

1 STATE OF VERMONT
2 PUBLIC SERVICE BOARD

3 DOCKET NUMBER 7316

4
5 IN RE: INVESTIGATION INTO REGULATION OF
6 VOICE OVER INTERNET PROTOCOL (VoIP) SERVICES

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8 February 16, 2017
9 11:00 a.m.

10 ---
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12 Montpelier, Vermont

13 Oral Argument held before the
14 Vermont Public Service Board, at the Susan M. Hudson
15 Conference Room, People's United Bank Building,
16 112 State Street, Montpelier, Vermont, on
17 February 16, 2017, beginning at 11:00 a.m.

18 P R E S E N T

19 Board Members: James Volz, Chairman
20 Margaret Cheney
21 Sarah Hofmann

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1 CHAIRMAN VOLZ: Good morning. We're here
2 this morning in Docket Number 7316, which is the
3 Investigation into regulation of Voice over Internet
4 Protocol, also known as VoIP, Services. I'd like to
5 start by taking notices of appearance.

6 MR. BURKE: Dan Burke on behalf of the
7 Department of Public Service.

8 MS. LUDWIG: Megan Ludwig for the Department
9 of Public Service.

10 MR. BURKE: And we also have Jim Porter,
11 Director of Telecommunications and Connectivity, and
12 Corey Chase, Infrastructure Analyst, here today.

13 CHAIRMAN VOLZ: Okay.

14 MR. POCIUS: Dave Pocius on behalf of AT&T,
15 Verizon Access, and the VON Coalition.

16 MR. TARRANT: On behalf of Comcast Phone of
17 Vermont, Gerry Tarrant with the firm of Tarrant,
18 Gillies & Richardson and Luke Platzer, P-L-A-T-Z-E-R,
19 with the firm of Jenner & Block out of Washington DC.
20 Mr. Platzer represented Comcast on the appeal to the
21 Supreme Court and on the remand back in 7316, and he
22 holds a pro hac vice license. He's a member in good
23 standing with the Bars of the State of New York and
24 Washington DC, and he will be making the argument this
25 morning.

1 If I could take just a second and introduce a
2 couple of people from Comcast, we have on my left,
3 Andrew Fisher, far left. He's a Deputy General Counsel
4 out of Philadelphia for Comcast. We have Stacey
5 Parker, who is the Vice President of Government and
6 Regulatory Affairs, Northeast Division, and Jim White
7 who is the Senior Director of Government and Regulatory
8 Affairs, Northeast Division.

9 CHAIRMAN VOLZ: Okay, great. Thanks. I'd
10 just like to note there are some people on the phone
11 who are listening to the oral argument. So, if people
12 would speak up, that would be helpful.

13 So this is an oral argument. We've read all of
14 your filings, so you don't need to review everything in
15 great detail. I'd urge you to just highlight, address
16 the issues that you want to highlight the most, and,
17 from my perspective, it makes sense to start with
18 Comcast. Is that agreeable to the parties? Okay. Why
19 don't you go ahead?

20 MR. PLATZER: Need the microphone here?

21 CHAIRMAN VOLZ: That would be good. I don't
22 think it's on.

23 MR. PLATZER: Oh, well.

24 CHAIRMAN VOLZ: We can turn it on, perhaps.

25 MR. PLATZER: Does the Board require it, or

1 is this --

2 CHAIRMAN VOLZ: No. Just, it might help the
3 people on the phone, that's all, and it is on now, so
4 you can try it.

5 MR. PLATZER: All right. Well, may it please
6 the Board, thank you for the opportunity to present
7 oral argument on Comcast's comments to those decision
8 here today. I'm not sure how much time the Board would
9 like to allot, but, to the extent possible, I would
10 like to reserve a couple of minutes in the event of any
11 reply.

12 CHAIRMAN VOLZ: We'll allow everybody to make
13 an additional argument and anyone to reply to anybody
14 else after that if they choose to. There's no
15 particular time limit. We'd like to be done in total
16 by noon.

