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Reported By:
Jennifer Cassella
HEARING CONVENE 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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Joe Post.

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

MS. GEDULDIG: Oh, sure. I'm sorry. So today we have Maureen Helmer who's a partner at Barclay -- or unless the panelists want to introduce themselves. That would probably be a lot better.

MS. HELMER: Yeah, I'd be happy to. Again, my name is Maureen Helmer. I am partner at Barclay Damon and I'm here representing the Cable Telecommunications Association of New York, which at the present time, is constituted of Time Warner Cable, Cable Vision and Charter Communications.

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

MR. SANTORELLI: Hi. Michael Santorelli. I'm Director of the Advanced Communications Law & Policy Institute here at New York Law School, and
welcome to everyone.

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

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

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

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

MR. POST: Thank you, Karen.

Let me start with the observation as a policy matter. Seeking to assume jurisdiction over intermodal services such as VOIP and wireless would simply not be the right thing for the Commission to do,
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whatever the legalities of the situation are.

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

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

Section 5, Subsection 6 of the Public Service Law states that,
"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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consumers by suppressing to whatever extent, the incentives for investment in innovation.

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

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

I'll make a few points. One, I don't believe there's any clear evidence that there's any strong evidence that local state level consumer protection has dampened investment. In fact, we've seen
an explosion in investment. I think this applies actually at the federal regulatory level that we have not seen as regulators have increasingly been awake to the needs to protect consumers and promote the public interest. We have seen an explosion of capital investment. The AWS-3 Auction was record breaking in terms of the amount of capital laid out for it. The charter is presently poised to spend tens of billions of dollars to buy Time Warner Cable including right here in New York, and Altice is investing billions of dollars to buy Cablevision. So I think that puts paid to the idea that consumer protection harms investment and it also puts paid to the idea that we need some kind of national rules, and we should have federal only regulation and the states have no role to play.

There are several things to note here. One, the Federal Communications Commission gets something on the order of 100,000 consumer complaints a year. They
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are able to touch maybe a tenth of them. So it makes all the sense in the world that local regulators that are most in tune to local needs would regulate and respond to local complaints. I think that's -- it makes a lot of sense and I think it actually respects of principle of subsidiarity.

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

So I think we'll probably get into all of those and I think we'll probably -- I wish I were here yesterday, unfortunately I was not, but I suspect we -- I fear I missed something but I think
there's going to be some -- plenty of opportunity to dive into more of these points later.

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

MR. POST: I'm not sure I agree with the position that criticality is somehow a sufficient basis for litigation. Water is critical, food is critical, clothing is critical, but they're all sold in competitive markets. The market mechanisms, I think, and I guess I'm going to reveal my philosophical biases here, the
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marketing mechanism has worked very well in bringing the U.S. economy to where it is today. Certainly the economy is having its problems but they really shouldn't blind us to the tremendous accomplishments that have been made over the years and decades and centuries.

And regulation should be a response not to the criticality of services but to market failures. I don't think we've seen anything in the wireless space yet that constitutes the kind of pervasive market failure that would warrant a regulatory response. It's not to say there haven't been some problems. It's not to say that consumers haven't had complaints, some of which -- some proportionate which are certainly legitimate, but there are mechanisms to deal with that. And to say that merely because of that situation, merely because of the potential for problems we need to have a regulation is, I think, a dangerous assumption to make. And 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 fee. We need surgical regulation that acts only where it's necessary and appropriate.

MR. JESMER: Joe, let me challenge
you just a little bit. You mentioned surgical regulation and I think, you know, the question we're trying to get at is that the Department staff, at least, has expressed a desire for some minimum set of regulatory principles in the study, or the assessment, I should say, which Karen laid out earlier; basic consumer protections affordability, equitable contributions to public funding, emergency response and restoration. So, you know, from my perspective, anyway, I think that is a relatively light touch.

So what I would like to challenge you on a little bit is to tell us where that line would be if the Commission were to go ahead and institute a proceeding to research jurisdiction over wireless in a hypothetical scenario? What would be the bright line where it would become depressing investment versus ensuring that New York consumers are being protected, and are being given information, and have a 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
emergency response only really works if you have universal service, and universal service does not exist in a purely market-driven environment. Let's look at a national example. The idea that you could pick up a telephone, get a dial tone in Key West and reach Barrow, Alaska with ten digits, the market would never provide that on its own. You could do a similar example here in New York, the idea that you could pick up a phone in some of the northern regions of the State and easily dial Midtown Manhattan with ten digits. This sort of point-to-point universality of service only happens in a regulated environment and it's because the State maintained its carrier of last resort jurisdiction that the State was in a position to compel Verizon to rebuild in Fire Island after it attempted to degrade and substitute with the voice line product.

So if -- you know, we can talk about sort of the theoretical examples of a creeping regulatory state and we can talk
about, you know, white board and economic theory, or we can talk about the reality on the ground which is that consumers need the reliability of point-to-point universal service and regulators need to know that service will be point-to-point if universal, if the emergency response means anything at all.

MR. SANTORELLI: Can I jump in?

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

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

So I think, at least the way it's phrased in the question, it seems like you might be putting the cart before the horse, because it seems before you can reassert jurisdiction you need to define a lack of effective competition. And so it might be better to, if that's the path that the Commission wants to go down, to hold whatever hearings are necessary to get to that point and then identify the specific problems that exist that constitute or
contribute to what the Commission perceives as lack of effective competitive and then tailor regulatory responses to meet those very specific needs. Because it sounds like there might be already a framework in mind that would kind of blanket the industry when in fact there might be very narrow problems that need to be addressed and can be addressed in much more or less intrusive ways.

And so, but I think also the assessment and lots of other data already highlights some of the problem areas, getting back to the question about availability. You know, there are challenges still out there to deploying that works, and we heard about this a lot yesterday from Ben, from the CTIA and others. You know, when we think about where wireless isn't available in this State it's usually in, you know, parks or very densely -- or areas where there are topographic challenges. A lot of those areas have very restrictive policies when
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
challenges that need to be addressed and figuring out narrow solutions to those, but I would just say that having the Commission make the determination that there's a lack of effective competition in the wireless space I think would be a pretty shocking conclusion, even if it does go through the process of having hearings and gathering information because assessment as well as even the FCC, which has declined to label the national market effectively competitive, but it hasn't said that it's not competitive or that it's uncompetitive. They both need assessment and federal wireless studies. There's a rich amount of data to show that there is in fact effective competition, but if there are instances again, where there are narrow or specific challenges or issues that need to be addressed, then the better approach, arguably, is to target those rather than do a sort of blanket approach.

