

PUBLIC SERVICE COMMISSION OF UTAH

Docket No. 20-2618-01

TELEPHONIC HEARING

October 13, 2020

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ALSO PRESENT: Brock Johansen
Douglas Meredith
Darren Woolsey

1 October 13, 2020 9:00 A.M.

P R O C E E D I N G S

2

3 PRESIDING OFFICER HOGLE: This is the time
4 and place noted for a hearing on Citizens
5 Telecommunications Company of Utah, dba Frontier
6 Communications' motion for partially summary judgement in
7 Docket No. 20-2618-01.

8 My name is Yvonne Hogle, and I'm the
9 Commission's designated presiding officer. Let's take
10 appearances for the record, please, beginning with
11 Frontier.

12 MR. RUSSEL: Phillip Russell on behalf of
13 Frontier.

14 MR. HOGLE: E Fiber?

15 MR. BRUBAKER: Gregory Bru- -- I'm sorry,
16 Gregory Brubaker on behalf of Frontier.

17 PRESIDING OFFICER HOGLE: Oh, thank you,
18 Mr. Brubaker, I apologize.

19 For E Fiber, please?

20 MS. SLAWSON: Kira Slawson of Blackburn and
21 Stoll on behalf of E Fiber and the Utah Rural Telecom
22 Association.

23 PRESIDING OFFICER HOGLE: Okay. Is anybody
24 else on? Mr. Fiber? [Sic]

25 MR. JOHANSEN: Brock Johansen with E Fiber.

1 PRESIDING OFFICER HOGLE: Good morning.

2 MR. WOOLSEY: Darren Woolsey with E Fiber.

3 PRESIDING OFFICER HOGLE: I'm sorry, can you
4 repeat your name?

5 MR. WOOLSEY: Darren Woolsey.

6 PRESIDING OFFICER HOGLE: Can you spell your
7 last name?

8 MR. WOOLSEY: Yes, W-O-O-L-S-E-Y.

9 PRESIDING OFFICER HOGLE: Okay. Let me just
10 pause there for a second and make sure that the court
11 reporter doesn't need any of your names to be spelled.

12 COURT REPORTER: I am good, thank you.

13 PRESIDING OFFICER HOGLE: Anybody else with E
14 Fiber?

15 Okay. The Division, please.

16 MR. JETTER: Good morning. This is Justin
17 Jetter with the Utah Attorney General's Office, and I
18 will be representing the Utah Division of Public
19 Utilities in the arguments this morning. Thank you.

20 PRESIDING OFFICER HOGLE: With the Office of
21 Consumer Services?

22 MR. MOORE: Yes. This is Robert Moore of the
23 Attorney General's Office. I will be representing the
24 Office of Consumer Services in oral arguments. Thank
25 you.

1 PRESIDING OFFICER HOGLE: Thank you. And
2 Kelly Slawson with URTA, is what I heard earlier; is that
3 correct?

4 MS. SLAWSON: It's Kira Slawson with URTA,
5 then we also have Douglas Meredith on the line.

6 PRESIDING OFFICER HOGLE: With URTA?

7 MS. SLAWSON: With URTA, yes.

8 PRESIDING OFFICER HOGLE: Okay. Thank you.

9 Okay. In terms of the order -- was anybody
10 going to say anything? Did I hear somebody?

11 Okay. In terms of the order --

12 MR. MOORE: I will say something.

13 PRESIDING OFFICER HOGLE: Okay. Go ahead,
14 Mr. Moore.

15 MR. MOORE: I think -- and I had a discussion
16 with Mr. Russel about this, but I might have been
17 unclear. So if he doesn't understand -- if he disagrees
18 with me, he should say something.

19 I think what we've agreed to do is to have
20 Mr. Russel go first because it's Frontier's motion. But
21 we are going to address, mainly, two arguments. One
22 dealing with the statutory argument, dealing with
23 54-19-102 and 103 first, and then I will go second, and
24 Mr. Jetter will go third.

25 And then we will deal with the COLR issue

1 second and Mr. -- Mr. Russel will go up first on that,
2 Ms. Slawson and then Mr. Jetter and I will finish up at
3 the end.

4 Is that correct, everyone?

5 MS. SLAWSON: I would just add that for
6 the -- this is Kira Slawson. I think what we
7 anticipated -- you just left me out of the first
8 argument, it's going to -- I think what we've decided to
9 do is argue the issues separately.

10 So Mr. Russel will first present on the
11 statutory IP issue, then I will go, then Mr. Moore will
12 go, then Mr. Jetter. And then Frontier will go present
13 the argument on the carrier of last resort issue, then I
14 will present our argument on that issue, then Mr. Jetter,
15 then Mr. Moore

16 Is that what everybody's understanding is?

17 MR. MOORE: My -- apologize.

18 MR. JETTER: This is Justin Jetter. That was
19 my understanding.

20 MR. RUSSEL: Yes, this is Mr. Russel. It's
21 my understanding as well.

22 And just so -- just so Your Honor is aware,
23 we had a discussion about this in an effort to try to not
24 go all the way through the motion with each of us arguing
25 all of the arguments in the motion, but to try and break

1 it up in a way that makes discussion about these issues a
2 little easier for all of us.

3 PRESIDING OFFICER HOGLE: Okay. I -- I think
4 I'm clear on what I just heard about the order that you
5 all have agreed to, in terms of presenting the argument.
6 There's going to be two arguments. One of them is going
7 to be the statutory argument, whether E Fiber services
8 fall into the exemptions for regulation under 54-19-102
9 or 103 first.

10 And in that sort of prawn, we have Mr. Russel
11 presenting and Ms. Slawson then would be responding, and
12 then Mr. Moore and then Mr. Jetter.

13 The second argument would be the carrier of
14 last resort argument, and the order for that argument
15 would be, again, Mr. Russel presenting, Ms. Slawson
16 responding, then Mr. Jetter, then --

17 (Technical difficulties.)

18 PRESIDING OFFICER HOGLE: Is that correct?

19 MS. SLAWSON: Sorry, the Commission cut out
20 for me. I couldn't hear the last part, after you said,
21 "Mr. Jetter."

22 MR. MOORE: The Commission cut out for me as
23 well. This is Robert Moore.

24 PRESIDING OFFICER HOGLE: Oh. Oh, okay. So
25 did you hear my first -- the order for the first

1 argument? Russel, Slawson, Moore, Jetter?

2 SPEAKER: Yes.

3 PRESIDING OFFICER HOGLE: And then the
4 carrier of last resort, Russel, Slawson, Jetter, Moore.

5 MS. SLAWSON: Yes.

6 PRESIDING OFFICER HOGLE: Okay. Perfect. I
7 apologize for that. I hope that was the only time that
8 that happens.

9 Can you guys hear me?

10 MS. SLAWSON: Yes.

11 MR. RUSSEL: Yes. And this is --

12 PRESIDING OFFICER HOGLE: Okay.

13 MR. RUSSEL: -- Mr. Russel. Because it is
14 Frontier's motion, I anticipate that Frontier will have,
15 on each of those topics, an opportunity to respond
16 briefly to the arguments made by the parties opposing the
17 motion?

18 PRESIDING OFFICER HOGLE: Yes. And that's
19 exactly right. I was just going to go there. In terms
20 of the order, we have already established that. Then the
21 parties will respond in the order that I've stated, and
22 you all agreed to. And then we will give it back to
23 Mr. Russel to reply to what the parties responded to, if
24 everybody is okay with that.

25 This is sort of, typically, how it goes, so

1 I'm assuming you all are okay.

2 Okay. Well, Mr. Russel, if you would please
3 go ahead and present your first argument.

4 MR. RUSSEL: Is Your Honor ready for me to
5 proceed?

6 PRESIDING OFFICER HOGLE: I apologize, I
7 probably was cut off again.

8 Yes, I said, "Please proceed with your first
9 argument, Mr. Russel."

10 MR. RUSSEL: Is anybody else there?

11 MR. MOORE: I'm here.

12 PRESIDING OFFICER HOGLE: Can you hear me?

13 MS. SLAWSON: We -- we're here, and I can
14 hear the ALJ, but it appears that Mr. Russel cannot hear.

15 MR. RUSSEL: Hello?

16 PRESIDING OFFICER HOGLE: Mr. Russel, can you
17 hear me? Mr. Russel?

18 Can everybody else hear me?

19 MS. SLAWSON: I can. This is Kira.

20 MR. JETTER: Yes, this is Justin. I can hear
21 you just fine.

22 MR. MOORE: I can hear you as well. I can't
23 hear anything Phil is saying. He may be giving his
24 presentation.

25 PRESIDING OFFICER HOGLE: All right.

1 Mr. Russel, would you mind calling back in?

2 Can the court reporter hear me?

3 COURT REPORTER: I can hear you, yes.

4 PRESIDING OFFICER HOGLE: Okay. This would
5 be a good time to, sort of, pause and see if he comes
6 back on.

7 (A pause was held off the record but the
8 conversation was still transcribed.)

9 COURT REPORTER: Your Honor, while this is a
10 pause, can I just tell the participants, if there is any
11 way they can send me any arguments on my email, that
12 would be appreciated.

13 MR. RUSSEL: So I didn't hear whatever was
14 just said.

15 (Technical difficulties.)

16 PRESIDING OFFICER HOGLE: Okay.

17 MR. RUSSEL: I wasn't able to hear that, I'm
18 sorry.

19 PRESIDING OFFICER HOGLE: Now?

20 MR. RUSSEL: That's better.

21 PRESIDING OFFICER HOGLE: Okay.

22 Ms. Slawson, can you hear me?

23 MS. SLAWSON: I can. I had a question about
24 the court reporter's request.

25 The Commission is cutting out.

1 (Technical difficulties.)

2 PRESIDING OFFICER HOGLE: Mr. Jetter, can you
3 hear me?

4 MR. JETTER: I can hear you clearly now.
5 Just a moment ago, it was a little bit in and out.

6 PRESIDING OFFICER HOGLE: Okay.

7 Mr. Moore, can you hear me?

8 MR. MOORE: I can hear you. But, again, it
9 seems to be coming in and out.

10 PRESIDING OFFICER HOGLE: All right. Well,
11 okay.

12 Ms. Slawson, why don't you present your
13 question.

14 MS. SLAWSON: The court reporter had
15 suggested that we email arguments to her, and I guess I'm
16 just wondering what that might look like.

17 And if they are going to be emailed to the
18 court reporter, I would like it to be emailed to all the
19 parties as well, I guess. Is she talking -- are we
20 talking about --

21 (Technical difficulties.)

22 COURT REPORTER: Okay. You know what? Never
23 mind. That's fine. We can just ignore that and just
24 continue on, and I will just hopefully pick up all the
25 words I can.

1 But thank you. Just, we can ignore that.

2 (Technical difficulties.)

3 PRESIDING OFFICER HOGLE: Okay. And I have
4 to say, that is a little bit different from the
5 presentation of the witness in a regular hearing, but I
6 was expecting that it would be after the presentation, so
7 that if that were to happen, the only reason why the
8 court reporter would use the materials would be to fill
9 in things that she did not hear.

10 But anyway, let's move past that.

11 MS. SLAWSON: Right. I don't have a problem
12 with that --

13 PRESIDING OFFICER HOGLE: Go ahead.

14 MS. SLAWSON: -- provided that those emails
15 are sent to all the parties, I don't have a problem with
16 it being sent after, if that would assist the court
17 reporter.

18 PRESIDING OFFICE HOGLE: And we can ask her
19 later but let's -- we can ask her later if that would
20 help. I think it could help if we keep breaking up a
21 little bit here and there. Hopefully, it won't be too
22 much of that.

23 But, Mr. Russel, can you hear me?

24 MR. RUSSEL: Yes.

25 PRESIDING OFFICER HOGLE: Are you ready to

1 present your first argument?

2 MR. RUSSEL: Yes. So what I'll do is I'm
3 going to start with a brief introduction, if that's okay
4 with Your Honor, and then I'll go -- I'll move into the
5 argument about 54-19-103. The introduction would just be
6 in a form of an overview as to what the application is
7 and how the motion fits in.

8 So in its application, E Fiber requests an
9 CPCN in seven exchanges in Southeast Utah, to build a
10 fiber to the home system. And I'm going to talk about
11 the specifics of the fiber to the home system here
12 shortly.

13 But in addition to seeking the CPCN, E Fiber
14 requests a designation as a rate of return regulated
15 carrier of last resort. Those two terms, "rate of return
16 regulated" and "carrier of last resort" are two separate
17 designations with two separate definitions, and we will
18 discuss each of them in turn shortly.

19 But both of those designations are necessary
20 for E Fiber to obtain access to distributions from the
21 Utah Universal Service Fund, which E Fiber has made clear
22 is necessary for it to elect to build its proposed fiber
23 to the home system in those local exchanges.

24 E Fiber asserts that it will use its proposed
25 fiber to the home system to offer retail voice service

1 and wholesale broadband service to end-use customers in
2 the local exchanges. It proposes to sell its wholesale
3 broadband service to two of its affiliates, one of whom
4 will offer retail internet service and the other of whom
5 will offer video service to end-use customers.

6 Frontier filed its motion addressing four
7 separate issues, and while we are only going to address
8 two of them in argument today, I will just address the
9 motion broadly.

10 The first was a question about whether the
11 Commission has subject matter jurisdiction as a result
12 of, you know, being preemptive by federal law. Frontier
13 didn't actually take a position on that, either in its
14 motion and didn't address it in its reply. And the
15 parties have agreed that we can just submit that issue on
16 the briefing.

17 The second issue that Frontier addressed in
18 its motion was whether state law bars the Commission from
19 regulating the services that E Fiber intends to offer.
20 And if it does, then E Fiber cannot be designated as a
21 rate of return regulated carrier.

22 Third, Frontier's motion asserted that E
23 Fiber cannot meet the obligations of a carrier of last
24 resort, as is required for it to receive CPCN in the
25 local exchanges and, therefore, for it to receive access

1 to the Universal Service Fund.

2 And lastly, Frontier filed its motion to
3 address an issue raised in E Fiber's application, its
4 testimony about whether Frontier can be barred from
5 receiving USF distributions itself.

6 The parties will only address the second and
7 the third issues on the state law -- whether the
8 Commission has jurisdiction under state law 54-19-103 and
9 on the COLR obligation. We will just submit it in on the
10 briefs on the other two.

11 So moving to the state -- the state statutes,
12 as I mentioned, E Fiber requests a designation as a rate
13 of return regulated carrier. Now it makes this request
14 so it can gain access to distributions from the state
15 Universal Service Fund, or the UUSF.

16 Section 54-8b-15 of the Utah Code establishes
17 the UUSF, and in Subsection 4, states that a rate of
18 return regulated carrier of last resort is eligible for
19 payments from the USF if it provides certain services or
20 if the Commission determines that its reasonable cost
21 exceed its revenue. I'm paraphrasing there, of course.

22 The statute defines the term "rate of return
23 regulated" as being subject to regulation under Section
24 54-4-4. That statute titled, "Classification in fixing
25 rates -- fixing of rates after hearing," is what empowers

1 the Commission to conduct an investigation into utilities
2 costs and set the utilities rates.

3 As noted in the motion, the service E Fiber
4 intends to offer is not subject to regulation under
5 Section 54-4-4, and, therefore, E Fiber cannot be a rate
6 of return regulated carrier. And it cannot be a rate of
7 return regulated carrier because this Commission is
8 barred from regulating the services that E Fiber intends
9 to offer by Utah Code Section 54-19-103.

10 Subsection 1 of that statute states as
11 follows: A state agency and political subdivision of the
12 state may not directly or indirectly regulate internet
13 protocol-enabled service or voice over internet protocol
14 service.

15 The two terms in that statute, "internet
16 protocol-enabled service" and "voice over internet
17 service" are defined in the immediately preceding
18 statute, Section 102. Both of E Fiber services satisfy
19 the definition of internet protocol-enabled service.
20 Therefore, this Commission may not directly or indirectly
21 regulate those services.

22 Internet protocol-enabled service is defined
23 in Section 102 as, "Any service, functionality or
24 application that uses internet protocol or a successor
25 protocol that enables an enduser to send or receive

1 voice, data or video communications."

2 Now here, I think it makes sense for us to
3 examine what E Fiber system will look like for us to
4 determine whether it falls within that description. And
5 I think the easiest way for us to do that is to look at a
6 diagram that E Fiber provided in response to DPU's data
7 requests 1.7, which I have included as Exhibit 5 to our
8 reply brief.

9 And I will give everybody a moment to go
10 retrieve that. In that diagram, E Fiber notes it is a
11 configuration for the E Fiber voice and broadband
12 services at a residential location. I don't understand
13 that the E Fiber network will look a whole lot different
14 in commercial locations, but this is what they provided.

15 So on left-hand sided of that diagram, you'll
16 see that there is a box that identifies the home and the
17 equipment within the home. The equipment towards the top
18 of the box in blue would utilize the portion of the
19 service that would connect to the internet.

20 The telephone or the analog phone that's
21 identified there at the bottom is just a regular old
22 phone that would plug into a typical phone port, and if a
23 customer were to make a call, it would utilize the
24 existing copper wire within the house to send that call
25 through those copper wires to a -- what's called an

1 optical network terminal, or ONT, which E Fiber would
2 install either on the outside wall of the home or
3 somewhere within the home, plugged into the home's
4 electrical to provide electricity.

5 A single physical fiber would then connect
6 that ONT with the remainder of E Fiber's network. The
7 single physical fiber would transmit voice signals
8 through a dedicated private IP or virtual LAN through
9 that red line that you see that moved from left to right
10 through -- from the ONT through E Fiber's network.

11 That same physical fiber would then
12 separately send data communications through that blue
13 line on a -- using public internet protocol to the OLT
14 and then on to the router and then on to the public
15 internet.

16 So an end-use customer that picks up the
17 phone and makes a phone call would send signals through
18 the copper wiring to the ONT, which would then convert
19 the analog signals into an internet protocol
20 enhanced -- or excuse me, internet protocol
21 communications system into separate data packets and
22 would run it along in that private IP, internet protocol
23 system, ultimately terminating at the Public Switch
24 Telephone Network, or PSTN.

25 Conversely, the -- a customer in that home

1 who turns on their computer and tries -- and seeks to
2 access the internet will be able to send or receive data
3 communications using the blue line, the -- which uses
4 Ethernet cable within the home that connects to the ONT,
5 which then converts signals or utilizes IP to send in
6 their protocol signals to -- all the way through E
7 Fiber's network to the public internet.

8 Both of those systems, both the voice and the
9 broadband internet connections utilize internet protocol
10 throughout E Fiber's system. And looking back at the
11 definition of "internet protocol-enabled service," any
12 service, functionality or application that uses internet
13 protocol or a successor protocol that enables an enduser
14 to send or receive a voice data communication.

15 It's undisputed that an enduser in this
16 system would be able to send or receive voice
17 communications through this system that uses internet
18 protocol to enable that voice call. It's also undisputed
19 that E Fiber intends to sell its wholesale broadband
20 service to two of its affiliate, one of which will
21 provide internet service at retail to endusers. Another
22 of which will sell a retail video service to an enduser.

23 Those endusers, as I mentioned, would be able
24 to access the internet in their home to send or receive
25 data or video communications through this system using

1 the IP or internet protocol system. So, again, both
2 systems, the voice and the internet, the broadband
3 internet, would enable an enduser to send or receive
4 voice data or video communications using internet
5 protocol.

6 And this clearly shows that the services that
7 E Fiber intends to offer are internet protocol-enabled
8 services that this Commission is barred by state law from
9 regulating. And as such, the -- E Fiber would not be
10 subject to regulation under Section 54-4-4 and,
11 therefore, cannot be a regulated return carrier.

12 We've also addressed in our -- particularly
13 in our reply brief the issue of whether E Fiber's
14 proposed voice system also qualifies as a voice over
15 internet protocol service under the definition in Section
16 102. But to be clear, we don't need to show that the
17 voice system is -- you know, falls within each of the
18 subparagraphs or the -- meets each of the elements of the
19 definition of voice over internet protocol.

20 We only need to show that the services that
21 they intend to offer are IP-enabled services, and they
22 are. But just for the sake of completeness, we believe
23 the voice system also meets the definition of voice over
24 internet protocol service.

25 I don't think it's -- in voice over internet

1 protocol service, you can -- that definition is
2 identified at 54-19-102, Sub 2, and it's any service
3 that, A, enables realtime, two-way voice communication
4 originating from or terminating at the users location in
5 internet protocol or a successor protocol; B, uses a
6 broadband connection from the user's connection; and C,
7 permits a user to receive a telephone call that
8 originates on the Public Switch Telephone Network and to
9 terminate a call to the PSTN.

10 And I will start with last subparagraph first
11 because I don't think there's any -- any dispute that it
12 does exactly that. E Fiber's proposed voice service
13 would permit a user to receive a telephone call that
14 originates on the PSTN and to terminate a call to the
15 PSTN. I think that's -- I think that's conceded.

16 So let's focus on Subsection A. Subsection
17 A, again, states that, "Enabled realtime two-way voice
18 communication originating from or terminating at the
19 user's location in internet protocol or its successor
20 protocol."

21 It clearly does enable realtime two-way voice
22 communication. The only dispute is whether it originates
23 from or terminates at the user's location in internet
24 protocol.

25 Now I mentioned earlier when describing this

1 system that the ONT, which is the device that E Fiber
2 intends to attach to the enduser's home, either on the
3 outside wall or the inside wall, utilizing electricity at
4 the user's home, is the device that would convert analog
5 voice signals into internet protocol. That internet
6 protocol begins and terminates at the customer's
7 location, at the customer's house.

8 There's been some discussion about whether
9 customer's location means on the customer or the network
10 side of the line of demarcation, but we don't believe
11 that's the appropriate discussion. We've cited to a
12 couple of places in our reply brief where other -- other
13 commissions have determined that customer's location
14 means that the customer's home, and I will just
15 specifically point you to page 10 of our reply brief,
16 notes 16 and 21.

17 Moving on to Subsection B, "Uses a broadband
18 connection from the user's location."

19 The arguments that have been presented in
20 response to the motion had asserted that the ONT, or the
21 voice system, does not use a broadband connection. And
22 that it doesn't use a broadband connection because it's
23 not connected to the internet.

24 In our reply briefs, you will see that we
25 responded to that argument, that a broadband connection

1 does not necessarily require or mean an internet
2 connection. And let me see if I can find -- bear with me
3 for just a moment, my apologies.

4 So yeah, E Fiber uses a broadband connection
5 from the customer's home or the user's location to send
6 and receive voice communications. The connection over
7 the public internet or private network is not necessary
8 for it to be a broadband connection.

9 I will point you to Footnote 21 of our reply
10 brief, which cites to a ruling by the Public Service
11 Commission, or the commission in D.C., in the District of
12 Columbia, which examined a system that looks an awful lot
13 like E Fiber's system. And it examined it in connection
14 with a statute that is an awful lot like the Utah statute
15 at issue here, and determined that it is a voice over
16 internet protocol system and does meet that same
17 definition.

18 So as I mentioned, the voice -- E Fiber's
19 voice system meets both definitions, both IP-enabled and
20 VoIP, under the Statute 54-19-102, and, therefore, this
21 Commission is barred from regulating it under Section
22 103. The wholesale broadband, our contention is that
23 it's IP enabled. I think the definition clearly shows
24 that it is. And the Commission is barred from regulating
25 it under Section 103.

1 And with that, I guess I will turn it over to
2 Ms. Slawson, unless -- unless Your Honor has any
3 questions about all of that.

4 PRESIDING OFFICER HOGLE: I do, but I -- I
5 will wait to ask questions when I hear everybody, after I
6 hear everybody, all the parties.

7 Go ahead, Ms. Slawson.

8 MS. SLAWSON: Thank you. So as a preliminary
9 matter, I just wanted to clear up a couple of things that
10 Mr. Russel identified in his argument. The first thing
11 that absolutely needs to be cleared up is any
12 misconception that the only telecommunication
13 service -- the only services that E Fiber is going to
14 provide are voice and wholesale broadband internet access
15 service. That's not at all supported by the record.

16 The declaration of Brock Johansen, the
17 application itself, the answers to numerous data requests
18 by the Division of Public Utilities, the Office of
19 Consumer Services and even Frontier, the applicants, have
20 proposed or have propounded clearly indicate that E Fiber
21 is going to provide all of the telecommunications, public
22 telecommunication services, that are contained in the
23 Emory Telecom tariff.

24 E Fiber anticipates that once the CPCN is
25 granted, they will vote -- they will draft a tariff. It

1 will be nearly identical to the Emory Telecom tariff, the
2 Emory Telecom tariff pursuant to which Emory Telecom has
3 been providing regulated telephone service for years and
4 years. The services that will be provided by E Fiber
5 will include all of those services. So any statement
6 that the only two services that we're going to provide
7 are voice service and wholesale broadband internet access
8 service is not supported by the record

9 The second issue that I wanted to clear up
10 before I go into the bones of our response here, is that
11 the diagram that Mr. Russel discussed, this was a
12 diagram -- a diagram entitled, "E Fiber network services
13 over fiber."

14 I just need to point out two things in case
15 it wasn't clear from Mr. Russel's argument. The blue
16 line in that diagram, the data VLAN public IP line, that
17 is only active if the subscriber takes a broadband
18 service, how the broadband -- you know, takes a broadband
19 service or a broadband connection, and the red line is
20 available if they take voice only service.

21 So in other words, if the customer is taking
22 a voice -- subscribing to a voice only service, which is
23 what we're discussing in this particular instance, the
24 blue line is not -- that port is not activated. There is
25 no access to the internet for the -- for the voice

1 service customer.

2 Okay. So having cleared those things up,
3 hopefully, the question, as indicated by Mr. Russel, is
4 whether E Fiber's service can be regulated as a rate of
5 return carrier of last resort. In other words, is E
6 Fiber proposing to provide regulated telephone service.
7 And the answer to that question is yes.

8 The National Exchange Carriers Association,
9 NECA, is the agency that's authorized to interpret FCC
10 rules. They have issued a reporting guideline to all
11 rate of return regulated carriers which directly
12 addresses this issue. The Reporting Guideline 8.11,
13 entitled, "Providing local exchange telephone service
14 using voice over internet protocol technology," was
15 included as an exhibit to Mr. Meredith's testimony, which
16 was filed on September 25th.

17 That exhibit was omitted from the copy of the
18 testimony which was attached to Frontier's reply
19 memorandum. Nevertheless, in developing this guideline,
20 NECA has reviewed many of the cases that were cited in
21 the motion for summary judgment and the opposing
22 memorandum filed in connection with the motion for
23 summary judgment -- summary judgment.

24 Specifically, NECA discusses the AT&T
25 IP-in-the-Middle case, which was cited by the applicants

1 and the Office of Consumer Services. The Commission will
2 recall that in the AT&T IP-in-the-Middle order, the FCC
3 addressed an interconnected service where the carrier,
4 AT&T in that case, converted traffic into an IP format
5 for transmission over its network fiber backbone. Then
6 they converted the calls back to their original format
7 for delivery to the called parties.

8 In that particular instance, the FCC
9 determined that the service was telecommunication
10 services because the internet protocol technology was
11 only used in the transport of the call. It's telling
12 that Frontier did not address the AT&T case in its reply
13 memorandum, particularly when the technology used by AT&T
14 in that case is exactly the technology that will be used
15 by E Fiber. In other words, IP technology from the
16 switch to the customer's premises.

17 NECA also reviewed and discussed the Charter
18 case, which was identified in the Frontier's motion for
19 summary judgment and discussed by the parties in their
20 opposing memorandum. This was -- the Charter case, as
21 you will recall, determined that Charter's interconnected
22 voice service was an information service, and so was
23 preempted from state regulation.