17 MR. PLATZER: Thank you, Mr. Chairman.

18 CHAIRMAN VOLZ: Yeah.

19 MR. PLATZER: So we're here in this docket
20 to, with very specific instructions from the Supreme
21 Court to address a very narrow issue, which is the
22 proper classification under federal law of
23 interconnected VoIP services in general and Comcast's
24 XFINITY voice service in particular, and we appreciate
25 that the proposed decision and think correctly scopes

1 that issue and appropriately identifies the limited
2 decision that the Supreme Court asked the Board to
3 address.

4 And we also appreciate that the Hearing Officer
5 correctly sort of looked to FCC decisions and federal
6 law in order to engage in that federal classification,
7 but, as set forth in our papers, where we believe the
8 proposed decision errs and should not be adopted by the
9 Board is that we believe it misapplies some of the
10 important FCC precedents and disregards the decisions
11 of several federal courts that have all decided this
12 precise issue under the Communications Act of 1996 and
13 reached different outcomes from those in the proposed
14 decision.

15 And one benefit that the Board has here is that
16 time has been somewhat of the Board's friend here, and
17 that is this docket's now approaching its tenth year,
18 and, during that time, the Board had the advantage of
19 seeing the effects of the federal deregulatory policy
20 of having some light-touch national federal regulations
21 for interconnected VoIP services, which is the very
22 reason that Congress deregulated information services
23 in the 1996 act to begin with was to encourage
24 competition and to spur demand for broadband and
25 IP-Enabled services, and the Board in this docket has

1 the benefit of seeing a decade's worth of the effects
2 of that, of having Comcast and other interconnected
3 VoIP providers provide their services without
4 state-specific telecommunications regulations.

5 With that overview in mind, I understand the Board
6 has read our papers, and there's a lot of issues set
7 forth there. There are three issues I'd like to focus
8 on that we think are particularly significant here.
9 The first is that, as a factual and legal matter, we
10 believe both the record here and FCC decisions on point
11 direct the conclusion that what Comcast is offering and
12 what interconnected VoIP providers in general who
13 operate similarly are offering is a net protocol
14 conversion capability.

15 Signals go into the network in IP, and they're
16 given the capability of coming out in TDM, and we think
17 the proposed decision errs by focusing on the fact that
18 it's a voice or analog signal that goes into the user's
19 telephone on one end and out the other end. The FCC
20 decisions tell us to look to where it goes into the
21 network and where it comes out of the network.

22 That sort of leads into the second issue I'd like
23 to address, which is that, under both the four federal
24 judicial precedents and the pertinent FCC decisions,
25 that net protocol conversion capability is dispositive

1 of the legal classification. If it is a net protocol
2 conversion capability being offered, under FCC
3 precedent, it is an information service, unless it
4 falls within one very narrow exception for to enable
5 reverse compatibility with old customer premises
6 equipment.

7 That exception does not apply here. We think that
8 the proposed decision errs both by misapplying that
9 exception and also by applying the internetworking
10 exception which is, on its face, inapplicable when
11 there's a net protocol conversion.

12 MS. HOFMANN: Counsel, so, if you go with
13 this net protocol conversion as being the final answer,
14 who is a telecom service? Who is left as a telecom
15 service? Isn't everybody an information service?

16 MR. PLATZER: Well, Commissioner, I think
17 the, the question there becomes whether they're
18 actually offering a net protocol conversion capability
19 and, Why are they doing it? There is, as the proposed
20 decision correctly calls out, there is an exception
21 where a provider can offer even a net protocol
22 conversion if the reason they are doing it is that
23 they're making piecemeal upgrades to their network and
24 in that, during that process they have to make sure the
25 customers' old telephones or other equipment still

1 works.

2 MS. HOFMANN: So those people might be
3 telecom providers, but --

4 MR. PLATZER: That's correct. That exception
5 may very well apply. To the extent a traditional ILEC
6 or RLEC is engaged in piecemeal upgrades and getting
7 its network onto IP bit by bit has to engage in some
8 protocol conversions so that old telephones still work,
9 they may fall within that exception, but, certainly, a
10 network that is built from the ground up that is all IP
11 as Comcast's network here is does not fall within that
12 limited exception, and we think, under the Computer II
13 decision and the Non-Accounting Safeguards Order, that
14 is a net protocol conversion capability and it's
15 required to be treated as an information service.