MS. HELMER: This issue obviously applies to the VOIP side of the house as
well as the wireless side of the house, so my comments I guess are a little more addressed to the VOIP side. But I agree with Joe's comment about the potential for regulatory creep, but I think almost as importantly the idea of regulatory uncertainty is very problematic. You've had two industries, the VOIP industry and the wireless industry that have invested billions of dollars -- and if I get repetitive from yesterday I apologize in advance -- billions of dollars based on a particular regulatory scheme at the State and Federal level.

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

Regulators need to be very, very
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careful as they go forward and I think Michael, you know, continued verbally about the fact that, you know, you have to be surgical, you have to have, I like his expression, a certain level of humility as you approach these issues, and the extent to which you don't know the future, and you don't know how technology is going to evolve, and you don't know how innovation is going to evolve, to make sure that you don't hinder those things. Because one of the things that we have seen in both of these industries is a lot of cross-pollinization between different sectors in the industry which you didn't have before. And so, you know, aspects of the internet are dealing with aspects of, you know, the various wireline and wireless carriers and both the innovation and also the cooperation in terms of, you know, responses to emergencies has really been stellar.

So, you know, I would caution that the Commission look very carefully before
it thinks about revisiting some of these
issues that have just worked very well,
especially with respect to, you know,
affordability. Affordability, I don't know
how you address "affordability" without
getting into some kind of price regulation,
and both the uncertainty of regulation and,
you know, certainly the cost of regulation
and all these things have costs, add to the
cost of investment and uncertainty as to
the cost of investment, and, you know, we
want folks to invest in this State.

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

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

MR. JESMER: Anybody else?

MR. SANTORELLI: Well, the Minnesota example is interesting. I mean, it's being challenged in court so we'll have to see how that works itself out. If history is any guide, I think it kind of faces a steep climb, just based on the, again, as Maureen mentioned, there's been a federal kind of preference for regulating that service and that goes back over a decade to cases that came up, again, in Minnesota and some other places attempting to regulate nomadic VOIP, and those were preempted by the FCC and
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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legal sort of basis for extending
regulation to it, and I'm sure they'll look
to the Minnesota case and some of the other
precedent that has been set at the federal
level and at the FCC when making that
determination.

But I think sort of just looking at
the arc of regulatory and legal precedent
in the VOIP space over the last dozen years
or so, I think it is -- it tilts much
further to the federal side, even if the
FCC has had a docket open on the specific
issue of whether VOIP is an
IP -- information service or telecom
service since 2004, it still hasn't made a
determination but it kind of has reserved
the right for itself to make that
determination later as well as to kind of
dictate how the regulatory framework
proceeds going forward because they have
preempted states in the past, they've tried
to regulate VOIP but also they've also kind
of layered on some additional, I guess
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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and public programs. Are you talking more about, you know, line extension type issues or getting computers in a classroom?

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

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

COMMR. SAYRE: Or cellular broadband service.

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

MR. MCGOWAN: A lifeline service.

COMMR. SAYRE: This is lifeline.

MR. O'BOYLE: So I have something I can share. I think that there's -- it's clear that the state can be involved. California Public Utilities Commission has been very much a leader and an innovator in how to work within its own state lifeline framework. It offered -- the State has seen fit to offer a top-up and a match to the Federal 925 so now the State level contribution is something on the order of $20, and as we know, lifeline modernization
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is moving forward at the federal level, it seems like next month. I think that there's a good model there to follow, that if the State should in its wisdom identify universal service as a -- and digital divide as a problem, which it clearly is, that the State can move forward with repurposing its Universal Service Fund.

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

MR. POST: I think Maureen's hit upon a very important point. I don't think anyone here disputes that the digital divide is a serious social problem. I think it, you know, to the extent it can be solved by money, the money should be raised on as broad a base as possible. It's a
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
Universal Service Fund but then it runs into the issue of whether the State can assess broadband providers for that purpose. In the FCC's Open Internet Order, it makes a point of saying that the State Commissions are bound by its forbearance regime and as the sole example that they give is with respect to broadening State and Universal Service Funds.

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

COMMR. SAYRE: But we have to get past that. Assuming that the FCC and its reform of its own lifeline program allows the states to supplement the federal
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program with the same kind of contribution base, should we?

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

You know, the job of the public interest is to -- the job of Public Interest Regulation is to advance the public interest, not to advance the convenience of providers.

MR. SANTORELLI: If I could, sorry, weigh in again. Just to build on your point about consumers and that's critically important because the lifeline is to focus on consumers, getting more people on line, but I'll go off on a policy tangent for a second if that's okay. You know, the notion -- the Lifeline Subsidy Program at the federal level, state level, it addresses an important issue because, as we know, there's lots of data out there showing that there's a socioeconomic, a big socioeconomic component of the digital divide. But I would argue, and we've done a lot of work on this at our program, looking at sort of the broad array of factors that go into broadband adoption, and it's a lot more than just cost. And I
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
might not see the value of doing it. So if there are more, sort of granular local level outreach efforts to get more people aware of the benefits of broadband, then that could drive either more lifeline applications to the federal level, state level, both, or sort of organic broadband subscriptions on their own paying -- seeing the value of investing scarce dollars on correction as long as they see the relevance and meaning and value to their lives.

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

I mean, the contours are almost the same since the 90's, socioeconomic
components, there are the minority groups have been behind adoption levels since the 90's, educational levels differ when it comes to adoption rates. So we know the problems -- but so long story short, there are lots of other things that could be done beyond subsidies and perhaps the Public Service Commission could highlight those. I don't know if it could actually do much on its own to address those, but highlighting the importance of those within the sort of package of things it does around the digital divide could be potentially powerful.

MR. O'BOYLE: Actually, I have just one very short thing to say to the question of relevance. I don't think anyone is saying that we should not be digital inclusion or digital literacy at all. In New York, we have some really fantastic examples here. Tom Kamber's OATS, Older Adult Technology Service, really is a national exemplar in how to teach digital literacy and digital relevance to older
adults, and if you haven't ever had one of his seminars, sit down with him, it's amazing.

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

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

So I think while we absolutely should be investing and finding ways to
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teach digital literacy and digital inclusion, I think the Mayor here in New York is doing some really exciting work in that area as well. I think, you know, Susan Crawford is a great friend, but I think sometimes we use the word "relevance" without really digging in to what does it mean, and I think there are -- there's maybe some problems on the social scientific standpoint with the research that says that relevance is the chief issue. I think it's superficial and doesn't get to the heart of the matter.

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

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

MR. JESMER: Sure, Joe.

MR. POST: I think the discussion of adoption relevance is very interesting. I take your point in that it is indeed interesting that probably hasn't been considered enough, but I'd like to use
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.
probably a subject for a whole other forum, but there are a number of steps that the State could take to increase incentives for broadband investment.

