

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

May 26, 2010 - 9:20 a.m.  
Concord, New Hampshire

DAY 3  
A.M. SESSION  
PUBLIC

**RE: DT 10-025  
FAIRPOINT COMMUNICATIONS, INC.  
REORGANIZATION**

**PRESENT:** Chairman Thomas B. Getz, Presiding  
Commissioner Clifton C. Below  
Commissioner Amy L. Ignatius  
Jody Carmody, Clerk

**APPEARANCES:**

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Frederick J. Coolbroth, Esq. (Devine...)  
Shirley Linn, Esq., General Counsel

**Reptg. BayRing Communications:**  
Alan M. Shoer, Esq. (Adler, Pollack...)

**Reptg. Otel Telekom:**  
Gregory M. Kennan, Esq. (Fagenbaum...)

**Reptg. segTEL, Inc.:**  
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**Reptg. Comcast Phone of N.H., Inc.:**  
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**Reptg. Irene Schmitt:**  
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**COURT REPORTER: Susan J. Robidas, LCR No. 44**

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

**APPEARANCES: (C o n t i n u e d)**

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Edward N. Damon, Esq.

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I N D E X

WITNESS PANEL:

ALAN KESSLER, RAYMOND GROSS, RONALD CASSEL

<u>DIRECT EXAMINATION</u>	<u>PAGE</u>
By Mr. Judd . . . . .	4

<u>CROSS-EXAMINATION</u>	<u>PAGE</u>
By Mr. Linder . . . . .	17
By Mr. Kennan . . . . .	28
By Ms. Mullholand . . . . .	47
By Mr. Roth . . . . .	49
By Chairman Getz . . . . .	85

<u>REDIRECT EXAMINATION</u>	<u>PAGE</u>
By Mr. Judd . . . . .	94

<u>EXHIBITS</u>	<u>PAGE</u>
FP 29 Record request by Cmsr. . . . . Ignatius re: Court Order of 5/11/10 Bankruptcy hearing	93
FP 30 Record request by Atty. Judd . . . . . re: 2008 and 2010 Settlement Agreements	99

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

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**P R O C E E D I N G S**

CHAIRMAN GETZ: Good morning.  
We reopen the Docket DT 10-025. Anything we need  
to address this morning before we hear from the  
Non-Advocate Staff panel?

MR. JUDD: No, sir.

CHAIRMAN GETZ: Okay. Then  
please proceed, Mr. Judd.

MR. JUDD: Thank you.  
Gentlemen, would you rise to be sworn.

(**WHEREUPON**, the witnesses were duly  
sworn and cautioned by the Court  
Reporter.)

**ALAN KESSLER, SWORN**

**RAYMOND GROSS, SWORN**

**RONALD CASSEL, SWORN**

**DIRECT EXAMINATION**

**BY MR. JUDD:**

Q. Mr. Cassel -- actually, let me start with  
Mr. Kessler.

Please state your full name, business  
address and your position in your company.

A. (Mr. Kessler) My name is Alan Kessler,  
K-E-S-S-L-E-R. My business address

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 244 North Main Street, Concord, New  
2 Hampshire. And I am a senior consultant  
3 with Accion.

4 Q. And Mr. Kessler, did you prefile testimony  
5 along with Mr. Cassel and Mr. Gross in this  
6 matter?

7 A. (Mr. Kessler) I did.

8 Q. If you were asked those same questions,  
9 would you answer them in the same way?

10 A. (Mr. Kessler) I would.

11 Q. Do you have any corrections to that  
12 testimony?

13 A. (Mr. Kessler) I do. I have two corrections  
14 to that testimony. In our supplemental  
15 report --

16 Q. Excuse me, Mr. -- can we get to the report  
17 separately? Do you have anything -- and I'm  
18 referring now to Non-Advocate Staff 1 --

19 A. (Mr. Kessler) I have no changes to that  
20 testimony.

21 Q. Thank you. Did you also prepare what has  
22 been marked as Non-Advocate Staff 2? And  
23 that's both a public and a confidential  
24 version report dated April 19th.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Kessler) I did.

2 Q. And do you have any corrections or changes  
3 in any manner to be made to that report?

4 A. (Mr. Kessler) I do not.

5 Q. Did you also prepare a supplemental report  
6 dated May 17th that's been marked as  
7 Non-Advocate Staff 3P and Non-Advocate Staff  
8 3C, to be distinguished between the public  
9 and confidential version?

10 A. (Mr. Kessler) I did.

11 Q. Do you have any changes or corrections to be  
12 made to that report?

13 A. (Mr. Kessler) I do, and they apply to both  
14 of those exhibits. On Page 10, in the  
15 fourth paragraph on that page, there's a  
16 typo. We had referred to the requirement of  
17 notice being filed 30 days in advance  
18 regarding removal of pay phones, and that  
19 should be 60 days.

20 Q. And if I could, I believe you said Page 10,  
21 but I think you meant Page 11.

22 A. (Mr. Kessler) Oh, I'm sorry. Page 11.

23 Q. Thank you. And anything --

24 A. (Mr. Kessler) And I have one further

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 correction. On Page 15, we would like to  
2 strike the second bulleted item, based on  
3 information we -- that has come to our  
4 attention. It appears that the 10-Q for  
5 2010 will not -- will probably not be  
6 available before this Commission issues its  
7 ruling; and therefore, we don't want to make  
8 that an impediment to the Commission final  
9 decision in this case.

10 Q. Mr. Kessler, would you briefly summarize  
11 your professional experience --

12 A. (Mr. Kessler) Yes.

13 Q. -- and why you're here today.

14 A. (Mr. Kessler) Yes. For the past 25 or so  
15 years I have been a consultant to industry,  
16 focusing on several areas, including  
17 bankruptcy and reorganization, mergers and  
18 acquisitions, and regulation of utilities.  
19 I have appeared before this Commission on  
20 several occasions relating to bankruptcy  
21 matters and reorganization matters and have  
22 worked for the State as its advisor in a  
23 number of other matters as well. I've also  
24 represented creditors in bankruptcy in the

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 steel -- in steel, aerospace and information  
2 technology industries. And I essentially  
3 was asked by the Staff to review the plan of  
4 reorganization to determine whether it was a  
5 reasonable financial reorganization.

6 Q. Thank you. Mr. Cassel, would you please  
7 state your full name, your business address  
8 and the position of your company.

9 A. (Mr. Cassel) My name is Ronald Cassel,  
10 C-A-S-S-E-L. My business address is  
11 11 Melanie Lane, East Hanover, New Jersey.  
12 And I am the CEO of Millennium  
13 Communications Group.

14 Q. And likewise, did you prepare prefiled  
15 testimony along with Mr. Kessler and  
16 Mr. Gross?

17 A. (Mr. Cassel) Yes, I did.

18 Q. Did you have any changes or corrections to  
19 that?

20 A. (Mr. Cassel) Not the original one. No, I  
21 did not.

22 Q. Okay. Did you also participate in the  
23 preparation of the Accion report dated  
24 April 19th which has been marked as

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Non-Advocate Staff 2?

2 A. (Mr. Cassel) I did.

3 Q. And do you have any changes or corrections  
4 you'd like to make to that document?

5 A. (Mr. Cassel) I do. On Page 23, Paragraph 2,  
6 second to last sentence, it reads, "the  
7 phenomenon produces an extraordinary amount  
8 of noise." It should read "signal loss"  
9 instead of "noise."

10 Q. Would you please briefly summarize your  
11 professional experience.

12 A. (Mr. Cassel) Yes. I have been in the  
13 communications business, both on the  
14 operations side and the construction side,  
15 for the past 30 years. The past 20 years  
16 I've been involved with fiber optic services  
17 in both public and private, and utility  
18 industries as well.

19 Q. And referring back to the Accion report that  
20 is Non-Advocate Staff No. 2, would it be  
21 correct to state that your portion of that  
22 report began on Page 22, and it's a review  
23 of the fiber optics issue brought to this  
24 Commission --

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Cassel) That is correct.