16 I understand there's also sort of the broader
17 policy concern that the proposed order lays out, which
18 is that, Well, what about sort of 10, 15 years down the
19 road, if the whole network migrates to IP, then why
20 does net protocol conversion capability still matter in
21 that instance? I think the proposed decision is right
22 to point out that, eventually, that may be a concern
23 that certainly some of the other commentators have
24 noted, but it doesn't need to concern the Board for the
25 present purposes, and I think there's two reasons for

1 that.

2 The first is that, as the Supreme Court noted in
3 its remand, this is eventually an issue the FCC is
4 going to decide, and it's going to be able to take
5 policy considerations into account when it interprets a
6 federal statute. What the Board is really just doing
7 here is reaching an interim application of federal law
8 until there's a federal agency decision to which to
9 affirm.

10 MS. HOFMANN: Do you have any guess as to
11 when the FCC might be looking at this?

12 MR. PLATZER: If you had asked me back in
13 2006 or in 2007, I would have said, Any day now. I do
14 not know, but, certainly, to the extent that the
15 overall network technology is shifting and raising
16 different policy issues, those are the types of issues
17 the FCC intends to get involved in. And, for present
18 purposes, the FCC has guiding decisions on point about
19 how net protocol conversion capabilities are treated,
20 and we think that they do require the outcome here.

21 The other reason that sort of the eventual
22 migration of the whole network to IP at some
23 long-distant future date need not concern the Board for
24 the narrow legal question it's deciding here is that,
25 is one that the FCC itself noted in the AT&T order

1 where the FCC acknowledged, Look, if IP is just being
2 used for internetworking purposes to replicate the
3 exact, same functionality with no net protocol
4 conversion, we're going to say that's a
5 telecommunications service for now, but, if that
6 service evolves and gets additional capabilities that
7 are built in, then we're leaving ourselves the ability
8 to reevaluate that decision and look at the full
9 capabilities of the service.

10 And if, eventually, the network moves in general
11 to IP, what I suspect you will see is a lot of
12 providers adding different functions and features
13 enabled by IP that will become an information service,
14 not because of the protocol conversion capabilities,
15 but because of all the other features.

16 And that does sort of lead into my third point
17 here which is that, irrespective of the protocol
18 conversion capability, Comcast has shown here through
19 record evidence that its XFINITY voice service includes
20 a lot of additional advanced features beyond pure voice
21 transmission. There's nomadic access to the service
22 from software applications on tablets and smartphones.
23 There's online access through a portal. You can read
24 emails, sorry, voicemails as emails. You can forward
25 them as electronic attachments. You can get your

1 caller ID on your television screen or your computer.
2 In conjunction, all of those features together make up
3 a service that is more full-featured than just voice
4 transmission.

5 MS. HOFMANN: So, if a company just added one
6 of those, it may not be enough to, to kick it into the
7 information, but maybe, if you add two, you are an
8 information service rather than a telecom service? Is
9 there some degree of what you have to add to become an
10 information service?

11 MR. PLATZER: So there is, Commissioner, and
12 the, the test that the FCC has always applied in
13 looking at this issue of, when you're commingling
14 transmission capabilities with other capabilities, you
15 look to the extent to which they are functionally
16 integrated. Are you just bundling at the point of sale
17 two discrete and different capabilities, like, you're
18 just selling voicemail as an add-on to traditional
19 telephone, or are you doing things that work in
20 conjunction with one another and get experienced by the
21 user as more of a seamless whole? And the FCC has
22 issued a couple of decisions on this, but the
23 consistent pattern there is that you look overall at
24 the way in which the features are functionally
25 integrated.