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

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

MR. POST: Thank you, Graham.

As a starting point, when I was reading over these questions last night, it
occurred to me there was an ambiguity and
my understanding is that what we're talking
about here is interconnection for purposes
of exchanging VOIP traffic as opposed to
peering and transiting arrangements for
internet access traffic.

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

MR. POST: So my view of this as a
legal matter is that exchanges of voice
traffic in IP format are not subject to
either the substance of that obligations,
or Section 251 of the Act, or the
negotiation procedures of Section 252.
This is another one of those issues that
the FCC has under review. To my knowledge,
it's never interpreted. The incumbent
interconnection obligations of 251(c)(2)
either to allow a carrier to demand
IP-to-IP interconnection or to require
interconnection for the exchange of traffic
that never touches the public switch
telephone network.
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In fact, the FCC recently confirmed in an appellate brief that it had not yet taken action in this area. Last year, it declined to mandate VOIP interconnection arrangements because "The Commission -- meaning the FCC -- is currently considering the appropriate policy framework for VOIP interconnection and pending proceedings."

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

The 252 process for negotiation interconnection agreements was created in a very different environment. You know, now, ILECs are just one of the many players in the marketplace. They have no special historic advantages in the provision of VOIP service. I don't have the figures with me, but I'd be very surprised if in
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New York is elsewhere. The ILEC share of the VOIP marker 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 look 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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My clients, the Verizon companies have been industry leaders in negotiating IP and IP interconnection agreements. We've entered into them with partners of different sizes and types. Some providers are, you know, in our view are not serious about negotiating agreements with us. Others appear to be uninterested in establishing IP-to-IP interconnection arrangements. But from my seat, the commercial agreement mechanism is working and as yet, there's no reason for intervention, certainly state intervention in the process.

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

MR. POST: That's wise, Maureen.

MS. HELMER: -- but we do feel that 251(c) does allow for a state involvement in this issue. We do acknowledge and appreciate the fact that the FCC does have an open docket on this and we are watching it very carefully and participating in it.
I felt very strongly for a long time that the states and the feds, but the states kind of play a very important role in wholesale issues and business-to-business issues. And again, it's -- and we've even seen this evolve on the regular voice interconnection front, most of the time it is just company-to-company, but to have the Commission there as a backstop to be of assistance and to help negotiate, I think is very helpful to businesses. So, you know, again, we are also watching what happens at the federal level on this issue but we are hopeful that the states will play a role in this.

MS. GEDULDIG: So we're lucky enough to have another -- we're going to go off panel for just a second, but Joe Gillan is here today and has a lot of expertise in
MR. GILLAN: See, we've already had an interconnection problem.

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

Now, first I want to make a comment about your program that will tie into this. There are three markets in the telecommunications industry. There's the residential market, there's the market of 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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to say hey, that's discriminatory or this
provision's not in the public interest, but
it's a transparency role that the State
Commission plays with a second critical
component and that's opt-in. The Telecom
Act gives you the opportunity not to sit
down in a dark room not knowing none of the
other deals that Verizon or some incumbent
has cut with other players, but you
actually get before you go to the
negotiator and you get to look at the
contracts that already exist and say yup, I
can live with that, I want it, I want to
opt-in. And when you look at this
industry, 90 percent of the agreements in
every state I've ever been in or any
process I've been involved in are opt-in.
The foundation of this industry isn't
arbitration and conflict, it is opt-in; let
me have that contract and then I will
conform my business to its requirements and
I will move on.

So we have this system, 251, 252,
that is designed to prevent discrimination
and give you opt-in. Now, what do those agreements really look like? The Telecom -- the FCC has been very clear in providing guidance that just says look, if these agreements address, and there's a list, I don't have all of them memorized, a list of duties or activities and they resale and they involve number portability, they involve reciprocal compensation, and they involve interconnection, then these are interconnection agreements under the Act and they have to be filed.

I will tell you, contracts don't hide what they're about. So if you get to look at a contract, you can pretty easily see does it address these activities. And who is it that's supposed to decide whether they have be to filed or not? It is not the incumbent, it is not Verizon. The law is quite clear. The FCC Orders are quite clear. It is the State Commission. To the extent there's any dispute about whether something should be filed, the State Commission, not the FCC, the FCC expressly
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states in an Order called Quest Declaratory Ruling, the entity of -- the first review on this question of whether something should be filed is the State Commission because the State Commission is closer to the process of being able to review the contract.

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

Secondly, Verizon has a contract with Verizon Business, its own affiliate. Other carriers want to know what do those
agreements look like and can I opt-in to them. In terms of state authority, by the way, Michael pointed out that there's about 30 states that have removed VOIP jurisdiction. In each and every one of those laws that I've seen, and I will admit I have not seen all 30 but I only probably missed one or two, every single one of them I've ever seen always has a reservation clause in it that says, we are removing from the Commission authority over VOIP except the Commission still has authority to fully do its duties under 251, 252. So there's never been a question as to whether or not states had the continuing authority to look at these just because they went to IP.

Now, word is, has the FCC left it? The FCC left it where they said unambiguously, that all VOIP calls are subject to 251, 252 as a call because they brought VOIP to PSTN, PSTN to VOIP, and VOIP-to-VOIP calls into the Intercarrier Compensation Order into Section -- to the
provisions of the reciprocal compensation.

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

These two contracts are being
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transferred from Verizon to Frontier as part of a California merger. We finally had a break in the wall of confidentiality because the California Commission ruled, hey, as the -- before the contrast can be transferred to Frontier, they got to be filed. So we expect them to be filed under 252 in California Friday, maybe Monday, unless there's some super game about to be unfolded, which I don't expect.

Once they're public, it will be much easier for State Commissions to answer this question, because again, contracts don't hide what they're about. You'll be able to look at it, you'll be able to determine if it applies in your stay, you'll be able to determine whether it addresses things like number of portability, reciprocal compensation and interconnection, and you'll be in a position to do your duty under the act that the FCC gave you to tell Verizon, hey, file this. Why? Because competitors actually want the same thing 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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about to become public so that this
conversation can deal with hard facts.

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

So why is telecommunications
special? Why was this regime established
in 1996? Well, I mean, I don't think
there's any doubt what the answer to that
is. It was in recognition of what was
perceived to be the special market position
of the incumbents. I heard words during
your presentation like big, large,
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
horribles 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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is up in the air and I think my comments of cooperative federalism are still to remain. We could spend the rest of this forum and a whole other one arguing about the details of 251 and 252 but I think it probably is appropriate in a forum like this to focus on the policy issues, and to my mind, they point more in the direction of abstention than of act of regulation and trying to extend the 252 regime into an area where it's very ill-suited.