24 However, as we've identified in our -- in the
25 applicant's memorandum in opposition, the service

1 provided in the Charter case is distinguishable from the
2 service provided in the E Fiber -- proposed to be
3 provided by E Fiber because the service offered by
4 Charter required a brand -- broadband connection at the
5 user's connection. In fact, in the Charter case, the
6 customer could not get Charter's voice service without a
7 broadband connection. This is not so for E Fiber
8 service.

9 After reviewing these next -- these cases,
10 NECA, in their Reporting Guideline 8.11, identified three
11 separate scenarios where voice service may use IP
12 technology. It's the first scenario that's identified by
13 NECA that's applicable to this case.

14 Specifically, NECA identified -- in the first
15 scenario identified by NECA, the ILEC carrier provides
16 voice telephone exchange service to the enduser using
17 voice technology between the switch and the customer
18 premises.

19 In this scenario, NECA states that "Except
20 for the use of the voice technology in the carrier's
21 network," so it's using voice technology within the
22 carrier's network, NECA states, "there is no other change
23 made in the way the service is offered to the endusers."

24 NECA determined that in this particular
25 scenario, there's nothing to preclude a carrier from

1 using IP technology in its provision of basic local
2 exchange service. NECA states that "the voice service
3 continues to be considered regulated, even though some or
4 all of the service is provided using IP technology in the
5 carrier's network."

6 In that particular scenario, the ILEC bills
7 the enduser its local exchange service tariff rate, it
8 bills the enduser an interstate switch charge and in
9 assessing originating and terminating access charges, you
10 know, nonlocal interexchange -- on nonlocal interexchange
11 traffic.

12 NECA states that in this particular scenario,
13 the ILEC is providing POTS service and the service
14 continues to be considered regulated. This is precisely
15 the service that E Fiber is proposing to provide. And,
16 in fact, as will be discussed in rebuttal testimony, NECA
17 has reviewed E Fiber's service and has confirmed that it
18 is regulated -- it would be regulated POTS service. So
19 for federal purposes, E Fiber will be a rate of return
20 regulated provider.

21 Without considering the NECA Reporting
22 Guideline 8.11, Frontier initially argued that E Fiber's
23 proposed services were voice over internet protocol
24 services, which the Commission was barred from regulating
25 under Utah Code 54-19-103. However, the -- in the

1 responsive pleadings, the testimony, the declaration of
2 Brock Johansen and the applicant's data request responses
3 quickly put an end to this argument.

4 As Mr. Russel identified, under Utah and
5 federal law, voice over internet protocol services are
6 defined to require a broadband connection at the user's
7 location. Mr. -- Mr. Russel indicates that a broadband
8 connection is defined by federal law as a wired line,
9 wireless channel or satellite service that terminates at
10 an enduser's location or mobile device, and enables the
11 enduser to receive information from, or send information
12 to, the internet at information rates exceeding 200
13 kilobits per second, at least one direction.

14 By this definition, a broadband connection is
15 a connection to the public internet. While Frontier
16 properly cited the Commission to the broadband connection
17 in its reply motion, it then stated that "the FCC has
18 recognized that a broadband connection may or may not
19 provide the enduser with internet access."

20 This -- this statement came from a form
21 44- -- the Form 477 instruction and is related to over
22 the top voice and it misses the point. While a broadband
23 connection may not provide the enduser with internet
24 access, the connection must still, by definition, send or
25 receive information to the internet or else it is not a

1 broadband connection. The voice service provided by E
2 Fiber indisputably does not send or receive information
3 to or from the internet.

4 Additionally, Frontier erroneously states
5 that whether the connection is over the public internet
6 or private IP network is irrelevant. Again, this
7 statement is also inaccurate. By definition, the
8 broadband connection must send or receive information to
9 the internet, and E Fiber's dedicated private IP network
10 did not send or receive information to the internet.

11 It's undisputed that the E Fiber voice does
12 not use or require a connection to the public internet.
13 Therefore, it's our contention that E Fiber's voice
14 service does not require or utilize a broadband
15 connection at the enduser's location and is not voice
16 service as defined by state or federal law.

17 Recognizing that its VoIP argument was in
18 jeopardy, in Frontier's reply memorandum, for the first
19 time, they argued that E Fiber's voice service is
20 IP-enabled service as defined by Utah Code 54-19-1021.
21 This argument is not tenable for several reasons.

22 First, if the Commission -- if this
23 Commission were to decide that E Fiber's voice service is
24 IP-enabled service and is precluded from regulation, then
25 all regulated voice service that currently uses IP

1 transport between the switch and the customer premise
2 would be automatically transformed into unregulated
3 IP-enabled service.

4 And this is -- this is an important point
5 here. If the Commission adopts this argument, virtually
6 all regulated telephone service in Utah with, perhaps,
7 the exception of Frontier service, would be converted to
8 unregulated IP-enabled service. That -- that just can't
9 be what the Legislature had in mind when it adopted that
10 in its -- that definition.

11 Also this argument completely ignores the
12 NECA reporting guidelines, which I discussed above, which
13 specifically state that "using IP technology to transport
14 a voice service from the switch to the customer premises,
15 does not convert the service from regulated to
16 unregulated service."

17 Finally -- or additionally, I guess, the
18 interpretation also cannot be reconciled with the FCC's
19 AT&T IP-in-the-Middle order. Just like in the AT&T
20 order, E Fiber's service -- E Fiber's customers don't
21 order a different service. I mean, the use of IP
22 technology in the middle of the carrier's network doesn't
23 result in any change or any differentiation of the
24 service provided to the customer when TDM transport is
25 used in the carrier's network. The customer doesn't

1 order a different service. They don't pay different
2 rates. They don't place and receive calls any
3 differently than they would for service that uses TDM
4 transport.

5 Like the AT&T customers, E Fiber's customers
6 will not -- sorry, like the AT&T customers, E Fiber's
7 customers will receive POTS service, that's plain old
8 telephone service, rather than some -- the transforming
9 benefits of an IP-enabled service. In other words,
10 according to the FCC, the AT&T service was not IP-enabled
11 service and, therefore, neither is E Fiber's voice
12 service.

13 As a third point I want to make on the
14 IP-enabled service argument that Frontier's made is that
15 IP-enabled services are inseparable from a connection to
16 the internet. The IP services include video, data and
17 other media transported over the internet. FCC has
18 identified the basic characteristics of IP-enabled
19 services as including a connection to internet, IP
20 compatible with CPE, and features that allow the
21 customers to manage personal communications dynamically.
22 Now that's from the Vonage Holding Corporation case, FCC
23 04267 at paragraph 32.

24 Finally, if you think about this argument
25 that Frontier is trying to get you to adopt, Frontier

1 suggested interpretation of the IP-enabled services under
2 Utah Code 54-19-102, Subsection 1, renders Subsection 2
3 of that statute, which is the definition of voice
4 service, to be superfluous or redundant. If IP-enabled
5 service that use any IT technology in any manner, there's
6 no need to have definition for VoIP.

7 And as this Commission is aware, a statute
8 cannot be read to render some words in a statute as
9 altogether redundant or superfluous. That's supported by
10 the United States Supreme Court case of Gustafson versus
11 Alloyd Co. 513 U.S. 561, at page 576. That's a 1995
12 case.

13 More recently, the Utah Supreme Court has
14 adopted that same statutory interpretation rule in
15 Monarrez verus UDOT 2016, Utah 21, paragraph 11. What's
16 more likely is that the Legislature included the
17 definition of VoIP in Subsection 2, to apply to services
18 that permit a user to receive a telephone call that
19 originates on or terminates to the public --

20 (Technical difficulties.)

21 MS. SLAWSON: -- because the E Fiber service
22 at issue connects to the Public Switch Telephone Network.
23 When considering whether such service can be regulated,
24 the Commission should look to the definition of VoIP
25 service, not IP-enabled service.

1 E Fiber's voice service will use IP transport
2 on its network between the switch and the customer
3 premise. The IP transport did not connect to the
4 internet and is not a broadband connection. Therefore,
5 the services regulated is a regulated plain old telephone
6 service under the NECA guidelines, and it is not VoIP or
7 IP-enabled services under Utah code.

8 And that's -- that's all I've got on that
9 argument, unless the Commission has questions for us.

10 PRESIDING OFFICER HOGLE: Thank you, Ms.
11 Slawson.

12 Why don't we go ahead with Mr. Moore.

13 MR. MOORE: Thank you.

14 I won't repeat all the arguments that Ms.
15 Slawson just presented. We support them, the Office
16 supports them. I just want to take a brief moment to
17 zero in on the statutory construction argument identified
18 by Ms. Slawson regarding surplus language.

19 On page 9 of August 25th initial brief, the
20 OCS cited State v Rushton, 2017 Utah 21, for the
21 proposition that the PSC must read the plain language and
22 statute as a whole, interpreting this provision in
23 harmony with this statute, to the same character and
24 related characters, avoiding any interpretations which
25 renders parts of the words in the statute inoperable or

1 superfluous.

2 That is bedrock statutory construction. It
3 is basically black letter law in Utah. I will state a
4 little bit about the underlying facts of Rushton. It was
5 a criminal case, and it turned on -- the provision that
6 we are citing turns on the question of whether
7 a -- (inaudible) -- defendant can take advantage of a
8 statute that provides for mandatory joinder of separate
9 offenses under a single criminal episode.

10 The statutory framework in that system was
11 similar to the framework in this system, in that they had
12 a mandatory statutory framework, and then they had a
13 permissive statutory framework. The defendant in the
14 case took the term "single criminal episode" and gave it
15 a very broad meaning, not unlike Frontier's argument
16 giving the IP-enabled service a broad meaning.

17 The court rejected that -- that
18 interpretation because it rendered the permissive
19 statute -- permissive joinder statute inoperable.

20 On page 20- -- on Paragraph 21 of that
21 provision, the majority held, "We must interpret the
22 mandatory joinder of the statute in harmony with the
23 permissive joinder of the statute."

24 Reading the plain language analysis, we
25 determine that Mr. Rushton's interpretation of single

1 criminal objective is overly broad and would render the
2 permissive joinder statute inoperative. This result is
3 contrary to our rules of statutory interpretation. Thus,
4 we reject Mr. Rushton's characterization of a single
5 criminal objective.

6 Justice Lee wrote an concurring opinion.
7 However, he did disagree with that statement of the law
8 and stated this. I'll just tell this. He said, the
9 single criminal objective cannot be defined in the
10 abstract. If it were, the preclusive effect of this
11 section would be all encompassing. And majority notes:
12 This -- (inaudible) -- would eviscerate the permissive
13 adjoinder statute.

14 He goes on to state: If all crimes said to
15 advance a general purpose must be charged jointly because
16 they are part of a single criminal episode, then the
17 joinder would never be permissive. We cannot, therefore,
18 we cannot -- that cannot be if we were to preserve the
19 meaning of the permissive joinder provision.

20 Now in our case, the argument that has been
21 presented is that the definitions of 54-19-2011 for -- in
22 the protocol services, says -- states that -- refers to
23 the use of internet protocol or successor protocol that
24 enables the enduser to send and receive voice, data and
25 video communications.

1 That term, "use of internet protocol -- use
2 of internet protocol" is repeated in Section 2, over
3 voice of the internet protocol services. That section
4 states that -- Section 2(a), "A voice over internet
5 protocol services means any services that enables
6 realtime two-way communications originating and
7 terminating from the user's location an internet protocol
8 or success of protocol."

9 That internet protocol and success of
10 protocol as given the interpretation, Frontier alleges,
11 would render the other two sections of Section 2
12 irrelevant and superfluous because they would -- that
13 they would -- they would be meaningless if -- if all that
14 we need to exempt the state from regulations is the use
15 of internet protocol services, the use of a
16 brand -- broadband connection would be meaningless. And
17 the use of the Public Switch Telephone Network would be
18 meaningless as well.

19 I said before that this is -- the statutory
20 construction rule is bedrock. It goes back for as long
21 as I can remember. It's stated in countless cases. And
22 it -- it precludes Frontier's broad interpretation of use
23 of internet protocol.

24 And where does that leave us? And I suggest
25 that it leaves us with Statute 2- -- 54-19-202 that

1 defines two different things. One of them is internet
2 protocol-enabled services, which must mean communications
3 between computers, not communications that utilize the
4 public switchboard network.

5 Such an interpretation, E Fiber's support
6 services would not constitute internet protocol services
7 because -- because they do not constitute
8 computer-computer communications but rather the
9 use -- they use analog telephone phone call connections
10 with the -- with internet protocol services as
11 Ms. Swenson [sic] explained.

12 Therefore, Section 1 would not bar the
13 Commission from regulating E Fiber's proposed services,
14 and Section 2 also wouldn't regulate E Fiber services
15 because they do not provide the -- satisfy the conditions
16 of 2(a), which provides enabled realtime two-way voice
17 communication originating from or terminating at the
18 user's location in internet protocol or successive
19 protocol.

20 It's been argued here that this -- well, the
21 contention that that element is -- that in this case is
22 both factually and legally wrong. It's factually wrong
23 because under the E Fiber's proposed system, the calls do
24 not originate or terminate from an internet protocol.
25 They originate and terminate from an analog phone.

1 The distinction between -- the sub-tails with
2 the OCS's argument in connection with the Charter case,
3 where the internet protocol conversion occurred on the
4 home side, on the homeowner's side of demarcation point,
5 as opposed to what's in this case, is when the internet
6 protocol conversion occurs within the network of E Fiber.

7 Because there's -- therefore, because the
8 call originates and terminates with an analog phone
9 equipment, it doesn't satisfy the requirements of 2(a).
10 in addition, it's been argued that user's locations means
11 a home. That can't be right because under that analysis,
12 that would exclude nomadic VoIP.

13 As the Commission may be aware, we discussed
14 the distinction between nomadic VoIP and fixed VoIP in
15 our memorandum, our supplemental memorandum, and nomadic
16 VoIP is a VoIP that you can use anywhere where there's a
17 broadband -- where there's a broadband connection. And
18 you don't have to be in your home, you can be in the
19 library, for instance, you can be in a Starbucks.

20 Therefore, the notion that it has to be from
21 their home would exclude nomadic VoIP from the
22 definition, and there's no basis in the statute to make
23 that distinction. That is just -- that argument is, I
24 would say, supported by the exceptions to the
25 regulation -- or the exemption from regulation under

1 54-19-30 -- 1031, that's the -- the exceptions that are
2 set out in 54-19-1032, which lists several type of issues
3 that the exceptions of regulation do not apply to,
4 including B -- 2(b), Subsection 2, "Any commission
5 obligated to implement or enforce federal law."

6 And importantly, Section B(5), the
7 application of Section 54-8(b)-2.1, which is the
8 provision which E Fiber is utilizing for competitive
9 entry.

10 Giving the plain meaning of the words,
11 "excluding application of Section 54-8(b)-201, read in
12 connection with the Commission's obligation to implement
13 and enforce federal law, leads to the conclusion that in
14 cases where you are dealing with competitive entry, the
15 statute should be interpreted in accord with federal law.

16 And as we stated in our supplemental
17 memorandum, we believe that E Fiber -- and as Ms. Slawson
18 pointed out in her argument, we believe that E Fiber's
19 services are not preempted by federal law, are consistent
20 with federal law, and, therefore, that's the only way to
21 give voice to the application of 2 -- 2(b)5, that the --
22 that the provisions against regulation in the statute do
23 not apply to applications of competitive entry.

24 That is the OCS's argument on that point. I
25 would again stress how well-established the theory that

1 you cannot have one provision of the statute essentially
2 eviscerate another section, or as the supreme -- the rest
3 of the Supreme Court said in Rushton, render another
4 section inoperable.

5 Thank you.

6 PRESIDING OFFICER HOGLE: Thank you,
7 Mr. Moore.

8 Let's go to Mr. Jetter, please.

9 MR. JETTER: Thank you. I'll try to keep my
10 comments fairly brief here.

11 The Division generally supports the arguments
12 set forth by both E Fiber and the Office of Consumer
13 Services. And following up a little bit on the Office of
14 Consumer Services' arguments regarding the statutory
15 interpretation of 54-19-1021, potentially, completely
16 subsuming the rest of the rule, this is a tricky area to
17 define boundaries.

18 And we know that the FCC has struggled with
19 this for quite some time, opening a docket, at least on
20 the surface to sort of do this very thing in 2004, and we
21 are 16 years later and still don't have clearcut rules
22 across the board for every scenario. We kind of have
23 piecemeal solutions.

24 And I think Utah Legislature struggles a
25 little bit with this as well, if the Commission chose to

1 go back and listen to the committee hearings on the bill
2 that enacted this legislation. And the intent was clear,
3 although it's not written into the law, admittedly, the
4 intent was clear from the legislature at that point that
5 the intent of the Chapter 19 edition was to codify what
6 was already in existence at the time.

7 And so at that point in 2012, you had the FCC
8 preempting internet regulations and taking that away from
9 the states that had been done by that point. And in
10 particular, the nomadic VoIP was sort of an issue at that
11 point and that's how the legislature dealt with it.

12 I think reading the statute more broadly, it
13 becomes fairly clear that the intent of the regulation,
14 or the prohibition of regulation as in Chapter 19, was to
15 codify what was then in existence, which was not to
16 remove all state regulation of telephone service, as
17 telephone service becomes more and more reliant on
18 internet protocol using that -- that system for
19 intermediate portions of their network because it's a
20 less expensive alternative.

21 I think read as a whole, the statute doesn't
22 preclude regulation of that, and that the internet
23 protocol-enabled service intention was a struggle by the
24 Legislature to properly define it, but the intent of that
25 definition was to -- as Mr. Moore mentioned earlier, was

1 computer-to-computer transmission, really, and something
2 different than telephone service. And that's why there's
3 two different definitions for the internet
4 protocol-enabled services and the voice over internet
5 protocol service.

6 And so for that reason, and for the public
7 policy that -- were this case that internet
8 protocol-enabled service were to be read broadly to
9 include any service that is enabled in any way by
10 internet protocol, the state's regulation of
11 telecommunications or telephone service, in general,
12 would effectively be over. And that is not the intent of
13 the legislature as demonstrated by the language of the
14 statute.

15 It also -- it would have broad public
16 implications to make that type of a determination, and
17 the Division would recommend that the Commission, I
18 guess, construe that section narrowly such that
19 it -- that it gives intent to the Legislature's or gives
20 affect to Legislature's intent to drafting that.

21 And as Mr. Moore said, there's fairly a
22 substantial body of case law on that method of
23 interpretation that is still current. And the Division
24 would recommend that that's the appropriate
25 interpretation.

1 And I will conclude my brief comments there.
2 Thank you.

3 PRESIDING OFFICER HOGLE: Thank you,
4 Mr. Jetter.

5 Before we kick it off to Mr. Russel, let me
6 think about whether I should ask my questions now or let
7 him respond to all of the parties arguments.

8 Mr. Russel, please go ahead and reply.

9 Mr. Russel?

10 MR. RUSSEL: Sorry, I was on mute, talking to
11 myself apparently.

12 PRESIDING OFFICER HOGLE: Okay. I will
13 withhold my questioning until you respond or reply to the
14 parties' responses to your motion.

15 MR. RUSSEL: Okay, great. Thank you. Thank
16 you, Your Honor.

17 I will start by responding to the points
18 raised by Ms. Slawson, and then I will address the
19 statutory interpretation argument that was addressed by
20 Mr. Moore and Mr. Jetter.

21 Ms. Slawson started out by identifying a
22 number of Federal Communication Commission rulings, the
23 8th Circuit ruling in Charter Advanced, the AT&T ruling,
24 which was FCC ruling, and the NECA guidelines. And I
25 think we can address all of those fairly quickly by

1 saying, all of those address the question of whether the
2 service at issue in each of those matters can be
3 regulated by the FCC.

4 The -- we mentioned that we weren't going to
5 get into the discussion of federal preemption. Had we
6 gotten into that, and I don't -- I'm not proposing we do
7 that now, but the distinction between whether the FCC
8 will regulate a matter or whether it will not regulate a
9 matter under Title 2 of the Telecommunications Act turns
10 on the question of whether it falls within the definition
11 of telecommunication service or an information service.

12 In each of the -- of the authorities that
13 Slawson cited, identify the question of whether it falls
14 within one of those two definitions. None of that has
15 anything to do with whether Utah -- the Utah Legislature
16 has determined whether this Commission can or should
17 regulate a particular type of service.

18 The Utah Legislature has passed a law that
19 even if a matter is not preempted by federal regulation,
20 this Commission can't regulate it. So all of the -- all
21 of the discussion about the federal rulings that
22 Ms. Slawson cited, the NECA guidelines which aren't
23 really law but are, you know, identified in discussions
24 about -- you know, about what can be regulated by the FCC
25 is either telecommunications or information service, none

1 of that affects whether the Utah Legislature has -- has
2 barred this Commission under 59 -- excuse me, 54-19-103
3 from regulating the service at issue here. So that's the
4 first one.

5 Ms. Slawson then raised four other points.
6 One was a public policy argument, that if the Commission
7 reads the plain language of IP-enabled service as
8 Frontier's suggesting here, that it will have, you know,
9 somewhat profound effects on regulation of service in the
10 state. I will candidly tell you that I have no idea
11 whether that's true or not. None of that information is
12 before the Commission. None of it is part of the record.

13 I don't know, sitting here today, what the
14 penetration of this type of service, this type of
15 IP-enabled service is in the state, other than this call
16 may, but it's not in the record so I can't really respond
17 to that, other than to say that it's a public policy
18 argument. We are making an argument about statutory
19 interpretation and about whether the facts of this case
20 fit within that statute.

21 And I guess what I'll say is, if applying the
22 plain language of the statute has some impacts
23 on -- outside of the bounds of this case, that's an issue
24 for the Utah Legislature to address, not an issue for
25 this Commission to address when it interprets the

1 language of the statute itself.

2 So I'll address Ms. Slawson's second point,
3 which was that this service that E Fiber intends to offer
4 is very much like the service that was offered or
5 discussed in the AT&T IP-in-the-Middle case, the FCC
6 ruling which determined that that service was a
7 telecommunication service rather than an information
8 service.

9 Once again, that issue is a question of
10 whether the FCC will regulate it under Section 2 of the
11 Telecommunications Acts, and it has implications about
12 whether the -- whether the states are preempted
13 from -- by federal regulation in -- if it's the service
14 that AT&T offers, I think the answer is that the -- that
15 federal law would not preempt Commission -- Commission
16 regulation.

17 But that's not the question. The question
18 isn't here whether this state law constitutes federal
19 preemption. The question is whether this state law bars
20 this Commission from regulating this service. So the
21 reason that we didn't address the AT&T IP-in-the-Middle
22 case is that it doesn't have any bearing on whether the
23 Utah Legislature has barred this Commission from
24 regulating this particular service.

25 Ms. Slawson also argued that IP-enabled

1 services are really inseparable from internet services,
2 and that really gets to kind of the point that Mr. Moore
3 was arguing for, which is the request that this
4 Commission somehow read into the definition of IP-enabled
5 service a requirement that -- that we apply it only to
6 communications between computers, that it requires some
7 sort of internet component.

8 The term "internet" isn't -- doesn't appear
9 in the definition of IP-enabled service. There is no
10 requirement in the definition of IP-enabled service that
11 the communications at issue that send or receive voice,
12 data or video services be between computers.

13 The definition says what it says, and there's
14 an effort by the parties opposing by the motion to try
15 and read into that definition, and I'll get into this a
16 little bit more when I address more squarely Mr. Moore's
17 argument. But there's a -- there's an effort here to
18 read some language into that definition that aren't
19 there, but I'll hold off on that for just a moment.

20 Because that -- that issue and this next
21 issue that Ms. Slawson raised about the definition of
22 VoIP being superfluous or redundant really do sort of
23 merge into the argument that Mr. Moore was making about
24 the statutory interpretation.

25 And about that, I'll say this: There were

1 some quotations to laws saying you can't read a statute
2 in a way that would make it redundant or superfluous.
3 And what I'll say is that there's a whole host of black
4 letter law citations to Utah Supreme Court decisions,
5 etc., that will say you cannot read into a statute words
6 that aren't there. You cannot read out words that are
7 there.

8 And the definition of VoIP is not rendered
9 redundant by the definitions themselves. What the
10 parties are arguing is that the way that the Legislature
11 has used the term VoIP and IP-enabled service is that
12 they've used them the same way. Clearly, VoIP is a
13 different scope, it is a different definition than
14 IP-enabled service.

15 I think all the parties here would recognize
16 that you can have a VoIP -- you can have IP-enabled
17 service. Even under their definition, that you can have
18 an IP-enabled service that does not constitute a VoIP
19 service. That means that they are not superfluous.

20 If you have -- you can have an IP-enabled
21 service that provides -- you know, enables an enduser to
22 send or receive video communications over -- using
23 internet protocol. That clearly isn't a VoIP service
24 because -- because VoIP is limited to voice. Therefore,
25 those definitions are not superfluous. They are

1 different definitions. They have a different scope.

2 What the parties are really saying is: Well,
3 but the Utah Legislature has seen fit to use those two
4 separate definitions in this same way, in that they have
5 barred the Commission from regulating services that fall
6 under IP enabled and under VoIP, and they've barred the
7 Commission from imposing regulations in the same way.

8 But that doesn't mean that the
9 definitions -- that reading IP enabled the way that
10 Frontier is asserting that you should do -- which, by the
11 way, is the plain language of that statute, it doesn't
12 mean that that makes it -- makes the definition of VoIP
13 superfluous. It's just the Utah Legislature hasn't seen
14 fit to use those two different definitions in two
15 different ways.

16 That does not eliminate or cancel out or
17 somehow violate some black letter law assertion
18 about -- about statutory interpretation. What it does is
19 it gives meaning to the very words that the Utah
20 Legislature has used. Indisputably, E Fiber's network in
21 its proposed services would utilize IP to enable an
22 end-use customer to send or receive voice, data or video
23 communications. That's what it does, and nobody has
24 argued otherwise.

25 Their efforts to insert into that statute a

1 requirement that the communication, in order to qualify
2 IP enabled, has to talk between computers or has to
3 access the internet, those requirements are not there.
4 And the Commission should not read into a statute words
5 that aren't there in an effort to try to reconcile
6 what -- what are already two different definitions, you
7 know, in order to try to use the definitions in a way
8 that the Utah Legislature did not see fit to draft.

9 If, as Mr. Jetter asserts, it was the
10 intention of the Utah Legislature to say something other
11 than what it said, that is an issue for the Utah
12 Legislature. If the public policy implications of
13 interpreting the statute the way it was written are a way
14 that -- are a result -- have results the Utah Legislature
15 did not intend, then that is an issue for the Utah
16 Legislature to address

17 This Commission has to utilize the statute
18 that the Utah Legislature has passed, and that statute
19 clearly says that a system like E Fiber, which utilizes
20 internet protocol to enable an enduser to send or receive
21 voice, data or video communications. This Commission
22 cannot regulate it as such.

23 E Fiber's proposed system would mean that it
24 cannot be regulated, cannot be subject to regulation
25 under Section 54-4-4, and, therefore, it cannot be rate

1 of return regulated carrier.

2 And I think that response, all the arguments
3 that were raised. And I'm happy to answer any questions
4 if you should have them, Your Honor.

5 PRESIDING OFFICER HOGLE: Thank you,
6 Mr. Russel. You can hear me. Correct?

7 MR. RUSSEL: Yes.

8 PRESIDING OFFICER HOGLE: Okay. Let's assume
9 that state law is ambiguous. Okay? And I'm not saying
10 that it is. I'm not saying that it isn't. I'm saying to
11 assume the state law is ambiguous.