1 And here we think the record shows that, both as
2 sort of a, from a user perspective and from a
3 technology perspective, the features that Comcast is
4 offering through XFINITY voice above and beyond simple
5 voice calling are functionally integrated. The record
6 shows that it's the use of IP by Comcast in its network
7 and the conversion of calls into IP that facilitate
8 adding all these additional features and integrating
9 them into the service.

10 And they work in conjunction too. They're not
11 sort of separate and discrete capabilities, but you can
12 make a call from your home phone, or, if you step out
13 from your home, it will go to a software application on
14 your iPad that you're carrying with you. If you're at
15 the grocery store, you can go on your iPad to the
16 website and see the call log, and you can forward the
17 email. Everything sort of works in conjunction, and,
18 certainly, it's not a formalistic test where you can
19 say it's two features rather than three or three
20 features rather than four and more of a wholistic look
21 at the customer experience and the extent to which the
22 capabilities are functionally integrated.

23 The most on-point decision here is one that we
24 believe the proposed decision does not grapple with
25 adequately which is the FCC's Vonage decision.

1 Everyone thinks of that case as just being about
2 nomadic VoIP because that's how the FCC ultimately
3 resolved the issue, but the Vonage decision from the
4 FCC looks at what are essentially the same features as
5 those being offered by Comcast here, which is online
6 access through a portal, conversion of voicemails into
7 electronic files and text, nomadic ability to access
8 the service from different locations on different
9 devices in conjunction with IP protocol processing.

10 And the FCC there characterizes those various
11 different features as forming an integrated whole as
12 one service, not as a series of discrete capabilities
13 that just happen to be bundled together at the point of
14 sale but as an integrated service, and we think that
15 the FCC's treatment of Vonage's service in that order
16 speaks to how the Board should look at that same
17 question here.

18 Because the issue is sort of so critical to the
19 outcome under the FCC decisions, I do want to briefly
20 -- I don't want to take up too much of the Board's
21 time, but I do want to just briefly explain why the net
22 protocol conversion analysis is so important here. If
23 you look at the FCC decisions like the Non-Accounting
24 Safeguards Order, which is the big one, as well as the
25 Protocols Order as well as all the federal court cases

1 that we cited in our briefs, what all of them look at
2 is, What's the protocol in which the customer is
3 sending communication into the network; what's the
4 protocol in which it's coming out? And what the
5 proposed decision does instead is sort of look into the
6 customer's house and say, Well, how is the information
7 starting even before it hits the network?

8 And we think that's in error, the way that the FCC
9 has always approached these questions, and it's quite
10 clear as a matter of law that the devices at the
11 customer premises like the telephone and the embedded
12 adaptor that converts calls into IP are customer
13 premises equipment. They are not part of the network.
14 They are on the customer side of the demarcation line.
15 And we think that the regulations that we cited in the
16 brief on that point are dispositive.

17 MS. HOFMANN: As a consumer, when I make a
18 telephone call, I don't really, you know, even though
19 we're all kind of utility geeks, I don't really think
20 about whether it's going through some sort of
21 conversion when it leaves my house and what it's
22 getting to on the other end, and why should that be any
23 kind of, from the consumer-facing perspective, why
24 should this make a difference in terms of whether it's
25 called an information service or a telephone service?

1 MR. PLATZER: Well, good question,
2 Commissioner, but I think there's two answers to it.
3 The first is that, while the FCC certainly looks to the
4 ways in which customers understand the bundle of
5 products that they're being given to determine what the
6 offering is, what the customer thinks they're getting,
7 or, particularly for us, a less sophisticated consumer
8 of services might think they are getting can't trump
9 what's actually being provided and what the provider is
10 actually doing, and if a net protocol conversion
11 capability is, in fact, there, then the text of the
12 Communications Act literally makes that the
13 transforming and processing of information. It's sort
14 of the application of the plain statute, plain text of
15 the statute requires that result.