2 Q. -- that's a part of this document?

3 A. (Mr. Cassel) That's correct.

4 Q. Thank you.

5 CHAIRMAN GETZ: Mr. Judd, I'm  
6 not sure I got the change on Page 23. I guess  
7 it's right in the middle of the page. It says  
8 "the phenomenon produces an extraordinary amount  
9 of noise." And the substitution was?

10 MR. CASSEL: Signal loss.

11 CHAIRMAN GETZ: Signal loss.

12 MR. JUDD: If you'd like an  
13 explanation of the difference, I'm not the one to  
14 ask.

15 CHAIRMAN GETZ: Thank you.

16 MR. JUDD: But Mr. Cassel is  
17 here.

18 BY MR. JUDD:

19 Q. Mr. Gross, would you please state your full  
20 name and your business address for the  
21 Commission.

22 A. (Mr. Gross) Raymond Gross, member of the  
23 Accion Group, 24 North Main Street, Concord  
24 New Hampshire.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. And as I've asked your colleagues, did you,  
2 too, prepare prefiled testimony?

3 A. (Mr. Gross) Yes, I did.

4 Q. And are there any changes or corrections you  
5 would make to that document?

6 A. (Mr. Gross) No, there are not.

7 Q. Likewise, did you participate in the  
8 preparation of both of the two reports, the  
9 one dated the 19th of April and May 17th?

10 A. (Mr. Gross) Yes, I did.

11 Q. Do you have any changes to make to those  
12 documents?

13 A. (Mr. Gross) No, I do not.

14 Q. Would you briefly summarize your  
15 professional experience.

16 A. (Mr. Gross) Sure. Initially 10 years in the  
17 accounting profession, and for the last 25  
18 or so years I have held positions as CEO,  
19 COO and chairman of public and private  
20 companies and security industry,  
21 telecommunications industry, and computer  
22 services industry; those businesses ranging  
23 in revenue size from 20 million to a  
24 billion.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. And would you briefly explain your part of  
2 the engagement with Accion Group, what you  
3 were asked to review as part of this  
4 document.

5 A. (Mr. Gross) Yes. I was asked to review the  
6 financial and operational elements of the  
7 plan of reorganization and related  
8 documents.

9 Q. Now, were you present Monday and Tuesday of  
10 the hearings?

11 A. (Mr. Gross) Yes, I was.

12 Q. And did you -- that means you were here for  
13 the first panel with Ms. Hood, Mr. Allieri  
14 and Mr. Newitt?

15 A. (Mr. Gross) Yes, I was.

16 MR. JUDD: And Mr. Chairman,  
17 we're going to be very circumspect here and try  
18 to avoid needing to go into non-public session.

19 BY MR. JUDD:

20 Q. But those discussions included new  
21 information that was not part of your  
22 initial review; is that correct?

23 A. (Mr. Gross) That's correct.

24 Q. And based on that information, does that

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 change any of your conclusions that were  
2 presented as part of these reports?

3 A. (Mr. Gross) No, it does not.

4 Q. Did that testimony change your concern about  
5 the ability of FairPoint to meet its  
6 obligations and projected revenue  
7 performance in the future?

8 A. (Mr. Gross) No, it did not.

9 Q. Can you briefly explain your concerns  
10 regarding the revenue projections?

11 A. (Mr. Gross) Sure.

12 Q. Thank you.

13 A. (Mr. Gross) Well, I think, you know, we  
14 recognize that revenue is a main driver in  
15 this plan. And as a main driver, it also  
16 has some pretty significant risks.

17 Just to touch on a few, as I think  
18 everyone knows in this industry, we're faced  
19 with a significant declining revenue due to  
20 the lack of demand or change in demand of  
21 the traditional services in the industry. A  
22 significant portion of FairPoint's revenue  
23 is related to the traditional services. And  
24 I believe that they did reflect in the plan

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 the downward trend. However, there are some  
2 industry analysts that would say that that  
3 downward trend is going to get even more  
4 severe in the next few years or in the  
5 future. So I think that is a significant  
6 portion of the plan.

7 Also, I would -- Mr. Lisciandro's  
8 testimony yesterday, where he referenced  
9 that he did a sensitivity analysis on  
10 revenue, you might recall that he mentioned  
11 that he did not impact the cost of the  
12 business. We take a little bit different  
13 position on that. If we were to do  
14 sensitivity -- and we did not do the  
15 traditional sensitivity testing that Mr.  
16 Lisciandro did. But typically in this  
17 business, the direct cost would move in line  
18 with the decline in revenue. So as the  
19 revenue went up or down, typically the  
20 direct costs would move in the same  
21 direction. However, the operational costs  
22 would not move in the same direction.  
23 That's due to the fact that a large portion  
24 of the direct costs in a business like this,

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 or in FairPoint's case, are fixed costs. Or  
2 as Mr. Newitt mentioned in his testimony on  
3 Monday I believe it was, that 70 to  
4 80 percent of the costs, the operating  
5 costs, are fixed or a step-function cost.  
6 And essentially what that means is they  
7 don't move with the change in revenue. That  
8 kind of gets to the point of, as an example,  
9 a 10-percent miss in revenue, a negative  
10 miss -- meaning under the current plan would  
11 equate to a much greater miss from an  
12 EBITDAR standpoint. And we just draw the  
13 Commission's attention to that, because as  
14 the business, you know, moves forward,  
15 misses in revenue do have a more severe  
16 impact on the EBITDAR and essentially the  
17 cash flow of the business.

18 Another element would be related to how  
19 the company deploys resources. And we  
20 learned in a technical session -- I believe  
21 I can use that information -- we learned in  
22 a technical session with the company that  
23 they had recently built out, developed a  
24 retention effort and also increased

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 significantly the sales force. And we think  
2 both of those initiatives were sound  
3 initiatives and should have a positive  
4 impact on the business. However, we did  
5 not -- we have not been provided to date any  
6 of the specific actions that those new  
7 initiatives in the business would take. So  
8 it's difficult for us to determine what the  
9 real impact would be on revenue.

10 Lastly, I mention that this plan is  
11 largely dependent on the build-out of the  
12 network. And as I think you heard from many  
13 folks that have testified in the last two  
14 days, that a significant portion of the  
15 revenue growth is going to be related to  
16 services that are -- that rely on the  
17 build-out of the infrastructure. So I just  
18 mention that. You know, we assume that the  
19 company will build out as they planned. But  
20 to the extent that does not happen, then  
21 there could be an impact on the services and  
22 the revenue sources that relate to the  
23 build-out.

24 Q. Thank you. Mr. Kessler, over the last two

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 days we've had some discussion about the  
2 credit agreement that you reviewed.

3 A. (Mr. Kessler) I have reviewed that  
4 testimony.

5 Q. Does any of that testimony change your views  
6 about the terms of that credit agreement,  
7 the restrictions on CAPEX, or anything else?

8 A. (Mr. Kessler) No, it does not.

9 MR. JUDD: Thank you. Nothing  
10 further on direct.

11 CHAIRMAN GETZ: Thank you.  
12 Start with Mr. Linder? Have questions for the  
13 panel?

14 MR. LINDER: Yes, I do. Thank  
15 you.

16 **CROSS-EXAMINATION**

17 **BY MR. LINDER:**

18 Q. Good morning, gentlemen. My name is Alan  
19 Linder. I'm with New Hampshire Legal  
20 Assistance, who represent low-income  
21 customers. And my few questions are  
22 actually directed to the pay phone  
23 discussion which appears on Pages 10 and 11  
24 and 14 of the Exhibit 3P, public, which is

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 the supplemental report dated May 17th. And  
2 just going to the fourth paragraph on  
3 Page 11 which was referenced a little  
4 earlier this morning in the direct  
5 testimony, as I understand it, if the  
6 commission pay phone contracts are rejected  
7 and the property owners do not any longer  
8 have any compensation that they would derive  
9 from the commissions that they have been  
10 receiving, then therefore be unwilling to be  
11 comfortable with having the pay phone  
12 continue to remain on their property, that  
13 would result in FairPoint having to remove  
14 those pay phones. Is that my understanding  
15 of what you're saying there?