12 So in reading 54-19-1021 and 54-19-1022, it's
13 not clear -- (inaudible.) Then -- then let's also accept
14 the argument that the federal government, in preempting
15 internet services, was doing so in order to facilitate
16 the growth and development of the internet, and then
17 how -- how would you then, sort of -- when you read the
18 definition of both internet protocol-enabled service and
19 voice over internet protocol service under state
20 law, and it's not clear, but there's a federal case law,
21 and I'm talking about the AT&T case, that says that
22 IP-in-the-Middle service is telecommunication service,
23 then why shouldn't you look at federal law, sort of
24 interpreting the type of service that they say, "You know
25 what? We don't want to regulate this service," or, "You

1 know, this is not the service that we're talking about
2 that we are preempting. States, you can take this. You
3 can regulate an IP-in-the-Middle type of service like
4 AT&T."

5 Why is that not acceptable in a situation
6 where state law is unclear?

7 MR. RUSSEL: I think I understand your
8 question, so I'll try to answer, but if I don't, please
9 let me know.

10 PRESIDING OFFICER HOGLE: Okay.

11 MR. RUSSEL: As I -- if I understand you
12 correctly, you're saying, you know, "Mr. Russel, assume
13 that the definition of IP enabled and/or voice in the
14 state statute is ambiguous in some way. Why can't the
15 Commission look at the FCC determination in the AT&T
16 IP-in-the-Middle case and make some determination about
17 what state law says; is that the question you are asking?"

18 PRESIDING OFFICER HOGLE: Yes. And also
19 accepting the argument that the reason why we have this
20 definition is because the federal -- federal agency or
21 the federal law has said, "We don't want the state -- the
22 state agencies to regulate internet service."

23 And so the reason why the state law was
24 passed was in order to adhere to this federal preemption.
25 Let's assume that and let's accept that argument.

1 MR. RUSSEL: Yeah. So I don't think that
2 those two things affect each other. And here's why. The
3 AT&T ruling did not turn on whether what AT&T was
4 offering was -- was something that falls within the
5 definition of IP enabled.

6 What the AT&T ruling turned on was the
7 question of whether what AT&T was offering was a
8 telecommunication service or an information service.
9 Neither of those two terms are in this statute. So it
10 wouldn't be on those grounds in which we have to find
11 ambiguity to look to the federal law.

12 You know, in fact, the FCC has, you know, in
13 its -- Mr. Jetter referenced the IP-enabled services line
14 of ruling from the FCC, but I don't know that anybody
15 cited this in their are briefs because it got into the
16 weeds quite a bit, but the FCC, in talking about VoIP and
17 IP enabled, often refers to VoIP as a subset of IP
18 enabled. And that's the very definition which the
19 parties here arguing renders VoIP superfluous.

20 So if we are going to be looking at FCC
21 determinations to try to -- try to resolve some sort of
22 ambiguity here, I think we would need to look at that
23 question. Because the Utah Legislature didn't -- didn't
24 say in their in the statute, you know, "We are going
25 to -- we are going to -- you know, this Commission can

1 regulate telecommunication services but not information
2 services as determined by the FCC." That's not what it
3 said.

4 It -- you know, it identified IP-enabled
5 service and VoIP as two separate definitions. And you've
6 asked me to assume for purposes of argument that there's
7 some ambiguity here. I guess we would have to determine
8 what the ambiguity is in order to figure out what part of
9 the FCC's regulations or rulings that we're looking for,
10 but nothing in the AT&T ruling would suggest that a
11 telecommunication service cannot be IP enabled.

12 So I guess what I'm saying is, you -- the
13 fact -- even if IP enabled somehow were ambiguous here,
14 you don't get to just throw out the words that are used
15 in that statute. You have to try to resolve that
16 ambiguity. And you don't just get to replace it with,
17 you know, concepts about distinctions between
18 telecommunication service and information service. You
19 have to try to figure out what the Utah Legislature meant
20 when it used those words in the IP-enabled statute. And
21 it didn't use telecommunication service or information
22 service.

23 So I guess my response is that the AT&T
24 ruling isn't going to provide very much guidance here
25 because it doesn't address the words that the Utah

1 Legislature used when it adopted the statute, to resolve
2 any sort of ambiguity in that statute.

3 MR. MOORE: I wondered, Your Honor, if you'd
4 have the people respond to that question as well, or is
5 that question specifically directed to Frontier?

6 PRESIDING OFFICER HOGLE: No. Actually, I
7 was thinking about asking all of you the same questions.

8 So, Ms. Slawson, I would like to hear from
9 you. I mean, typically, any -- any response you had to
10 Mr. Russel's explanation of why we should not use the
11 AT&T case to decide this specific issue.

12 MS. SLAWSON: Sure, Your Honor. I disagree.
13 So that's the short answer. The long answer is we
14 absolutely should look at the AT&T case to decide this
15 issue.

16 Like you said in the premise of the question,
17 assuming that the FCC has preempted IP-enabled service
18 and voice over internet protocol service that requires a
19 broadband connection, that's -- that's the framework that
20 59- -- or 54-19-103 was adopted under. Right? We are
21 going to codify what's already happening at the federal
22 level.

23 At the federal level FCC, says, "States, you
24 stay out of IP-enabled computer-to-computer type
25 services, and, States, you stay out of regulating voice

1 over internet protocol service that requires a broadband
2 connection."

3 You have to stay all the way out of it
4 because even if 59- -- 54-19-103 states, it has no effect
5 on taxes, USF, telecom relay service, 911. It has no
6 effect on the competitive entry statute, which is exactly
7 the statute we're -- it has no modification to the
8 competitive entry statute, which is the exact statute
9 we're talking about, you know, that the applications were
10 brought under. It doesn't affect or modify a carrier's
11 obligation under 47 USC 251 or 252. It doesn't affect or
12 modify the Public Service Commission's obligations under
13 472 USC 251, 252.

14 So there's lots of things that you can still
15 regulate, even if it is an IP-enabled or a voice
16 interconnected VoIP service that uses a broadband
17 connection. But at the time, the Utah Legislature was
18 trying to codify what was already happening on the
19 federal level.

20 So it's -- it's not only instructive, it's
21 critical to look at what the FCC decides that it's going
22 to qualify as VoIP service or information service, and
23 what is going to qualify as telecommunication service.

24 And the AT&T case did exactly that. They
25 said, "Look, okay. AT&T" -- AT&T, as every other party

1 in all of the cases that we have discussed, were trying
2 to get out of regulation by in -- by arguing that their
3 use of IP technology in their network exempted them from
4 regulation.

5 And in the AT&T case, the FCC said, "No, hold
6 on a second. You are talking about using IP technology
7 in the middle of your network. It has no effect on what
8 the consumer is getting. It has no effect on what
9 they're ordering. It has no effect on how you're
10 billing. It has -- there is absolutely no distinguishing
11 factor, other than you are using IP transport as opposed
12 to PDM transport, as opposed to electrical transport,"
13 you know, way back when.

14 "And so we're going to say no, that's
15 telecommunication services, not information services."

16 And by saying, "it's telecommunication
17 services, not information services," they are saying it
18 is a regulated service. Okay? And that's why it's
19 critical to look at the AT&T case.

20 You don't only have to look at the AT&T case,
21 though. You have the experts. The expert that is tasked
22 with interpreting FCC rules, saying, "All right. We know
23 the industry is changing. IP technology is being used to
24 varying degrees in the provision of voice service. And
25 we are going to identify when it is regulated and when it

1 is unregulated."

2 And what NECA has determined is that when it
3 is -- when IP technology is used in the transport section
4 of the network from the switch to the customer's
5 premises, it remains regulated telephone service. It
6 would be -- it would be ridiculous for this Commission to
7 not use the resources of the agencies who have created
8 this entire area of information.

9 And NECA even says, "Look, we -- we're the
10 authority to review the FCC's paper -- the FCC's
11 interpretation -- or I mean, sorry, FCC's regulations,
12 and -- and this is our interpretation of what the FCC has
13 intended. For federal purposes, you are going to be rate
14 of return regulated if you provide voice servicing that
15 way."

16 With the -- 54-19-102 and 103 being the
17 intent of those statutes being to mirror the -- or codify
18 the law in existence at that time, that's exactly what
19 you have to do. I mean, I just -- I just think it would
20 be irresponsible for this Commission to not consider the
21 AT&T case to determine any ambiguities in the statute.

22 PRESIDING OFFICER HOGLE: Thank you,
23 Ms. Slawson.

24 Mr. Moore?

25 MR. MOORE: Yes. You should absolutely take

1 that approach and interpret Sections 54-19-201 -- 202 and
2 54-19-103 in accordance with federal law.

3 And I would disagree with Frontier's argument
4 that there's no ambiguity reading the term "internet
5 protocol service" in isolation with -- apart from the
6 rest of the statute.

7 I would also disagree with the assertion that
8 maybe there's nothing inherent in the statute that makes
9 the interpretation offered by Frontier rendering Section
10 2 superfluous.

11 As a matter of logic and semantics, when you
12 use -- because Section 2(a) uses the term, "internet
13 protocol" as one of several elements, internet protocol
14 cannot, as a matter of logic and semantics, have the
15 meaning proposed by Frontier without rendering voice over
16 internet protocol services superfluous and meaningless.
17 That is inherent in the statute. If it causes a problem,
18 then the statute is ambiguous.

19 And I wanted to make another statutory
20 construction argument with respect to the claim there's
21 no ambiguity in the statute, and this is a case where I'm
22 sure Mr. Russel is well aware of because he and I took it
23 to the supreme court. Office of Consumer Services versus
24 Public Relations Commission, 2019-UT-26.

25 In that case, the argument was made that if

1 you took a provision in the general rates case statute
2 and you read it in isolation, as Mr. Russel is reading
3 success or protocol in isolation, that allows the
4 Commission to use internum rates in the EBA mechanism.

5 And this is what the court said: The
6 Commission acknowledges that this provision is surrounded
7 by subsections referring to the general rate case, not
8 the EBA mechanism. But it also emphasized that
9 Subsection A -- 4(a)2 itself makes no explicit reference
10 to the general rate case.

11 And on that basis, it is concluded that the
12 plain language of this section authorizes it to establish
13 internum rates in the EBA costs recovery proceeding. The
14 supreme court unanimously -- Justice Lee again -- held:
15 This is an erroneous reading of the statute. The
16 interpreted statute, our goal is to give effect to the
17 words enacted by the legislature. We do not, however,
18 read the statutory text in isolation. We must read the
19 context -- we must take it in context into consideration
20 surrounding terms and provision. When Section 4(a)2 is
21 read in connection -- read in context, it becomes obvious
22 the meaning applies only to a general rate case.

23 So that is the most recent Utah Supreme Court
24 case coming from the Commission to any sort of
25 proposition that you cannot take a term out of the

1 context, out of a statute and say that it is ambiguous
2 viewed in isolation. That's already been rejected less
3 than a year ago today.

4 So to the extent that the interpretation
5 offered by Frontier can be considered plausible, it is
6 ambiguous because it conflicts with Section 2. And
7 therefore, since we have an ambiguity, it makes perfect
8 sense to, from the words of the statute, apply it
9 consistent with federal law because the statute says that
10 it doesn't exempt the Commission's obligations to
11 implement or enforce federal law.

12 The statute itself refers to federal law.
13 And internet protocol-enhanced services is a term that is
14 founded in FCC opinions. And the statute, in the
15 interpretation that we give it, runs in accord with FCC
16 law.

17 And therefore, I think it is -- it is
18 ambiguous and it is opprobrious to find -- to refer to
19 the FCC in resolving that ambiguity. And that would
20 result in the fact that the type of services offered here
21 are not preempted by the statute.

22 Thank you.

23 PRESIDING OFFICER HOGLE: Thank you,
24 Mr. Moore

25 Mr. Jetter?

1 MR. JETTER: Thank you. I will keep this
2 brief since I'm kind of at the end of the line here. The
3 short, sort of, answer is to the question here a little
4 bit is that you can't have a VoIP service
5 without -- without internet protocol.

6 And so if all internet protocol-enabled
7 service is outside of the scope of regulation for the
8 Commission, there will be no need to put an additional
9 section in that defines voice over internet protocol as
10 something else because it would be subsumed within
11 internet protocol services.

12 And I would generally agree with the premise
13 of this line of questions that you presented initially,
14 that -- that it was the intent of the legislature to
15 codify what was happening in practice and to attempt to
16 codify what was going on at the FCC's -- with respect to
17 preemption of internet and VoIP services at the time in
18 2012.

19 And for that reason, it would make sense to
20 follow what the FCC has done. And the further
21 clarification that was had from the FCC since that point
22 and use that as potentially not a conclusive answer but,
23 at least, as guidance on what the FCC believes is still
24 within the purview of state regulation and what is not.

25 And I believe as I explained just briefly

1 earlier, there is some ambiguity in the statute.
2 Otherwise, it wouldn't make sense to include two
3 definitions. One that would be entirely subsumed within
4 the other.

5 And once you found some ambiguity, then it
6 makes a lot of sense to look to the FCC for their
7 guidance on state regulation, when that state regulation
8 is intended to -- to be a mirror or a codification of the
9 FCC's regulation to avoid -- incidentally, probably to
10 avoid litigation on these issues at the state level.

11 And that's -- that's all I have to add.
12 Thank you.

13 PRESIDING OFFICER HOGLE: Thank you,
14 Mr. Jetter.

15 Mr. Russel, I will give you one last
16 opportunity to reply or respond to any of the arguments
17 that they made and presented related to the question that
18 I asked you. If you have anything new to say, now would
19 be a good time.

20 MR. RUSSEL: Sure. I do, actually.

21 The suggestion is being made that because the
22 definition of VoIP is, by its plain language, a subset of
23 the larger definition of IP enabled, somehow there's an
24 ambiguity here. And the question that Your Honor asked
25 me is: If there is -- if that is -- does create an

1 ambiguity, should we go look at the AT&T case?

2 I answer that, I don't think so because AT&T
3 was not intending to define IP enabled. But, in fact, if
4 you do go look at that ruling, you will find the
5 following statement. This is at the top of Paragraph 2.
6 So before you even get into the background of AT&T
7 services, it's in the introduction.

8 And it introduces and says that "We've
9 recently adopted a notice of proposed rulemaking
10 concerning IP-enabled services, including voice over
11 internet protocol. In that proceeding, we sought comment
12 on, among other things, whether access charges should
13 apply to VoIP or other IP-enabled services."

14 The FCC itself has recognized that VoIP is a
15 subset of IP-enabled services. It's not any wonder that
16 the definitions that the Utah Legislature has adopted are
17 somewhat similar to those that are used by the FCC. VoIP
18 is a subset of IP enabled. That doesn't make the
19 definition of VoIP or IP enabled ambiguous.

20 And, in fact, if you found any ambiguity in
21 those definitions in the Utah statutes and you looked to
22 the FCC's ruling in AT&T, that very sentence that I just
23 read to you would resolve it. It is not ambiguous just
24 because it is a subset. It was intended to be a subset
25 because that's how the FCC set it up.

1 I won't -- I will further direct your
2 attention to paragraph 3 of that ruling, which -- let's
3 see, we're three sentences in. Let's see, we'll
4 go -- start with the second sentence. "When VoIP is
5 used, a voice communication traverses, at least, a
6 portion of its communications path in IP packet format
7 using IP technology and IP networks."

8 And here's the critical sentence. "VoIP can
9 be provided over the public internet or over private IP
10 networks."

11 The suggestion that IP enabled requires this
12 Commission to read into the definition of -- the
13 suggestion that this Commission has to read into IP
14 enabled to include some public internet or public
15 internet component is rejected by the very FCC ruling
16 that the parties are pointing you to.

17 The FCC recognized that IP doesn't require
18 public internet. So to the extent that this Commission
19 is looking to resolve any sort of ambiguity, and I don't
20 think there is any ambiguity, but if you look at
21 the -- you need to go no further than the third paragraph
22 of that AT&T ruling to realize that IP does not mean
23 public internet. It can mean that, but it doesn't have
24 to mean that. It can be over a private IP network. And
25 VoIP is a subset of IP-enabled service. That doesn't

1 render the definition superfluous.

2 As I mentioned earlier, what the parties are
3 reacting to is the way that the Utah Legislature has
4 elected to use those two definitions. It has elected to
5 use those two definitions, one which is subsumed within
6 the other in the same way. That doesn't make them -- you
7 know, it doesn't short-circuit the statutory analysis
8 here or the statutory interpretation.

9 They are different definitions, and that
10 satisfies the supreme court's direction not to interpret
11 one statute in isolation from another. You can interpret
12 IP enabled, and it's a different definition than voice
13 over internet protocol service, and it's fine that those
14 are two separate definitions.

15 I'm not asking you to look at IP enabled in
16 isolation. Look at IP enabled. Look at VoIP. But what
17 happens is VoIP -- all VoIP is IP enabled. Not all IP
18 enabled is VoIP. And that's a perfectly acceptable
19 construction of those two statutes.

20 In Section 103, the Utah Legislature has seen
21 fit to bar this Commission from regulating either one of
22 them. The Legislature, I suppose could have adopted a
23 law that applies only to VoIP, and then I suppose that
24 would take away the argument that the parties are making
25 that, well, gee, you know, treating two separate

1 definitions in the same way means the same thing. They
2 are not. They have different definitions. It's just
3 that the legislature has treated them -- hasn't treated
4 them -- has imposed the same bar towards regulation to
5 those two separate definitions.

6 And it doesn't make it ambiguous. But even
7 if it did, it would resolve that ambiguity in the very
8 same way that I'm suggesting that the plain language
9 says, which is, it doesn't require -- it doesn't require
10 access to the public internet for it to be IP enabled,
11 and VoIP is a subset of IP enabled. That's what the FCC
12 says.

13 The Utah Legislature, in adopting its
14 prohibition against this Commission regulating those two
15 services, did not mirror the definitions or the
16 distinctions between information services and
17 telecommunication service.

18 It could have sought to do so and it did not.
19 It used the IP-enabled definition that you see there in
20 its plain language, and it barred this Commission from
21 regulating it.

22 Any service that is IP enabled is not subject
23 to 54-4-4. It is not subject to rate of return
24 regulation. And therefore, it can't be rate of return
25 regulated.

1 And I guess I'll just -- I'll stop with that
2 before I repeat myself.

3 PRESIDING OFFICER HOGLE: Thank you,
4 Mr. Russel.

5 This question is for, I guess to start with,
6 with Mr. Moore, because I believe Mr. Moore is the one
7 who used -- that sort of described internet protocol and
8 internet service as, I believe, communication between two
9 computers.

10 And I just wanted to explore a little bit,
11 Mr. Moore, the use of the term "voice" in that
12 definition, in internet protocol enabled service.
13 What -- what do they mean or what does voice mean in that
14 definition? Does it include Subsection 2, 54-19-102? Is
15 it broader? How do you, sort of, interpret the
16 Legislature's use of voice in the definition of internet
17 protocol-enabled service?

18 MR. MOORE: I think the Legislature -- as I
19 understand you correctly, I think the Legislature is
20 making two definitions to find two different things. And
21 I think that in determining what voice -- what internet
22 protocol means in Section -- Subsection 1 -- Section 1,
23 you have to have it align with Subsection 2 to give both
24 sections meaning.

25 And we know that if that is the case, and

1 I've argued that the Commission is compelled to find that
2 that is the case, the distinction -- one of the
3 distinctions between the VoIP in Section 2 and the
4 internet protocol in Section 1 is that the VoIP has to
5 relate -- has to deal with the Public Switch Telephone
6 Network, with the plain old television services.

7 So they were considering VoIP to be something
8 that communicates using internet protocol with
9 the -- with the public television network. Now
10 the -- when we interpret, therefore, what does internet
11 protocol mean in Subsection 1, it must be -- it must be
12 something less than anything that is suggested by
13 Frontier.

14 Because, you know, they are right that
15 that -- that that definition, if given that broad
16 interpretation, would subsume Subsection 2. Therefore,
17 it must be something less than what they are suggesting.
18 And I think at a minimum, the distinction between
19 phone-to-phone communication and computer-to-computer
20 communication is implicit in the statute and necessary to
21 give both words their meaning.

22 I think it is somewhat ambiguous, and we
23 would argue that at the most, it means
24 computer-to-computer technology communication and
25 subject, of course, to the exception, which, again,

1 include the application of Section 54-8-2(b)-21, which is
2 the provision that E Fiber is moving under.

3 So I think it is ambiguous, and I think it
4 means, at the very most, computer-to-computer technology
5 because that distinguishes it from computer to phone
6 technology in Subsection 2

7 Does that answer your question?

8 PRESIDING OFFICER HOGLE: Yes. I mean, it
9 tells me how you would distinguish or reconcile VoIP as
10 it's used in 54-19-1021 and considering 54-19-1022, which
11 is voice over internet protocol service.

12 And I -- and I actually would like Ms.
13 Slawson to answer that question as well. And if you
14 want, I can pose it again, or if you understood the
15 question, then you can proceed and tell me how you
16 interpret the word "voice" as written in the definition
17 of internet protocol-enabled service and whether you
18 distinguish it in any way or whether you think it
19 includes voice over internet protocol service or is less
20 than voice over internet protocol service or how you
21 explain the use of voice in internet protocol-enabled
22 service definition.

23 MS. SLAWSON: Sure. I would be happy to.

24 So the voice communication identified or
25 contained in the definition off IP-enabled service, it

1 has to be something other than VoIP or else the
2 definition as Mr. Moore has argued and I have argued, the
3 definition of VoIP in Subsection 2 would be pure
4 superfluous.

5 And I think that a good way of speaking about
6 this or looking at this is, as indicated by NECA,
7 basically, the FCC has two bookended cases. Right? So
8 they bookended this issue with two cases. You've got the
9 Pulver case on one side, which we identified in the NECA
10 Reporting Guideline 8.11, and we've got the AT&T
11 IP-in-the-Middle order on the other end of that bookend.

12 So in the Pulver case, pulver.com free world
13 dialup offering, was determined by the Commission to be
14 an unregulated information service, largely because the
15 free world dial up service did not include any
16 transmission service or transmission capability. Rather,
17 the users communicated via their own internet connection
18 using SIP phones or softwares that -- software that
19 enabled their personal computers to function as soft
20 phones. But this is exactly what Mr. Moore is talking
21 about. This is a computer at one end of the spectrum,
22 you've got a computer-to-computer communication, and then
23 you have the VoIP definition.

24 And their voice definition is the -- when a
25 voice service connects to the public switch network. And

1 that's the AT&T case. And in a case where the voice
2 service touches the Public Switch Telephone Network, the
3 use of IP transport in that call task does not transform
4 a telecommunication services -- service into an
5 information service.

6 In other words, it doesn't transform a
7 regulated service into an unregulated service. And so I
8 think -- I think you have to see a distinction in the
9 voice -- the definitions of voice between the IP-enabled
10 services definition and the VoIP services definition,
11 because if -- you know, Mr. Russel stated previously that
12 all VoIP is IP enabled but not all IP enabled is VoIP.

13 And you have to have a distinction in the
14 voice service, and I think that distinction is
15 computer-to-computer, as -- as NECA has identified as one
16 end of the spectrum, and then PSTN voice communications
17 at the other -- in the AT&T IP-in-the-Middle case, as the
18 other end of the spectrum.

19 It's interesting to note too that the Pulver
20 was decided before the MPRM and the AT&T case was
21 public -- you know, where they determined that this is
22 service that goes to the public switch telephone network
23 was decided shortly after the MPRM.

24 Does that answer your question?

25 PRESIDING OFFICER HOGLE: Yes, thank you.

1 Mr. Jetter, if you can address that question
2 or just, you know, this issue for me, I would -- I would
3 be grateful, please.

4 MR. JETTER: I'm not sure I have a lot
5 to -- I guess, to add to what has been said by Mr. Moore
6 and Ms. Slawson here.

7 I think the distinguishing factor that I
8 would point to between the two would be the connection to
9 the Public Switch Telephone Network. Generally, if you
10 discuss internet or internet protocol or even internet
11 protocol-enabled services -- so let's, you know, take an
12 example of a Skype call or a -- any of the direct voice
13 communication-type networks, whether they're -- I think
14 Facebook pushes Messenger in the United States, but
15 WhatsApp is probably globally the most common of the
16 alternatives to the public switch network. Those are the
17 types of services I would categorize under a voice
18 service that's an internet service.

19 And granted, on my cell phone, I can make
20 either one. I can switch over and make a variety of
21 different kinds of voice connections over different types
22 of networks. And if I'm -- if I'm making a VoIP call, if
23 I use, let's say, Vonage or something, that's a little
24 bit different because it dials into a phone number that's
25 part of the public switch network.

1 And at some point in that telephone call,
2 it's going to be reconnected to a public switch network,
3 and then I can call to somebody with a traditional
4 landline-type telephone. If I'm making a call on
5 WhatsApp, it's going to be a pure IP connection all the
6 way through the endusers.

7 And if I go into -- on an android phone, I
8 can go in and make a SIP phone call also, which is fairly
9 straightforward to do. And that would be closer to a
10 traditional analog telephone call.

11 And so I think that the distinction, at
12 least, that I would read in between those two definitions
13 as -- would be the connection to the public switch
14 network. And while I do recognize I could probably do
15 all three of those same functions from my laptop, I think
16 only the one that would dial into a public switch network
17 would qualify under the VoIP definition, whereas the
18 other services would be voice over, just a standard
19 internet protocol-enabled voice communication.

20 I hope that -- that was directed to the
21 question.

22 PRESIDING OFFICER HOGLE: It was. Thank you.
23 Thank you, all of you.

24 Mr. Russel, do you care to comment on my
25 question at all before we -- probably, the next thing

1 that we will do is after one more question that I have,
2 we can take a break and then take the second issue after
3 the break.

4 But, Mr. Russel, would you like an
5 opportunity to answer my question?

6 MR. RUSSEL: Yes. Thank you, Your Honor. I
7 will be very brief.

8 My understanding of your question is: Does
9 the term "voice" in the definition of IP-enabled service
10 mean the same thing as the word "voice" in the definition
11 of voice over internet protocol, and I think the answer
12 is yes.

13 Voice is an interested term in the industry,
14 and I -- I don't think anybody on this call has a -- is
15 confused about what the term "voice" means. I think the
16 use of those terms in both of those definitions was
17 intended to be the same word and have the same meaning.

18 I will --

19 PRESIDING OFFICER HOGLE: And so --

20 MR. RUSSEL: -- I will --

21 PRESIDING OFFICER HOGLE: Go ahead.

22 MR. RUSSEL: Yeah. And I'll just say there's
23 been some reference to the notice of proposed rulemaking
24 issued by the FCC. I'm -- I'd like to -- I'd like to
25 read the very first sentence of that notice of proposed

1 rulemaking, which says, "In this notice of proposed
2 rulemaking, we examine issues related to services and
3 applications making use of internet protocol, including,
4 but not limited to, voice over internet protocol
5 services." It says, "collectively, IP-enabled services."

6 This suggestion that's being made here that
7 we have to -- we have to interpret IP-enabled services as
8 being something different than or VoIP is something
9 different than IP-enabled services, as the Utah
10 Legislature has adopted those definitions, is belied by
11 FCC itself, which says that VoIP is an IP-enabled
12 service.

13 And that's all I'm going to say.

14 PRESIDING OFFICER HOGLE: Mr. Russel, should
15 we consider -- "we" meaning the Public Service
16 Commission, should it make any difference in our analysis
17 here with respect to whether we have jurisdiction over E
18 Fiber? Should we consider that E Fiber itself is
19 projecting itself through regulation?