16 The second response is that I would gently push
17 back on the idea that consumers are completely clueless
18 or don't appreciate what they're getting when they have
19 the ability to get voice service over their broadband
20 line. They certainly understand that it negates the
21 need to have both a copper wire from the telephone
22 company and a broadband line from their ISP coming into
23 their house, that they can use both of them over the
24 same connection, that they get them simplified on the
25 same bill, and they also get the benefits of that

1 protocol conversion and that, unlike sort of your
2 software internet-based programs like, say, Skype or
3 FaceTime before they started integrating with the PSTN
4 where you can only call someone else using the same
5 software, you can make or receive calls from anyone,
6 and that's a capability that comes from protocol
7 conversion.

8 So I think the short answer is the consumers may
9 not appreciate the capability that's actually being
10 provided, but it's still being provided, and that's
11 what the statutory text says, but I --

12 MS. HOFMANN: As Comcast do you tell
13 consumers then, You're getting an information service,
14 and, therefore, you won't have these consumer
15 protections if you were, if you were buying a telephone
16 service from us? I mean, you say consumers are aware,
17 but I'm wondering. Do you actually go through a litany
18 with them when they're trying to decide what service to
19 buy?

20 MR. PLATZER: I'm not aware, Commissioner, of
21 whether the advertising or marketing materials speak to
22 the legal classification of the service in any way.
23 Certainly, my understanding from the record is that the
24 fact that you can use your broadband connection to get
25 voice and that you get sort of the clarity that that

1 brings and the advantages of the additional features
2 that come with IP like the online portal and the
3 ability to use a software application on your phone,
4 that is certainly, I believe, reflected in the
5 marketing and advertising.

6 I realize I've gone on a little bit long, but I'll
7 just quickly make the point that, once it's clear that
8 it is a net protocol conversion capability being
9 offered here, this whole internetworking idea that's
10 set forth in the proposed decision has to go away.
11 The FCC's been very clear that the internetworking
12 exception applies if, and only if, it's the exact, same
13 protocol going in and out of the network. That leaves
14 only the exception the FCC has recognized for sort of
15 piecemeal network upgrades that preserve reverse
16 compatibility with old customer premises equipment, and
17 that's quite clearly not what's happening here, and we
18 think the proposed order gets that exception wrong.

19 I'd refer the Board to the District of Minnesota's
20 recent decision in Charter versus Heydinger that
21 addressed a similar issue and that noted that, to the
22 extent there is a protocol conversion that is being
23 offered between networks to bridge different networks,
24 that has nothing to do with the exception the FCC has
25 recognized of doing a protocol conversion so that

1 customers' old telephones still work during the network
2 upgrade, and, in fact, the Department's witness, Mr.
3 Goldstein, at the hearing in this docket admitted that
4 this piecemeal network upgrade exception for allowing
5 protocol conversion as part of a telecommunication
6 service does not apply to the type of conversion
7 capability that's being included here.

8 I realize I've gone on for far too long. So,
9 unless the Board has any further questions, I'll let
10 the Department respond now.

11 CHAIRMAN VOLZ: Did AT&T want to add
12 anything?

13 MR. POCIUS: No, Mr. Chairman. We're going
14 to stand by our papers.

15 CHAIRMAN VOLZ: Okay, great. Thanks.

16 MR. BURKE: And we are intending on
17 presenting only a very short presentation to the Board.

18 CHAIRMAN VOLZ: Okay.

19 MR. BURKE: And I think, at the outset, I
20 want to just agree with Mr. Platzer that this is a
21 docket that's been open for about ten years and the
22 Board has had an opportunity to witness market
23 performance within Vermont over those ten years. As
24 the Board is aware, in a separate proceeding the
25 Department has partially supported a request from an

1 ILEC to relax its service quality requirements within
2 competitive territories, and we are conscious of the
3 fact that Comcast and other VoIP-based CLEC providers
4 are inherently, by definition, competitive providers,
5 and it would be our position that they should be put on
6 the same competitive regulatory field as the ILEC's
7 going forward.