MR. GILLAN: The 252 regime has already been extended and it was extended, quite honestly, at the urging of large carriers like AT&T and Verizon who wanted to get rid of reciprocal compensation and access charge obligations relating to the termination of their traffic. And so the FCC in the Intercarrier Compensation Order did what the large carriers asked and brought all VOIP to PSTN, all PSTN to VOIP, and all VOIP to VOIP traffic into an intercarrier compensation regime that meant everybody had to step down towards bill and
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keep. And that whole regime was designed to basically benefit carriers that have large terminating volumes at the high end of the market which was basically AT&T, Verizon, the collateral beneficiaries were Sprint and T-Mobile, and the people who ended up having balance sheet or income statement issues from the decision were cable companies, CLEC, small ILECs, and other people that were opposed to it, but it happened and it happened to bring that traffic in.

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

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

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

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

MR. POST: It involves physical arrangements.

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

MR. POST: That doesn't seem to 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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intercarrier comp and all the USF. I mean, that 956 -- I actually, I'm 80 percent certain that's the number, but I could be off --

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

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

This didn't get resolved because the FCC at the time could not add another issue into the pot. Is this issue going to be resolved by the FCC? Not any time soon. It's not on their agenda. Yeah, they got an open docket. So what? They ain't moving it. This administration has ten months left and they don't need to move it. They're well aware of the fact that these
contracts are now going to be filed in California. They're well aware of the fact that the states can resolve this, and there's no indication that they've ever given that they ever intend to lift a finger to change any of this. The contracts will, thank God, get filed, presume -- unless that Order -- unless something really weird happens, they'll be filed very soon. They'll be public, and states, where they're applicable, will have to make a decision, are we going to walk away from our responsibility, because it's your responsibility under the Quest Declaratory Ruling to make the decision as to whether these should be filed, these interconnection agreements, and the standard is pretty clear.

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

Right now, I think we're going to
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take a 15-minute break until, let's call it 11:00, and then we'll come back and talk about some of the broadband issues surrounding the Open Internet Order and Section 706 of the Telecommunications Act.

(Whereupon, a recess is taken.)

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

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

MR. SANTORELLI: Great. Thank you.

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

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

But just looking at the Order itself, it does address the issue of State
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terest in several instances and it's
clear for the most part that State
teris limited, except when it says
that it's not. So just to go through a
couple of examples about the limits of
State authority in the Order. So -- and
there's a section, a dedicated section in
the Order on this issue.

So one of the first limits is that
the FCC affirms and makes clear that
broadband is jurisdictionally interstate,
so that automatically puts it beyond the
reach of Public Service Commissions.
Second, as I mentioned before, states are
bound by the forbearance regime that the
FCC put in place. So the FCC forbeared --
forbore --

MR. POST: Forbore.

MR. SANTORELLI: -- forbore from
dozens of statutory provisions and hundreds
of rules and selected about a dozen or so
specific provisions to apply. The states
are bound by that regime so the states can
engage in things like rate regulation,
which is beyond the scope of the FCC's regime, something of the USF limitations that I mentioned earlier, that they might roll back the lifeline context as we discussed before.

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

But interestingly, in several parts of the -- other parts of the Order, the FCC acknowledges that of course the states have a role with respect to broadband. So it kind of carves out this very gray area for states. One quote is that, "Finding out the services is jurisdictionally interstate does not by itself preclude all possible
state requirements regarding the service."
And that's in the footnote, footnote 1276
if anyone's following at home.

And then the example sited in that
footnote was data collection. There's an
Order from a couple of years ago around
data collection. And then in a paragraph,
a hundred paragraphs later there's another
mention of states where the Commission
notes that, "As part of its forbearance
regime, it does not forbear with respect to
provisions of the Act insofar as they
merely reserve State authority." So there
are other parts of the Act that reserve
authority to states and those things
include ETC designation which might change
possibly in the lifeline context, Section
253 around rights-of-way management,
Section 332 when it comes to sort of
wireless carveout for states, and then also
Section 706 which I think we'll talk about
in a little bit. But that's kind of what
the Order says and that doesn't really
provide all that much clarity.
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You could -- one could interpret it as a blanket prohibition on what states can do on lesson until the FCC tells them that they can do something like in the case of USF reform, or one can interpret it as the FCC acknowledging that there are gray areas and that the states could probe those outer limits of its jurisdictional -- new jurisdiction over the service in light of the Open Internet Order but that the FCC reserved the right to kind of manage how the states do that with the looming threat of preemption.

And there's also legal precedent on the books showing -- or underscoring that the FCC has pretty broad authority to manage how states implement -- or interpret and implement, especially under Title 2, and that goes back to the aftermath of the 96 Act when there was considerable uncertainty about the interplay of State Commissions and the FCC when it came to things like unbundling and interpreting the complex array of obligations that were
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included in the Act. The seminal case of
the Iowa Utilities Case from 1999
underscored that the FCC even when there
are clear delegations to State can still
manage their interpretations and
applications of provisions of the Act that
have sort of federal consequences.

So with all of that said, I think,
you know, being careful in interpreting and
applying this seemingly, you know, new
grant of authority might be the wisest
course of action because it seemed like the
FCC opened the door to more regulation of
broadband under Title 2 but there's only
really room for the FCC to go through it at
this point. But the legal challenge might
cast some doubt on that, subsequent orders
might loosen up some of the requirements,
subsequent FCC's could unforbear from
certain provisions. So I think time will
tell, but I think right now there is still
considerable uncertainty about what would
happen if a state kind of tried to probe
what this means in practice.
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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plays out in the litigation and then subsequently how it's implemented by the FCC, we need to look at the State law and how that applies.

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

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

MS. GEDULDIG: So I'm a half glass
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full kind of person. So when I hear gray areas that's okay. So I'm curious to focus a little bit less on the limitations in the Order because I think those are pretty clear and I think we all accept them.

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

Yeah. Joe.

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

Maureen is quite right that the question of whether the FCC is preempted jurisdiction or reserved State jurisdiction is secondary to the question of whether the
New York State legislature has conferred that jurisdiction on the Commission. And aside from the issue that Maureen mentioned that there's no explicit grant of subject matter jurisdiction over broadband service in the Public Service Law, there's another important aspect of the internet -- of the Open Internet Order which is that it very explicitly classifies broadband internet access as an interstate service and that has implications for State law because Section 90, Subsection 2 of the Public Service Law limits the Public Service Commission's jurisdiction over telephone services to communications between one point and another within the State of New York which is an old fashioned way of saying intrastate service.

So I think the implications of the FCC's classification of broadband internet access as an interstate service go well beyond the various gray areas, preempted areas and non-preempted areas that are 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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there's a whole other aspect of this conversation that nowhere -- I too see it as a glass half full, not a carving out a gray area, although I do like that term or phrase.