16 A. (Mr. Gross) I think that should be towards  
17 me --

18 Q. Okay.

19 A. (Mr. Gross) -- since they were my comments.  
20 Well, I wouldn't say that it would say  
21 that FairPoint had to remove the phones.  
22 What I think I said in that document was  
23 that there are a number of motivations for a  
24 property owner to have pay phones on the

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 property. One of them, a significant  
2 motivation, is compensation. To the extent  
3 compensation is removed or eliminated, that  
4 eliminates a motivation.

5 Q. Okay. Thank you for clarifying that.

6 The second sentence in that fourth  
7 paragraph... actually, let me direct your  
8 attention to the conclusions on Page 14, and  
9 the fifth paragraph in the conclusion, to  
10 the paragraph that discusses the pay phones.  
11 And I just wanted to direct your attention  
12 to that. I had a couple questions to see if  
13 you could clarify a couple of statements in  
14 that fifth paragraph. The last sentence  
15 says that... actually, the second sentence  
16 says that -- and I wonder if you could  
17 explain -- "We believe the arrangement...  
18 consisting of maintaining the pay phones  
19 without compensating the site owner will  
20 ultimately have a negative impact on the  
21 phone locations and their usability." And I  
22 wondered if you could explain what you meant  
23 by that.

24 A. (Mr. Gross) What I meant by that was,

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 effectively, that without the commission or  
2 the fee that's paid to a property owner,  
3 they're less motivated to maintain the  
4 phones. And, you know, property owners in  
5 that business -- and I guess I can state for  
6 the record I ran as a CEO a large  
7 independent pay phone company in 1999 and  
8 2000, Davel Communications, headquartered in  
9 Tampa. And without the commission or the  
10 fees that are paid to the property owner,  
11 they're less motivated to maintain the  
12 phone. And again, you know, when you remove  
13 that motivation, they're less likely to  
14 report to the company when the phones are  
15 not operating, when they're not cleaned  
16 properly, coin boxes not maintained and  
17 those type of things. So, again, it is a  
18 motivation. And without having the fees,  
19 property owners are just less inclined to  
20 maintain pay phone locations.

21 Q. Thank you. I apologize, but I have to go  
22 back to Page 11 again.

23 A. (Mr. Gross) That's okay.

24 Q. And it would be again the fourth paragraph.

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 And it's actually the last sentence in which  
2 you made a change with respect to the notice  
3 requirement.

4 But before I ask you about that, I  
5 wanted to ask you about the last clause in  
6 that last sentence, which is that there  
7 could be potential public-interest pay phone  
8 issues as a result of the removal of the pay  
9 phones. I wonder if you could explain what  
10 you meant by that or elaborate.

11 A. (Mr. Gross) Well, I think it's pretty common  
12 knowledge that most of the pay phones now,  
13 other than those that are located and  
14 operated in correctional facilities, most of  
15 the pay phones are in areas where they  
16 provide a backup way of communications, or  
17 sometimes a primary form of communications  
18 for low-income citizens. And to the extent  
19 pay phones are not maintained or not  
20 operable -- operateable -- operable, then I  
21 think, you know, those citizens are  
22 impacted, and could be impacted in a  
23 negative way.

24 Q. Okay. Thank you. As long as we're on that

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 sentence, I just wanted to ask you about the  
2 change that you made earlier this morning,  
3 because the sentence originally referred to  
4 a 30-day notice requirement, and the change  
5 was to make that to a 60-day notice  
6 requirement. And you have looked at the  
7 memorandum of understanding with Legal  
8 Assistance and our client which was marked  
9 as FairPoint Exhibit 3?

10 A. (Mr. Gross) I believe so.

11 Q. Okay. And I have a copy of it.

12 MR. LINDER: May I?

13 CHAIRMAN GETZ: Please.

14 (Mr. Linder hands document to witness.)

15 A. (Mr. Kessler) Mr. Linder, may I take this?

16 I don't recall. I know that I did not  
17 review that document. And I just acquired  
18 it from Mr. Gross. He doesn't recall  
19 reviewing it either. We were advised by the  
20 Commission Staff that it was 60 days. And  
21 that 30 to 60 was a typo on our part.

22 Q. Okay. That's what I'd like to clarify.

23 Because if you look at Page 2 of that  
24 memorandum of understanding, the bottom of

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 the page, you see No. 4 where it says pay  
2 phones?

3 A. (Mr. Kessler) We're reviewing it for the  
4 first time now.

5 Q. Okay.

6 (Witness reviews document.)

7 Q. I just want you to confirm, having read it  
8 for the first time, that there it says 30  
9 days' notice, advance notice in writing to  
10 the Staff and the OCA and the New Hampshire  
11 Legal Assistance. Do you see that?

12 A. (Mr. Kessler) I see it. That's what the  
13 document says in fact, yes.

14 Q. Okay. I'm not saying that your change was  
15 inaccurate or incorrect. And I don't know  
16 if you're familiar with the statute. And  
17 I'm not asking for a legal conclusion, but I  
18 just want the record to be clear that --  
19 have you looked at the New Hampshire statute  
20 that deals with public-interest pay phones  
21 that says --

22 A. (Mr. Kessler) I have not.

23 A. (Mr. Gross) I have not, either.

24 Q. I'm sorry?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Gross) I have not.

2 Q. Okay. The statute number is R.S.A.

3 374:22-Q. And I'm just going to show it to  
4 you, with counsel's permission, and just  
5 show you a sentence in there. And I'm only  
6 doing this to make the record clear.

7 MR. JUDD: Thank you.

8 (Discussion among counsel).

9 MR. JUDD: Go ahead. That's  
10 fine.

11 MR. LINDER: Thank you.

12 BY MR. LINDER:

13 Q. I know you're looking at this for the first  
14 time. And I'm only doing this to clarify  
15 the record. Roman numeral three of the  
16 statute that I just cited, if you could just  
17 look at it, and then I'll ask you a  
18 question.

19 (Witness reviews document.)

20 CHAIRMAN GETZ: Mr. Linder, do  
21 we want to get this into the record, have them  
22 read it out loud?

23 MR. LINDER: I was going to  
24 ask if that could be done.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 CHAIRMAN GETZ: Please.

2 MR. LINDER: Okay. Thank you.

3 A. (Mr. Kessler) Do you want me to read a  
4 portion of it into the record or -- which  
5 portion?

6 Q. If you would be kind enough to do that,  
7 starting with this sentence and then ending  
8 here, or wherever you wish to end.

9 (Counsel indicates.)

10 A. (Mr. Kessler) Okay. I'm reading from the  
11 cited statute, and it says, "The provider  
12 shall notify the Commission and the owner at  
13 least 60 days prior to removal. Posting  
14 notice on the pay phone at least 30 days  
15 prior to removal shall constitute adequate  
16 public notice."

17 Q. Thank you. And the last item that I wanted  
18 to ask about is in the conclusions on Page  
19 14, that fifth paragraph that we referred to  
20 earlier. Has a recommendation in it in the  
21 last sentence of the fifth paragraph. And I  
22 just wondered if you could clarify that  
23 which says, "In our opinion, a potential  
24 solution would be to sell the pay phone

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 business line to a suitable pay phone  
2 operator." And it's unclear to me, and  
3 maybe you could clarify this. Are we  
4 talking about the 1800 pay phones in New  
5 Hampshire? Are we talking about the 786  
6 commission pay phones in the three northern  
7 New England states? Are we talking about  
8 only the 153 commission pay phones in New  
9 Hampshire, which were those 153 were  
10 rejected? It's not clear to me which ones  
11 we're referring to here.

12 A. (Mr. Gross) First of all, I'm not sure I'd  
13 characterize that as a recommendation. But  
14 in any event, it was my comment. And my  
15 rationale for the comment: It is a  
16 potential solution. And my reference was to  
17 the entire pay phone business. And just as  
18 a solution for FairPoint, to the extent that  
19 they did not believe they could provide the  
20 proper focus, attention or, you know,  
21 financial or human resources to manage that  
22 business, there is a market for pay phones.