8 And I bring this up just conscious of the fact
9 that we are only in phase one of this docket, and phase
10 two, if we arrive at that point, is designed to
11 delineate the scope of the Board's jurisdiction or
12 regulation over these VoIP-based providers, and I think
13 it would be fair to say that the Department's position
14 with respect to that scope has evolved somewhat in the
15 ten years since it filed its petition, and it would be
16 likely that we would, while we still believe the Board
17 should retain the jurisdictional authority, the scope
18 and the actual areas where we would ask the Board to
19 assert regulation is probably more limited than what we
20 had anticipated when we filed the petition a decade
21 ago.

22 That being said, we certainly support the Board
23 adopting the Hearing Officer's proposal. We think it
24 stands on a firm legal basis, and we have articulated
25 our position through the briefs that we filed in this

1 docket. Obviously, our comments in response to the
2 P-for-D were very narrow and basically requested that
3 the Board adopt the P-for-D.

4 I did want to bring up just a couple issues in
5 response to the papers that we received from AT&T and
6 VON as well as Comcast. All the companies rely --
7 well, I wouldn't say heavily, but they do cite to
8 federal case law in support of their position with
9 respect to net protocol conversion, and there are two
10 cases in particular that were decided in 2008 and 2010
11 which -- or 2006 and 2010, excuse me -- which are the
12 PAETEC Communications versus Comm Partners decision,
13 Southwestern Bell Telephone versus Missouri Public
14 Service Commission, and those decisions were both
15 decided before the FCC issued its transformation order
16 and the open internet order.

17 And, within the transformation order, the FCC
18 itself actually disregarded the holdings that those
19 cases involved and decided to move in a different
20 direction, and it's important to note that those cases,
21 the actual issue was whether or not VoIP providers were
22 required to pay access charges to the incumbent
23 carriers for delivery and completion of phone calls,
24 and, while they addressed the net protocol conversion
25 issue, it was really an ancillary point with relatively

1 little legal analysis.

2 And just this past summer or, I guess, this past
3 May, the federal court in Louisiana in the case of
4 CenturyTel of Chatham, LLC, versus Sprint
5 Communications -- and the cite for this is
6 185 F.Supp.3d 932 -- expressly declined to follow the
7 logic of those two prior federal court decisions and
8 basically said that the FCC has decided not to follow
9 those and it is not going to. It did not directly
10 address the net protocol issue, but it found more or
11 less that those cases were bad law.

12 And so there is other federal precedent that goes
13 against the decisions that were cited by the companies
14 in their papers, and I would recommend the Board, if it
15 were to review those cases, also review the case that
16 I've brought to your attention as well, and I think,
17 unless you have anything, Ms. Ludwig, that's the extent
18 of our presentation.

19 CHAIRMAN VOLZ: Good. Would you like time to
20 respond?

21 MR. PLATZER: Yes, please, Chairman.

22 CHAIRMAN VOLZ: Sure.

23 MR. PLATZER: I'm aware of the CenturyTel
24 versus Chatham case that the Department cites as well
25 as the FCC's transformation order, and I want to make

1 sure the Board understands the limited nature of the
2 questions that were decided in those cases. The PAETEC
3 Communications and Southwestern Bell decisions, the
4 reason those disputes arose was that they were both
5 disputes about whether or not access charges needed to
6 be paid on VoIP traffic because, at the time they were
7 decided, information service traffic didn't have to pay
8 access charges in the same way as telecommunications
9 traffic. And both of those decisions went into a fair
10 bit of legal analysis, particularly the Southwestern
11 Bell case, to explain why they believed that the VoIP
12 traffic was an information service, and then, once they
13 had held that, it flowed out of that, that, under the
14 law at the time, that access charges were not due.

15 The, the FCC's transformation order where they
16 change the underlying access charge regime to apply
17 access charges to VoIP traffic didn't change anything
18 about the rulings or the legal rationales behind the
19 Southwestern Bell or PAETEC cases, which held that VoIP
20 traffic was an information service. What the FCC
21 changed was what the implications of that would be on
22 carriers' intercarrier compensation obligations by just
23 creating a new intercarrier compensation structure to
24 govern VoIP traffic.