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

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

MR. SANTORELLI: Well, I think -- I'm sorry. I do think 706 is the
biggest gray area that is kind of somewhat implicated in the Order by -- I see Commission Sayre getting ready to ask a question so --

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

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

MR. O'BOYLE: I wouldn't disagree in your analysis -- with your analysis because
I think the Verizon court found quite clearly that the virtuous circle is a real thing and that lots of things go into investment, go into adoption, go into the deployment and the virtuous circle that drives investment and the -- sort of the broader ecosystem of communications, you know, the Verizon court found that the FCC -- that providers have an ability and an incentive to interrupt that virtuous circle and that there is an important role for regulation to maintain that virtuous circle. It only found that Section 706 was not sufficient to sustain common carrier regulation and then that's why we went through everything we did through to get to the Open Internet Order of 2015.

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

MR. SANTORELLI: Right. The court
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did agree with the FCC's use of virtuous
cycle and that analysis, but, you know -- I
mean, well, one could argue that it's very
expansive but within that context it
was -- the virtuous cycle, circle?

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

MR. SANTORELLI: So the cycle I
guess is a good one. So the virtuous cycle
in the Order and well, in the 2010 Order,
the Verizon case and in the 2015 Order
looked at the narrow kinds of relationships
between the service providers and the edge
companies. And, you know, the FCC
interpreted the cycle as moving in one
direction from the carriers to the edge and
the carriers having the incentive and the
ability to harm edge companies, so that
impacted the virtuous cycle. But within
the specific context of things outside of
that narrow context, I think it would
be -- it would be plowing new ground to
make a legal argument that again, like a
new regulatory regime on consumer complaints or something else that is being contemplated would require new arguments. I mean, even to fit within that virtuous cycle framework that the FCC didn't contemplate that in their original interpretation and application, and when they did so in the 2015 Order, they grounded it in Title 2 and not 706 so --

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

MR. SANTORELLI: Right.

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

COMMR. SAYRE: Is the panel at risk of highjacking the next question? Does the panel have a position under the Public Service Law, not 706, but the Public Service Law itself as to whether we could mandate pole attachment capabilities on behalf of pure played broadband providers that don't have a CPCN and are not cable TV 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
with a, you know, I don't want to say franchising because that's not the right word, but a sort of clearing house to be able to get on poles as a broadband provider, or is it about, jumping into the broadband lifeline space, what can and should the Commission do to fulfill its role in this regard?

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

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

I would repeat what I said earlier in terms of, and what other people have said earlier, in terms of the remaining federal preemption issues and State law issues, but I would also like to bring your attention back to the second half of that paragraph, the -- not just this State Commission but the State Commissions generally and others tend to focus on this mandate to encourage deployment on a reasonable and timely basis. But the second half of that paragraph, and, you
know, I think Michael makes the argument that it's not exclusive, but I think it does give you a flavor for the kind of things that if states are going to dip their toes into this, that they should be focusing on "public interest convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment."

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

MR. POST: I agree with that. I think it's incredibly significant that Congress specifically listed regulatory
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forbearance as a Section 706 strategy.

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

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

So where can the State in support of removing these barriers to infrastructure investment, what can we do to generate the
investment in the areas where there hasn't been any to date?

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

MS. GEDULDIG: Okay. Anything else?

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

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

There is a lot of room for public involvement and I think you mentioned, Graham, you know, some kind of a clearing house assistance or pole attachment, you know, would be a terrific idea, but it's also other State agencies. You know, the park -- we talked yesterday about the parks and how tough it is to get through the
parks. Again, you know, in the rural areas, those are the kinds of issues you're dealing with, is stringing wire across long terrain.

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

MS. HELMER: Well, you're fundamentally reducing the cost of entry when you get rid of those barriers because every one of those things is time and money and increases the cost of going to those areas. And what you've seen over time, and again, I can only speak from the cable perspective, what you've seen over time is
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as you've added more services that are available to an individual company -- excuse me, customer, so you're not just selling one voice service, you're selling voice and cable and broadband. The areas of the State that are attractive to serve are ever increasing and the population or the density or the distance that you have to go changes over time as the economics of the products change over time.

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

CHAIR ZIBELMAN: Can I followup on that? Because it seems to me and this is -- that what we're hearing is that the 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
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
MR. O'BOYLE: I'd like to add something. I would just sort of agree in part, and sort of concur in part and dissent in part with Maureen. I think there are important things that the State can do to promote policies like "one-touch" make-ready or "dig once" that can assist with and facilitate deployment.

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

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


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take that role, then that's an appropriate role.
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always if you deconstruct it, if you
deregulate, we will invest. And I think if
you look on a state-by-state level, there's
not very much. You know, there's barely
any correlation between State X deregulated
and a thousand followers bloomed. If you
look, it's a patchwork based on broader
macroeconomic concerns. Does it make sense
to invest here? Yeah, more or less it
does. Does it make sense to invest there?
No, it doesn't. Does that have anything to
do with whether we have a local franchising
law? Does that have anything to do with
whether we have a Public Service Commission
with teeth? Does that have anything to do with
whether -- with access to public lands
and parks? On the whole, no. And so I
think we need to be awfully careful about
doing away with a lot of very good, you
know, meaningful and common sense consumer
protection in the name of chasing capital
investment.

As Maureen said, you know, you're
facilitating it and making it a little
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bit -- the cost to acquire that household or that consumer marginally less, but there's a difference between that marginal here, right? At what cost? And if that consumer is still not economically advantageous to serve, they're not going to be served, even if the cost is marginally less.

So I would urge caution when it comes to doing away with important consumer protections. As I said earlier, the State here was wise enough to leave standing its carrier of last resort and that's why you were able to exert your jurisdiction, and you were able to hold hearings in Fire Island a few years back and have people come out and say your voice link is not sufficient for my small business, it's not sufficient for my life alert, it's not sufficient for my home phone. And so think about where you might be if the State looked up and realized, oh, we took all of these measures to facilitate capital investment, just like, you know, I think
Pennsylvania, for instance is deregulated in large part. I don't think the broadband picture there is much better or worse. It's patchwork just like it is across New York State.

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

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

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

MS. HELMER: You're right. It wasn't over simplification. And one other clarification, Todd, we're not suggesting wiping out regulation. You know, the theme yesterday and I think the theme today is to
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say that a lot of private capital was put into the State I will say by the cable companies, others as well, based on a certain regulatory regime which has worked pretty darn well, and what we're cautioning against is to be very careful to change it. And frankly, one way or the other.