20 Whereas, in -- I suspect, many of the cases
21 before courts or the FCC, the entity was probably
22 attempting to keep itself out of regulation? What do you
23 think of that?

24 MR. RUSSEL: Yes, I think it's an interesting
25 dynamic. And you're right, in most of the instances in

1 which the Commission or other commissions have passed on
2 this issue, including the Vonage order or the Charter
3 Advanced. It was the entity who was -- the Commission
4 was trying to -- subject to regulation was trying to get
5 out of that regulation.

6 I don't think that changes the analysis here,
7 though, because, you know, the question here is whether
8 this Commission has the power to subject E Fiber to the
9 regulations of Section 54-4-4. And the answer is it
10 doesn't. As we all know, the Commission only has those
11 powers that the Legislature has chosen to give it, and
12 the Legislature has expressly chosen not to give it the
13 power to impose those types of regulations here, even if
14 the party might want it.

15 Now where E Fiber's choice in the matter
16 comes in is whether it, in seeking to offer an
17 unregulated service, is required to or -- is required to
18 get a CPCN, or if it wants one, whether it can get one
19 and I will try to explain that.

20 There are a small number, but some, Utah
21 Public Service Commission rulings in which an ILEC is
22 there -- is trying to impose a CPCN requirement on a
23 party that is offering a, you know, VoIP service. I
24 think the parties have referenced the 8-by-8 Ruling in
25 the filing.

1 In that case, the ILEC, the Carbon/Emory ILEC
2 was seeking to subject a competing entity that was
3 offering a VoIP service, and I'll -- just to cut off any
4 sort of implication, there's a different type of VoIP
5 service than the one that E Fiber was -- is seeking to
6 offer here. But in any event, the ILEC there was -- you
7 know, filed a request that the Commission impose a
8 requirement that the competing entity come in and get a
9 CPCN.

10 And that entity said, "What we ordered on a
11 regulated service, you can't force us to get a CPCN."

12 But I think Section 103 makes clear that if a
13 party offering a service that this Commission can't
14 regulate, under Section 54-4-4, comes in seeking a CPCN,
15 I think this Commission has the latitude to grant a CPCN.

16 But that's not the question here. The
17 question isn't, "Can you grant a CPCN?" the question is,
18 "Would it be a rate of return regulated carrier?"

19 So to -- to your question, the motion
20 addresses the question of whether -- whether E Fiber can
21 be deemed a rate of return regulated carrier, and we
22 believe the answer to that is no because it is not
23 offering the service that that this Commission can
24 regulate, consistent with Section 54-4-4, so, therefore,
25 it doesn't meet the definition of "rate of return

1 regulated."

2 That's a different question than whether E
3 Fiber can get a CPCN, which would entitle it to, you
4 know, use of the rights-of-way and -- (inaudible) -- and
5 that kind of thing. And, in fact, oftentimes in order to
6 build out an unregulated service, you need a CPCN to go
7 into a county to conduct that type of a build, even if
8 the -- even if the service, you're not -- even if the
9 service you're going to offer is not going to be
10 regulated by the Commission. I don't think there's any
11 problem with the Commission granting a CPCN under those
12 circumstances.

13 But as I said, the issue is: Can it be a
14 rate of return regulated carrier? And the answer is no.

15 PRESIDING OFFICER HOGLE: Okay. Thank you,
16 Mr. Russel.

17 One more question for Ms. Slawson, would E
18 Fiber service work if the wireline connection to the home
19 is down?

20 MS. SLAWSON: Okay. So would E Fiber's voice
21 service work if the wireline connection to the home was
22 down?

23 PRESIDING OFFICER HOGLE: Yes.

24 MS. SLAWSON: Let me think about that. So
25 no. I mean, if the -- if the -- if -- for example -- no.

1 If your phone -- if the phone service is down, the phone
2 service is down. So if the wireline connection -- the
3 wireline connection to the home is down, the phone
4 service isn't going to work. Just like regular telephone
5 service. Right? When you -- when your phone service
6 goes out, it's out.

7 So am I understanding the question correctly?

8 PRESIDING OFFICER HOGLE: You are. Yes.

9 MS. SLAWSON: Okay. Would I have an
10 opportunity to address the question that Mr. Russel just
11 answered about the -- you know, the election to the
12 regulated or if the analysis changes?

13 PRESIDING OFFICER HOGLE: Yes. Go ahead,
14 Ms. Slawson.

15 MS. SLAWSON: So Mr. Russel says that E
16 Fiber's offering a service that can't be regulated, and I
17 just take exception to that.

18 He said that there -- I -- earlier in my
19 argument, I suggested that if the Commission determines
20 that E Fiber service is not regulated service, that most,
21 if not all, regulated telephone service in Utah would
22 cease to exist. And Mr. Russel took exception to that as
23 not being in the record.

24 That is just not true. If we just consider
25 the testimony of Brock Johansen and the declaration of

1 Brock Johansen and the testimony of Douglas Meredith, the
2 Emory tele- -- Emory Telephone, Carbon/Emory Telecom,
3 Inc., and Hanksville Telecom, which are all rated under
4 the term "regulated companies," provide service in
5 exactly the same manner.

6 They provide a -- you know, analog service
7 that's converted to IP for transport, in the middle of
8 the service, converted back to analog service for
9 delivery to the called party.

10 So it's just not accurate to say that it's a
11 service that cannot be regulated by the Public Service
12 Commission. It is being regulated by the Public Service
13 Commission, and it has been regulated by the Public
14 Service Commission from the beginning, you know, of time.
15 Right? At the beginning of these -- these companies.

16 Furthermore, there's more services involved
17 than just the voice service and the wholesale broadband
18 internet service. There's all of the services that are
19 in the Emory Telecom tariff. There's -- the tariff is
20 still public telecommunications services that E Fiber has
21 committed to providing.

22 So there's been no discussion or argument and
23 there's no factual dispute that those services are public
24 telecommunication services which are subject to
25 regulation.

1 And so I think -- I think it absolutely does
2 make a difference. I mean, you've got all of these
3 companies trying to find a way to get out of regulation.
4 You've got E Fiber saying, "I want to come in and provide
5 service the exact same way as, at least, three other rate
6 of return regulated carriers of last resort are providing
7 service."

8 And I think under those circumstances, and
9 to -- and relying on the guidance of NECA to interpret
10 the FCC's regulation, those services are regulated
11 services. And we're not going to -- the -- this
12 Commission should not be lured down the road in
13 determining that a use of IP transport anywhere in the
14 system, in any amount, is -- however minuscule would
15 automatically make those services unregulated services.

16 And I also wanted to say -- I just wanted to
17 clarify too, if a telephone company -- I mean, if a
18 customer had voice service and a broadband connection,
19 and the broadband connection was out, their internet was
20 out, the voice service would continue to work at their
21 house.

22 PRESIDING OFFICER HOGLE: Okay. Hold on a
23 minute. I just want to make sure that I got that. Tell
24 me again about the internet connection.

25 MS. SLAWSON: So if we had -- let's say we

1 had a customer who takes Emory's voice service but also
2 signs up for broadband connection separate. So they have
3 internet service from the Emory affiliates and they have
4 voice service -- or internet service from the E Fiber
5 affiliate and voice service from E Fiber.

6 If the internet goes down, so if the VLAN for
7 the internet is down, it doesn't affect the VLAN for the
8 voice service. The customer's voice service is going to
9 continue to work. This is completely distinguishable
10 from the a VoIP service where -- that's dependant on a
11 broadband connection.

12 If you have a VoIP service that is dependent
13 on a broadband connection as required by state and
14 federal law, when your internet service goes down, you
15 can't make a call. That's not the case with Emory's
16 voice service. E Fiber's voice service and Emory's voice
17 service and Carbon/Emory's voice service and Hanksville
18 voice service still works.

19 Even though there's IP-in-the-Middle of the
20 circuit, of the call path, it -- the service still works
21 when the internet is down.

22 PRESIDING OFFICER HOGLE: Right. Right. So
23 let's assume the internet is down because there's a power
24 outage, and in that case, what you're telling me is that
25 E Fiber's voice service would still work.

1 And am I correct, and that's because you have
2 some kind of back-up equipment to the optical network
3 terminal? That we presumably also go down, and then
4 we're kind of back up, would you have, like, a generator
5 or something or --

6 MS. SLAWSON: So there's a back-up battery
7 unit located at the customer's premises for the ONT, and
8 so in the event of power outage, the back-up power works
9 for the voice service.

10 PRESIDING OFFICER HOGLE: Okay. I thought
11 that was the case. Okay.

12 Okay. Well, how does -- I'm sure that the
13 court reporter would appreciate this as well, we come
14 back at 11:30 for the Issue No. 2 argument; does that
15 sound okay with everybody?

16 MS. SLAWSON: Yes, that sounds fine with us.

17 PRESIDING OFFICER HOGLE: Okay. Let's
18 reconvene at 11:30 then.

19 (Whereupon, a break was taken.)

20 PRESIDING OFFICER HOGLE: Are we ready to
21 tackle the second issue?

22 MR. RUSSEL: I believe so.

23 PRESIDING OFFICER HOGLE: Okay. Mr. Russel,
24 please proceed.

25 MR. RUSSEL: Sure. So we have discussed E

1 Fiber's request to be -- receive designation as a rate of
2 return regulated carrier. As I mentioned in the -- in my
3 opening, E Fiber also requests that it be designated a
4 carrier of last resort.

5 And this is necessary for two reasons: One,
6 because it seeks access to the Utah Universal Service
7 Fund distributions, and in order to get that as a rate of
8 return regulated carrier of last resort, it has to be a
9 carrier of last resort.

10 Second, under the statute that they filed
11 their application under, 54-8(b)-2.1, they're seeking
12 competitive entry in certain local exchanges with fewer
13 than 5,000 access lines, where the incumbent has fewer
14 than 30,000 lines in the state. And as a result, they
15 have to meet the obligations of a carrier of last resort
16 in order to obtain the CPCN.

17 So the question is: Do they meet those
18 obligations? And carrier of last resort is defined in
19 54-8(b)-15 as an obligation to -- or the obligation -- of
20 a carrier of last resort, an obligation to provide
21 telecommunication service to any customer or class of
22 customers that request service within the local exchange.

23 And in the motion in our filings, we question
24 whether E Fiber can meet that obligation because, one, it
25 doesn't currently have any facilities in any of the local

1 exchange. It was created this year, specifically, as
2 a -- you know, stand-alone entities, they have
3 affiliates, of course, but E Fiber, itself, doesn't have
4 any facilities yet in those exchanges.

5 It has a plan to build out a fiber to the
6 home network in a local exchanges over a five-year
7 period. And it will -- you know, intends to expand its
8 service as that fiber to the home network is built out,
9 and it will provide service to customers as it goes
10 along.

11 But it's not currently in a position to meet
12 the carrier of last resort obligations and won't be for a
13 great number of customers, at least until that five-year
14 build-out plan is done. They've indicated that at the
15 end of that five-year build-out plan, they won't be able
16 to meet that obligation to -- well, I guess they've
17 indicated that they won't be able to extend their fiber
18 network to all of the customers in the outlying areas,
19 that those customers who are the most expensive to serve,
20 they'll, you know, be subject to a line extension
21 agreement.

22 And if not -- it's not immediately clear to
23 me how extensive the line extension agreement
24 requirements will be, but suffice it to say that they
25 don't currently have any -- any ability to meet that

1 obligation, in that during the five-year build-out
2 period, they won't be able to meet the obligation to
3 service any customers -- (inaudible) -- customers that
4 request service within the local exchange.

5 And as a result, if the -- as the requirement
6 in the competitive entry statute states, they -- you
7 know, in order to get the CPCN, they have to -- they have
8 to meet that obligation. And either they can meet it or
9 they can't. And if they can't meet it, then they
10 shouldn't get the -- they shouldn't get the CPCN.

11 And, similarly, if they can't meet the
12 carrier of last resort obligations, then they are not
13 entitled to -- they are not eligible for the USF funds.
14 And that's -- it's a fairly -- it's a fairly simple
15 discussion, but that's -- that's it.

16 And I'm happy to respond to any questions now
17 or later.

18 PRESIDING OFFICER HOGLE: Thank you,
19 Mr. Russel.

20 Why don't we let Ms. Slawson respond.

21 MS. SLAWSON: Sure. Thank you, Your Honor.

22 So Mr. Russel just set forth their argument:
23 Can E Fiber be a carrier of last resort? He says no. We
24 say yes.

25 Frontier argues, as he just stated, that

1 because E Fiber doesn't currently have facilities so that
2 immediately upon their CPCN being granted, they can be
3 providing service to all customers in the local
4 exchanges, that that argues against their designation as
5 carrier of last resort.

6 I just want to make a couple of minor
7 distinctions for the Public Service Commission. In the
8 local exchanges, in all but one of the local exchanges,
9 the -- they are small role exchanges. In other words,
10 they have fewer than 5,000 access lines served by a
11 carrier with fewer than 30,000 access lines in the state.
12 And so they -- those exchanges -- competitive entry into
13 those exchanges falls under 54-8(b)-2.1, Subsection 4.

14 The competitive entry statute contemplates:
15 Competitive entry into a small rural exchange if the
16 applicants have the appropriate managerial, technical and
17 financial resources and the competitive entry is in the
18 public interest. If it is -- if the competitive entry is
19 permitted, then the Commission is statutorily required to
20 impose an obligation upon the competitive entrant to
21 provide public telecommunication services to every
22 customer or class of customers who request it within the
23 local exchange.

24 So it's automatic. If you're granted
25 competitive entry into a small rural exchange, you are,

1 by definition, a carrier of last resort. There's no
2 statutory requirements in the competitive entry statute
3 that such service must be provided immediately. In fact,
4 it would be completely unreasonable to require a
5 competitive entrant to build out an entire service area
6 to serve all of the customers in the local exchange
7 before they even obtain authorization to serve the area.

8 And so we argue that adopting Frontier's
9 interpretation of the carrier of last resort obligation
10 effectively prohibits competitive entry. There just
11 would be no be situation where any competitive entrant
12 would build out the entire area, and then, you know, just
13 on the hope and the prayer that they would be granted a
14 CPCN to provide service in the area.

15 Frontier states in its reply memorandum that
16 it only opposes allowing competitive entry when the
17 competitive entrant cannot meet its core obligations
18 during the period in which the applicants in this case
19 are paid millions of dollars from the USF to build out
20 the network.

21 And I'm responding to this because it
22 demonstrates a fundamental misunderstanding of the USF
23 and how the USF is -- (inaudible.) As we've discussed in
24 Brock Johansen's testimony and data request responses, if
25 the applicants are granted competitive entry in these

1 small rural exchanges, then they begin construction of
2 the network. Now, it's -- it's also noteworthy that if
3 the applications are granted, there are some fiber
4 facilities that are owned by EP&V.

5 Those fiber facilities will be immediately
6 transferred to E Fiber, and those customers will be
7 immediately served by E Fiber. So there's some portion
8 of the customers that will be -- immediately be able to
9 be served by E Fiber.

10 But nevertheless, the E Fiber entities are
11 going to construct the network and they do this without
12 receiving any USF. They just -- as a carrier of last
13 resort, rate of return regulated carrier of last resort,
14 they will be eligible to receive USF, under the USF
15 statute, if they meet the conditions that are contained
16 in that statute.

17 And so any USF that applicants might be
18 granted would be received between 13 and 24 months, after
19 the cost building network are incurred, and this is
20 because of the regulatory lag described in Brock
21 Johansen's testimony and contained in Utah Administrative
22 Code Rule, R 7468-401.

23 So the -- your process for obtaining USF
24 support is that the rate of return regulated carrier of
25 last resort submits an annual report to Division of

1 Public Utilities and Public Service Commission in April.
2 The Division of Public Utilities reviews the annual
3 report, reviews the necessary -- the reasonable and
4 necessary and prudent expenses of the -- of the carrier,
5 identifies the reasonable expenses of the carriers that
6 would be eligible for USF support, makes the
7 recommendation to the Public Service Commission in
8 October.

9 The Commission either adopts those
10 recommendations or modifies the recommendations in some
11 way, shape or form, issues an order, and the USF funds
12 become distributed the following January. So we are
13 talking about between 13 and 24 months after the costs
14 are incurred, the applicant may or may not receive USF
15 distributions for those -- for those expenses.

16 So at the time that the USF -- if USF is
17 granted, at the time that the USF support is received,
18 the network facilities that are being, you know,
19 reimbursed, for lack of a better word, have already been
20 constructed and the services are available to customers.
21 So there's not some worry that we're getting USF -- this
22 big lump sum of USF up front to build-back network, even
23 when we can't provide a carrier of last resort service.
24 At the time that the USF is distributed, we will be
25 providing service in that area.

1 So I think that the critical distinction here
2 on the -- on whether we can be designated as a carrier of
3 last resort is it's not a designation of carrier of last
4 resort except in the Moab exchange. And the other
5 exchanges, if competitive entry is granted, we will be a
6 carrier of last resort and we will have those
7 obligations.

8 And what the Commission needs to decide is if
9 the statute require that those conditions be -- those
10 obligations be met immediately. And we would argue no,
11 they do not.

12 In fact, Emory Telecom, Carbon/Emery Telecom
13 and Hanksville Telecom are all carriers of last resort,
14 but that doesn't mean that the build out -- built out
15 their networks to every potential subscriber or customer
16 in the area. I mean, they haven't done that. None of
17 the regulated telephone companies or even the power
18 companies, energy companies, have done that. I mean, it
19 just wouldn't be -- it wouldn't be reasonable and
20 prudent.

21 And the reasonableness and prudence of the
22 build out brings me to the last point, which is this
23 statement that somehow our inclusion of a line extension
24 tariff means that we are never going to meet our carrier
25 of last resort obligations. There's -- (inaudible.)

1 All of the Emory-affiliated carriers of last
2 resort rate of return regulated companies have line
3 extension tariffs -- a line extension provision in their
4 tariff. Frontier has a line extension provision in its
5 tariff. And it makes sense, from a public policy
6 perspective, you don't want companies who can seek
7 reimbursement from the Universal Service Fund or seek
8 support from the Universal Service Fund, to be able to go
9 out and build at every last far-reaching corner of
10 the -- of the local service area because that's not a
11 reasonably prudent expense.

12 The USF should not necessarily be funding the
13 deployment of the facilities to every last cabin owner
14 who chooses to build their, you know, dream home 14 miles
15 up the canyon, away from the last network infrastructure.
16 And so the line extension agreement -- the line extension
17 tariffs are necessary, and they are reasonable and
18 they're prudent to ensure that the USF funds are spent in
19 a prudent matter.

20 So I just think that the argument that
21 "because we have a line extension tariff, we'll never be
22 able to meet the carrier of last resort obligations," is
23 incorrect, and it is contrary to the existing practices
24 before the Public Service Commission

25 And that's -- that's basically our position

1 on the carrier of last resort obligation.

2 PRESIDING OFFICER HOGLE: Thank you,
3 Ms. Slawson

4 Mr. Jetter, please.

5 MR. JETTER: Hi, thank you. This is -- this
6 is really a new sort of a matter of first impression for
7 the Commission, and in my research, it's in some ways
8 potentially, at least, a matter of first impression
9 broadly for most commissions.

10 There's very little case law or commission
11 review of a scenario like this, where a new entrant is
12 potentially going to be imposed a burden, which would be
13 the carrier of last resort obligation, and the question
14 of whether they need to be able to meet that obligation
15 immediately or not.

16 And the Division's position, as it was laid
17 out in our -- in our memo is that the obligation is, is
18 an obligation on the carrier that is imposed by the
19 Public Service Commission, and there's a degree of
20 reasonableness in meeting that obligation.

21 Part of that is a reasonable amount of time
22 needs to be necessary. And this is going to be a
23 fact-specific question for each type of carrier. And I
24 would suggest that that's true fairly universally for
25 public utilities in general. And we see that for -- for

1 example, in Dominion Energy's gas line extension to
2 Eureka, they will be imposed a carrier of last resort
3 obligation to serve customers in that area, but they're
4 not required to have all customers -- have facilities
5 available to connect all customers immediately, prior to
6 a CPCN being granted for that area.

7 And I would suggest the same is also true,
8 for example, if -- if a developer creates a new
9 subdivision within a territory that's currently served by
10 one of the providers of the carrier of last resort
11 obligation, and that could actually be any of the public
12 utilities that are regulated, there's a period of time in
13 which those utilities would have the opportunity to build
14 out their facilities to serve a new subdivision.

15 And I don't think -- it would be a
16 fact-specific inquiry, but to the extent that these
17 carriers are diligently acting in a way that they're
18 building out their facilities to serve the customers in a
19 commercially prudent manner, I don't think that it
20 would -- I think it would be difficult to find fault with
21 them.

22 And I would suggest that the Commission, in
23 that instance, would not revoke their CPCN or find a
24 carrier in that situation in violation or failing to meet
25 its burden to satisfy that carrier of last resort

1 obligation. And for those reasons, I think it's
2 important to recognize that there is a reasonableness
3 sort of baked into that carrier of last resort
4 obligation. And part of that reasonableness is, is a
5 reasonable amount of time given the circumstances to
6 provide the service that is obligated to be provided.

7 And I don't have any specific case law. Most
8 of the case law I found, candidly, is going back to maybe
9 1850 English common law and it doesn't provide a lot of
10 guidance for this scenario. And I haven't found a lot of
11 direct, on-point guidance from any other states'
12 commissions nor do I believe that this Commission has
13 addressed this issue in the past.

14 And so I think given the circumstances, that
15 the correct interpretation of that carrier of last resort
16 obligation for a competitive entrant would be to impose
17 the obligation immediately but provide a reasonable time
18 to complete the facility installation before the
19 Commission might find that a carrier would be in
20 violation of that obligation or failing to meet the
21 obligation that's imposed.

22 And that, I guess, concludes my argument on
23 this issue. Thank you.

24 PRESIDING OFFICER HOGLE: Thank you,
25 Mr. Jetter.

1 Mr. Moore?

2 MR. MOORE: Just briefly, as, again, the
3 question of statutory construction, the central point in
4 the OCS's review, the statute side by Frontier, is the
5 term "obligation."

6 In our brief, we define "obligation" from
7 Black's Law Dictionary, 10th edition, "as a formal
8 binding agreement or acknowledgment of liability to pay
9 certain amount due or to do a certain thing for a
10 physical person or set of persons."

11 We make the argument that there's nothing
12 temporal in that definition. It doesn't require
13 immediacy. An example would be an obligation on a, let's
14 say, promissory note with a five years -- at a five-year
15 term with 10 percent interest. The holder of -- the
16 person who gave the promissory note would be obligated to
17 pay the amount of the note, but that obligation wouldn't
18 by -- necessarily be due immediately.

19 Therefore, when you're determining whether
20 obligation should have an immediacy aspect in it, you
21 have to read the statute, as we have been saying along,
22 in context with the other statutes that it is interacting
23 with.

24 And the carrier -- and one of those statutes
25 is the competitive entry statute, Section 54-8(b)214,

1 which states that "The competitive telecommunication
2 corporation obligation is to serve shall be no greater or
3 less than the incumbent telecom corporation."

4 Therefore, because Frontier has a line
5 extension policy, they are not technically in compliance
6 with the carrier of last resort as well if it's
7 interpreted to mean that you have to immediately serve
8 every person without a reasonable component in it.

9 And as Mr. Jetter and Ms. Slawson argued,
10 there should be a reasonableness application in that, and
11 we can find that in the statutory language in Section
12 58-8(b)-15, the universal fund statute, which is as we
13 noted and disputed, allows for the funds for
14 reimbursement of reasonable costs determined by the
15 Commission.

16 Therefore, because the building out of the
17 infrastructure must be done reasonably, we find -- we
18 would argue that that reasonableness has a time component
19 in it as well for the reasons that Mr. -- Ms. Slawson and
20 Mr. Jetter mentioned.

21 And that will be the extent of my comments.

22 PRESIDING OFFICER HOGLE: Thank you,
23 Mr. Moore.

24 Mr. Russel, would you like to reply?

25 MR. RUSSEL: Sure. And I'll try to keep this

1 brief. I think that the issue that Mr. Moore just hit on
2 about the definition of the term "obligation" is
3 important and I'm going to address that.

4 Second my initial reply comments will
5 actually go to something that Mr. Jetter said about
6 having looked for some guidance on this, of the
7 Commission now having found it.

8 I had the same experience, Mr. Jetter, and
9 I'm heartened that I wasn't missing something. You know,
10 I -- before we -- before we filed the motion, I went
11 looking to see if, you know, how other -- other
12 commissions handle this, and I couldn't find anything.
13 And so what we're left with is the statute saying that a
14 party has the obligation to provide service in a
15 customer, class of customer that seeks it.

16 And the question, I guess, is, if we allow a
17 party to conduct its -- you know, its network build out
18 over a number of years and don't impose on it a
19 requirement that it actually serve all customers or class
20 of customers that -- that request it, whether they're
21 obligated -- whether we can say that they are obligated
22 to do so. The statute says that they must be obligated
23 to do so, you know. And what I -- what I think is clear
24 is that there's going to be some period of time before E
25 Fiber will get to the point where it can satisfy that

1 obligation the way that that term is meant.

2 And I guess the question is: You know, does
3 the Commission have the ability not to impose some sort
4 of penalties for a failure to meet that obligation?
5 Because that's really kind of what we're -- what the
6 question is. You know, if you have an obligation and you
7 can't meet it, either, you know -- are you subject to
8 some sort of penalty if you're not -- if it's not an
9 obligation at all.

10 And I'm not proposing that the Commission
11 impose some sort of penalty on E Fiber. That's not my
12 point. My point is that you've got a party seeking to
13 come in and compete with an ILEC, you know, where it's
14 not going to be able to meet the obligation to serve all
15 the customers, at least for some period of time.

16 And the question is: Does the statute, when
17 it requires that party to have an obligation, when we all
18 here recognize they won't be able to meet it, at least
19 for some period of time, does that satisfy the term
20 "obligation"?

21 And I point out in the reply brief that there
22 is a way around this, and that is there's the statute
23 that allows the Commission to impose exceptions to
24 requirements of Title 54, Section 8(b). And it -- it
25 requires the Commission to consider a couple of things,

1 specific factors that I point out in the reply brief.
2 And we just -- that's -- I suppose that would be the way
3 that the Commission could address whether -- if it thinks
4 that there's a -- the word "obligation" means just what
5 it says, I suppose it could impose, you know, an
6 exception to that obligation to allow E Fiber not to have
7 to meet it for some period of time. But we -- you know,
8 nobody's moved under that.

9 I don't know that there's petitioned evidence
10 in the record for them to consider the necessary factors.
11 But if there is a time component or some sort of grace
12 period as the Division and the Office suggests and as E
13 Fiber suggests in the definition of "obligation" itself,
14 what is it and how does the Commission draw that line?

15 Because what if the build out period were ten
16 years or 15 years? What if they, you know, intended to
17 go straight down the middle of Main Street and take all
18 the easy ones first and then have a really slow build out
19 for the rest of it?

20 And I don't know within the context of these
21 local exchanges what's a reasonable time period. Maybe
22 five years is the right number. But five years is also a
23 long time not to be able to meet the obligation with
24 respect to all customers that request a service.

25 And so it seems to me that the Commission's

1 got some thinking to do about what it means to impose
2 that carrier of last resort obligation here. And, you
3 know, I guess -- I guess that's really all I have to say.
4 It seems to me that the term "obligation" in the statute
5 has to mean that they require -- there is a requirement to
6 do it, or they're subject to some penalty for not being
7 able to do it.

8 And, again, I'm not proposing there be a
9 penalty here. I'm saying, if they can't do it, then they
10 are not subject to the obligation, and therefore, they
11 are not entitled to the benefits of those two statutes.