23 Q. Okay. And my last question is, then, with  
24 respect to that suggestion that you've made,

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1           how would one -- if a sale of the pay phone  
2           business were to occur -- I know that Mr.  
3           Nixon testified that there is no intent to  
4           do that. But if such a sale were to occur,  
5           how would one implement the pay phone  
6           commitments in the memorandum of  
7           understanding which is in front of you,  
8           which, for example, requires notice and  
9           commitments with respect to public-interest  
10          pay phones? How would one make sure or be  
11          able to assure that that's implemented by  
12          the new owner?

13        A.    (Mr. Gross) Finished? Okay. Well, first of  
14           all, I would assume that, to the extent that  
15           Mr. Nixon did make a decision, or the  
16           company made a decision to sell the pay  
17           phone business, that they would typically  
18           target a current pay phone operator and --  
19           you know, in the states where the pay phones  
20           exist, which would then imply that that pay  
21           phone operator is then regulated, however  
22           they are now regulated in the states where  
23           the pay phones locations exist.

24        Q.    Well, thank you for clarifying that. I have

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 no further questions. Thank you gentlemen  
2 very much.

3 A. (Mr. Gross) Welcome.

4 CHAIRMAN GETZ: Thank you.

5 Mr. Kennan? Questions?

6 MR. KENNAN: Yes. Thank you,

7 Mr. Chairman.

8 **CROSS-EXAMINATION**

9 **BY MR. KENNAN:**

10 Q. Good morning, gentlemen.

11 A. (Witness Panel) Good morning.

12 Q. I'd like to be sure that I understand your  
13 role. Would you please describe your  
14 relationship with the Staff.

15 A. (Mr. Kessler) We are -- we were retained to  
16 assist the Non-Advocate Staff in conducting  
17 their review and analysis and making  
18 findings and recommendations to the  
19 Commission with regard to the company's  
20 requested actions.

21 Q. And these findings and recommendations, are  
22 they contained in your reports, as well as  
23 what you might say on the stand today?

24 A. (Mr. Kessler) That's correct.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. I'd like to ask a couple of clarifying  
2 questions, or at least which I hope will  
3 clarify things for me.

4 Would you look at Page 6 of your  
5 original report. That's Non-Advocate  
6 Staff 2.

7 A. (Mr. Kessler) Okay.

8 Q. And in the paragraph near the top that says  
9 No. 2, network access, about on the third  
10 and fourth lines there's a reference to "as  
11 switched access minutes of use across the  
12 network declines and rates per minute  
13 decrease." are you talking about switched  
14 access rates there?

15 (Witness reviews document.)

16 A. (Mr. Gross) No, I don't believe it was  
17 rates. This language was actually -- I  
18 believe this is language we -- was from the  
19 10-Q for the third quarter. So this was  
20 language provided by the company to explain  
21 the elements and how network access fees are  
22 derived, or revenue is derived.

23 Q. So do you know what rates per minute are  
24 being referred to there?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Gross) I assume it's the standard rates  
2 per minute.

3 Q. To end users?

4 A. (Mr. Gross) I believe it would be to all end  
5 users.

6 Q. Well, let me ask you perhaps more directly.  
7 In anything that you've reviewed, did you  
8 see references to plans by the company to  
9 alter switched access rates?

10 A. (Mr. Gross) I did not.

11 Q. Would you take a look at Page 8 of  
12 Non-Advocate Staff 2, Exhibit 2, please, and  
13 specifically Paragraph 2 near the top,  
14 reduction in head count due to the decrease  
15 in cutover issues over time. Then I'm going  
16 to ask you to compare that statement to a  
17 statement on Page 18 of the same exhibit,  
18 please, which is in the first full paragraph  
19 that begins "other operating expenses." And  
20 the statement is, "The projections assume  
21 that all integration and cutover costs are  
22 eliminated in 2010."

23 Are those two statements related, the  
24 statement on Page 8 and the statement on

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Page 18?

2 (Witness reviews document.)

3 A. (Mr. Gross) I guess the answer to that could  
4 be a yes and no.

5 Q. Could you explain, please.

6 A. The reduction in head count was actually  
7 related to information we received in our  
8 technical session from Mr. Newitt. He  
9 provided a detailed expense-reduction list,  
10 which included some fairly significant  
11 changes in head count. And so based on  
12 that, and based on the time frame, I guess  
13 you could say that they were related, that  
14 the projections assumed that all the  
15 integration cutover costs were eliminated.  
16 And it would be in 2010, because that's the  
17 planned projections.

18 Q. Would you look at Page 16 of Non-Advocate  
19 Staff Exhibit 2, please. And in the first  
20 full paragraph at the top you cite as  
21 drivers of revenue decline, competition and  
22 service degradation. Do you see that?

23 (Witness reviews document.)

24 A. Yes.

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. And the competition that you cite is from  
2 other wireless services, competitive local  
3 exchange carriers, cable operators and  
4 alternative technologies. And I'd like to  
5 focus on that a little bit.

6 From the point of view of FairPoint's  
7 revenue, all competition is not created  
8 equal, is it?

9 A. (Mr. Gross) Were you asking a question?

10 Q. Yes.

11 A. (Mr. Gross) I don't think I can answer on  
12 behalf of FairPoint. I guess I would say  
13 from our -- from my opinion, I would think  
14 that's a fair statement, because local  
15 exchange carriers are in one degree  
16 competitors and one degree a customer.

17 Q. Well, that's exactly the point I wanted to  
18 get at. Let's say FairPoint has a retail  
19 end-user customer, and it loses that  
20 customer to a wireline CLEC that uses  
21 FairPoint's facilities. Okay? Now, in that  
22 situation, would you agree that FairPoint  
23 would lose the retail revenue associated  
24 with that end user?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Gross) From a net perspective, no,  
2 because they would essentially become -- if  
3 the CLEC is a FairPoint CLEC, then naturally  
4 it would be -- then that customer would  
5 effectively become a customer of the CLEC.  
6 Is that where you're headed?

7 Q. FairPoint would lose the retail revenue, but  
8 it might pick up wholesale revenue; is that  
9 correct?

10 A. (Mr. Gross) Right. That's my -- that's how  
11 I believe it worked.

12 Q. Now contrast that situation with the  
13 FairPoint retail customer bolting for a  
14 cable provider. What is the effect there on  
15 FairPoint's revenue?

16 A. (Mr. Gross) They lose the retail revenue.

17 Q. Would they pick up any wholesale revenue in  
18 that situation?

19 A. (Mr. Gross) Not in that case.

20 Q. Now let's posit the situation of the retail  
21 customer of a wireline CLEC that uses  
22 FairPoint's facilities, such as my client,  
23 Otel Telekom. If the customer of the  
24 retail -- if the retail customer of the

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 wireline CLEC leaves the wireline CLEC for  
2 the cable company, in that case would  
3 FairPoint lose the wholesale revenue  
4 associated with that customer?

5 A. (Mr. Gross) Let me make sure, because I'm  
6 not familiar with all of the CLEC  
7 relationships with FairPoint. If what  
8 you're saying is if the customer left the  
9 CLEC for a competitor which is not  
10 FairPoint, would they consider that a loss  
11 of revenue? Is that essentially the  
12 question?

13 Q. Maybe. No. Let me try to rephrase.

14 A. I don't have an answer to --

15 Q. Let me try to rephrase that. I'll be very  
16 specific.

17 Let's say there's a wireline CLEC that  
18 is providing service to a retail customer  
19 using a UNE loop provided by FairPoint. In  
20 that case, the wireline CLEC is paying  
21 wholesale prices to get that UNE loop; is  
22 that correct?

23 A. (Mr. Gross) That's my understanding.

24 Q. Okay. Now, that customer decides to switch

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 providers, and it goes to a cable company.

2 Would it be safe to assume in that case that  
3 the wireline CLEC would discontinue paying  
4 the price of the UNE loop to FairPoint?