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

MR. O'BOYLE: Well, I think this is one case where reclassification actually makes it quite clear. You have the protection that traditionally you -- you have the jurisdiction that was traditionally afforded to you for basic
telephone service. Now you have for basic broadband.

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

So the FCC said that broadband to telecom service would only in this narrow statutory construct and it kind of carved out of Title 2, and a lot of those authorities were kind of cited to uphold its Open Internet rules. You know, that's pretty much the universe of that legal regime exists within the Open Internet context. So for a state to leverage that into layering on legacy POTS regulation onto broadband, I don't know if that would be legally viable. I think that might be a little bit beyond the scope of the Open Internet Order which is, again, the context within which the Common Carrier -- the new Common Carrier regime exists.
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
questions of what should we do to encourage broadband, and in some cases it's going to lead you, as I said, in exactly the wrong direction by encouraging overly blunt approaches that are going to inhibit facilities-based competition rather than foster it.

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

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

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

MR. POST: I'm not sure I have anything startling to say that I haven't
said before. I think basically what the Commission can do is adopt it in the words of 706, think about regulatory forbearance and removing barriers to infrastructure investment, but I think as far as affirmative measures that will encourage broadband deployment, they would appropriately be addressed to the State as a whole and to other agencies of the State, and, you know, we've surveyed some of them, tax policy, right-of-way management and so forth and so forth.

To the extent the issue is economic unviability of the service, I don't think commanding control regulation is going to resolve that issue. What will resolve that issue is the targeted, smartly targeted expenditure of public money which should be raised, because this is a broad social problem, should be raised -- should be funded through revenues obtained from the broadest possible base in the State and not placed on the back of a, you know, a small number of regulated companies.
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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to invest in this geography is driven in large measure by what's the other guy's business model? Oh, he's able to purchase content at a much lower rate than I am; his programming costs are so much lower than mine per unit; I'm never going to be able to compete with his programming costs because I'm a new market entrant and I don't have the benefits of scale. So actually the larger you make the incumbent, the harder you make it for the next guy to enter the market. And to use a crude analogy, you know, the bigger the bully on the block is, the harder it is to -- you know the less likely you are to come around.

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

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

MR. SANTORELLI: Can I?

MR. JESMER: Sure.

MR. SANTORELLI: So to tie all the questions together, I think it's -- the issue we're discussing is -- well, two problems that are looking to be solved. One is bringing broadband to unserved areas, and two, addressing what some would
describe as a lack of competition in other areas. And so it's -- how do you solve either of those problems?

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

So that piece, I mean, that piece is working. I mean, it's on track. The Governor's programs up until this point have allocated tens of millions of dollars,
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has succeeded in attracting private partners to build out to these unserved areas, certainly when we think that offering even more money under this New York Program will help to bring more broadband to unserved areas. And it's worth noting that, and I'll jump ahead to part of another question about whether the State can mandate certain types of network architecture or things, unilaterally no, but within these grant programs, the State is free to attach or to craft them in such ways that they effect certain outcomes. So the new New York Program Phase 1 has been structured in a way that has certain requirements included in it that will, in theory, result in certain outcomes in terms of speeds and things like that. It doesn't require so much a specific network architecture but by defining speeds at a certain level, you kind of narrow the playing field a little bit to certain types of providers.

So if you have a target of 100
megabits per second say, or 50 or 25, then that narrows the field and kind of cuts away fixed wireless, for example. And so that raises the policy question of whether getting some broadband to an area is good now or if we want to narrow the field and have certain types of providers. So would fixed wireless now make sense and then making the business case and showing that there's demand in certain areas to attract further investment or if, through this program, want to get to a certain type of network architecture. It seems like in Phase 1 it's more towards the latter half.

On the issue of perceived lack of competition, what can the PSC do, I think it goes back to what I think Maureen discussed and we heard a lot about yesterday when it comes to barriers to deployment that's under 706, what does the PSC have specific authority to do to remove these barriers and things like the not very sexy things around pole attachments and things like that are, it sounds like, at
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 subsiding 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
unserved and the lack of competition, and it does come back to the percentage of people where there is no economic value to build there, or to maintain, and upgrade and innovate those networks, and I think the upgrade and innovate is important. You might get some money to build out there and you might grant dollars to build the systems, but you also need the incentive to continue to innovate and upgrade them.

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

MS. HELMER: It's happening, Karen. You know, especially, you know, again, from the cable perspective, these networks, there isn't a voice network, and a
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broadband network, and a cable network. It's one network, and each of those subparts are competing against different entities. So whether it's a new innovation on the video side that requires them to upgrade their system for that part or one of the other two parts, they're consistently reinvesting in the network, and it's one of the points that they've made is the fact that it's not enough that we have -- there was this -- and it wasn't one shop, it was an ongoing infusion of billions of dollars.

You know, factually speaking, the companies are continuing to invest in their networks, they're continuing to push out fiber farther and farther into the tentacles of their networks, they're continuing to invest in new electronics to make these networks smarter and the connections to the house smarter. It is happening. You know, the argument yesterday that companies don't have an incentive to invest in their networks is
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just completely false.

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

MR. SANTORELLI: So maybe that implicates things like franchise reform. I mean, as we heard yesterday, the Google Fiber Model has kind of highlighted how
antiquated in a lot of ways the franchising model is with build-out requirements and things like that. I mean, maybe that's something to look that.

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

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

MR. O'BOYLE: I didn't mean to interrupt you, but I think we can have a conversation about franchising and I think there's always been an understanding that non-dominant carriers and new market entrants might be afforded a phase in that they might not have to serve all households on day one that they like their network, but they might have a time stagger that they can progress through and maybe serve some of the more valuable customers and then as they get to farther out, but I wouldn't want to throw out all franchising
I would say though, just to pushback on your point, the idea that Google doesn't invest Google Fiber in states that still have franchising is blind by the fact that just yesterday they announced they're delivering Google Fiber to their hometown in San Francisco and --

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

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

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

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

MR. POST: Okay.
MR. SANTORELLI: At the very least, it raises interesting questions about the need maybe for modernizing franchise processes in states, as well as -- I mean, and to raise it up even to a larger level, revisiting -- because franchising process is -- has been around for a long time and that specific model has been around for a long time. Maybe it's time to revisit, maybe not. I don't know. But I'm not advocating either way, but it just -- it's interesting to see that towns and cities have fallen over themselves to cater to Google in a lot of ways. I think someone mentioned yesterday the phrase and notion of redlining around their demand aggregation strategy, which would not play well at all in New York if a carrier tried to do that. But, you know, towns are willing to let Google do that and, I mean, it's still very popular and cities are still trying to get them in. So, I mean, maybe looking at that model could potentially, I don't know, maybe raise some
interesting things that could be considered here.