12 PRESIDING OFFICER HOGLE: Mr. Russel, are you
13 done?

14 MR. RUSSEL: Yes.

15 PRESIDING OFFICER HOGLE: Okay. I guess a
16 question that I have for you, and then maybe others, is
17 whether it's -- well, what -- how do you respond to their
18 argument that it stands to reason that, you know,
19 they -- they have to build out their facility, their
20 infrastructure, before they can actually serve?

21 And that inherent in that is some, you know,
22 acknowledgment or recognition that they are not going to
23 be able to meet that obligation initially?

24 And so I'm curious about your response to
25 that specifically. Let's assume it's not this precise

1 situation, where we have somebody like an E Fiber, but
2 let's say it's like Frontier Communication going into a
3 new service territory, how do you distinguish that?

4 MR. RUSSEL: Yes. So that's a good question.
5 So the -- and I tried to address this a little bit in the
6 reply brief. You know, an entity that is seeking to come
7 in as, you know, a competitive entrant into an area that
8 is served by an incumbent has a number of options in the
9 way that it can provide service to customers.

10 It can utilize the existing infrastructure of
11 the incumbent through a, you know, interconnection
12 agreement to provide service to all of the customers in
13 the area that the incumbent can provide. You know, it
14 didn't have some obligation to exceed the service the
15 incumbent has. It's just meeting the same service. That
16 won't take -- you know, that type of service only takes
17 as long as it takes to negotiate an interconnection
18 agreement. And so once you have that, you can provide
19 that service.

20 E Fiber's proposal to build out a separate
21 network -- not utilize the existing network but build out
22 a separate network using different materials to provide a
23 different type of service is E Fiber's choice. That's
24 their business plan. But that doesn't mean that
25 the -- that the statute has to accommodate all business

1 plans.

2 And this business plan will take five years
3 in each of the exchanges, I guess, or it will take five
4 years for all of the exchanges. I guess I'll put it that
5 way. And it's clear that they are not going to be able
6 to serve all customers that request it during that time
7 that they're building it out, you know.

8 And so I don't think that the Commission
9 needs to read that statute in that obligation as saying,
10 "Well, if it's -- you know, if a party comes in and wants
11 to build something from the ground up, we have to
12 accommodate that business plan." I don't think that's
13 the way that it works.

14 A party that wants to do that, that
15 cannot -- cannot meet the obligations of a carrier of
16 last resort by utilizing the existing infrastructure can,
17 under the statute -- I think it's 54-8(b)-3 seek an
18 exception from that requirement for a period of time.

19 So that's really my response, is that I don't
20 think it eliminates competition. It may eliminate
21 competition that is so heavily reliant on Universal
22 Service Funds. It may -- and I don't think it really
23 eliminates competition there. It requires that type of
24 party to seek an exemption from that requirement.

25 But no, I don't think the Commission needs to

1 read the term "obligation" as accommodating any type of,
2 you know, slow build-out process.

3 PRESIDING OFFICER HOGLE: Does the
4 Commission, on the other hand, need to meet the statute
5 to only require a short time, or -- I mean, is it a
6 matter of sort of extreme, not extreme, you know?

7 I mean, I don't know if you understand my
8 question, but I guess I'm -- I was struck by your
9 argument that, you know, there's -- in a situation where
10 a competitor is coming in and relying on the
11 infrastructure of an incumbent and they are taking some
12 time to negotiate an interconnection agreement.

13 So in that situation, the Commission -- or
14 that competitor doesn't need to seek an exemption, is
15 what you are saying, but in the situation where it's a
16 long -- and I'm not sure what time is attributed to
17 "long," other than the five years that we're talking
18 about here, then they do need to seek an exemption; is
19 that what you're arguing?

20 Mr. Russel, did you hear my question? Hello?
21 Can parties hear me?

22 MR. JETTER: I can hear you. I don't
23 hear --

24 (Inaudible talking.)

25 MS. SLAWSON: -- Phil.

1 MR. MOORE: I think we lost Phil.

2 PRESIDING OFFICER HOGLE: Let's wait for a
3 bit. Hopefully, he'll dial in.

4 Can the court reporter hear me?

5 COURT REPORTER: Yes, I can hear you.

6 PRESIDING OFFICER HOGLE: Thank you, Kellie.
7 We are almost done here, so, hopefully, he'll
8 dial back in.

9 Is there anybody else on the -- with us from
10 Frontier?

11 MR. BRUBAKER: Yes, Your Honor. This is
12 Brock Brubaker. I was trying to reach out to Phil
13 while --

14 PRESIDING OFFICER HOGLE: Okay. Keep trying,
15 if you don't mind.

16 Okay. So maybe we take a five-minute break.
17 I have 12:05 now. Maybe in five minutes, let's all dial
18 back and see if Mr. Russel is on; is that okay?

19 MR. MOORE: That sounds great.

20 PRESIDING OFFICER HOGLE: Okay. Thank you,
21 bye-bye.

22 (Whereupon, a break was taken.)

23 PRESIDING OFFICER HOGLE: Okay. Good. I
24 think I have everybody.

25 Mr. Russel, did you hear my question?

1 MR. RUSSEL: Yeah. Well, I don't know. I
2 heard a question posed to me, and I was answering it.
3 And then I realized that I was talking to myself for
4 quite a while but I wasn't sure how long. And -- maybe
5 we can just start with your question again.

6 PRESIDING OFFICER HOGLE: Sure. My question
7 is whether it's your position that a competitor who is
8 seeking to come in and compete against an incumbent local
9 exchange carrier and who doesn't have its own network but
10 plans to use the network of the incumbent and needs time
11 to negotiate an interconnection agreement, whether it's
12 your position that that competitor does not need to come
13 in seeking an exemption, as you suggest, for a competitor
14 like E Fiber who needs five years to deploy its
15 infracture; is that your position?

16 MR. RUSSEL: So I think my understanding of
17 this is that the Commission could condition the issuance
18 of a CPCN on that competitor's entry into an
19 interconnection agreement, if that's the way that the
20 competitor sought to meet its obligations in the
21 exchange. Because then there -- there would be no lag
22 there.

23 PRESIDING OFFICER HOGLE: Okay. So by the
24 same --

25 MR. RUSSEL: Does that -- does that answer

1 your question? I'm not sure if that --

2 PRESIDING OFFICER HOGLE: Yes. Yes, it does.

3 MR. RUSSEL: Okay.

4 PRESIDING OFFICER HOGLE: And so -- yes. So
5 by that logic, could the Commission, likewise, condition
6 the CPCN on being able to fulfill that obligation in
7 whatever period of time needed in order to deploy the
8 infracture to meet that obligation once the build out is
9 complete; do you understand my question?

10 MR. RUSSEL: I think so. I think what you're
11 asking is: Could the Commission say, "Yes, E Fiber, you
12 can have a CPCN in," we will call it, "the Thompson
13 exchange, but it's only -- you only get the CPCN once
14 you've built out the network;" is that is that the idea?

15 PRESIDING OFFICER HOGLE: Yes.

16 MR. RUSSEL: Yes. So I think this Commission
17 has the regulatory authority to do that. I think that
18 would cause some problems, candidly, for E Fiber,
19 although I don't -- you know, I guess we could ask
20 Ms. Slawson to address those.

21 But my suspicion is they're going to need the
22 CPCN to conduct the build out itself. Although,
23 I -- ultimately, I don't know that. And it may -- it may
24 have some implications for their -- their application for
25 USF funds. But yeah, I think the Commission has the

1 regulatory authority to do that.

2 PRESIDING OFFICER HOGLE: So Ms. Slawson, my
3 question for you is, a CPCN -- issued the CPCN
4 conditioned upon completion of the build out and whether
5 it has the authority to do that.

6 MS. SLAWSON: I do think the Commission has
7 the authority to condition the CPCN. And I just want to
8 think about it, just for a second here, the conditioning
9 on the -- on the completion of the build out.

10 So once the -- so as I understand it, once
11 the build out was completed in a local exchange, how
12 would that work. E Fiber would then submit a notice to
13 the Public Service Commission that the build out is
14 completed, and at that point, the CPCN would take effect.

15 And then the annual report that
16 submitted -- I mean, what we -- what we've been very
17 frank and candid with the Commission about is that these
18 are expensive remote rural exchanges, and we would
19 need -- we need to be able to count on receiving USF
20 support if our costs are reasonable and all of those
21 conditions are met.

22 So, you know, assuming that the timing of the
23 CPCN doesn't jeopardize the receipt of USF for those
24 particular exchanges, I think -- you know, I think
25 that -- that might work.

1 Another option -- or let me just say this: E
2 Fiber's plan does not utilize the facilities of Frontier.
3 And to be frank, E Fiber's reluctant to say that they
4 will serve an area utilizing the facilities of Frontier
5 while it builds out its infrastructure because there have
6 been a lot of service complaints about Frontier's voice
7 service.

8 But if the Public Service Commission is
9 concerned about the timing of the build out, I think
10 there's a couple of things that the Public Service
11 Commission can do. They can order a build-out plan so
12 that you have to meet these requirements, and if you
13 don't meet those requirements, you use your CPCN. You
14 know, you meet certain phases of build out, like the FCC
15 does with the CAF Phase II fund, that you have to report
16 that certain -- that you've met the build-out obligations
17 on certain timelines.

18 I guess the other thing that the Public
19 Service Commission could do is require E Fiber to resell
20 Frontier's voice service while the build out is
21 happening. And, you know, E Fiber would be -- would be
22 amenable to that. As I -- as I've been working through
23 this answer in my head, I think the problem with having
24 the CPCN issued once the build out is -- of the entire
25 exchange is complete means that we can't provide voice

1 service in that area as sections of the -- of the
2 exchange are complete.

3 So I don't -- I don't think the Public
4 Service Commission should issue the CPCN based on the
5 completion of the entire exchange. You know, I think a
6 more reasonable approach would be to -- if the Commission
7 wanted to, set out some parameters. Right? You're going
8 to serve this many customers by this date, and there can
9 be status reports and that kind of thing.

10 So I think -- I think that's a better
11 approach. Because what we -- what we want to do -- the
12 goal is, is to get the customers served by the carrier of
13 last resort, that E Fiber is the carrier of last resort.
14 And as you know, you know, if the infrastructure is being
15 deployed, you know, it's going down the street.

16 And once it passes a certain -- a customer's
17 house, they should be able to receive service from that
18 infrastructure. They shouldn't have to wait until the
19 entire exchange is built out to be able to receive that
20 voice service. So that's the problem I see with the
21 conditioning it on building the entire exchange.

22 PRESIDING OFFICER HOGLE: So something akin
23 to -- again, I'm just asking -- you know, exploring
24 options here, assuming a favorable ruling for E Fiber.

25 So conditioning a -- issuing the CPCN

1 conditioned on build out doesn't necessarily mean entire
2 build out. It can be sections, it can be exchanges,
3 etc., so that I don't think you'll have the problem,
4 Ms. Slawson, that you just referred to.

5 I'm looking at it sort of like, you know,
6 getting the franchise agreement and things like that,
7 that carriers have to obtain before they actually provide
8 the service. So something akin to that. You know, I
9 think there's a section in the statute, CPCN statute,
10 that recognizes that, you know, contingencies like making
11 sure that the company can operate in a city by -- or a
12 county by negotiating a franchise agreement and getting
13 all of that in place, I think that's specifically -- and
14 expressly stated in the statute, I believe.

15 But I suppose issuing a CPCN contingent on
16 the phase-out approach would sort of be the same, and I
17 just want to be clear that you would agree that that is
18 an option.

19 MS. SLAWSON: I do agree that that's an
20 option. I just -- like I said, I just really wouldn't
21 want to see that wait until the entire exchange is built
22 out because then the customers that are served -- I mean,
23 these are -- some of these are very large and remote
24 exchanges, so we -- if you start on the east side and you
25 build towards the west side of the exchange, we don't

1 want the customers on the east side to have to wait until
2 the build out goes all the way through the exchange.

3 But absolutely, like you said, you can
4 condition it on the build out of certain areas or certain
5 deadlines that is contained, and I think the Commission
6 has that authority.

7 PRESIDING OFFICER HOGLE: And I'd like to
8 hear from the Office and -- first from the Office and
9 then the Division, same question, please.

10 MR. MOORE: I haven't thought about this. I
11 think that would be -- I think that would be within the
12 Commission's authority, to -- under Section 54-8(b)-15
13 because they do make the decision -- I mean, the
14 potential test here is: Are they going to get USF
15 support to build out their -- to build out their
16 facilities.

17 And the Commission has given authority, broad
18 authority, to determine what type of expenditures are
19 given, are -- it can be reimbursed to the USF, and they
20 have to decide that they're reasonable and prudent, etc.
21 And that's within the statutory language, and I would
22 think under that statutory language, the Commission has
23 discretion to require a build-out plan or something as
24 has been discussed in the question.

25 I don't believe the Office has concerns about

1 that. We've concerned about getting these customers
2 served.

3 PRESIDING OFFICER HOGLE: Sure. And can you,
4 again, cite the section of the statute that you think --

5 MR. MOORE: Yes, this is --

6 PRESIDING OFFICER HOGLE: Go ahead.

7 MR. MOORE: This is Section 54-8(b)-15,
8 Universal Public Telecommunication Services support fund,
9 Commission duties, charges, lifeline program. And the
10 reasonableness language is in 4(b), and that's referring
11 to whether a carrier gets the reimbursement for their
12 expenditures to serve their customers.

13 And it's contingent on a reasonable finding.
14 And "reasonable" is a broad term that usually grants an
15 administrative agency, I would believe, a lot of
16 discretion in implementing that.

17 PRESIDING OFFICER HOGLE: Okay. Thank you.

18 MR. MOORE: Because that's what --

19 PRESIDING OFFICER HOGLE: Right.

20 MR. MOORE: -- getting a build-out exchange.

21 PRESIDING OFFICER HOGLE: Right. So I was
22 talking about issuing a CPCN conditioned on a phase-out
23 build out. In other words, you can have a CPCN for
24 this -- this exchange or this section of the exchange,
25 you know --

1 MR. MOORE: Well --

2 PRESIDING OFFICER HOGLE: -- from completion,
3 let's say, the network that would require -- that is
4 required in order to offer the services, in that
5 exchange. Let's just say it's an exchange.

6 That's -- that would be more specific --

7 MR. MOORE: I think --

8 PRESIDING OFFICER HOGLE: -- question I have
9 in terms of the Commission's authority to do that. As I
10 said, just like the Commission can condition that the
11 CPCN -- by saying, "Well, you have to get your franchise
12 agreement first, but assuming all if that, then yes,
13 we -- CPCN."

14 MR. MOORE: The CPCN statute that would be
15 applicable is a competitive entry statute, 54-8(b)-2.1,
16 which says nothing -- standing any provision of Section
17 54-4-25, that's the CPCN statute. And then they can
18 issue a CPCN competitive entry.

19 I think to make the -- I would -- I would go
20 back and read that in connection with the period
21 that -- or the statute that I read before, which goes
22 into reasonableness to a grant the Commission authority
23 to condition the CPCN under 54-8(b)-2.1. I'm sorry, I
24 can't be more clearer than that.

25 PRESIDING OFFICER HOGLE: Nope. I got it.

1 MS. SLAWSON: Your Honor, if I might?

2 PRESIDING OFFICER HOGLE: Can I please hear
3 from Mr. Jetter first, Ms. Slawson --

4 MS. SLAWSON: Sure.

5 PRESIDING OFFICER HOGLE: -- then we will go
6 back to you?

7 MS. SLAWSON: Sure.

8 PRESIDING OFFICER HOGLE: Mr. Jetter?

9 MR. JETTER: I --

10 PRESIDING OFFICER HOGLE: I can repeat the
11 question if you want, but I think you get the gist of
12 where I'm going here.

13 MR. JETTER: Yeah, I think so. So I haven't
14 really thought through this entirely. The Commission
15 does have authority, and this is 54-4-25, Subpart 4(c),
16 iii, which is -- is the Commission's authority to issue
17 the certificate for a portion of the requested CPCN
18 territory, is how I would read that. It's a portion of
19 only the contemplated line plant system extension, etc.

20 And then under the next section, D, it
21 provides more, I guess, pretty broad authority there for
22 the Commission to attach variation terms and conditions.
23 And I think that -- that probably is broad enough to
24 cover sequential grants of additional territory in the
25 CPCN as the build out is completed.

1 The concern I have on the basis of just
2 public policy is, I don't know, and this is really a
3 question for a carrier, whether it's efficient to build
4 out a system in phases like that. And I understand that
5 the -- that the -- maybe the backhaul trunk line, if you
6 will, the primary larger fiber lines running back to the
7 central office, may be more efficient to build out all at
8 once, rather than, sort of, in piecemeal fashion to each
9 area.

10 And then I think once that line is in, the
11 rollout to a subdivision, for example, you would expect
12 that that subdivision to be covered all at once, in one
13 operation.

14 What I don't totally know is when the build
15 out is done by the utility, I don't know if all of their
16 crews would -- it would make sense efficiency-wise to
17 have all of the crews go to one exchange and do it all at
18 once, or if it would be more efficient to have them,
19 essentially, doing certain things in different places at
20 the same time as efficiency, I guess, would require.

21 And so for that reason, I guess we would have
22 to kick this back to probably E Fiber in this case, but I
23 don't know which is more efficient. And the Division
24 would probably support whatever method is the least cost
25 to ratepayers.

1 PRESIDING OFFICER HOGLE: Thank you,
2 Mr. Jetter.

3 Okay. Ms. Slawson, I'm ready for you.

4 MS. SLAWSON: Thank you. I appreciate that.
5 You know, as we've kind of -- I think the Commission is
6 asking some excellent questions. I think that a lot of
7 these questions probably, for the record, needs to be
8 more fully developed, and that can be done through the
9 rebuttal testimony.

10 In fact, you know, we've got rebuttal
11 testimony due on Friday. We've already drafted -- you
12 know, we're in the process of drafting that, and we
13 address a lot of these issues in that -- in that rebuttal
14 testimony.

15 And so I -- I wonder if -- you know, I
16 believe the Commission has the authority to address
17 certain conditions in the CPCN. But I also think there's
18 some issues, like Justin just suggested, that, you know,
19 what are the most -- what's the most efficient way of
20 doing that? What's the most cost efficient way of doing
21 that?

22 You know, is it better for the Commission to
23 say, you know, "Once -- okay. Your CPCN -- once you
24 build out an area, you get a CPCN."

25 And in that instance, will the cap- -- the

1 capital expenditures and the operating expenditures that
2 were expended prior to getting that CPCN issued, would
3 those be included in the reasonable expenses subject to
4 USF reimbursement?

5 These are -- these are some factual questions
6 that I think we still need to develop, including, you
7 know, okay, would it be better for E Fiber to just agree,
8 or for the Public Service Commission to determine, that E
9 Fiber should purchase voice service from Frontier until
10 the fiber is built out?

11 These are -- these are some factual questions
12 that I think can duly benefit for a more developed
13 record. And so, you know, I think the question here is:
14 Can Emory -- has Emory -- has E Fiber agreed or suggested
15 that they will made the obligation of the carrier of last
16 resort?

17 Yes, they have. Yes, they will. If there's
18 conditions put on that, you know, I guess once they see
19 those conditions, they can say yes -- yes or no. If
20 there's conditions that are required to -- by the
21 Commission to meet those carrier of last resort
22 obligations, those should be identified.

23 And then E Fiber can be given the opportunity
24 to say, "Yes, we will," or "No, we won't." If they won't
25 meet those conditions, then they don't get the CPCN.

1 But, again, I think -- I think that the
2 record should be a little bit more fully developed on
3 this.

4 PRESIDING OFFICER HOGLE: Right, right.
5 Well, thank you, Ms. Slawson. I was just talking about
6 the legal -- which I think is appropriate in this
7 instance, given that the hearing is for a motion for
8 summary judgment on these issues.

9 I want it to -- I want people to point me to
10 the legal authority that the Commission has, should the
11 Commission decide to approach a CPCN in this instance
12 like that.

13 So I'm going to ask Mr. Russel, as one final
14 opportunity, to comment on any of what has been said with
15 respect to this issue on the Commission's authority to
16 include conditions upon a CPCN to the extent that I've,
17 sort of, asked for specific condition in a way that it
18 would be a phase-out/phase-in approach, for example.

19 MR. RUSSEL: Yeah. So I don't have a whole
20 lot more to say about whether the Commission has the
21 authority. I think it does.

22 I'll point Your Honor to 54-8(b)-2.12 sub B,
23 which is the requirement that the Commission find that
24 the issuance of a CPCN be in the public interest. And
25 the Commission has the authority to say, "It's in the

1 public interest if you meet the following conditions." I
2 think that's -- I think that's the legal authority for
3 the Commission to impose conditions on the issuance of a
4 CPCN.

5 My -- I guess a question that I would have,
6 and I don't know if this is a question directed at
7 anybody in particular, but the topic here is
8 whether -- whether E Fiber meets the obligation of a
9 carrier of last resort, and it has to meet that
10 obligation within the local exchange, not just within the
11 sum subset of that local exchange, where the Commission
12 is sort of expanding the CPCN as the build out goes
13 along, you know.

14 So I guess -- I guess the question is: What
15 are the -- do the conditions address the question about
16 whether -- whether E Fiber has or meets the obligations
17 of a carrier of last resort? And you haven't suggested
18 any particular -- particular conditions. I just -- you
19 know, I think the conditions would need to address that
20 obligation.

21 So I guess that's all -- that's the only
22 other thought I had on this.

23 PRESIDING OFFICER HOGLE: Okay. I don't
24 think I have any additional questions. And unless
25 anybody else has a question for me, then I think we can

1 adjourn.

2 And I suspect that we will be issuing an
3 order on Frontier's motion for partially summary
4 judgement very close to when the hearing for -- or the
5 evidentiary hearing will begin. So around that time is
6 when I think you-all should expect an order on the motion
7 for partially summary judgement.

8 And does anybody have any questions?

9 MR. RUSSEL: No, Your Honor.

10 MS. SLAWSON: No. Thank you.

11 MR. MOORE: No questions.

12 MR. JETTER: Nothing from the Division.

13 Thank you.

14 PRESIDING OFFICER HOGLE: Well, thank you all
15 so much for the hearing today, for your presentations.
16 Helpful, I think, for me anyway. And like I said, we
17 will issue a hear- -- an order on this around that time,
18 and stay safe.

19 Thank you. We are adjourned.

20 (The hearing was concluded at 12:40 P.M.)

21

22

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25

REPORTER'S CERTIFICATE

State of Utah)
)
County of Salt Lake)

I hereby certify that the witnesses in the foregoing hearing were duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said hearing was taken at the time and place herein named;

That the testimony of said witnesses were reported by me in stenotype and thereafter transcribed into typewritten form.

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action and that I am not interested in the events thereof.

IN WITNESS WHEREOF, I set my hand this 23rd day of October, 2020.



Kellie Peterson, RPR

<hr/> 0 <hr/>	2(b) 41:4	47 58:11
04267 33:23	2(b)5 41:21	472 58:13
<hr/> 1 <hr/>	2- 38:25	477 30:21
1 16:10 34:2 39:12 70:22 71:4,11	20- 36:20	<hr/> 5 <hr/>
1.7 17:7	20-2618-01 3:7	5 17:7
10 22:15 99:15	200 30:12	5,000 87:13 90:10
102 16:18,23 20:16	2004 42:20	513 34:11
103 5:23 7:9 23:22,25 60:16 68:20 80:12	2012 43:7 64:18	54 102:24
1031 41:1	2016 34:15	54-19-102 5:23 7:8 21:2 23:20 34:2 60:16 70:14
10th 99:7	2017 35:20	54-19-1021 31:20 42:15 53:12 72:10
11 34:15	2019-UT-26 61:24	54-19-1022 53:12 72:10
11:30 86:14,18	202 61:1	54-19-103 13:5 15:8 16:9 29:25 47:2 57:20 58:4 61:2
12:05 108:17	2020 3:1	54-19-1032 41:2
13 3:1 92:18 93:13	21 22:16 23:9 34:15 35:20 36:20	54-19-201 61:1
14 95:14	24 92:18 93:13	54-19-2011 37:21
15 103:16	251 58:11,13	54-19-202 38:25
16 22:16 42:21	252 58:11,13	54-19-30 41:1
1850 98:9	25th 26:16 35:19	54-4-25 117:17 118:15
19 43:5,14	<hr/> 3 <hr/>	54-4-4 15:24 16:5 20:10 52:25 69:23 79:9 80:14, 24
1995 34:11	3 67:2	54-8(b)-15 87:19 115:12 116:7
<hr/> 2 <hr/>	30,000 87:14 90:11	54-8(b)-2.1 41:7 87:11 90:13 117:15,23
2 21:2 34:2,17 38:2,11 39:14 41:4,21 46:9 48:10 61:10 63:6 66:5 70:14,23 71:3,16 72:6 73:3 86:14	32 33:23	54-8(b)-201 41:11
2(a) 38:4 39:16 40:9 61:12	<hr/> 4 <hr/>	54-8(b)-3 106:17
	4 15:17 90:13	54-8(b)214 99:25
	4(a)2 62:9,20	
	4(b) 116:10	
	4(c) 118:15	
	44- 30:21	

