those contracts either working together or
21 collaboratively to solve issues in the
22 contract, or if it becomes adversarial and
23 you go to court.

24 But I think -- I'll just talk about
25 in the context of New York City because I'm

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2 most familiar with what's happening here,
3 and the fact that there are unserved parts
4 of this city is still amazing to me but
5 just, you know, given it's New York City,
6 but it happens sometimes because,
7 especially in New York, formally commercial
8 areas become residential areas and they
9 fall outside of franchise areas so there's,
10 you know, there's kind of gap areas. In
11 the past, the city has, as a franchising
12 entity, has worked with existing providers
13 to figure out ways to build out to these
14 areas and former warehouses that are now
15 either startup hubs or -- and/or
16 residential buildings to accommodate
17 population growth.

18 And so in the past, the franchise
19 authority here, DoITT, has worked with, I
20 believe it was Time Warner Cable in some of
21 the areas to figure out ways to build out
22 to these areas. In the past, the city has
23 worked with Verizon on pilot programs for
24 facilitating fiber build-out. A couple of
25 years ago there was something around

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2 micro-trenching that came up. So in those
3 instances, the city worked collaboratively
4 with these -- the franchisees to figure out
5 solutions, but if they come to dispute over
6 terms of the franchise, then, you know,
7 there are other remedies available.

8 In terms of the Commission's rule,
9 I'm not exactly certain whether the
10 Commission has authority to intervene, I
11 guess, on -- in these issues.

12 MR. POST: Responding to the points
13 about New York City, there are certain
14 interpretation issues which -- on which the
15 company differs with New York City. Those
16 are being --

17 CHAIR ZIBELMAN: Can I just -- I
18 don't really want to get into -- just
19 generally, I'm looking at a policy question
20 or practical question, which has been a
21 dilemma since I've been here, is just -- we
22 have areas and it doesn't -- as I
23 understand there's a debate, we're
24 obviously aware of it, between Verizon and
25 New York City, but in general throughout

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2 the State we have multiple cities that are
3 only getting partial service. And the
4 question is, is what can we do from
5 a -- we've talked about removing barriers
6 but, you know, is there something more
7 sustainable that we can do rather than
8 just, you know, looking at idiosyncratic
9 build-outs? What can we do as a
10 Commission?

11 MR. O'BOYLE: Franchises don't have
12 to be renewed.

13 CHAIR ZIBELMAN: Well, we
14 don't -- and that gets back to the
15 question, without the State franchise, can
16 we accomplish something? That's what I'm
17 curious -- because I understand. I don't
18 want to get into a debate on who said -- he
19 said, she said, just generally, how do
20 people make practical business decisions in
21 these circumstances?

22 MR. POST: I don't think the issue
23 here is cable television service. I think
24 we're talking about broadband and there's
25 no franchising process currently for

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broadband. So the issue really isn't fixing or putting in place a franchising process. The issue is remedying gaps in availability that exist. And I'm not sure I have anything to add to what we've already been saying about that.

If the gap is due to a market failure, a situation in which a private investment model simply won't work, I think the ultimate remedy -- the model for the ultimate remedy is provided by the Governor's broadband program. I think there's a lot that can be done through grants, subsidies, even measures, and someone mentioned this yesterday, perhaps it was Dr. Lerner -- I'm sorry, Dr. Crawford, about the possibility of financing guarantees, which may be a less expensive way for the State to reduce the costs of investment.

All of these things, these things need to be looked at, you know. Without more detail about what the particular problem is in the particular place, I don't

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2 know that I can offer anything more helpful
3 than that. And there's general
4 observations.

5 COMM. SAYRE: There is one thing I
6 think in our regulations for cable TV
7 franchises that has, and I'm not an expert
8 on this, maybe Graham, you can help me on
9 it --

10 MR. JESMER: I'll give it a shot.

11 COMM. SAYRE: -- a minimum standard
12 in terms of build-out based on number of
13 dwelling units per mile or --

14 MR. JESMER: Yeah. The minimum
15 threshold Commissioner Sayre's referring to
16 is a 35 homes per mile requirement.

17 COMM. SAYRE: So I'd like to ask
18 the panel, given that cable TV build-out
19 generally brings with it broadband
20 build-out whether we regulate it or not,
21 and given that technology has been changing
22 in recent years in terms of how expensive
23 it is to build new facilities, it is time
24 that we took another look at that threshold
25 and perhaps tightened it up?

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MR. POST: That hasn't really been an issue in Verizon's franchise areas. We have generally chosen to build out to the entire municipality. I don't think we have taken advantage of the primary service area versus nonprimary service area construct. In the areas where we have proposed limited build-out, they haven't been based on that, so they've been based on other factors than the 35 per mile limit. So I guess this is a confession of ignorance, I have no idea whether in more rural parts of the State that has been an issue.

MS. HELMER: I think on the cable side, when the cable companies look at their ROI, you know, it often is a different number than 35 that, you know, based on the products and the demographics and so forth. So, I mean obviously they have to comply with that and if there is somebody who asks for service and they fall within that category, the company has to serve, but I think there are many cases where the company serves at lower than

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2 those numbers.

3 MS. GEDULDIG: So if there aren't
4 any other questions, we're going to take a
5 quick break and then we'll come back and
6 wrap up.

7 (Whereupon, a recess is taken.)