And then also again to the bigger issue of looking back at these legacy and historic models that might need to be revisited because they were crafted in completely different contexts, seeing as how the franchise model came out of a completely different context than what we're seeing today with Google kind of highlighting that very stark contrast.

Maybe there are other regulatory regimes, statutory regimes that need to be looked at that might be holding back investment, pole attachments, things like that. So -- so, I'll just stop there.

MR. O'BOYLE: A fruitful example might be Los Angeles' RFP for fiber investment, not the first RFP that went more or less -- that didn't really work out but they went back to the drawing board, re-crafted it and addressed several of these questions in a way that I think actually strikes a meaningful and equitable
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balance that really avoids a lot of the redlining concerns. And I know we're not here to debate Los Angeles, but it might, you know, be worth review.

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

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

MR. POST: Well, I'm not familiar
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with statewide franchise laws anywhere else than in New York. I've looked at a number of them that have been proposed to this State's legislature and as soon as the concept was introduced in the legislature, immediately everyone had a list of I want this, I want that. So they were larded about with dozens of different mandates and requirements, build-out -- you know, statewide build-out requirements with the next year's benefits to municipalities, et cetera, et cetera, et cetera, none of which created a very attractive environment for investment.

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

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

MS. HELMER: Well, and the reason is the Commission has leveled playing field rules which, you know, we are supportive of. The things that I think were being referred to a minute ago in terms of the legislature are kind of exactly what I was responding to Commissioner Sayre about yesterday when I said that statewide
franchising is just -- politically is a very difficult thing to do. I mean, aside from the regular legislative process, you've got a lot of municipalities that, you know, simply don't want to have their positions unserved. And, you know, I don't like to say don't do something because it's difficult but when it comes to legislature, I do worry that, you know, where you start out with and what you want to begin with may not be what you end up with.

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

And we'll start at this end this time, Maureen, and we'll work our way down
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to you.

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

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

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

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

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

MR. O'BOYLE: I will say this, I think that we should see this as an opportunity and not a challenge that, again, to reiterate the 96 Act and going all the way back to the 34 Act, envisioned interlocking and at times overlapping jurisdiction between state and feds, that's a good thing. That means consumers have more eyes on the, you know, more eyes on the problem, that they have people that are closer to local concerns and can address 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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think most people will agree there's some uncertainty and some areas of gray and the potential for litigation, but there's an opportunity to kind of look beyond the specific wording of 706 but still keeping with its spirit. And so thinking more broadly about the issues of broadband deployment and not being fixated on what can the Commission do or can it regulate a specific outcome, but thinking broadly. And when you look at the sort of cornucopia of things that the State is doing around broadband deployment which is the specific mandate in 706, the State's doing some really interesting things.

And so arguably, that would satisfy the requirement of broadband being deployed reasonably and timely in the State, the sort of totality of circumstances I think the State would argue in favor of the circumstances, meaning the statutory requirement. So thinking broadly and positioning the Commission as the kind of 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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broadly I think is generally a good thing, and I think there is potentially a huge opportunity for the Commission to position itself as some sort, of cross government facilitator of some sort and to be the -- it is the expert agency on these issues, so to offer its guidance and advice on some of these issues. And then removing barriers to deployment.

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

MR. POST: I'm just going to briefly touch on some of the themes that I've developed at more length through the discussion today: Harnessing the power of
private investment; not creating disincentives to such investment; eliminating regulatory barriers; eliminating, to the extent the State can, problems related to access to public and private rights-of-way; a favorable tax policy; smart targeted expenditures of public funds to alleviate market failures in cases where they exist. These are the measures that I think the State should take and to some extent is taking to encourage broadband deployment.

MS. HELMER: I would agree with all of those, and just to pick up on a theme that Michael was talking about, you know, the Commission has always had a real sweet spot in terms of being an honest and expert broker, whether it's with municipalities, whether it's with other state and public entities, whether it's with companies. So I would encourage -- I would encourage the Commission to continue to be involved in those issues. I think everything else got 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 preempt 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", 
we're only supposed to regulate when there's a market failure. Well, I don't buy that because there are all sorts of critical public interests and consumer protections that we want, that we regulate, that we legislate because they're the right thing to do, irrespective of the competitive landscape.

A great example, we have laws that prevent discrimination in the provisioning of hotel rooms, right, because they're public callings. That goes back a long, long time. Why -- we have a very competitive hotel market, but the simple fact that we have -- you know, it's not like this is an either or. We still want laws that prevent discrimination in the hotel industry because it's the right thing to do. And, you know, we often sort of proceed from this idea that we only have consumer protection or we only have public interest intervention at times of market failure, but broadly speaking, I know this goes beyond your question, I don't buy
MR. SANTORELLI: Just on the specific question of municipal broadband, we've done a lot of work on that issue and we have a pretty lengthy report out on it, we presented it before and Commissioner Sayre has heard it, I believe, but on the specific issue of if a municipality decides that it wants to build its own system, I would urge any city that's looking at this issue to make informed decisions about it because it is a very complicated thing to do and it's also a very expensive thing to do. So to be able to either dedicate existing funds or to assume more debt to build a network, you know, that's a pretty big step for a municipality to take, especially some of the smaller ones that have very tiny budgets and, you know, debt limits and things like that.

So, you know, the only thing I would argue would be for municipalities to take a couple of steps back and to really think
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about it and to see whether there's a real need, if they already thought that there's a market failure or have they gone through, you know, a litany of other things that they could do to attract a competitor, potentially, if it's -- some of the things are on the Google Model, kind of tweaking some of their requirements to maybe attract a new competitor, things like that. And then also looking at the business case because there's been a pretty long history of some cities that had built these networks and failed because of either very tepid demand for the system, even if it does offer comparable services at comparable prices to the incumbents. In a lot of businesses, people just stay with the provider that they have.

And also, there have been other instances where the incumbent has stopped responded by cutting prices and kind of driving the municipal's network out of business because the municipalities 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
Proceedings to the City Council meeting and address the city and tell the Mayor and the council members what an exciting new thing they were doing and this is going to be a model throughout the southeast. It went all the way up to a regional vice president who said we can't have that, margins aren't good enough, we're going to shoot that down right now; this stops at my desk and goes no further. Because they were worried of exact -- they were worried that it would be successful at margins that weren't acceptable and that it would be duplicated in other communities.

And again, there was money to be made there but not enough, and so they said no, no, no, the status quo is better for our margins so they shot it down, and it was only then that the city said fine, seeing no other alternative we will build our own network, and it has been by all accounts pretty successful. Their take rates are way ahead of their initial projections. They are -- they were
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revenue -- or they were -- they realized an operating profit years ahead of schedule and I'll add, they serve every address in the city. There is no redlining because any household within the city limits that requests service even if you're a farmhouse that lies within the incorporated limits, even if you're a, you know, a half a mile off of the road and it is extremely capital intensive to wire that home, by charter, if you live in the city limits you get service.