54-8-2(b)-21 72:1	accepting 54:19	adhere 54:24
54-8b-15 15:16	access 13:20 14:25 15:14 19:2,24 24:14 25:7,25 29:9 30:19,24 52:3 66:12 69:10 87:6,13 90:10,11	adjoiner 37:13
561 34:11		administrative 92:21 116:15
576 34:11		admittedly 43:3
58-8(b)-15 100:12		adopt 33:25
59 47:2	accommodate 105:25 106:12	adopted 32:9 34:14 57:1, 20 66:9,16 68:22 78:10
59- 57:20 58:4	accommodating 107:1	adopting 69:13 91:8
<hr/>		adopts 32:5 93:9
7	accord 41:15 63:15	advance 37:15
<hr/>		Advanced 45:23 79:3
7468-401 92:22	accordance 61:2	advantage 36:7
<hr/>		affect 44:20 55:2 58:10, 11 85:7
8	accurate 83:10	affects 47:1
<hr/>		affiliate 19:20 85:5
8(b) 102:24	acknowledges 62:6	affiliates 14:3 85:3 88:3
8-by-8 79:24	acknowledgment 99:8 104:22	agencies 54:22 60:7
8.11 26:12 28:10 29:22 73:10	Act 46:9	agency 16:11 26:9 54:20 116:15
8th 45:23	acting 97:17	agree 64:12 114:17,19
<hr/>		agreed 5:19 7:5 8:22 14:15
9	activated 25:24	agreement 88:21,23 95:16 99:8 105:12,18 107:12 109:11,19 114:6, 12 117:12
<hr/>		ahead 5:13 9:3 12:13 24:7 35:12 45:8 77:21 82:13 116:6
9 35:19	active 25:17	akin 113:22 114:8
911 58:5	Acts 48:11	align 70:23
9:00 3:1	add 6:5 65:11 75:5	ALJ 9:14
<hr/>		
A	addition 13:13 40:10	
<hr/>		
A.M. 3:1	additional 64:8 118:24	
ability 88:25 102:3	address 5:21 14:7,8,14 15:3,6 27:12 45:18,25 46:1 47:24,25 48:2,21 49:16 52:16 56:25 75:1 82:10 101:3 103:3 105:5 110:20	
absolutely 24:11 57:14 59:10 60:25 84:1 115:3	addressed 14:17 20:12 27:3 45:19 98:13	
abstract 37:10	addresses 26:12 80:20	
accept 53:13 54:25	addressing 14:6	
acceptable 54:5 68:18		

alleges 38:10
allowing 91:16
Alloyd 34:11
alternative 43:20
alternatives 75:16
altogether 34:9
ambiguities 60:21
ambiguity 55:11,22 56:7,
8,16 57:2 61:4,21 63:7,
19 65:1,5,24 66:1,20
67:19,20 69:7
ambiguous 53:9,11
54:14 56:13 61:18 63:1,
6,18 66:19,23 69:6 71:22
72:3
amenable 112:22
amount 84:14 96:21 98:5
99:9,17
analog 17:20 18:19 22:4
39:9,25 40:8 76:10 83:6,
8
analysis 36:24 40:11
68:7 78:16 79:6 82:12
and/or 54:13
android 76:7
annual 92:25 93:2
111:15
answering 109:2
answers 24:17
anticipate 8:14
anticipated 6:7
anticipates 24:24
apologies 23:3
apologize 3:18 6:17 8:7
9:6

apparently 45:11
appearances 3:10
appears 9:14
applicable 28:13 117:15
applicant 93:14
applicant's 27:25 30:2
applicants 24:19 26:25
90:16 91:18,25 92:17
application 13:6,8 15:3
16:24 19:12 24:17 41:7,
11,21 72:1 87:11 100:10
110:24
applications 41:23 58:9
78:3 92:3
applies 62:22 68:23
apply 34:17 41:3,23 49:5
63:8 66:13
applying 47:21
appreciated 10:12
approach 61:1 113:6,11
114:16
April 93:1
area 42:16 60:8 91:5,7,
12,14 93:25 94:16 95:10
97:3,6 105:7,13 112:4
113:1
areas 88:18 115:4
argue 6:9 71:23 91:8
94:10 100:18
argued 29:22 31:19
39:20 40:10 48:25 51:24
71:1 73:2 100:9
argues 89:25 90:4
arguing 6:24 49:3 50:10
55:19 59:2 107:19

argument 5:22 6:8,13,14
7:5,7,13,14 8:1 9:3,9
13:1,5 14:8 22:25 24:10
25:15 30:3 31:17,21
32:5,11 33:14,24 35:9,17
36:15 37:20 40:2,23
41:18,24 45:19 47:6,18
49:17,23 53:14 54:19,25
56:6 61:3,20,25 68:24
82:19 83:22 86:14 89:22
95:20 98:22 99:11
104:18 107:9
arguments 4:19,24 5:21
6:25 7:6 8:16 10:11
11:15 22:19 35:14 42:11,
14 45:7 53:2 65:16
aspect 99:20
asserted 14:22 22:20
asserting 51:10
assertion 51:17 61:7
asserts 13:24 52:9
assessing 29:9
assist 12:16
Association 3:22 26:8
assume 53:8,11 54:12,25
56:6 85:23 104:25
assuming 9:1 57:17
111:22 113:24 117:12
AT&T 26:24 27:2,4,12,13
32:19 33:5,6,10 45:23
48:5,14,21 53:21 54:4,15
55:3,6,7 56:10,23 57:11,
14 58:24,25 59:5,19,20
60:21 66:1,2,6,22 67:22
73:10 74:1,17,20
attach 22:2 118:22
attached 26:18

attempt 64:15	23:21,24 29:24 47:2	board 42:22
attempting 78:22	48:23 51:5,6 69:20	body 44:22
attention 67:2	bars 14:18 48:19	bones 25:10
Attorney 4:17,23	based 113:4	bookend 73:11
attributed 107:16	basic 29:1 33:18	bookended 73:7,8
August 35:19	basically 36:3 73:7 95:25	bottom 17:21
authorities 46:12	basis 40:22 62:11	boundaries 42:17
authority 60:10 110:17	battery 86:6	bounds 47:23
111:1,5,7 115:6,12,17,18	bear 23:2	box 17:16,18
117:9,22 118:15,16,21	bearing 48:22	brand 28:4 38:16
authorization 91:7	bedrock 36:2 38:20	break 6:25 77:2,3 86:19
authorized 26:9	begin 92:1	108:16,22
authorizes 62:12	beginning 3:10 83:14,15	breaking 12:20
automatic 90:24	begins 22:6	briefing 14:16
automatically 32:2 84:15	behalf 3:12,16,21	briefly 8:16 64:25 99:2
avoid 65:9,10	belied 78:10	briefs 15:10 22:24 55:15
avoiding 35:24	believes 64:23	brings 94:22
aware 6:22 34:7 40:13	benefits 33:9 104:11	broad 36:15,16 37:1
61:22	big 93:22	38:22 44:15 71:15
awful 23:12,14	bill 43:1	115:17 116:14 118:21,23
	billing 59:10	broadband 14:1,3 17:11
B	bills 29:6,8	19:9,19 20:2 21:6 22:17,
	binding 99:8	21,22,25 23:4,8,22 24:14
B(5) 41:6	bit 11:5 12:4,21 36:4	25:7,17,18,19 28:4,7
back 8:22 10:1,6 19:10	42:13,25 49:16 55:16	30:6,7,14,16,18,22 31:1,
27:6 38:20 43:1 59:13	64:4 70:10 75:24 105:5	8,14 35:4 38:16 40:17
83:8 86:4,14 98:8 108:8,	108:3	57:19 58:1,16 83:17
18 117:20 118:6	black 36:3 50:3 51:17	84:18,19 85:2,11,13
back-up 86:2,6,8	Black's 99:7	broader 70:15
backbone 27:5	Blackburn 3:20	broadly 14:9 43:12 44:8
background 66:6	blue 17:18 18:12 19:3	96:9
baked 98:3	25:15,24	Brock 3:25 24:16 30:2
bar 39:12 68:21 69:4		82:25 83:1 91:24 92:20
barred 15:4 16:8 20:8		108:12
		brought 58:10

Bru- 3:15

Brubaker 3:15,16,18
108:11,12

build 13:9,22 81:6,7 88:5
91:5,12,19 94:14,22
95:9,14 97:13 101:17
103:15,18 104:19
105:20,21 106:11 110:8,
22 111:4,9,11,13 112:9,
14,20,24 114:1,2,25
115:2,4,15 116:23
118:25

build-back 93:22

build-out 88:14,15 89:1
107:2 112:11,16 115:23
116:20

building 92:19 97:18
100:16 106:7 113:21

builds 112:5

built 88:8 94:14 110:14
113:19 114:21

burden 96:12 97:25

business 105:24,25
106:2,12

bye-bye 108:21

C

cabin 95:13

cable 19:4

CAF 112:15

call 17:23,24 18:17 19:18
21:7,9,13,14 27:11 34:18
39:9 40:8 47:15 74:3
75:12,22 76:1,3,4,8,10
77:14 85:15,20 110:12

called 17:25 27:7 83:9

calling 10:1

calls 27:6 33:2 39:23

cancel 51:16

candid 111:17

candidly 47:10 98:8
110:18

canyon 95:15

capability 73:16

Carbon/emery 94:12

Carbon/emory 80:1 83:2

Carbon/emory's 85:17

care 76:24

carrier 6:13 7:13 8:4
13:15,16 14:21,23 15:13,
18 16:6,7 20:11 26:5
27:3 28:15,25 53:1
80:18,21 81:14 87:2,4,8,
9,15,18,20 88:12 89:12,
23 90:5,11 91:1,9 92:12,
13,24 93:4,23 94:2,3,6,
24 95:22 96:1,13,18,23
97:2,10,24,25 98:3,15,19
99:24 100:6 104:2
106:15 109:9 113:12,13
116:11

carrier's 28:20,22 29:5
32:22,25 58:10

carriers 26:8,11 84:6
93:5 94:13 95:1 97:17
114:7

case 25:14 26:25 27:4,
12,14,18,20 28:1,5,13
33:22 34:10,12 36:5,14
37:20 39:21 40:2,5 44:7,
22 47:19,23 48:5,22
53:20,21 54:16 57:11,14
58:24 59:5,19,20 60:21
61:21,25 62:1,7,10,22,24

66:1 70:25 71:2 73:9,12
74:1,17,20 80:1 85:15,24
86:11 91:18 96:10 98:7,8

cases 26:20 28:9 38:21
41:14 59:1 73:7,8 78:20

categorize 75:17

cease 82:22

cell 75:19

central 99:3

certificate 118:17

change 28:22 32:23

changing 59:23

channel 30:9

Chapter 43:5,14

character 35:23

characteristics 33:18

characterization 37:4

characters 35:24

charge 29:8

charged 37:15

charges 29:9 66:12
116:9

Charter 27:17,20 28:1,4,
5 40:2 45:23 79:2

Charter's 27:21 28:6

choice 79:15 105:23

chooses 95:14

chose 42:25

chosen 79:11,12

circuit 45:23 85:20

circumstances 81:12
84:8 98:5,14

citations 50:4

cite 116:4	commercially 97:19	105:2
cited 22:11 26:20,25 30:16 35:20 46:13,22 55:15	commission 7:19,22 10:25 14:11,18 15:8,20 16:1,7,20 20:8 23:11,21, 24 27:1 29:24 30:16 31:22,23 32:5 34:7,24 35:9 39:13 40:13 41:4 42:25 44:17 45:22 46:16, 20 47:2,6,12,25 48:15, 20,23 49:4 51:5,7 52:4, 17,21 54:15 55:25 60:6, 20 61:24 62:4,6,24 64:8 67:12,13,18 68:21 69:14, 20 71:1 73:13 78:16 79:1,3,8,10,21 80:7,13, 15,23 81:10,11 82:19 83:12,13,14 84:12 90:7, 19 93:1,7,9 94:8 95:24 96:7,10,19 97:22 98:12, 19 100:15 101:7 102:3, 10,23,25 103:3,14 106:8, 25 107:4,13 109:17 110:5,11,16,25 111:6,13, 17 112:8,11,19 113:4,6 115:5,17,22 116:9 117:10,22 118:14,22	communication-type 75:13
cites 23:10	Commission's 3:9 41:12 58:12 63:10 103:25 115:12 117:9 118:16	communications 17:1 18:12,21 19:3,17,25 20:4 23:6 33:21 37:25 38:6 39:2,3,8 49:6,11 50:22 51:23 52:21 67:6 74:16
citing 36:6	commissions 22:13 79:1 96:9 98:12 101:12	Communications' 3:6
Citizens 3:4	committed 83:21	commuters 73:19
city 114:11	committee 43:1	companies 83:4,15 84:3 94:17,18 95:2,6
claim 61:20	common 75:15 98:9	company 3:5 84:17 114:11
clarification 64:21	communicated 73:17	compatible 33:20
clarify 84:17	communicates 71:8	compelled 71:1
class 87:21 90:22 101:15,19	communication 19:14 21:3,18,22 39:17 45:22 52:1 67:5 70:8 71:19,20, 24 72:24 73:22 76:19	compete 102:13 109:8
Classification 15:24		competing 80:2,8
clear 7:4 13:21 20:16 24:9 25:9,15 43:2,4,13 53:13,20 80:12 88:22 101:23 106:5 114:17		competition 106:20,21, 23
clearcut 42:21		competitive 41:8,14,23 58:6,8 87:12 89:6 90:12, 14,15,17,18,20,25 91:2, 5,10,11,16,17,25 94:5 98:16 99:25 100:1 105:7 117:15,18
cleared 24:11 26:2		competitor 107:10,14 109:7,12,13,20
clearer 117:24		competitor's 109:18
closer 76:9		complaints 112:6
code 15:16 16:9 29:25 31:20 34:2 35:7 92:22		complete 98:18 110:9 112:25 113:2
codification 65:8		completed 111:11,14 118:25
codify 43:5,15 57:21 58:18 60:17 64:15,16		completely 32:11 42:15 85:9 91:4
collectively 78:5		
COLR 5:25 15:9		
Columbia 23:12		
comment 66:11 76:24		
comments 42:10 45:1 100:21 101:4		
commercial 17:14		

completeness 20:22	configuration 17:11	92:15,21 115:5
completion 111:4,9 113:5 117:2	confirmed 29:17	contemplated 118:19
compliance 100:5	conflicts 63:6	contemplates 90:14
component 49:7 67:15 100:8,18 103:11	confused 77:15	contention 23:22 31:13 39:21
computer 19:1 72:5 73:21	connect 17:19 18:5 35:3 97:5	context 62:19,21 63:1 99:22 103:20
computer-computer 39:8	connected 22:23	contingencies 114:10
computer-to-computer 44:1 57:24 71:19,24 72:4 73:22 74:15	connection 21:6 22:18, 21,22,25 23:2,4,6,8,13 25:19 26:22 28:4,5,7 30:6,8,14,15,16,18,23,24 31:1,5,8,12,15 33:15,19 35:4 38:16 40:2,17 41:12 57:19 58:2,17 62:21 73:17 75:8 76:5,13 81:18,21 82:2,3 84:18, 19,24 85:2,11,13 117:20	contingent 114:15 116:13
computers 39:3 49:6,12 52:2 70:9	connections 19:9 39:9 75:21	continue 11:24 84:20 85:9
conceded 21:15	connects 19:4 34:22 73:25	continues 29:3,14
concepts 56:17	consideration 62:19	contrary 37:3 95:23
concerned 112:9 116:1	considered 29:3,14 63:5	conversation 10:8
concerns 115:25	consistent 41:19 63:9 80:24	Conversely 18:25
conclude 45:1	constitute 39:6,7 50:18	conversion 40:3,6
concluded 62:11	constitutes 48:18	convert 18:18 22:4 32:15
concludes 98:22	construct 92:11	converted 27:4,6 32:7 83:7,8
conclusion 41:13	constructed 93:20	converts 19:5
conclusive 64:22	construction 35:17 36:2 38:20 61:20 68:19 92:1 99:3	copper 17:24,25 18:18
concurring 37:6	construe 44:18	copy 26:17
condition 109:17 110:5 111:7 115:4 117:10,23	consumer 4:21,24 24:19 27:1 42:12,14 59:8 61:23	core 91:17
conditioned 111:4 114:1 116:22	contained 24:22 72:25	corner 95:9
conditioning 111:8 113:21,25		corporation 33:22 100:2, 3
conditions 39:15 92:15 94:9 111:21 118:22		correct 5:3 6:4 7:18 53:6 86:1 98:15
conduct 16:1 81:7 101:17 110:22		correctly 54:12 70:19 82:7
		cost 15:20 92:19
		costs 16:2 62:13 93:13 100:14 111:20

count 111:19
countless 38:21
county 81:7 114:12
couple 22:12 24:9 90:6
102:25 112:10
court 4:10,12 10:2,3,9,24
11:14,18,22 12:8,16
34:10,13 36:17 42:3 50:4
61:23 62:5,14,23 86:13
108:4,5
court's 68:10
courts 78:21
cover 118:24
CPCN 13:9,13 14:24
24:24 79:18,22 80:9,11,
14,15,17 81:3,6,11 87:16
89:7,10 90:2 91:14 97:6,
23 109:18 110:6,12,13,
22 111:3,7,14,23 112:13,
24 113:4,25 114:9,15
116:22,23 117:11,13,14,
17,18,23 118:17,25
CPE 33:20
create 65:25
created 60:7 88:1
creates 97:8
crimes 37:14
criminal 36:5,9,14 37:1,
5,9,16
critical 58:21 59:19 67:8
94:1
curious 104:24
current 44:23
customer 17:23 18:16,25
22:9 25:21 26:1 28:6,17
32:1,14,24,25 35:2 51:22

84:18 85:1 87:21 90:22
94:15 101:15
customer's 22:6,7,9,13,
14 23:5 27:16 60:4 85:8
86:7 113:16
customers 14:1,5 32:20
33:5,6,7,21 87:22 88:9,
13,18,19 89:3 90:3,22
91:6 92:6,8 93:20 97:3,4,
5,18 101:19,20 102:15
103:24 105:9,12 106:6
113:8,12 114:22 115:1
116:1,12
cut 7:19,22 9:7 80:3
cutting 10:25

D

D.C. 23:11
Darren 4:2,5
data 17:1,6 18:12,21
19:2,14,25 20:4 24:17
25:16 30:2 33:16 37:24
49:12 51:22 52:21 91:24

date 113:8
dba 3:5
deadlines 115:5
deal 5:25 71:5
dealing 5:22 41:14
dealt 43:11
decide 31:23 57:11,14
94:8 115:20
decided 6:8 74:20,23
decides 58:21
decision 115:13
decisions 50:4

declaration 24:16 30:1
82:25
dedicated 18:8 31:9
deemed 80:21
defendant 36:7,13
define 42:17 43:24 66:3
99:6
defined 16:17,22 30:6,8
31:16,20 37:9 87:18
defines 15:22 39:1 64:9
definition 16:19 19:11
20:15,19,23 21:1 23:17,
23 30:14,24 31:7 32:10
34:3,6,17,24 40:22 43:25
46:10 49:4,9,10,13,15,
18,21 50:8,13,17 51:12
53:18 54:13,20 55:5,18
65:22,23 66:19 67:12
68:1,12 69:19 70:12,14,
16 71:15 72:16,22,25
73:2,3,23,24 74:10 76:17
77:9,10 80:25 91:1 99:12
101:2 103:13
definitions 13:17 23:19
37:21 44:3 46:14 50:9,25
51:1,4,9,14 52:6,7 56:5
65:3 66:16,21 68:4,5,9,
14 69:1,2,5,15 70:20
74:9 76:12 77:16 78:10
degree 96:19
degrees 59:24
delivery 27:7 83:9
demarcation 22:10 40:4
demonstrated 44:13
demonstrates 91:22
dependant 85:10
dependent 85:12

deploy 109:14 110:7
deployed 113:15
deployment 95:13
describing 21:25
description 17:4
designated 3:9 14:20
87:3 94:2
designation 13:14 15:12
87:1 90:4 94:3
designations 13:17,19
determination 44:16
54:15,16
determinations 55:21
determine 17:4 36:25
56:7 60:21 115:18
determined 22:13 23:15
27:9,21 28:24 46:16 48:6
56:2 60:2 73:13 74:21
100:14
determines 15:20 82:19
determining 70:21 84:13
99:19
developer 97:8
developing 26:19
development 53:16
device 22:1,4 30:10
diagram 17:6,10,15
25:11,12,16
dial 73:15 76:16 108:3,8,
17
dials 75:24
dialup 73:13
Dictionary 99:7
difference 78:16 84:2

differentiation 32:23
differently 33:3
difficult 97:20
difficulties 7:17 10:15
11:1,21 12:2 34:20
diligently 97:17
direct 67:1 75:12 98:11
directed 57:5 76:20
direction 30:13 68:10
directly 16:12,20 26:11
disagree 37:7 57:12
61:3,7
disagrees 5:17
discretion 115:23 116:16
discuss 13:18 75:10
discussed 25:11 27:17,
19 29:16 32:12 40:13
48:5 59:1 86:25 91:23
115:24
discusses 26:24
discussing 25:23
discussion 5:15 6:23 7:1
22:8,11 46:5,21 83:22
89:15
discussions 46:23
dispute 21:11,22 83:23
disputed 100:13
distinction 40:1,14,23
46:7 71:2,18 74:8,13,14
76:11 94:1
distinctions 56:17 69:16
71:3 90:7
distinguish 72:9,18
105:3

distinguishable 28:1
85:9
distinguishes 72:5
distinguishing 59:10
75:7
distributed 93:12,24
distributions 13:20 15:5,
14 87:7 93:15
District 23:11
Division 4:15,18 24:18
42:11 44:17,23 92:25
93:2 103:12 115:9
Division's 96:16
docket 3:7 42:19
dollars 91:19
Dominion 97:1
Douglas 5:5 83:1
down 81:19,22 82:1,2,3
84:12 85:6,7,14,21,23
86:3 103:17 113:15

DPU's 17:6
draft 24:25 52:8
drafting 44:20
draw 103:14
dream 95:14
due 99:9,18
duties 116:9
dynamic 78:25
dynamically 33:21

E

earlier 5:2 21:25 43:25
65:1 68:2 82:18

easier 7:2
easiest 17:5
east 114:24 115:1
easy 103:18
EBA 62:4,8,13
edition 43:5 99:7
effect 37:10 58:4,6 59:7,
8,9 62:16 111:14
effectively 44:12 91:10
effects 47:9
effort 6:23 49:14,17 52:5
efforts 51:25
elect 13:22
elected 68:4
election 82:11
electrical 18:4 59:12
electricity 18:4 22:3
element 39:21
elements 20:18 61:13
eligible 15:18 89:13
92:14 93:6
eliminate 51:16 106:20
eliminates 106:20,23
email 10:11 11:15
emailed 11:17,18
emails 12:14
Emory 24:23 25:1,2 83:2,
19 85:3 94:12
Emory's 85:1,15,16
Emory-affiliated 95:1
emphasized 62:8
empowers 15:25

enable 19:18 20:3 21:21
51:21 52:20
enabled 21:17 23:23
39:16 44:9 51:6,9 52:2
54:13 55:5,17,18 56:11,
13 65:23 66:3,18,19
67:11,14 68:12,15,16,17,
18 69:10,11,22 70:12
73:19 74:12
enables 16:25 19:13 21:3
30:10 37:24 38:5 50:21
enacted 43:2 62:17
encompassing 37:11
end 6:3 30:3 64:2 73:11,
21 74:16,18 88:15
end-use 14:1,5 18:16
51:22
enduser 16:25 19:13,15,
22 20:3 28:16 29:7,8
30:11,19,23 37:24 50:21
52:20
enduser's 22:2 30:10
31:15
endusers 19:21,23 28:23
76:6
energy 94:18
Energy's 97:1
enforce 41:5,13 63:11
English 98:9
enhanced 18:20
ensure 95:18
entire 60:8 91:5,12
112:24 113:5,19,21
114:1,21
entities 88:2 92:10
entitle 81:3

entitled 25:12 26:13
89:13 104:11
entity 78:21 79:3 80:2,8,
10 105:6
entrant 90:20 91:5,11,17
96:11 98:16 105:7
entry 41:9,14,23 58:6,8
87:12 89:6 90:12,14,15,
17,18,25 91:2,10,16,25
94:5 99:25 109:18
117:15,18
EP&V 92:4
episode 36:9,14 37:16
equipment 17:17 40:9
86:2
erroneous 62:15
erroneously 31:4
essentially 42:1
establish 62:12
established 8:20
establishes 15:16
Ethernet 19:4
Eureka 97:2
event 80:6 86:8
everybody's 6:16
evidence 103:9
eviscerate 37:12 42:2
exact 58:8 84:5
examine 17:3 78:2
examined 23:12,13
exceed 15:21 105:14
exceeding 30:12
exception 32:7 71:25
82:17,22 103:6 106:18

exceptions 40:24 41:1,3
102:23

exchange 26:8,13 28:16
29:2,7 87:22 88:1 89:4
90:15,23,25 91:6 94:4
109:9,21 110:13 111:11
112:25 113:2,5,19,21
114:21,25 115:2 116:20,
24 117:5

exchanges 13:9,23 14:2,
25 87:12 88:4,6 90:4,8,9,
12,13 92:1 94:5 103:21
106:3,4 111:18,24 114:2,
24

exclude 40:12,21

excluding 41:11

excuse 18:20 47:2

exempt 38:14 63:10

exempted 59:3

exemption 40:25 106:24
107:14,18 109:13

exemptions 7:8

exhibit 17:7 26:15,17

exist 82:22

existence 43:6,15 60:18

existing 17:24 95:23
105:10,21 106:16

expand 88:7

expecting 12:6

expenditures 115:18
116:12

expense 95:11

expenses 93:4,5,15

expensive 43:20 88:19
111:18

experience 101:8

expert 59:21

experts 59:21

explain 72:21 79:19

explained 39:11 64:25

explanation 57:10

explicit 62:9

explore 70:10

exploring 113:23

expressly 79:12 114:14

extend 88:17

extension 88:20,23
94:23 95:3,4,16,21 97:1
100:5 118:19

extensive 88:23

extent 63:4 67:18 97:16
100:21

extreme 107:6

F

Facebook 75:14

facilitate 53:15

facilities 87:25 88:4 90:1
92:4,5 93:18 95:13 97:4,
14,18 112:2,4 115:16

facility 98:18 104:19

fact 28:5 29:16 55:12
56:13 63:20 66:3,20 81:5
91:3 94:12

fact-specific 96:23 97:16

factor 59:11 75:7

factors 103:1,10

facts 36:4 47:19

factual 83:23

factually 39:22

failing 97:24 98:20

failure 102:4

fairly 42:10 43:13 44:21
45:25 76:8 89:14 96:24

fall 7:8 51:5

falls 17:4 20:17 46:10,13
55:4 90:13

far-reaching 95:9

fault 97:20

favorable 113:24

FCC 26:9 27:2,8 30:17
33:10,17,22 42:18 43:7
45:24 46:3,7,24 48:5,10
54:15 55:12,14,16,20
56:2 57:17,23 58:21
59:5,22 60:12 63:14,15,
19 64:20,21,23 65:6
66:14,17,25 67:15,17
69:11 73:7 77:24 78:11,
21 112:14

FCC's 32:18 56:9 60:10,
11 64:16 65:9 66:22
84:10

features 33:20

federal 14:12 29:19 30:5,
8 31:16 41:5,13,15,19,20
45:22 46:5,19,21 48:13,
15,18 53:14,20,23 54:20,
21,24 55:11 57:21,23
58:19 60:13 61:2 63:9,
11,12 85:14

fewer 87:12,13 90:10,11

fiber 3:14,19,21,24,25
4:2,14 7:7 13:8,10,11,13,
20,21,22,24,25 14:19,20,
23 15:12 16:3,5,8,18

17:3,6,10,11,13 18:1,5,7,
11 19:19 20:7,9 22:1
23:4 24:13,20,24 25:4,
12,13 26:6 27:5,15 28:2,
3,7 29:15,19 31:2,11
34:21 39:14 40:6 41:8,17
42:12 48:3 52:19 72:2
78:18 79:8 80:5,20 81:3,
18 82:20 83:20 84:4
85:4,5 87:3,24 88:3,5,8,
17 89:23 90:1 92:3,5,6,7,
9,10 101:25 102:11
103:6,13 105:1 109:14
110:11,18 111:12
112:19,21 113:13,24
Fiber's 15:3 18:6,10
19:7,10 20:13 21:12
23:13,18 26:4 29:17,22
31:9,13,19,23 32:20
33:5,6,11 35:1 39:5,13,
23 41:18 51:20 52:23
79:15 81:20 82:16 85:16,
25 87:1 105:20,23 112:2,
3
figure 56:8,19
filed 14:6 15:2 26:16,22
80:7 87:10 101:10
filing 79:25
filings 87:23
fill 12:8
Finally 32:17 33:24
financial 90:17
find 23:2 55:10 63:18
66:4 70:20 71:1 84:3
97:20,23 98:19 100:11,
17 101:12
finding 116:13
fine 9:21 11:23 68:13
86:16

finish 6:2
fit 47:20 51:3,14 52:8
68:21
fits 13:7
five-minute 108:16
five-year 88:6,13,15 89:1
99:14
fixed 40:14
fixing 15:24,25
focus 21:16
follow 64:20
Footnote 23:9
force 80:11
form 13:6 30:20,21 93:11
formal 99:7
format 27:4,6 67:6
found 65:5 66:20 98:8,10
101:7
founded 63:14
framework 36:10,11,12,
13 57:19
franchise 114:6,12
117:11
frank 111:17 112:3
free 73:12,15
front 93:22
Frontier 3:5,11,13,16
6:12 8:14 14:6,12,17
15:2,4 24:19 27:12 29:22
30:15 31:4 32:7 33:25
38:10 51:10 57:5 61:9,15
63:5 71:13 89:25 91:15
95:4 99:4 100:4 105:2
108:10 112:2,4