5 A. (Mr. Gross) I would assume so. I mean, it's  
6 a loss of a customer. So my assumption is  
7 that they would essentially lose the  
8 revenue.

9 Q. FairPoint would lose the revenue?

10 A. (Mr. Gross) That's my assumption.

11 Q. And if FairPoint provided poor service to  
12 the wholesale customer -- the wholesale  
13 customer -- such that that motivated the  
14 CLEC's retail customer to bolt to the cable  
15 company, would that result in that same loss  
16 of revenue to FairPoint?

17 A. (Mr. Gross) Well, I think no matter what the  
18 reason was for the loss of customer, whether  
19 it be competitive service, rate differences  
20 or whatever, it would be a loss of revenue.

21 Q. And if FairPoint raised rates to the CLEC,  
22 such that this rate difference that you just  
23 referred to was created, such that the  
24 customer then left for the cable company,

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 would that result in a loss of revenue to  
2 FairPoint?

3 A. (Mr. Gross) I believe it would.

4 Q. So it's in FairPoint's economic interest to  
5 provide very good service to its wholesale  
6 customers, isn't it?

7 A. I would assume so, yes.

8 Q. And it's in FairPoint's economic interest  
9 not to raise the prices to wholesale  
10 customers too much, so that it results in  
11 the rate differences that you were just  
12 referring to?

13 A. (Mr. Gross) In my opinion, that would be  
14 correct.

15 Q. Can I ask you to turn at this point to  
16 exhibit Non-Advocate Staff 3, which is your  
17 supplemental report. You've got the -- I'm  
18 looking at the discussion of the success  
19 bonus plan.

20 A. (Mr. Gross) Page 5.

21 Q. Now, am I correct -- well, let me withdraw  
22 that.

23 Do you understand that the success  
24 bonus plan focuses in part on three specific

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 service-quality measurements?

2 A. (Mr. Kessler) I do.

3 Q. And each of those three measurements drives  
4 11 percent of the participant's potential  
5 bonus under the success bonus plan?

6 A. (Mr. Kessler) That's the way I understand  
7 the plan to work.

8 Q. And if those metrics or measurements,  
9 service-quality measurements improve, the  
10 participant will receive the bonus  
11 associated with the achievement of those  
12 metrics?

13 A. (Mr. Kessler) Correct. Once they pass a  
14 certain threshold, as I understand the plan.

15 Q. Now, there are many more service-quality  
16 metrics to which the company is subject. Do  
17 you understand that?

18 A. (Mr. Kessler) I do.

19 Q. And if those other metrics other than the  
20 three improve, that has no effect upon the  
21 achievements of the success bonus plan?

22 A. (Mr. Kessler) That's correct. Well, it's  
23 correct directly. It's not correct  
24 indirectly. Because those service-quality

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 metrics will also drive the company's  
2 ability to keep and earn revenue and to  
3 raise EBITDAR. And EBITDAR -- meeting  
4 certain EBITDAR targets constitutes the  
5 majority of the success bonus plan.

6 Q. But there are a lot of other factors that go  
7 into achieving EBITDAR; is that correct?

8 A. There's always other factors in everything  
9 we do in life.

10 Q. And the achievement of the service-quality  
11 metrics is only a part of the achievement of  
12 EBITDAR; is that correct?

13 A. (Mr. Kessler) That's correct.

14 CHAIRMAN GETZ: Mr. Kessler,  
15 could you draw the microphone closer.

16 MR. KESSLER: Oh, I'm sorry.  
17 I wasn't taking my own advice and speaking to  
18 you.

19 BY MR. KENNAN:

20 Q. Now, the purpose of a bonus plan -- would  
21 you agree that the purpose of a bonus plan  
22 is to motivate someone to achieve the goals  
23 of the plan?

24 A. (Mr. Kessler) In this case, the success

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 bonus plan was to motivate people to achieve  
2 the plan and to stabilize management during  
3 a very disruptive period in the company's  
4 history.

5 Q. And the bonus plan provides a reward for  
6 behavior that is deemed desirable?

7 A. (Mr. Kessler) Correct. And for achieving  
8 certain specific results related to  
9 emergence from bankruptcy.

10 Q. Now, on the flipside, would you agree that  
11 one could develop a plan to penalize  
12 behavior that's deemed inappropriate or  
13 undesirable?

14 A. (Mr. Kessler) Certainly there are carrots  
15 and sticks used in every business.

16 Q. And the stick part of that would involve  
17 some sort of penalty for behavior that is  
18 deemed undesirable or inappropriate?

19 A. (Mr. Kessler) Such as not earning the bonus.

20 Q. Or not achieving the underlying results that  
21 lead to the bonus.

22 A. (Mr. Kessler) That's the result. That's not  
23 the incentive.

24 Q. Such a situation -- would you agree with me

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 that, the higher the penalty, the greater  
2 the incentive to behave appropriately?

3 A. (Mr. Kessler) Not necessarily.

4 Q. Would that be a factor that would enter into  
5 it?

6 A. (Mr. Kessler) Could be. I don't pretend to  
7 be a psychologist. So I can't tell you  
8 whether -- you know, where those points are.

9 Q. Are you aware of the performance assurance  
10 plan, or PAP that governs FairPoint's  
11 service quality to its wholesale customers?

12 A. I'm aware that it exists. I really am not  
13 familiar with its details.

14 Q. Are any of the three of you aware of it?

15 A. (Mr. Gross) Again, aware of it, but not  
16 familiar with the intricate details.

17 Q. Would you turn to Page 15 of your  
18 supplemental testimony, Non-Advocate Staff  
19 Exhibit 3. I'm sorry. Withdraw that,  
20 please.

21 Would you turn to paragraph -- I mean  
22 Page 2 of your supplemental testimony. I  
23 detect a certain lack of confidence on your  
24 part regarding the details of FairPoint's

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 financial and operational plans. Would that  
2 be a fair statement?

3 A. (Mr. Gross) Are you referring to specific  
4 language?

5 Q. Yes. I'm looking in particular at the third  
6 full paragraph on Page 2.

7 (Witness reviews document.)

8 A. (Mr. Gross) Well, I would say we reviewed  
9 the plan, understand the logic in the plan.  
10 Having been an operator for most of my  
11 career, I believe the plan is solid. The  
12 logic is reasonable. And I believe the  
13 projections of the plan are reasonable.

14 What we're referring to here is we were  
15 not provided information on specific actions  
16 that would be taken to achieve such a thing  
17 as revenue -- such things as revenues. We  
18 understand the logic on how the information  
19 and financial results or the financial  
20 projections were derived. But we were not  
21 provided specifics. So as you get more  
22 specifics on exactly how the achievement of  
23 revenue will be attained, then you build  
24 more confidence in the plan.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. Well, in the third paragraph on Page 2, you  
2 refer to, as I understand it, repeated  
3 requests for information which were not  
4 fulfilled. Was the company not forthcoming?

5 A. (Mr. Gross) No, I wouldn't say the company  
6 was not forthcoming. What we asked for  
7 were -- was information on specific actions  
8 related to how they would deploy resources  
9 to achieve revenue projections. They  
10 provided, you know, their response to that  
11 request. I think those responses can come  
12 in many different forms and fashions. And  
13 in my opinion, the responses were not  
14 specifically detailed. They were  
15 directional and, you know, seemed  
16 reasonable, but there weren't specific  
17 actions related to those responses.

18 Q. Do you think they just haven't figured it  
19 out yet?

20 A. (Mr. Gross) No, I wouldn't say that.

21 Q. You just didn't get the information.

22 A. (Mr. Gross) Well, I think it -- you know,  
23 the process they're in is kind of a fluid  
24 process. And, you know, I think we were

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 provided reasonable information, not to the  
2 level of detail that we would have liked,  
3 and that's why we made the statements that  
4 we did in our report, that we based our  
5 conclusions on the information that was  
6 provided.