8 MR. MCGOWAN: Okay. Let's resume.

9 MS. GEDULDIG: So this last section
10 of the technical conference is for next
11 steps, and I think it's fair to say that
12 we've got a lot of ideas over the past two
13 days, and the best way to characterize how
14 our next steps are going to go are in the
15 shorter term, the mid term and the longer
16 term. We have a lot of ideas from
17 panelists yesterday over the things that
18 the Department staff can recommend, and can
19 issue some White Papers on, and get
20 comments on before presenting
21 recommendations, on things around pole
22 attachments and other barriers to entry
23 which we can move forward a little bit
24 quicker.

25 In the medium term, I think there's

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2 also areas where we can have a little bit
3 more process, and I think we're talking
4 about having an evidentiary hearing on
5 service quality which might take a little
6 bit longer than issuing some White Papers,
7 but we can -- we'll go ahead and make that
8 recommendation as well. And more longer
9 term are things that we can advocate before
10 the FCC and could take a little bit more
11 time.

12 And so that's really our plan for
13 next steps, and if there's things people
14 would like to add or suggestions in that
15 vein of the shorter term, mid term and
16 longer term, I think that would be helpful.

17 MR. MCGOWAN: Yeah. I would just
18 also clarify that in the third bucket I
19 think there are things that we're going to
20 want to advocate before the FCC but there
21 are also probably some additional fact
22 gathering and policy idea generation that
23 we'll want to think about because some of
24 these problems are deep and they need broad
25 and innovative solutions, and we need to

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2 work on some of those.

3 MS. GEDULDIG: Many stakeholders.

4 MR. MCGOWAN: So that, I think
5 concludes our --

6 MS. GEDULDIG: That's our theory on
7 next steps. I don't think we have specific
8 details, partly because a lot what we're
9 contemplating doing next were derived from
10 the technical conferences here today.

11 CHAIR ZIBELMAN: But do you want to
12 clarify though, that staff will be issuing
13 a White Paper on the specific
14 recommendations you're going to be making
15 that will be --

16 MR. MCGOWAN: The short term.

17 CHAIR ZIBELMAN: -- for the short
18 term on that?

19 MR. MCGOWAN: The first priorities,
20 yes.

21 MS. GEDULDIG: Staff members will be
22 issuing White Papers on the shorter term
23 recommendations and those will be issued
24 and available for comment.

25 UNIDENTIFIED SPEAKER: Will those

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2 deal with broadband only or legacy and
3 broadband?

4 MS. GEDULDIG: I think there's a
5 fair amount of crossover on some of those,
6 especially around barriers and service. I
7 think a lot of it will be a little bit more
8 on -- well, universal access I think can go
9 to both. I think we're looking for in
10 areas that aren't served, they could be
11 served by DSL which is a more traditional
12 system

13 MR. JESMER: I think the answer is
14 we're not quite sure yet because we need to
15 go back and digest everything we've heard
16 over the last two days.

17 MS. GEDULDIG: With the details.

18 UNIDENTIFIED SPEAKER: Let me just
19 say one thing.

20 MS. GEDULDIG: I wouldn't foreclose
21 it.

22 UNIDENTIFIED SPEAKER: Well -- okay.
23 The policy -- differences between the
24 panelists which were all fascinating and
25 important, eventually lead you to a

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2 question as to how you choose between them,
3 and in many of these cases, including in
4 broadband, what evidence the Commission
5 will generate and use as a foundation upon
6 which to make the policy decisions is
7 unclear to me, and I would suggest that a
8 lot of -- that staff ought to go through an
9 exercise about asking itself what evidence
10 it needs on any of the issues that were
11 identified, sufficient to say this shall be
12 our policy.

13 MR. MCGOWAN: Yes. We always want
14 to make sure that recommendations we make
15 to the Commission have a rational basis,
16 have a factual foundation, and to the
17 extent we need additional facts --

18 MS. GEDULDIG: We'll get them.

19 MR. MCGOWAN: -- and to the extent
20 that those additional facts are best
21 adduced at an evidentiary hearing, then we
22 will definitely bear that in mind.

23 MR. JESMER: Or through a notice in
24 comment process if that's the way that
25 staff decided to go to. I think, you know,

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individual issues will inevitably require different processes and we're not quite at a point where we can tell you X, Y and Z issues will be dealt with in A, B and C ways.

UNIDENTIFIED SPEAKER: I agree that it's issue-specific but I sense, at least my input here is to give greater weight to the historic evidentiary process that the Commissioners had available to it that might have been the case over the last several years. The actual participation of parties in a litigated proceeding about the facts has value that perhaps I appreciate more than others, but I appreciate it.

MR. MCGOWAN: And we appreciate you're bringing it up.

MS. GEDULDIG: Thank you very much.

MR. MCGOWAN: Well, thank you very much New York Law School for hosting us, and it's been real fun and we'll do it again some time.

(Time noted: 1:03 p.m.)

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C E R T I F I C A T E

STATE OF NEW YORK)
COUNTY OF RICHMOND) ss:

I, JENNIFER CASSELLA, a Notary Public
within and for the State of New York, do hereby
certify:

I reported the proceedings in the
within-entitled matter, and that the within
transcript is a true record of such proceedings
to the best of my ability.

I further certify that I am not related
to any of the parties to this action by blood
or marriage; and that I am in no way interested
in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set
my hand this 3rd day of March, 2016.

JENNIFER CASSELLA