Frontier's 5:20 8:14
14:22 26:18 27:18 31:18
33:14 36:15 38:22 47:8
61:3 91:8 112:6,20
fulfill 110:6
function 73:19
functionality 16:23 19:12
functions 76:15
fund 13:21 15:1,15 87:7
95:7,8 100:12 112:15
116:8
fundamental 91:22
funding 95:12
funds 89:13 93:11 95:18
100:13 106:22 110:25

G

gain 15:14
gas 97:1
gave 36:14 99:16
gee 68:25
general 37:15 44:11
62:1,7,10,22 96:25
General's 4:17,23
generally 42:11 64:12
75:9
generator 86:4
gist 118:11
give 8:22 17:9 41:21
62:16 63:15 65:15 70:23
71:21 79:11,12
giving 9:23 36:16 41:10
globally 75:15
goal 62:16 113:12

good 4:1,12,16 10:5
65:19 73:5 105:4 108:23
government 53:14
grace 103:11
grant 80:15,17 117:22
granted 24:25 75:19
90:2,24 91:13,25 92:3,18
93:17 94:5 97:6
granting 81:11
grants 116:14 118:24
grateful 75:3
great 45:15 88:13 108:19
greater 100:2
Gregory 3:15,16
ground 106:11
grounds 55:10
growth 53:16
guess 11:15,19 24:1
32:17 44:18 47:21 56:7,
12,23 70:1,5 75:5 88:16
98:22 101:16 102:2
104:3,15 106:3,4 107:8
110:19 112:18 118:21
guidance 56:24 64:23
65:7 84:9 98:10,11 101:6
guideline 26:10,12,19
28:10 29:22 73:10
guidelines 32:12 35:6
45:24 46:22
Gustafson 34:10
guys 8:9

H

hand 107:4

handle 101:12
Hanksville 83:3 85:17
94:13
happen 12:7
happening 57:21 58:18
64:15 112:21
happy 53:3 72:23 89:16
harmony 35:23 36:22
he'll 108:3,7
head 112:23
hear 5:10 7:20,25 8:9
9:12,14,17,18,20,22,23
10:2,3,13,17,22 11:3,4,7,
8 12:9,23 24:5,6 53:6
57:8 107:20,21,22,23
108:4,5,25 115:8 118:2
heard 5:2 7:4 109:2
hearing 3:4 12:5 15:25
hearings 43:1
heartened 101:9
heavily 106:21
held 10:7 36:21 62:14
hit 101:1
Hogle 3:3,8,14,17,23 4:1,
3,6,9,13,20 5:1,6,8,13
7:3,18,24 8:3,6,12,18
9:6,12,16,25 10:4,16,19,
21 11:2,6,10 12:3,13,18,
25 24:4 35:10 42:6 45:3,
12 53:5,8 54:10,18 57:6
60:22 63:23 65:13 70:3
72:8 74:25 76:22 77:19,
21 78:14 81:15,23 82:8,
13 84:22 85:22 86:10,17,
20,23 89:18 96:2 98:24
100:22 104:12,15 107:3
108:2,6,14,20,23 109:6,

23 110:2,4,15 111:2
113:22 115:7 116:3,6,17,
19,21 117:2,8,25 118:2,
5,8,10
hold 49:19 59:5 84:22
holder 99:15
Holding 33:22
home 13:10,11,23,25
17:16,17 18:2,3,25 19:4,
24 22:2,4,14 23:5 40:4,
11,18,21 81:18,21 82:3
88:6,8 95:14
home's 18:3
homeowner's 40:4
Honor 6:22 9:4 10:9 13:4
24:2 45:16 53:4 57:3,12
65:24 77:6 89:21 108:11
118:1
hope 8:7 76:20 91:13
host 50:3
house 17:24 22:7 84:21
113:17

I

idea 47:10 110:14
identical 25:1
identified 17:21 21:2
24:10 27:18,24 28:10,12,
14,15 30:4 33:18 35:17
46:23 56:4 72:24 73:9
74:15
identifies 17:16 93:5
identify 46:13 59:25
identifying 45:21
ignore 11:23 12:1

ignores 32:11	included 17:7 26:15 34:16	install 18:2
II 112:15	includes 72:19	installation 98:18
iii 118:16	including 33:19 41:4 66:10 78:3 79:2	instance 25:23 27:8 40:19 97:23
ILEC 28:15 29:6,13 79:21 80:1,6 102:13	inclusion 94:23	instances 78:25
immediacy 99:13,20	incorrect 95:23	instruction 30:21
immediately 16:17 88:22 90:2 91:3 92:5,7,8 94:10 96:15 97:5 98:17 99:18 100:7	incumbent 87:13 100:3 105:8,11,13,15 107:11 109:8,10	instructive 58:20
impacts 47:22	incurred 92:19 93:14	intend 20:21 52:15
implement 41:5,12 63:11	indirectly 16:12,20	intended 60:13 65:8 66:24 77:17 103:16
implementing 116:16	indisputably 31:2 51:20	intending 66:3
implication 80:4	industry 59:23 77:13	intends 14:19 16:4,8 19:19 20:7 22:2 48:3 88:7
implications 44:16 48:11 52:12 110:24	information 27:22 30:11, 12,25 31:2,8,10 46:11,25 47:11 48:7 55:8 56:1,18, 21 58:22 59:15,17 60:8 69:16 73:14 74:5	intent 43:2,4,5,13,24 44:12,19,20 60:17 64:14
implicit 71:20	infracture 109:15 110:8	intention 43:23 52:10
important 32:4 98:2 101:3	infrastructure 95:15 100:17 104:20 105:10 106:16 107:11 112:5 113:14,18	interacting 99:22
importantly 41:6	inherent 61:8,17 104:21	interconnected 27:3,21 58:16
impose 79:13,22 80:7 90:20 98:16 101:18 102:3,11,23 103:5 104:1	initial 35:19 101:4	interconnection 105:11, 17 107:12 109:11,19
imposed 69:4 96:12,18 97:2 98:21	initially 29:22 64:13 104:23	interest 90:18 99:15
imposing 51:7	inoperable 35:25 36:19 42:4	interested 77:13
impression 96:6,8	inoperative 37:2	interesting 74:19 78:24
inaccurate 31:7	inquiry 97:16	interexchange 29:10
inaudible 36:7 37:12 53:13 81:4 89:3 91:23 94:25 107:24	inseparable 33:15 49:1	intermediate 43:19
incidentally 65:9	insert 51:25	internet 14:4 16:12,13, 15,16,19,22,24 17:19 18:13,15,19,20,22 19:2, 7,9,11,12,17,21,24 20:1, 2,3,4,7,15,19,24,25 21:5, 19,23 22:5,23 23:1,7,16 24:14 25:7,25 26:14 27:10 29:23 30:5,12,15, 19,23,25 31:3,5,9,10,12
include 25:5 33:16 44:9 65:2 67:14 70:14 72:1 73:15	inside 22:3	

33:16,17,19 35:4 37:23
38:1,2,3,4,7,9,15,23
39:1,6,10,18,24 40:3,5
43:8,18,22 44:3,4,7,10
49:1,7,8 50:23 52:3,20
53:15,16,18,19 54:22
57:18 58:1 61:4,12,13,16
63:13 64:5,6,9,11,17
66:11 67:9,14,15,18,23
68:13 69:10 70:7,8,12,
16,21 71:4,8,10 72:11,
17,19,20,21 73:17 75:10,
18 76:19 77:11 78:3,4
83:18 84:19,24 85:3,4,6,
7,14,21,23
internum 62:4,13
interpret 26:9 36:21 61:1
68:10,11 70:15 71:10
72:16 78:7 84:9
interpretation 32:18
34:1,14 36:18,25 37:3
38:10,22 39:5 42:15
44:23,25 45:19 47:19
49:24 51:18 60:11,12
61:9 63:4,15 68:8 71:16
91:9 98:15
interpretations 35:24
interpreted 41:15 62:16
100:7
interpreting 35:22 52:13
53:24 59:22
interprets 47:25
interstate 29:8
introduces 66:8
introduction 13:3,5 66:7
investigation 16:1
involved 83:16
IP 6:11 18:8,22 19:5 20:1

23:23 25:16 27:4,15
28:11 29:1,4 31:6,9,25
32:13,21 33:16,19 35:1,3
51:6,9,21 52:2 54:13
55:5,17 56:11,13 59:3,6,
11,23 60:3 65:23 66:3,
18,19 67:6,7,9,11,13,17,
22,24 68:12,15,16,17
69:10,11,22 74:3,12 76:5
83:7 84:13
IP-ENABLED 20:21
23:19 31:20,24 32:3,8
33:9,10,14,15,18 34:1,4,
25 35:7 36:16 47:7,15
48:25 49:4,9,10 50:11,
14,16,18,20 55:13 56:4,
20 57:17,24 58:15 66:10,
13,15 67:25 69:19 72:25
74:9 77:9 78:5,7,9,11
IP-IN-THE-MIDDLE
26:25 27:2 32:19 48:5,21
53:22 54:3,16 73:11
74:17 85:19
irrelevant 31:6 38:12
irresponsible 60:20
isolation 61:5 62:2,3,18
63:2 68:11,16
issuance 109:17
issue 5:25 6:11,13,14
14:15,17 15:3 20:13
23:15 25:9 26:12 34:22
43:10 46:2 47:3,23,24
48:9 49:11,20,21 52:11,
15 57:11,15 73:8 75:2
77:2 79:2 81:13 86:14,21
98:13,23 101:1 113:4
117:18 118:16
issued 26:10 77:24 111:3
112:24
issues 6:9 7:1 14:7 15:7

41:2 65:10 78:2 93:11
issuing 113:25 114:15
116:22

J

January 93:12
jeopardize 111:23
jeopardy 31:18
Jetter 4:16,17 5:24 6:2,
12,14,18 7:12,16,21 8:1,
4 9:20 11:2,4 42:8,9
45:4,20 52:9 55:13 63:25
64:1 65:14 75:1,4 96:4,5
98:25 100:9,20 101:5,8
107:22 118:3,8,9,13
Johansen 3:25 24:16
30:2 82:25 83:1
Johansen's 91:24 92:21
joinder 36:8,19,22,23
37:2,17,19
jointly 37:15
judgement 3:6
judgment 26:21,23 27:19
jurisdiction 14:11 15:8
78:17
Justice 37:6 62:14
Justin 4:16 6:18 9:20

K

Kellie 108:6
Kelly 5:2
kick 45:5
kilobits 30:13
kind 42:22 49:2 64:2 81:5

86:2,4 102:5 113:9	Lee 37:6 62:14	30:7,10 31:15 38:7 39:18
kinds 75:21	left 6:7 18:9 101:13	locations 17:14 40:10
Kira 3:20 5:4 6:6 9:19	left-hand 17:15	logic 61:11,14 110:5
<hr/>	legally 39:22	long 38:20 57:13 103:23 105:17 107:16,17 109:4
<hr/>	legislation 43:2	looked 66:21 101:6
L	legislature 32:9 34:16 42:24 43:4,11,24 44:13 46:15,18 47:1,24 48:23 50:10 51:3,13,20 52:8, 10,12,14,16,18 55:23 56:19 57:1 58:17 62:17 64:14 66:16 68:3,20,22 69:3,13 70:18,19 78:10 79:11,12	lost 108:1
lack 93:19	Legislature's 44:19,20 70:16	lot 17:13 23:12,14 65:6 75:4 98:9,10 112:6 116:15
lag 92:20 109:21	letter 36:3 50:4 51:17	lots 58:14
laid 96:16	level 57:22,23 58:19 65:10	lump 93:22
LAN 18:8	liability 99:8	lured 84:12
landline-type 76:4	library 40:19	<hr/>
language 35:18,21 36:24 44:13 47:7,22 48:1 49:18 51:11 62:12 65:22 69:8, 20 100:11 115:21,22 116:10	lifeline 116:9	M
laptop 76:15	likewise 110:5	<hr/>
large 114:23	limited 50:24 78:4	made 8:16 13:21 28:23 33:14 61:25 65:17,21 78:6
largely 73:14	lines 87:13,14 90:10,11	Main 103:17
larger 65:23	listen 43:1	majority 36:21 37:11
lastly 15:2	lists 41:2	make 4:10 17:23 33:13 40:22 44:16 50:2 54:16 61:19 64:19 65:2 66:18 68:6 69:6 75:19,20 76:8 78:16 84:2,15,23 85:15 90:6 99:11 115:13 117:19
latitude 80:15	litigation 65:10	makes 7:1 15:13 17:2 18:17 51:12 61:8 62:9 63:7 65:6 80:12 93:6 95:5
law 14:12,18 15:7,8 20:8 30:5,8 31:16 36:3 37:7 41:5,13,15,19,20 43:3 44:22 46:18,23 48:15,18, 19 50:4 51:17 53:9,11, 20,23 54:6,17,21,23 55:11 60:18 61:2 63:9, 11,12,16 68:23 85:14 96:10 98:7,8,9 99:7	local 13:23 14:2,25 26:13 29:1,7 87:12,22,25 88:6 89:4 90:3,8,23 91:6 95:10 103:21 109:8 111:11	making 47:18 49:23 68:24 70:20 75:22 76:4 78:3 114:10
laws 50:1	located 86:7	manage 33:21
leads 41:13	location 17:12 21:4,19, 23 22:7,9,13,18 23:5	
leave 38:24		
leaves 38:25		

managerial 90:16	Meredith 5:5 83:1	6:11,15,17 7:12,22,23
mandatory 36:8,12,22	Meredith's 26:15	8:1,4 9:11,22 11:7,8
manner 34:5 83:5 97:19	merge 49:23	35:12,13 42:7 43:25
materials 12:8 105:22	Messenger 75:14	44:21 45:20 49:2,23 57:3
matter 14:11 24:9 46:8,9, 19 61:11,14 79:15 95:19 96:6,8 107:6	met 94:10 111:21 112:16	60:24,25 63:24 70:6,11, 18 73:2,20 75:5 99:1,2
matters 46:2	method 44:22	100:23 101:1 108:1,19
meaning 36:15,16 37:19 41:10 51:19 61:15 62:22 70:24 71:21 77:17 78:15	middle 32:22 59:7 83:7 103:17	115:10 116:5,7,18,20 117:1,7,14
meaningless 38:13,16, 18 61:16	miles 95:14	Moore's 49:16
means 22:9,14 38:5 40:10 50:19 69:1 70:22 71:23 72:4 77:15 94:24 103:4 104:1 112:25	millions 91:19	morning 4:1,16,19
meant 56:19 102:1	mind 10:1 11:23 32:9 108:15	motion 3:6 5:20 6:24,25 8:14,17 13:7 14:6,9,14, 18,22 15:2 16:3 22:20 26:21,22 27:18 30:17 45:14 49:14 80:19 87:23 101:10
mechanism 62:4,8	minimum 71:18	move 12:10 13:4
media 33:17	minor 90:6	moved 18:9 103:8
meet 14:23 23:16 80:25 87:15,17,24 88:11,16,25 89:2,8,9,11 91:17 92:15 94:24 95:22 96:14 97:24 98:20 102:4,7,14,18 103:7,23 104:23 106:15 107:4 109:20 110:8 112:12,13,14	misconception 24:12	moving 15:11 22:17 72:2
meeting 96:20 105:15	misses 30:22	MPRM 74:20,23
meets 20:18,23 23:19	missing 101:9	mute 45:10
memo 96:17	misunderstanding 91:22	<hr/> N <hr/>
memorandum 26:19,22 27:13,20,25 31:18 40:15 41:17 91:15	Moab 94:4	names 4:11
mentioned 15:12 19:23 21:25 23:18 43:25 46:4 68:2 87:2 100:20	mobile 30:10	narrowly 44:18
	modification 58:7	National 26:8
	modifies 93:10	NECA 26:9,20,24 27:17 28:10,13,14,15,19,22,24 29:2,12,16,21 32:12 35:6 45:24 46:22 60:2,9 73:6, 9 74:15 84:9
	modify 58:10,12	necessarily 23:1 95:12 99:18 114:1
	moment 11:5 17:9 23:3 35:16 49:19	needed 110:7
	Monarrez 34:15	negotiate 105:17 107:12 109:11
	months 92:18 93:13	
	Moore 4:22 5:12,14,15	

negotiating 114:12
network 17:13 18:1,6,10, 24 19:7 21:8 22:9 23:7 25:12 27:5 28:21,22 29:5 31:6,9 32:22,25 34:22 35:2 38:17 39:4 40:6 43:19 51:20 59:3,7 60:4 67:24 71:6,9 73:25 74:2, 22 75:9,16,25 76:2,14,16 86:2 88:6,8,18 91:20 92:2,11,19 93:18,22 95:15 101:17 105:21,22 109:9,10 110:14 117:3
networks 67:7,10 75:13, 22 94:15
nobody's 103:8
nomadic 40:12,14,15,21 43:10
nonlocal 29:10
note 74:19 99:14,16,17
noted 3:4 16:3 100:13
notes 17:10 22:16 37:11
noteworthy 92:2
notice 66:9 77:23,25 78:1 111:12
notion 40:20
number 45:22 75:24 79:20 88:13 101:18 103:22 105:8
numerous 24:17

O

objective 37:1,5,9
obligated 41:5 98:6 99:16 101:21,22
obligation 15:9 41:12 58:11 87:19,20,24 88:16 89:1,2,8 90:20 91:9 96:1, 13,14,17,18,20 97:3,11 98:1,4,16,17,20,21 99:5, 6,13,17,20 100:2 101:2, 14 102:1,4,6,9,14,17,20 103:4,6,13,23 104:2,4, 10,23 105:14 106:9 107:1 110:6,8
obligations 14:23 58:12 63:10 87:15,18 88:12 89:12 91:17 94:7,10,25 95:22 106:15 109:20 112:16
obtain 13:20 87:16 91:7 114:7
obtaining 92:23
obvious 62:21
occurred 40:3
occurs 40:6
OCS 35:20
OCS's 40:2 41:24 99:4
October 3:1 93:8
offenses 36:9
offer 13:25 14:4,5,19 16:4,9 20:7,21 48:3 79:16 80:6 81:9 117:4
offered 28:3,23 48:4 61:9 63:5,20
offering 55:4,7 73:13 79:23 80:3,13,23 82:16
offers 48:14
Office 4:17,20,23,24 12:18 24:18 27:1 35:15 42:12,13 61:23 103:12 115:8,25
officer 3:3,9,17,23 4:1,3, 6,9,13,20 5:1,6,8,13 7:3, 18,24 8:3,6,12,18 9:6,12, 16,25 10:4,16,19,21 11:2,6,10 12:3,13,25 24:4 35:10 42:6 45:3,12 53:5,8 54:10,18 57:6 60:22 63:23 65:13 70:3 72:8 74:25 76:22 77:19, 21 78:14 81:15,23 82:8, 13 84:22 85:22 86:10,17, 20,23 89:18 96:2 98:24 100:22 104:12,15 107:3 108:2,6,14,20,23 109:6, 23 110:2,4,15 111:2 113:22 115:7 116:3,6,17, 19,21 117:2,8,25 118:2, 5,8,10
oftentimes 81:5
OLT 18:13
omitted 26:17
on-point 98:11
ONT 18:1,6,10,18 19:4 22:1,20 86:7
opening 42:19 87:3
operate 114:11
opinion 37:6
opinions 63:14
opportunity 8:15 65:16 77:5 82:10 97:13
opposed 40:5 59:11,12
opposes 91:16
opposing 8:16 26:21 27:20 49:14
opposition 27:25
opprobrious 63:18
optical 18:1 86:2

option 112:1 114:18,20
options 105:8 113:24
oral 4:24
order 5:9,11 7:4,14,25
8:20,21 27:2 32:19,20,21
33:1 52:1,7 53:15 54:24
56:8 73:11 79:2 81:5
87:7,16 89:7 93:11 110:7
112:11 117:4
ordered 80:10
ordering 59:9
original 27:6
originate 39:24,25
originates 21:8,14,22
34:19 40:8
originating 21:4,18 29:9
38:6 39:17
outage 85:24 86:8
outlying 88:18
overly 37:1
overview 13:6
owned 92:4
owner 95:13

P

packet 67:6
packets 18:21
paid 91:19
paper 60:10
paragraph 33:23 34:15
36:20 66:5 67:2,21
parameters 113:7
paraphrasing 15:21

part 7:20 37:16 47:12
56:8 75:25 96:21 98:4
partially 3:6
participants 10:10
parties 8:16,21,23 11:19
12:15 14:15 15:6 24:6
27:7,19 45:7 49:14
50:10,15 51:2 55:19
67:16 68:2,24 79:24
107:21
parties' 45:14
parts 35:25
party 58:25 79:14,23
80:13 83:9 101:14,17
102:12,17 106:10,14,24
passed 46:18 52:18
54:24 79:1
passes 113:16
past 12:10 98:13
path 67:6 85:20
pause 4:10 10:5,7,10
pay 33:1 99:8,17
payments 15:19
PDM 59:12
penalties 102:4
penalty 102:8,11 104:6,9
penetration 47:14
people 57:4
percent 99:15
perfect 8:6 63:7
perfectly 68:18
period 88:7 89:2 91:18
97:12 101:24 102:15,19
103:7,12,15,21 106:18
110:7 117:20

permissive 36:13,18,19,
23 37:2,12,17,19
permit 21:13 34:18
permits 21:7
permitted 90:19
person 99:10,16 100:8
personal 33:21 73:19
persons 99:10
perspective 95:6
petitioned 103:9
Phase 112:15
phase-out 114:16 116:22
phases 112:14
Phil 9:23 107:25 108:1,
12
Phillip 3:12
phone 17:20,22 18:17
39:9,25 40:8 72:5 75:19,
24 76:7,8 82:1,3,5
phone-to-phone 71:19
phones 73:18,20
physical 18:5,7,11 99:10
pick 11:24
picks 18:16
piecemeal 42:23
place 3:4 33:2 114:13
places 22:12
plain 33:7 35:5,21 36:24
41:10 47:7,22 51:11
62:12 65:22 69:8,20 71:6
plan 88:5,14,15 105:24
106:2,12 112:2,11
115:23

plans 106:1 109:10	practices 95:23	21 11:2,6,10 12:3,13,18, 25 24:4 35:10 42:6 45:3, 12 53:5,8 54:10,18 57:6 60:22 63:23 65:13 70:3 72:8 74:25 76:22 77:19, 21 78:14 81:15,23 82:8, 13 84:22 85:22 86:10,17, 20,23 89:18 96:2 98:24 100:22 104:12,15 107:3 108:2,6,14,20,23 109:6, 23 110:2,4,15 111:2 113:22 115:7 116:3,6,17, 19,21 117:2,8,25 118:2, 5,8,10
plant 118:19	prawn 7:10	pretty 118:21
plausible 63:5	prayer 91:13	previously 74:11
pleadings 30:1	preceding 16:17	prior 97:5
plug 17:22	precise 104:25	private 18:8,22 23:7 31:6,9 67:9,24
plugged 18:3	precisely 29:14	problem 12:11,15 61:17 81:11 112:23 113:20 114:3
point 22:15 23:9 25:14 30:22 32:4 33:13 40:4 41:24 43:4,7,9,11 48:2 49:2 64:21 75:8 76:1 94:22 99:3 101:25 102:12,21 103:1 111:14	preclude 28:25 43:22	problems 110:18
pointed 41:18	precluded 31:24	proceed 9:5,8 72:15 86:24
pointing 67:16	precludes 38:22	proceeding 62:13 66:11
points 45:17 47:5	preclusive 37:10	process 92:23 107:2
policy 44:7 47:6,17 52:12 95:5 100:5	preempt 48:15	profound 47:9
political 16:11	preempted 27:23 41:19 46:19 48:12 57:17 63:21	program 116:9
port 17:22 25:24	preempting 43:8 53:14 54:2	prohibition 43:14 69:14
portion 17:18 67:6 92:7 118:17,18	preemption 46:5 48:19 54:24 64:17	prohibits 91:10
portions 43:19	preemptive 14:12	projecting 78:19
pose 72:14	preliminary 24:8	promissory 99:14,16
posed 109:2	premise 32:1 35:3 57:16 64:12	properly 30:16 43:24
position 14:13 88:11 95:25 96:16 109:7,12,15	premises 27:16 28:18 32:14 60:5 86:7	proposal 105:20
potential 94:15 115:14	present 6:10,12,14 9:3 11:12 13:1	proposed 13:22,24 20:14
potentially 42:15 64:22 96:8,12	presentation 9:24 12:5,6	
POTS 29:13,18 33:7	presented 22:19 35:15 37:21 64:13 65:17	
power 79:8,13 85:23 86:8 94:17	presenting 7:5,11,15	
powers 79:11	preserve 37:18	
practice 64:15	presiding 3:3,9,17,23 4:1,3,6,9,13,20 5:1,6,8, 13 7:3,18,24 8:3,6,12,18 9:6,12,16,25 10:4,16,19,	

21:12 24:20 28:2 29:23
39:13,23 51:21 52:23
61:15 66:9 77:23,25 78:1

proposes 14:2

proposing 26:6 29:15
46:6 102:10 104:8

proposition 35:21 62:25

propounded 24:20

protocol 16:13,24,25
18:13,19,20,22 19:6,9,
13,18 20:1,5,15,19,24
21:1,5,19,20,24 22:5,6
23:16 26:14 27:10 29:23
30:5 37:22,23 38:1,2,3,5,
7,8,9,10,15,23 39:6,10,
18,19,24 40:3,6 43:18
44:5,10 50:23 52:20
53:19 57:18 58:1 61:5,
13,16 62:3 64:5,9,11
66:11 68:13 70:7,12,22
71:4,8,11 72:11,19,20
75:10 77:11 78:3,4

protocol-enabled 16:13,
16,19,22 19:11 20:7 39:2
43:23 44:4,8 53:18 64:6
70:17 72:17,21 75:11
76:19

protocol-enhanced
63:13

provide 18:4 19:21
24:14,21 25:6 26:6 29:15
30:19,23 39:15 56:24
60:14 83:4,6 84:4 87:20
88:9 90:21 91:14 93:23
98:6,9,17 101:14 105:9,
12,13,18,22 112:25
114:7

provided 12:14 17:6,14
25:4 28:1,2,3 29:4 31:1
32:24 67:9 91:3 98:6

provider 29:20

providers 97:10

providing 25:3 26:13
29:13 83:21 84:6 90:3
93:25

provision 29:1 35:22
36:5,21 37:19 41:8 42:1
59:24 62:1,6,20 72:2
95:3,4 117:16

provisions 41:22

prudence 94:21

prudent 93:4 94:20
95:11,18,19 97:19
115:20

PSC 35:21

PSTN 18:24 21:9,14,15
74:16

public 4:18 18:13,14,23
19:7 21:8 23:7,10 24:18,
21 25:16 30:15 31:5,12
34:19,22 38:17 39:4
44:6,15 47:6,17 52:12
58:12 61:24 67:9,14,18,
23 69:10 71:5,9 73:25
74:2,21,22 75:9,16,25
76:2,13,16 78:15 79:21
83:11,12,13,20,23 90:7,
18,21 93:1,2,7 95:5,24
96:19,25 97:11 111:13
112:8,10,18 113:3 116:8