7 Q. What happens if FairPoint does not meet its  
8 revenue projections?

9 A. (Mr. Gross) I think it's a degree of  
10 magnitude. You know, if they miss the  
11 revenue -- I think Mr. Lisciandro did a  
12 sensitivity analysis, which was a very  
13 reasonable approach with the information  
14 that he was provided. He's obviously an  
15 expert in that field. And he tested the  
16 revenue at various levels. I mean, it's a  
17 degree of magnitude. You know, if the  
18 company misses revenue by a 10-percent  
19 level, there are ways that they can adjust  
20 the business and the operating expenses of  
21 the business to derive the same result from  
22 an EBITDAR standpoint.

23 Q. You think there would be pressure on the  
24 company at that point to increase revenues?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Kessler) I think there would be  
2 pressure on the company to do a lot of  
3 things.

4 A. (Mr. Gross) No, I think the pressure on the  
5 company is -- you know, in a business like  
6 this, there are a lot of pressure points,  
7 and there are a lot of different actions  
8 that you can take based on the condition  
9 that the business is in. So I would -- you  
10 know, I would say that the business has to  
11 do what the business has to do. And it can  
12 reduce expenses, renegotiate contracts. It  
13 can, you know, effect rates. I think it  
14 really depends on the nature of where the  
15 business is at the time.

16 Q. Might one of those possibilities of the "lot  
17 of things" the company would be under  
18 pressure to do would be to increase  
19 wholesale rates?

20 A. (Mr. Kessler) Not necessarily. You know,  
21 depending upon the elasticity of demand and  
22 what the competitive landscape looks like,  
23 it could well be that it would be under  
24 pressure to reduce rates.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. Reduce wholesale rates?

2 A. (Mr. Kessler) Reduce any rates in order to  
3 attract customers.

4 Q. Now I'd like to ask you to go back to  
5 Page 15, please.

6 A. (Mr. Gross) Of the supplemental?

7 Q. Supplemental, yes. Exhibit 3. I'm looking  
8 specifically at the very last recommendation  
9 regarding retaining a monitor.

10 In your recommendation regarding a  
11 monitor, are you confining that  
12 recommendation to one single monitor?

13 A. (Mr. Gross) You mean one single measurement?

14 Q. No, one single monitor. It says "retain a  
15 monitor."

16 A. (Mr. Gross) No. No, we were not.

17 Q. Do you mean to suggest that the company  
18 should retain such monitors as are necessary  
19 to monitor the implementation of all steps  
20 taken by FairPoint to achieve the revenue  
21 projections and operational improvements?

22 A. (Mr. Gross) The intent in that request was  
23 to provide the Commission an opportunity to  
24 monitor the progress once FairPoint emerges

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 from bankruptcy.

2 Q. Would the progress include improving the  
3 operational aspects of FairPoint's service  
4 to its wholesale customers, in your opinion?

5 A. (Mr. Gross) I believe that would be one of  
6 the measurements used to monitor progress.

7 Q. Are you aware of the Liberty Consulting  
8 Group's role as an independent monitor in  
9 connection with the cutover issues?

10 A. (Mr. Gross) Yes, I am.

11 Q. Is that the sort of monitor you had in mind?

12 A. (Mr. Gross) General concept, possibly. But  
13 I think the measurements might be somewhat  
14 different.

15 Q. Okay. Would monitoring FairPoint's steps  
16 taken to improve the operational aspects of  
17 its relationship with its wholesale  
18 customers be a valuable function, in your  
19 opinion?

20 A. (Mr. Gross) Obviously it would be, since  
21 wholesale customers are a pretty significant  
22 portion of FairPoint's revenue.

23 MR. KENNAN: Nothing further,

24 Mr. Chairman. Thank you.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 CHAIRMAN GETZ: Thank you.

2 Ms. Mullholand?

3 MS. MULLHOLAND: Yes. Thank  
4 you. Kath Mullholand for segTEL. In the absence  
5 of my attorney, I'd request permission of the  
6 Commission to ask questions.

7 **CROSS-EXAMINATION**

8 **BY MS. MULLHOLAND:**

9 Q. Looking at your reports, there are  
10 references to wholesale revenue. Did you  
11 evaluate at all FairPoint's compliance with  
12 their wholesale obligations to date?

13 A. (Mr. Kessler) No, we did not.

14 A. (Mr. Gross) No.

15 Q. Thank you. And on Page 2 of your  
16 supplemental report, Exhibit 3, Mr. Kennan  
17 was asking you some questions about the fact  
18 that you were not provided with specifics  
19 that allowed you to validate the company's  
20 logic in its plans, I think is what you  
21 said. What independent work did Accion  
22 perform to validate the feasibility of  
23 FairPoint's assumptions?

24 A. (Mr. Gross) We did really not provide

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 independent work. We reviewed the financial  
2 information provided in the plan. Well, we  
3 also reviewed all public -- oh, I'm very  
4 sorry.

5 (Cell phone ringing.)

6 A. (Mr. Gross) -- All public documents. Public  
7 documents and filings for the previous 18  
8 months.

9 A. (Mr. Kessler) We also reviewed data requests  
10 and participated in technical sessions with  
11 the company's management.

12 Q. And the public filings would include SEC  
13 filings?

14 A. (Mr. Gross) Yes, they would.

15 Q. Okay. Thank you.

16 CHAIRMAN GETZ: Ms. Geiger?

17 MS. GEIGER: I don't have any  
18 questions, Mr. Chairman. Thank you.

19 CHAIRMAN GETZ: Thank you.

20 Let's see. Mr. McHugh?

21 MR. McHUGH: No questions, Mr.  
22 Chairman.

23 CHAIRMAN GETZ: And

24 Ms. Hollenberg?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 MS. HOLLENBERG: No questions.

2 Thank you.

3 CHAIRMAN GETZ: And then

4 Mr. Roth.

5 MR. ROTH: Thank you. I have  
6 a few questions.

7 **CROSS-EXAMINATION**

8 **BY MR. ROTH:**

9 Q. Gentlemen, do you have before you the  
10 regulatory settlement agreement, a copy of  
11 that?

12 A. (Mr. Gross) I do not.

13 A. (Mr. Kessler) I do not.

14 MR. ROTH: Would you mind  
15 providing them a copy of it?

16 (Discussion between counsel)

17 CHAIRMAN GETZ: Now, just the  
18 issue of, I think, for the court reporter being  
19 able to capture cross-talk between the attorneys  
20 on some of this --

21 I don't know, Sue, if you  
22 managed --

23 MR. JUDD: I'll clarify that.

24 I simply showed the copy of the document to

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Attorney Roth because there are some  
2 highlightings on it, and I wanted to make certain  
3 he was comfortable that it was clean enough to  
4 provide to the witness.

5 CHAIRMAN GETZ: Thank you.

6 (Atty. Judd hands document to witness.)

7 BY MR. ROTH:

8 Q. Okay. Right now you're looking at what's  
9 been labeled FairPoint Exhibit 4, the  
10 post-filing regulatory settlement. And I'd  
11 like to call your attention -- and I suppose  
12 it would be you, Mr. Kessler, since you're  
13 sitting closest to me -- to 1.1 of that  
14 agreement.

15 A. (Mr. Kessler) 1.1?

16 Q. Yes. If you look at the last sentence in  
17 Paragraph 1.1 --

18 CHAIRMAN GETZ: Mr. Roth, I  
19 think you may need to get the microphone a little  
20 closer.

21 BY MR. ROTH:

22 Q. The last sentence in Paragraph 1.1, if you  
23 would read that for us, please?

24 A. The sentence beginning with, "The parties

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 agree further" --

2 Q. That's correct.

3 A. -- "that the obligations set forth in this  
4 regulatory settlement shall be the only  
5 obligations sought by the parties with  
6 respect to one another with respect to any  
7 change of control proceeding or with respect  
8 to the plan, and that such obligations shall  
9 be binding on the parties only once the  
10 terms of the [sic] regulatory settlement are  
11 approved by the Commission and upon the  
12 effective date of the plan."

13 Q. Okay. Thank you. And would you look at  
14 Paragraph 1.2 of that exhibit.

15 A. (Mr. Kessler) I'm there.

16 Q. And if you would be kind enough to find, I  
17 believe it would be the second sentence  
18 which begins with "Such approvals..."