25 So nothing in the transformation order holds or

1 even implies that those two cases got the information
2 service classification wrong. In fact, the FCC's
3 transformation order is quite clear that it is not
4 deciding whether VoIP is an information service or a
5 telecommunication service and holds that issue as one
6 that the FCC has not yet decided. So the grounds on
7 which the ultimate outcome in PAETEC and Southwestern
8 Bell is no longer the law has nothing to do with the
9 information service classification issue. It's about
10 what intercarrier obligation, intercarrier compensation
11 obligations flow from that.

12 The same is true of the CenturyTel versus Chatham
13 case. That case also acknowledges that the FCC has not
14 yet decided the telecommunications versus information
15 service issue with respect to VoIP traffic, and, unlike
16 the PAETEC and Southwestern Bell cases which needed to
17 reach that issue because, under the governing law at
18 the time, that distinction mattered for intercarrier
19 compensation purposes, that the CenturyTel versus
20 Chatham case was able to decide the intercarrier
21 compensation issue without deciding the underlying
22 classification question.

23 So those three, sorry, the FCC decision and the
24 CenturyTel decision the Department cites do not in any
25 way undercut the legal authority behind the

1 classification decision set forth in the four cases
2 that we have cited.

3 CHAIRMAN VOLZ: Thank you.

4 MR. BURKE: And I'd just respond.

5 CHAIRMAN VOLZ: Sure.

6 MR. BURKE: I think, basically, everything he
7 said is an accurate representation.

8 CHAIRMAN VOLZ: Is an accurate?

9 MR. BURKE: Accurate. It's valid.

10 CHAIRMAN VOLZ: Okay, good. Thank you.

11 MR. BURKE: Sorry. That was not particularly
12 -- but I did bring this case to the Board's attention
13 primarily for the purpose of noting that federal law or
14 there is federal precedent for finding that a state
15 tariff is not preempted by federal law, and, although
16 this case that I brought to your attention does not go
17 into the nitty-gritty detail of whether or not it's an
18 information or a telecommunications service, the courts
19 have not found any sort of universal agreement on these
20 issues, and to the extent they've addressed it, they
21 have all clearly said they are speculating as to what
22 the FCC has done and there is no clear guideline under
23 federal law.

24 So, if the Board is going to rely on federal law
25 to come to its conclusion on whether or not to adopt

1 the Hearing Officer's decision, it should know that
2 there is no clear ruling and federal judges have looked
3 at this have only said, We're speculating what we think
4 the FCC is going to do. And I think that's the extent
5 of what I have.

6 CHAIRMAN VOLZ: Anything else by anybody?

7 MR. PLATZER: And I'd simply note they're not
8 quite speculating about what the FCC would do. These
9 four federal courts that have addressed and decided the
10 issue have decided in order to reach outcomes in cases
11 before them. They're interpreting federal statutes
12 because, in the absence of an FCC decision, they're
13 required to apply the terms of the statute. We believe
14 the Board should do here as well, and we think the
15 proposed decision sort of gets the question right, but,
16 as we displayed, we think, gets the answer wrong.

17 CHAIRMAN VOLZ: Okay, great. Anything else?
18 All right. Thank you very much.

19 MS. HOFMANN: Thank you.

20
21 (Whereupon at 11:32 a.m. the hearing was adjourned.)
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23
24
25

C E R T I F I C A T E

1
2 I, Sunnie Donath, RPR, do hereby certify that
3 I recorded by stenographic means the Oral Argument re:
4 Docket Number 7316 at the Susan M. Hudson Conference
5 Room, People's United Bank Building, 112 State Street,
6 Montpelier, Vermont, on February 16, 2017, beginning at
7 11:00 a.m.

8 I further certify that the foregoing testimony was
9 taken by me stenographically and thereafter reduced to
10 typewriting and the foregoing 26 pages are a transcript
11 of the stenographic notes taken by me of the evidence
12 and the proceedings to the best of my ability.

13 I further certify that I am not related to any of
14 the parties thereto or their counsel, and I am in no
15 way interested in the outcome of said cause.

16 Dated at Westminster, Vermont, this 23rd day of
17 February, 2017.

18
19
20
21 _____
22 //Sunnie Donath
23
24
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