Pulver 73:9,12 74:19

pulver.com 73:12

pure 73:3 76:5

purpose 37:15

purposes 29:19 56:6
60:13

pursuant 25:2

purview 64:24

pushes 75:14

put 30:3 64:8 106:4

Q

qualifies 20:14

qualify 52:1 58:22,23
76:17

question 10:23 11:13
14:10 26:3,7 36:6 46:1,
10,13 48:9,17,19 54:8,17
55:7,23 57:4,5,16 64:3
65:17,24 70:5 72:7,13,15
74:24 75:1 76:21,25
77:1,5,8 79:7 80:16,17,
19,20 81:2,17 82:7,10
87:17,23 96:13,23 99:3
101:16 102:2,6,16
104:16 105:4 107:8,20
108:25 109:2,5,6 110:1,9
111:3 115:9,24 117:8
118:11

questioning 45:13

questions 24:3,5 35:9
45:6 53:3 57:7 64:13
89:16

quickly 30:3 45:25

quotations 50:1

R

raised 15:3 45:18 47:5
49:21 53:3

rate 13:14,15 14:21
15:12,17,22 16:5,6 26:4,
11 29:7,19 52:25 60:13
62:7,10,22 69:23,24
80:18,21,25 81:14 84:5
87:1,7 92:13,24 95:2

rated 83:3	13 23:6 30:11,25 31:2,8, 10 33:2,7 34:18 37:24 49:11 50:22 51:22 52:20 87:1 92:14 93:14 113:17, 19	referred 114:4
rates 15:25 16:2 30:12 33:2 62:1,4,13		referring 62:7 116:10
reach 108:12		refers 37:22 55:17 63:12
reacting 68:3	received 92:18 93:17	regular 12:5 17:21 82:4
read 34:8 35:21 41:11 43:21 44:8 49:4,15,18 50:1,5,6 52:4 53:17 62:2, 18,21 66:23 67:12,13 76:12 77:25 99:21 106:9 107:1 117:20,21 118:18	receiving 15:5 92:12 111:19	regulate 16:12,21 39:14 46:8,17,20 48:10 52:22 53:25 54:3,22 56:1 58:15 80:14,24
reading 36:24 43:12 51:9 53:12 61:4 62:2,15	recent 62:23	regulated 13:14,16 14:21 15:13,18,23 16:6,7 20:11 25:3 26:4,6,11 29:3,14, 18,20 31:25 32:6,15 34:23 35:5 46:3,24 52:24 53:1 59:18,25 60:5,14 69:25 74:7 80:11,18,21 81:1,10,14 82:12,16,20, 21 83:4,11,12,13 84:6,10 87:2,8 92:13,24 94:17 95:2 97:12
reads 47:7	recently 34:13 66:9	
ready 9:4 12:25 86:20	recognition 104:22	
realize 67:22	recognize 50:15 76:14 98:2 102:18	
realized 109:3	recognized 30:18 66:14 67:17	
realtime 21:3,17,21 38:6 39:16	recognizes 114:10	
reason 12:7 44:6 48:21 54:19,23 64:19 104:18	Recognizing 31:17	
reasonable 15:20 93:3,5 94:19 95:17 96:21 98:5, 17 100:8,14 103:21 111:20 113:6 115:20 116:13,14	recommend 44:17,24	regulating 14:19 16:8 20:9 23:21,24 29:24 39:13 47:3 48:20,24 51:5 57:25 68:21 69:14,21
reasonableness 94:21 96:20 98:2,4 100:10,18 116:10 117:22	recommendation 93:7	regulation 7:8 15:23 16:4 20:10 27:23 31:24 40:25 41:3,22 43:13,14,16,22 44:10 46:19 47:9 48:13, 16 52:24 59:2,4 64:7,24 65:7,9 69:4,24 78:19,22 79:4,5 83:25 84:3,10
reasons 31:21 87:5 98:1 100:19	recommendations 93:10	regulations 38:14 43:8 51:7 56:9 60:11 79:9,13
rebuttal 29:16	reconcile 52:5 72:9	regulatory 92:20 110:17 111:1
recall 27:2,21	reconciled 32:18	reimbursed 93:19 115:19
receipt 111:23	reconnected 76:2	reimbursement 95:7 100:14 116:11
receive 14:24,25 16:25 19:2,14,16,24 20:3 21:7,	reconvene 86:18	
	record 3:10 10:7 24:15 25:8 47:12,16 82:23 103:10	
	recovery 62:13	
	red 18:9 25:19	
	redundant 34:4,9 49:22 50:2,9	
	refer 63:18	
	reference 62:9 77:23	
	referenced 55:13 79:24	

reject 37:4	11:14,18,22 12:8,17	13:15,16 14:24 15:18
rejected 36:17 63:2 67:15	86:13 108:4,5	26:5 84:6 87:4,8,9,15,18, 20 88:12 89:12,23 90:5
relate 71:5	reporter's 10:24	91:1,9 92:13,25 93:23
related 30:21 35:24 65:17 78:2	reporting 26:10,12 28:10 29:21 32:12 73:10	94:3,4,6,13,25 95:2,22 96:1,13 97:2,10,25 98:3, 15 100:6 104:2 106:16 113:13
Relations 61:24	reports 113:9	resources 60:7 90:17
relay 58:5	representing 4:18,23	respect 61:20 64:16 78:17 103:24
reliant 43:17 106:21	request 10:24 15:13 30:2 49:3 80:7 87:1,22 89:4 90:22 91:24 101:20 103:24 106:6	respond 8:15,21 45:7,13 47:16 57:4 65:16 89:16, 20 104:17
reluctant 112:3	requested 118:17	responded 8:23 22:25
relying 84:9 107:10	requests 13:8,14 15:12 17:7 24:17 87:3	responding 7:11,16 45:17 91:21
remainder 18:6	require 23:1 30:6 31:12, 14 67:17 69:9 91:4 94:9 99:12 104:5 107:5 112:19 115:23 117:3	response 17:6 22:20 25:10 53:2 56:23 57:9 104:24 106:19
remains 60:5	required 14:24 28:4 79:17 85:13 90:19 97:4 117:4	responses 30:2 45:14 91:24
remember 38:21	requirement 49:5,10 52:1 79:22 80:8 89:5 101:19 104:5 106:18,24	responsive 30:1
remote 111:18 114:23	requirements 40:9 52:3 88:24 91:2 102:24 112:12,13	rest 42:2,16 61:6 103:19
remove 43:16	requires 49:6 57:18 58:1 67:11 102:17,25 106:23	result 14:11 32:23 37:2 52:14 63:20 87:14 89:5
render 34:8 37:1 38:11 42:3 68:1	research 96:7	results 52:14
rendered 36:18 50:8	resell 112:19	retail 13:25 14:4 19:21, 22
rendering 61:9,15	residential 17:12	retrieve 17:10
renders 34:2 35:25 55:19	resolve 55:21 56:15 57:1 66:23 67:19 69:7	return 13:14,15 14:21 15:13,18,22 16:6,7 20:11 26:5,11 29:19 53:1 60:14 69:23,24 80:18,21,25 81:14 84:6 87:2,8 92:13, 24 95:2
repeat 4:4 35:14 70:2 118:10	resolving 63:19	revenue 15:21
repeated 38:2	resort 6:13 7:14 8:4	
replace 56:16		
reply 8:23 14:14 17:8 20:13 22:12,15,24 23:9 26:18 27:12 30:17 31:18 45:8,13 65:16 91:15 100:24 101:4 102:21 103:1 105:6		
report 92:25 93:3 111:15 112:15		
reporter 4:11,12 10:2,3,9		

review 60:10 96:11 99:4	25:11 26:3 30:4,7 45:5,8, 9,10,15 53:6,7 54:7,11, 12 55:1 61:22 62:2 65:15,20 70:4 74:11 76:24 77:4,6,20,22 78:14,24 81:16 82:10,15, 22 86:22,23,25 89:19,22 100:24,25 104:12,14 105:4 107:20 108:18,25 109:1,16,25 110:3,10,16	107:14,18
reviewed 26:20 27:17 29:17		seeking 13:13 79:16 80:2,5,14 87:11 102:12 105:6 109:8,13
reviewing 28:9		seeks 19:1 87:6 101:15
reviews 93:2,3		sell 14:2 19:19,22
revoke 97:23		semantics 61:11,14
ridiculous 60:6		send 10:11 16:25 17:24 18:12,17 19:2,5,14,16,24 20:3 23:5 30:11,24 31:2, 8,10 37:24 49:11 50:22 51:22 52:20
rights-of-way 81:4		sense 17:2 63:8 64:19 65:2,6 95:5
road 84:12	Russel's 25:15 57:10	sentence 66:22 67:4,8 77:25
Robert 4:22 7:23	Russell 3:12	sentences 67:3
role 90:9		separate 13:16,17 14:7 18:21 28:11 36:8 51:4 56:5 68:14,25 69:5 85:2 105:20,22
router 18:14		separately 6:9 18:12
rule 34:14 38:20 42:16 92:22	sake 20:22	September 26:16
rulemaking 66:9 77:23 78:1,2	satellite 30:9	sequential 118:24
rules 26:10 37:3 42:21 59:22	satisfies 68:10	serve 88:19 91:6,7 97:3, 14,18 100:2,7 101:19 102:14 104:20 106:6 112:4 113:8 116:12
ruling 23:10 45:23,24 48:6 55:3,6,14 56:10,24 66:4,22 67:2,15,22 79:24 113:24	satisfy 16:18 39:15 40:9 97:25 101:25 102:19	served 90:10 92:7,9 97:9 105:8 113:12 114:22 116:2
rulings 45:22 46:21 56:9 79:21	scenario 28:12,15,19,25 29:6,12 42:22 96:11 98:10	service 13:21,25 14:1,3, 4,5 15:1,15 16:3,13,14, 16,17,19,22,23 17:19 19:11,12,20,21,22 20:15, 24 21:1,2,12 23:10 24:13,15 25:3,7,8,18,19, 20,22 26:1,4,6,13 27:3,9,
run 18:22	scenarios 28:11	
runs 63:15	scope 50:13 51:1 64:7	
rural 3:21 90:15,25 92:1 111:18	section 15:16,23 16:5,9, 18,23 20:10,15 23:21,25 37:11 38:2,3,4,11 39:12, 14 41:6,7,11 42:2,4 44:18 48:10 52:25 60:3 61:9,12 62:12,20 63:6 64:9 68:20 70:22 71:3,4 72:1 79:9 80:12,14,24 99:25 100:11 102:24 114:9 115:12 116:4,7,24 117:16 118:20	
Rushton 35:20 36:4 42:3	sections 38:11 61:1 70:24 113:1 114:2	
Rushton's 36:25 37:4	seek 95:6,7 106:17,24	
Russel 3:12 5:16,20 6:1, 10,20 7:10,15 8:1,4,11, 13,23 9:2,4,9,10,14,15, 16,17 10:1,13,17,20 12:23,24 13:2 24:10		

22,25 28:2,3,6,8,11,16,
23 29:2,4,7,13,15,17,18
30:9 31:1,14,16,19,20,
23,24,25 32:3,6,7,8,14,
15,16,20,21,24 33:1,3,7,
8,9,10,11,12,14 34:4,5,
21,23,25 35:1,6 36:16
43:16,17,23 44:2,5,8,9,
11 46:2,11,17,25 47:3,7,
9,14,15 48:3,4,6,7,8,13,
20,24 49:5,9,10 50:11,
14,17,18,19,21,23 53:18,
19,22,24,25 54:1,3,22
55:8 56:5,11,18,21,22
57:17,18 58:1,5,12,16,
22,23 59:18,24 60:5 61:5
64:4,7 67:25 68:13
69:17,22 70:8,12,17
72:11,17,19,20,22,25
73:14,15,16,25 74:2,4,5,
7,14,22 75:18 77:9
78:12,15 79:17,21,23
80:3,5,11,13,23 81:6,8,9,
18,21 82:1,2,4,5,16,20,
21 83:4,6,8,11,12,14,17,
18 84:5,7,18,20 85:1,3,4,
5,8,10,12,14,16,17,18,
20,25 86:9 87:6,21,22
88:8,9 89:3,4 90:3,7
91:3,5,14 93:1,7,23,25
95:7,8,10,24 96:19 98:6
101:14 103:24 105:3,9,
12,14,15,16,19,23
106:22 111:13 112:6,7,8,
10,19,20 113:1,4,17,20
114:8

services 4:21,24 7:7
14:19 15:19 16:8,18,21
17:12 20:6,8,20,21
24:13,19,22 25:4,5,6,12
27:1,10 29:23,24 30:5
33:15,16,19 34:1,17
35:5,7 37:22 38:3,5,15
39:2,6,10,13,14 41:19
42:13 44:4 49:1,12 51:5,
21 53:15 55:13 56:1,2
57:25 59:15,17 61:16,23
63:13,20 64:11,17 66:7,
10,13,15 69:15,16 71:6
74:4,10 75:11,17 76:18
78:2,5,7,9 83:16,18,20,
23,24 84:10,11,15 90:21
93:20 116:8 117:4

Services' 42:14
servicing 60:14
set 16:2 41:2 42:12 66:25
89:22 99:10 113:7
shape 93:11
short 57:13 64:3 107:5
short-circuit 68:7
shortly 13:12,18 74:23
show 20:16,20
shows 20:6 23:23
sic 3:24 39:11
side 22:10 40:4 73:9 99:4
114:24,25 115:1
sided 17:15
signals 18:7,17,19 19:5,6
22:5
signs 85:2
similar 36:11 66:17
similarly 89:11
simple 89:14
single 18:5,7 36:9,14,25
37:4,9,16
SIP 73:18 76:8
sitting 47:13
situation 54:5 91:11
97:24 105:1 107:9,13,15

Skype 75:12
Slawson 3:20 5:2,4,7
6:2,5,6 7:11,15,19 8:1,4,
5,10 9:13,19 10:22,23
11:12,14 12:11,14 24:2,
7,8 34:21 35:11,15,18
41:17 45:18,21 46:13,22
47:5 48:25 49:21 57:8,12
60:23 72:13,23 75:6
81:17,20,24 82:9,14,15
84:25 86:6,16 89:20,21
96:3 100:9,19 107:25
110:20 111:2,6 114:4,19
118:1,3,4,7

Slawson's 48:2
slow 103:18 107:2
small 79:20 90:9,15,25
92:1
soft 73:19
software 73:18
softwares 73:18
solutions 42:23
sort 7:10 8:25 10:5 42:20
43:10 49:7,22 53:17,23
55:21 57:2 62:24 64:3
67:19 70:7,15 80:4 96:6
98:3 102:3,8,11 103:11
107:6 114:5,16
sought 66:11 69:18
109:20
sound 86:15
sounds 86:16 108:19
Southeast 13:9
SPEAKER 8:2
speaking 73:5

specific 57:11 98:7 103:1 117:6
specifically 22:15 26:24 28:14 32:13 57:5 88:1 104:25 114:13
specifics 13:11
spectrum 73:21 74:16,18
spell 4:6
spelled 4:11
spent 95:18
squarely 49:16
stand-alone 88:2
standard 76:18
standing 117:16
stands 104:18
Starbucks 40:19
start 13:3 21:10 45:17 67:4 70:5 109:5 114:24
started 45:21
state 14:18 15:7,8,11,14 16:11,12 20:8 27:23 31:16 32:13 35:20 36:3 37:14 38:14 43:16 47:10, 15 48:18,19 53:9,11,19 54:6,14,17,21,22,23 64:24 65:7,10 85:13 87:14 90:11
state's 44:10
stated 8:21 30:17 37:8 38:21 41:16 74:11 89:25 114:14
statement 25:5 30:20 31:7 37:7 66:5 94:23
states 15:17 16:10 21:17 28:19,22 29:2,12 31:4 34:10 37:22 38:4 43:9 48:12 54:2 57:23,25 58:4 75:14 89:6 91:15 100:1
states' 98:11
status 113:9
statute 15:22,24 16:10, 15,18 23:14,20 34:3,7,8 35:22,23,25 36:8,19,22, 23 37:2,13 38:25 40:22 41:15,22 42:1 43:12,21 44:14 47:20,22 48:1 50:1,5 51:11,25 52:4,13, 17,18 54:14 55:9,24 56:15,20 57:1,2 58:6,7,8 60:21 61:6,8,17,18,21 62:1,15,16 63:1,8,9,12, 14,21 65:1 68:11 71:20 87:10 89:6 90:14 91:2 92:15,16 94:9 99:4,21,25 100:12 101:13,22 102:16,22 104:4 105:25 106:9,17 107:4 114:9,14 116:4 117:14,15,17,21
statutes 15:11 60:17 66:21 68:19 99:22,24 104:11
statutorily 90:19
statutory 5:22 6:11 7:7 34:14 35:17 36:2,10,12, 13 37:3 38:19 42:14 45:19 47:18 49:24 51:18 61:19 62:18 68:7,8 91:2 99:3 100:11 115:21,22
stay 57:24,25 58:3
Stoll 3:21
stop 70:1
straight 103:17
straightforward 76:9
street 103:17 113:15
stress 41:25
struck 107:8
struggle 43:23
struggled 42:18
struggles 42:24
sub-tails 40:1
subdivision 16:11 97:9, 14
subject 14:11 15:23 16:4 20:10 52:24 69:22,23 71:25 79:4,8 80:2 83:24 88:20 102:7 104:6,10
submit 14:15 15:9 111:12
submits 92:25
submitted 111:16
subparagraph 21:10
subparagraphs 20:18
Subpart 118:15
subscriber 25:17 94:15
subscribing 25:22
Subsection 15:17 16:10 21:16 22:17 34:2,17 41:4 62:9 70:14,22,23 71:11, 16 72:6 73:3 90:13
subsections 62:7
subset 55:17 65:22 66:15,18,24 67:25 69:11
substantial 44:22
subsume 71:16
subsumed 64:10 65:3 68:5
subsuming 42:16
success 38:8,9 62:3

successive 39:18
successor 16:24 19:13
21:5,19 37:23
suffice 88:24
suggest 38:24 56:10
96:24 97:7,22 109:13
suggested 11:15 34:1
71:12 82:19
suggesting 47:8 69:8
71:17
suggestion 65:21 67:11,
13 78:6
suggests 103:12,13
sum 93:22
summary 3:6 26:21,23
27:19
superfluous 34:4,9 36:1
38:12 49:22 50:2,19,25
51:13 55:19 61:10,16
68:1 73:4
supplemental 40:15
41:16
support 35:15 39:5 92:24
93:6,17 95:8 111:20
115:15 116:8
supported 24:15 25:8
34:9 40:24
supports 35:16 42:11
suppose 68:22,23 103:2,
5 114:15
supreme 34:10,13 42:2,3
50:4 61:23 62:14,23
68:10
surface 42:20
surplus 35:18
surrounded 62:6

surrounding 62:20
suspect 78:20
suspicion 110:21
Swenson 39:11
switch 18:23 21:8 27:16
28:17 29:8 32:1,14 34:22
35:2 38:17 60:4 71:5
73:25 74:2,22 75:9,16,
20,25 76:2,13,16
switchboard 39:4
system 13:10,11,23,25
17:3 18:21,23 19:10,16,
17,25 20:1,14,17,23
22:1,21 23:12,13,16,19
36:10,11 39:23 43:18
52:19,23 84:14 118:19
systems 19:8 20:2

T

tackle 86:21
takes 25:17,18 85:1
105:16,17
taking 25:21 43:8 107:11
talk 13:10 52:2
talking 11:19,20 45:10
53:21 54:1 55:16 58:9
59:6 73:20 93:13 107:17,
24 109:3 116:22
tariff 24:23,25 25:1,2
29:7 83:19 94:24 95:4,5,
21
tariffs 95:3,17
task 74:3
tasked 59:21
taxes 58:5

TDM 32:24 33:3
technical 7:17 10:15
11:1,21 12:2 34:20 90:16
technically 100:5
technology 26:14 27:10,
13,14,15 28:12,17,20,21
29:1,4 32:13,22 34:5
59:3,6,23 60:3 67:7
71:24 72:4,6
tele- 83:2
telecom 3:21 24:23 25:1,
2 58:5 83:2,3,19 94:12,
13 100:3
telecommunication
24:12,22 27:9 46:11 48:7
53:22 55:8 56:1,11,18,21
58:23 59:15,16 69:17
74:4 83:24 87:21 90:21
100:1 116:8
telecommunications 3:5
24:21 44:11 46:9,25
48:11 83:20
telephone 17:20 18:24
21:7,8,13 25:3 26:6,13
28:16 32:6 33:8 34:18,22
35:5 38:17 39:9 43:16,17
44:2,11 60:5 71:5 74:2,
22 75:9 76:1,4,10 82:4,
21 83:2 84:17 94:17
television 71:6,9
telling 27:11 85:24
tells 72:9
temporal 99:12
ten 103:15
tenable 31:21
term 15:22 36:14 38:1
49:8 50:11 61:4,12 62:25
63:13 70:11 77:9,13,15

83:4 99:5,15 101:2
102:1,19 104:4 107:1
116:14
terminal 18:1 86:3
terminate 21:9,14 39:24,
25
terminates 21:23 22:6
30:9 34:19 40:8
terminating 18:23 21:4,
18 29:9 38:7 39:17
terms 5:9,11 7:5 8:19
13:15 16:15 55:9 62:20
77:16 117:9 118:22
territory 97:9 105:3
118:18,24
test 115:14
testimony 15:4 26:15,18
29:16 30:1 82:25 83:1
91:24 92:21
text 62:18
theory 41:25
thing 24:10 42:20 69:1
76:25 77:10 81:5 99:9
112:18 113:9
things 12:9 24:9 25:14
26:2 39:1 55:2 58:14
66:12 70:20 102:25
112:10 114:6
thinking 57:7 104:1
thinks 103:3
Thompson 110:12
thought 86:10 115:10
118:14
throw 56:14
time 3:3 8:7 10:5 31:19
42:19 43:6 58:17 60:18

64:17 65:19 83:14 93:16,
17,24 96:21 97:12 98:5,
17 100:18 101:24
102:15,19 103:7,11,21,
23 106:6,18 107:5,12,16
109:10 110:7
timelines 112:17
timing 111:22 112:9
Title 46:9 102:24
titled 15:24
today 14:8 47:13 63:3
top 17:17 30:22 66:5
topics 8:15
touches 74:2
traditional 76:3,10
traffic 27:4 29:11
transcribed 10:8
transferred 92:6
transform 74:3,6
transformed 32:2
transforming 33:8
transmission 27:5 44:1
73:16
transmit 18:7
transport 27:11 32:1,13,
24 33:4 35:1,3 59:11,12
60:3 74:3 83:7 84:13
transported 33:17
traverses 67:5
treated 69:3
treating 68:25
tricky 42:16
true 47:11 82:24 96:24
97:7

turn 13:18 24:1 55:3
turned 36:5 55:6
turns 19:1 36:6 46:9
two-way 21:3,17,21 38:6
39:16
type 41:2 44:16 46:17
47:14 53:24 54:3 57:24
63:20 80:4 81:7 96:23
105:16,23 106:23 107:1
115:18

types 75:17,21 79:13
typical 17:22
typically 8:25 57:9

U

U.S. 34:11
UDOT 34:15
ultimately 18:23 110:23
unanimously 62:14
unclear 5:17 54:6
underlying 36:4
understand 5:17 17:12
54:7,11 70:19 107:7
110:9 111:10
understanding 6:16,19,
21 77:8 82:7 109:16
understood 72:14
undisputed 19:15,18
31:11
unit 86:7
United 34:10 75:14
universal 13:21 15:1,15
87:6 95:7,8 100:12
106:21 116:8

universally 96:24
unlike 36:15
unreasonable 91:4
unregulated 32:2,8,16
60:1 73:14 74:7 79:17
81:6 84:15
up 6:1,2 7:1 11:24 12:20
18:16 24:9,11 25:9 26:2
42:13 66:25 73:15 85:2
86:4 93:22 95:15 106:11
URTA 5:2,4,6,7
USC 58:11,13
user 21:7,13 34:18
user's 21:6,19,23 22:4,
18 23:5 28:5 30:6 38:7
39:18 40:10
users 21:4 73:17
USF 15:5,19 58:5 89:13
91:19,22,23 92:12,14,17,
23 93:6,11,14,16,17,21,
22,24 95:12,18 110:25
111:19,23 115:14,19
Utah 3:5,21 4:17,18 13:9,
21 15:16 16:9 23:14
29:25 30:4 31:20 32:6
34:2,13,15 35:7,20 36:3
42:24 46:15,18 47:1,24
48:23 50:4 51:3,13,19
52:8,10,11,14,15,18
55:23 56:19,25 58:17
62:23 66:16,21 68:3,20
69:13 78:9 79:20 82:21
87:6 92:21
utilities 4:19 16:1,2
24:18 93:1,2 96:25
97:12,13
utilize 17:18,23 19:9
31:14 39:3 51:21 52:17

105:10,21 112:2
utilizes 19:5 52:19
utilizing 22:3 41:8
106:16 112:4
UUSF 15:15,17

V

variation 118:22
variety 75:20
varying 59:24
versus 34:10 61:23
verus 34:15
video 14:5 17:1 19:22,25
20:4 33:16 37:25 49:12
50:22 51:22 52:21
viewed 63:2
violate 51:17
violation 97:24 98:20
virtual 18:8
virtually 32:5
VLAN 25:16 85:6,7
voice 13:25 16:13,16
17:1,11 18:7 19:8,14,16,
18 20:2,4,14,17,19,23,25
21:3,12,17,21 22:5,21
23:6,15,18,19 24:14
25:7,20,22,25 26:14
27:22 28:6,11,16,17,20,
21 29:2,23 30:5,22 31:1,
11,13,15,19,23,25 32:14
33:11 34:3 35:1 37:24
38:3,4 39:16 41:21 44:4
49:11 50:24 51:22 52:21
53:19 54:13 57:18,25
58:15 59:24 60:14 61:15
64:9 66:10 67:5 68:12

70:11,13,16,21 72:11,16,
19,20,21,24 73:24,25
74:1,9,14,16 75:12,17,21
76:18,19 77:9,10,11,13,
15 78:4 81:20 83:17
84:18,20 85:1,4,5,8,16,
17,18,25 86:9 112:6,20,
25 113:20
Voip 23:20 31:17 34:6,
17,24 35:6 40:12,14,16,
21 43:10 49:22 50:8,11,
12,16,18,23,24 51:6,12
55:16,17,19 56:5 58:16,
22 64:4,17 65:22 66:13,
14,17,19 67:4,8,25
68:16,17,18,23 69:11
71:3,4,7 72:9 73:1,3,23
74:10,12 75:22 76:17
78:8,11 79:23 80:3,4
85:10,12

Vonage 33:22 75:23 79:2
vote 24:25

W

W-O-O-L-S-E-Y 4:8
wait 24:5 108:2 113:18
114:21 115:1
wall 18:2 22:3
wanted 24:9 25:9 61:19
70:10 84:16 113:7
ways 51:15 96:7
weeds 55:16
well-established 41:25
west 114:25
Whatsapp 75:15 76:5
wholesale 14:1,2 19:19
23:22 24:14 25:7 83:17

wire 17:24 **Yvonne** 3:8
wired 30:8
wireless 30:9
wireline 81:18,21 82:2,3
wires 17:25
wiring 18:18
withhold 45:13
wondered 57:3
wondering 11:16
Woolsey 4:2,5,8
word 72:16 77:10,17
 93:19 103:4
words 11:25 25:21 26:5
 27:15 33:9 34:8 35:25
 41:10 50:5,6 51:19 52:4
 56:14,20,25 62:17 63:8
 71:21 74:6 90:9 116:23
work 81:18,21 82:4 84:20
 85:9,25 111:12,25
working 112:22
works 85:18,20 86:8
 106:13
world 73:12,15
worry 93:21
written 43:3 52:13 72:16
wrong 39:22
wrote 37:6

Y

year 63:3 88:1
years 25:3,4 42:21 99:14
 101:18 103:16,22 106:2,
 4 107:17 109:14