19 A. (Mr. Kessler) Such approval -- yeah.

20 Q. Would you read that for us, please.

21 A. (Mr. Kessler) "Such approvals shall  
22 incorporate the terms of the [sic]  
23 regulatory settlement and shall [sic] not  
24 include additional substantive new

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 conditions."

2 Q. Okay. And then turning to -- I'll just ask  
3 you to confirm with me. You don't have to  
4 read these. But is it -- have you  
5 previously reviewed this document?

6 A. (Mr. Kessler) Yes, I have.

7 Q. Okay. Just if you wish to, you can refresh  
8 your recollection about it by reading 1.3  
9 and 1.4 for yourself. But I'll just ask  
10 you, is it your understanding that, in  
11 essence, those two paragraphs require that  
12 essentially we have a completed record  
13 within 90 days of filing a completed  
14 application, and we have a decision within  
15 120 days of the completed application? Is  
16 that your understanding of how those two  
17 work?

18 A. Yes, I agree that that's what that says.

19 Q. Thank you. And now, also looking at 1.4, I  
20 would actually like you to read the last  
21 sentence of 1.4.

22 A. (Mr. Kessler) That the parties shall use  
23 reasonable efforts to --

24 Q. No, that's the penultimate. The last

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 sentence is, "If the Commission has  
2 approved" --

3 A. (Mr. Kessler) Oh, I see where it's -- "If  
4 the Commission has approved the regulatory  
5 settlement and change in control, subject to  
6 the plan being subsequently confirmed,  
7 neither party may void the terms of the  
8 regulatory settlement or any approval or  
9 change" -- of the change of control."

10 Q. Okay. And if -- is it your understanding  
11 that, based on 1.4, that neither FairPoint  
12 nor the Staff Advocates can void the  
13 regulatory settlement once it's been  
14 approved by the Commission?

15 A. (Mr. Kessler) That's what the parties to the  
16 regulatory settlement have agreed, yes.

17 Q. Okay. And from your review of that  
18 document, do you know of any other way for  
19 the parties to get out of it?

20 A. (Mr. Kessler) Not for FairPoint or -- the  
21 Advocate Staff?

22 Q. Correct.

23 A. (Mr. Kessler) I do not.

24 Q. Okay. Now, in 1.5 -- and there's a lot

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1           there.  But if you wish, you can reflect --  
2           you can refresh your recollection.  But  
3           would you agree with me that 1.5 provides  
4           that if somebody tries to get out, or if the  
5           agreement is voided, essentially everybody  
6           reserves all their rights to fight it all  
7           out at the bankruptcy court, or elsewhere if  
8           necessary, after trying to get out -- after  
9           getting out?

10          A.    (Mr. Kessler) The parties to this agreement  
11           have that right, yes.

12          Q.    That's correct.

13          A.    (Mr. Kessler) Yeah.

14          Q.    Okay.  Now, turning to Article 4.

15          A.    (Mr. Kessler) Okay.

16          Q.    Got to get there myself.

17          A.    (Mr. Kessler) I'm there.

18          Q.    Okay.  Now, looking at 4.2, is it your  
19           understanding that under Article 4. that the  
20           new FairPoint board of direction --  
21           directors is going to appoint a regulatory  
22           subcommittee which is going to be charged  
23           with, quote, monitoring compliance with the  
24           2008 order, as amended by this regulatory

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 settlement, and all regulatory matters  
2 involving the states?

3 A. (Mr. Kessler) I do.

4 Q. Okay. And if you look at Paragraph 4.5,  
5 isn't that what we call the "most favored  
6 nation clause"?

7 A. (Mr. Kessler) It's what you call a "most  
8 favored nations clause." I believe there's  
9 some room in there for interpretation.

10 Q. Okay. And 4.7, I'd like you to actually  
11 look at 4.7. And really, nobody's talked  
12 about this one yet. But I would like you to  
13 read 4.7 for us, if you wouldn't mind.

14 A. (Mr. Kessler) It says, "The parties agree to  
15 support the [sic] regulatory settlement and  
16 the application for a change of control and  
17 not take any action in any case or  
18 proceeding involving FairPoint that would  
19 breach or violate the terms set forth in the  
20 [sic] regulatory settlement for so long as  
21 this regulatory settlement is in force."

22 Q. Okay. So if -- just thinking about that for  
23 a second, the parties would include  
24 FairPoint; correct?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Kessler) Yes.

2 Q. All right. And -- all right. And then the  
3 last one I want you to look at is 4.9. And  
4 just, if you can, just tell us what you  
5 think 4.9 is supposed to say. Obviously,  
6 this is -- you're allowed to paraphrase and  
7 provide your own interpretation. In  
8 particular, the first sentence I think is  
9 really the gist of it.

10 (Witness reviews document.)

11 MR. KENNAN: Objection, Mr.  
12 Chairman. Is he calling for the witness to offer  
13 a legal conclusion?

14 CHAIRMAN GETZ: Are you  
15 calling for the witness to offer a legal  
16 conclusion?

17 MR. ROTH: I'm just asking him  
18 to paraphrase what 4.9, first sentence,  
19 essentially says. A legal conclusion I think is  
20 beyond his expertise. I'll submit to -- I'll  
21 agree with that.

22 A. (Mr. Kessler) What it essentially says is  
23 that FairPoint has made some representations  
24 to the parties to this agreement with regard

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 to the new term loan and the revolving  
2 credit facility.

3 Q. Doesn't it in fact say that any new term  
4 loan agreement or new revolving facility  
5 will contain substantially the same material  
6 terms and conditions as were in the plan  
7 support agreement on file back in October?

8 A. (Mr. Kessler) That's what the words say,  
9 yes.

10 Q. Okay. Thank you.

11 Now, you previously testified -- and  
12 forgive me. I can't remember whether it was  
13 you, Mr. Kessler, or Mr. Gross -- that you  
14 reviewed all the public documents and  
15 filings in the case; is that correct?

16 A. (Mr. Gross) Yes.

17 Q. Have you reviewed the bankruptcy docket and  
18 the pleadings filed in the bankruptcy?

19 A. (Mr. Gross) No.

20 A. (Mr. Kessler) No.

21 Q. So you weren't aware that in the early part  
22 of the case the three states objected to and  
23 obtained modifications to an order that was  
24 sought by the debtor looking to essentially

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 stay regulatory actions and that that order  
2 was modified to include a reservation of  
3 rights that the states could continue to  
4 regulate during the case? You didn't read  
5 that pleading?

6 A. (Mr. Kessler) We did not.

7 Q. Okay. And did you read the stipulations  
8 that were entered into a couple of times by  
9 the states and the debtors reserving rights  
10 to object to various issues upon  
11 confirmation and the confirmation order?

12 A. (Mr. Kessler) We did not. We were not asked  
13 to review that part of the record.

14 Q. And you did not review the stipulation which  
15 provided that the states could file proofs  
16 of claim if in fact the debtor took a veer  
17 to the wrong direction and decided to treat  
18 the states' claim --

19 A. (Mr. Kessler) No.

20 Q. -- the states' positions as claims?

21 A. (Mr. Kessler) We did not.

22 Q. Okay. And so you're not aware that, in  
23 fact, we have until sometime shortly before  
24 the confirmation hearing to object to the

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 confirmation; correct?

2 A. (Mr. Kessler) I was not aware of that. But  
3 I don't -- I'm not surprised if that's the  
4 case. But by the same token, Mr. Roth, I'm  
5 not sure that any of that is true. But I'm  
6 not denying that or doubting that what  
7 you're telling me is in fact the case.

8 Q. Okay. I understand. You just haven't  
9 looked at it.

10 A. (Mr. Kessler) I haven't looked at it.

11 Q. Okay. Now, I calling your -- you did, I  
12 hope, review the amended plan of  
13 reorganization?

14 A. (Mr. Kessler) Absolutely.

15 Q. Okay.

16 MR. ROTH: This is FairPoint  
17 Exhibit 16.

18 MR. JUDD: Thank you.

19 MR. McHUGH: That's okay.

20 (Mr. Roth hands document to witness.)