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

MR. POST: There are two levels of
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issues here. One is the legal issue and I don't pretend to be an expert in municipal law so I couldn't tell you whether municipalities in New York have authority to, under State law, to build broadband networks, but that's certainly an issue that would have to be investigated. As a policy matter, I think I lean more towards the nuanced approach. I'm glad this worked out for Wilson, North Carolina, but for every story with a happy ending there's a horror story of a municipality that got in over its head and made unwise investments and compromised the provision of, you know, other perhaps more important municipal services.

It's -- I don't think there's any bright line answer. There's a lot of things, just as a business has to evaluate a lot of things and deciding whether to make an investment, a municipality needs to evaluate a lot of things and needs to look at feasibility, management, whether they can ensure the continuity of service, the
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financial aspects for the municipality. Sometimes it will work, sometimes it will not work, and I don't think you can say that this is either a, you know, a good thing or a bad thing. Sometimes it will, if it's in the wrong environment, it could create an unsustainable municipal system while creating disincentives to private investment, which in the long run is not a good thing for the municipality. So it's something that, as I said and I think as Mr. Santorelli said, requires a very nuanced approach.

MS. HELMER: And I would just also urge that you look at the electric experience because there was a period of time, I'm going to say 10, 15 years ago where there were a couple of consultants in particular that just went from town to town on the electricity side and said, you know, you can build your own cogeneration plant, you'll save all this money compared to, you know, X, Y, Z utilities bills, gave them 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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to broadband and portions that don't. And certainly our concern, despite Common Cause's comments in the merger, was the opportunity to actually build out the system where it wasn't being built out and I think that that might continue and we don't need to debate it, but I think that for the people who aren't getting served today and will get served if -- once the --- if the merger charter gets ultimately approved, I think they'll be a lot happier in thinking at some point in the future there might be a competitive supplier coming in.

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

But the real question for me is, is
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in these communities where we have providers and there is a franchise and yet we still have portions of the community that are being unserved, what could and should the Commission be doing to address those issues? Because that is the level playing field issue has become an issue obviously before us in terms of providers coming in and only wanting to serve a portion of the community, and then the other aspect is where we have situations like Syracuse, like Albany, where you have basically people who seem to be wealthy are getting services, and people who are in less wealthy communities are not. And those are the things that I continue to come back to. How do we as a Commission address it? Because it seems to me that's the heart and soul of what a Public Utilities Commission should be looking at. Any thoughts? Any -- where 706, where FCC, because ultimately that's what the public looks to us to do.

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

I think that separate and apart from the law is just simply hearing from people, and hearing from small business owners, and hearing from competitors that would like to enter the market but can't, or hearing from school children or -- you know, you name it -- actually, 706 does specifically mention schools. So the listening tours and the public hearings are -- you can never do enough of those, and I think that they can only redound to the benefit of the public interest.
MR. SANTORELLI: Well, I think on the issue of enforcing franchises, I mean they are contracts essentially, between cities and providers. So if there is determined to be a breach of that contract then there are remedies available. Certainly, and I think most franchises have remedies included within the contractual language, and so it arises to that issue and certainly those remedies should be invoked.

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

But I think -- I'll just talk about in the context of New York City because I'm
most familiar with what's happening here, and the fact that there are unserved parts of this city is still amazing to me but just, you know, given it's New York City, but it happens sometimes because, especially in New York, formally commercial areas become residential areas and they fall outside of franchise areas so there's, you know, there's kind of gap areas. In the past, the city has, as a franchising entity, has worked with existing providers to figure out ways to build out to these areas and former warehouses that are now either startup hubs or -- and/or residential buildings to accommodate population growth.

And so in the past, the franchise authority here, DoITT, has worked with, I believe it was Time Warner Cable in some of the areas to figure out ways to build out to these areas. In the past, the city has worked with Verizon on pilot programs for facilitating fiber build-out. A couple of years ago there was something around
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micro-trenching that came up. So in those instances, the city worked collaboratively with these -- the franchisees to figure out solutions, but if they come to dispute over terms of the franchise, then, you know, there are other remedies available.

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

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

CHAIR ZIBELMAN: Can I just -- I don't really want to get into -- just generally, I'm looking at a policy question or practical question, which has been a dilemma since I've been here, is just -- we have areas and it doesn't -- as I understand there's a debate, we're obviously aware of it, between Verizon and New York City, but in general throughout
the State we have multiple cities that are only getting partial service. And the question is, is what can we do from a -- we've talked about removing barriers but, you know, is there something more sustainable that we can do rather than just, you know, looking at idiosyncratic build-outs? What can we do as a Commission?

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

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

MR. POST: I don't think the issue here is cable television service. I think we're talking about broadband and there's 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
know that I can offer anything more helpful than that. And there's general observations.

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

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

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

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

COMM. SAYRE: So I'd like to ask the panel, given that cable TV build-out generally brings with it broadband build-out whether we regulate it or not, and given that technology has been changing in recent years in terms of how expensive it is to build new facilities, it is time that we took another look at that threshold and perhaps tightened it up?
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
MS. GEDULDIG: So if there aren't any other questions, we're going to take a quick break and then we'll come back and wrap up.

(Whereupon, a recess is taken.)

MR. MCGOWAN: Okay. Let's resume.

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

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

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

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

MS. GEDULDIG: Many stakeholders.

MR. MCGOWAN: So that, I think

concludes our --

MS. GEDULDIG: That's our theory on

next steps. I don't think we have specific
details, partly because a lot what we're
contemplating doing next were derived from
the technical conferences here today.

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

MR. MCGOWAN: The short term.

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

MR. MCGOWAN: The first priorities,
yes.

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

UNIDENTIFIED SPEAKER: Will those
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deal with broadband only or legacy and broadband?

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

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

MS. GEDULDIG: With the details.

UNIDENTIFIED SPEAKER: Let me just say one thing.

MS. GEDULDIG: I wouldn't foreclose it.

UNIDENTIFIED SPEAKER: Well -- okay. The policy -- differences between the panelists which were all fascinating and important, eventually lead you to a
question as to how you choose between them, and in many of these cases, including in broadband, what evidence the Commission will generate and use as a foundation upon which to make the policy decisions is unclear to me, and I would suggest that a lot of -- that staff ought to go through an exercise about asking itself what evidence it needs on any of the issues that were identified, sufficient to say this shall be our policy.

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

MS. GEDULDIG: We'll get them.

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

MR. JESMER: Or through a notice in comment process if that's the way that 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.)
CERTIFICATE

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