21 BY MR. ROTH:

22 Q. Mr. Kessler, I'm showing you what has been  
23 identified as FairPoint Exhibit 16, which I  
24 will represent to you is a page from the

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Chapter 11 Reorganization Plan dated  
2 March 10 that was filed in the case. Now, I  
3 assume that you're aware that there has  
4 since been a second amended, modified plan,  
5 which I'm not sure is actually an exhibit in  
6 the case, but... well, let's go with this  
7 document, with FairPoint 16.

8 Would you read for the record and for  
9 our ears Paragraph 8.1 on that page. It's  
10 on both the front and the back.

11 A. (Mr. Kessler) The implement -- the section  
12 is means of implementation of the plan.  
13 Section 8.1 says --

14 (Court Reporter interjects.)

15 MR. KESSLER: I'll have Ray do  
16 it.

17 A. (Mr. Gross) "Means of implementation of the  
18 plan, 8.1, regulatory settlements. As  
19 provided herein, pursuant to Section 1123 of  
20 Bankruptcy Code and Bankruptcy Code  
21 Rule 9019, and in consideration for the  
22 settlements and compromises set forth in the  
23 regulatory settlements, upon the effective  
24 date, the provisions of the plan shall

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 constitute a good-faith compromise and  
2 settlement of all claims and controversies  
3 resolved pursuant to the regulatory  
4 settlements. The entry of" -- did you want  
5 me to go on further?

6 Q. Yes, please.

7 A. (Mr. Gross) "The entry of the confirmation  
8 order shall constitute the bankruptcy  
9 court's findings and determination that the  
10 regulatory settlements reflected in the plan  
11 are in the best interests of FairPoint and  
12 its estates; fair, equitable and  
13 reasonable" -- I'm sorry -- "fair, equitable  
14 and reasonable; made in good faith and  
15 approved by the bankruptcy court. Subject  
16 to obtaining the approval of the settlements  
17 reflected in the plan by the bankruptcy  
18 court on the effective of date, reorganized  
19 FairPoint will take all actions necessary or  
20 reasonable" -- "reasonably required to  
21 effectuate such settlements, and such  
22 settlements shall be binding on reorganized  
23 FairPoint."

24 Q. Okay. Thank you.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1                   CHAIRMAN GETZ: Mr. Roth, let  
2 me just note that the modified second amended  
3 joint plan of reorganization is in the record as  
4 FP 19, and it appears that the language that's  
5 just been read is identical to --

6                   MR. ROTH: Thank you.

7                   CHAIRMAN GETZ: -- that  
8 Section 8.1.

9                   MR. ROTH: Thank you for that.  
10 I was missing that page of the exhibit list.  
11 Sorry. My exhibits didn't go that far, or at  
12 least I didn't know. I appreciate that.

13 BY MR. ROTH:

14 Q. Now, are you gentlemen aware that the  
15 plan -- that there's already been one  
16 confirmation hearing on a plan of  
17 reorganization?

18 A. (Mr. Kessler) I was.

19 Q. And that the only remaining issue for  
20 confirmation, as far as I know, and perhaps  
21 maybe as far as you know, is the approval of  
22 the regulatory settlements by the states?

23 A. (Mr. Kessler) I knew that that was still an  
24 issue that needed to be resolved. I did not

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 know whether there whether other issues. I  
2 thought there were some claims issues still  
3 outstanding as well.

4 Q. Okay. Fair enough. But we understand that  
5 one of the primary issues left at the July  
6 confirmation hearing is going to be  
7 objections by the states, if any, and  
8 certainly the approvals of the regulatory  
9 settlements by the three states' PUC.

10 A. (Mr. Kessler) Agreed.

11 Q. Okay. Now, having reviewed the amended  
12 plans, is it fair to say that the amended  
13 plan, in fact, depends upon the  
14 implementation of the regulatory settlements  
15 by the three states? Is that correct?

16 A. (Mr. Kessler) Yes, it does.

17 Q. In fact, isn't the first listed means of  
18 implementation of the plan the approval of  
19 the regulatory settlements by the states,  
20 according to that document you're looking  
21 at?

22 A. (Mr. Kessler) I know that is certainly one  
23 of the things that confirmation depends on.

24 Q. Okay. And you have a fair amount of

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 experience in bankruptcy matters; isn't that  
2 correct?

3 A. (Mr. Kessler) I have had some, yes.

4 Q. You were involved in PSNH and El Paso.

5 A. (Mr. Kessler) I was.

6 Q. Know your way around the bankruptcy  
7 proceedings a little bit.

8 A. (Mr. Kessler) Generally familiar with them,  
9 yes.

10 Q. Okay. Would you agree with me that it would  
11 be a major problem for the debtor, and  
12 presumably for all the creditors, which  
13 would include the banks, who have agreed to  
14 waive \$1.7 billion if this plan were not  
15 to -- were to be not confirmed on July 7th?

16 A. (Mr. Kessler) It would be much more of a  
17 problem for FairPoint.

18 Q. That's correct. But you've heard the old  
19 adage, "If I owe you a dollar, I'm in  
20 trouble; if I owe you a million dollars,  
21 you're in trouble"?

22 A. (Mr. Kessler) I've heard that also, yes.

23 Q. Is it fair to say, based on your review of  
24 the plan, that upon confirmation, the

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 regulatory settlement essentially becomes  
2 part of the confirmation? Correct?

3 A. (Mr. Kessler) That's correct.

4 Q. And it's your understanding that a  
5 confirmation -- a confirmed plan is a  
6 contract, a binding contract between the  
7 parties that are involved in it -- between  
8 the debtors and creditors and other  
9 involved; isn't that correct?

10 MR. JUDD: Excuse me. Before  
11 you answer that, following up on an earlier  
12 question, Mr. Kessler is an attorney, but he is  
13 not appearing here to offer legal opinions. So I  
14 just want to make certain there's no confusion on  
15 that point. Thank you.

16 MR. ROTH: I appreciate that.  
17 I'm not asking him for legal advice. I'm simply  
18 banking on his experience with bankruptcy cases.

19 A. (Mr. Kessler) I would not -- I don't know  
20 whether it rises to the level of a contract.  
21 It is an order of court that carries force  
22 of law.

23 Q. Is it -- and I'm kind of out on a limb here,  
24 because I'm not sure how you answered this

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 question. But is it true that once a plan  
2 is confirmed, changing it is kind of an  
3 ordeal, isn't it?

4 A. (Mr. Kessler) Oh, absolutely.

5 Q. Okay.

6 A. (Mr. Kessler) Unless the parties agree.

7 Q. That's correct. And even then, it's  
8 complicated, because in a case like this,  
9 you'll never get all the parties to agree;  
10 right?

11 A. (Mr. Kessler) Well, post-confirmation, the  
12 parties independently can change their  
13 relationships.

14 Q. Among themselves.

15 A. (Mr. Kessler) Right.

16 Q. Not unilaterally.

17 A. (Mr. Kessler) No, bilaterally.

18 Q. Correct. All right. Now turning your  
19 attention to your supplemental report, the  
20 recommendations and conditions proposed on  
21 Page 15.

22 A. (Mr. Kessler) Okay.

23 Q. Now, it would have been helpful if you had  
24 numbered these, so I'll just call them --

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 I'll call them by numbers. And so you've  
2 already withdrawn No. 2. And so looking at  
3 No. 1 and No. 3, aren't they kind of the  
4 same thing?

5 A. (Mr. Kessler) Well, they're related.  
6 They're not the same.

7 Q. Okay. Let's look at No. 1. And what you're  
8 asking there is, as I understand it, is that  
9 the Commission condition the order  
10 approving, upon confirmation of the plan  
11 on -- when it's confirmed. Is that  
12 essentially what you're asking for?

13 A. (Mr. Kessler) Please repeat that question?

14 Q. With the first recommendation, the first  
15 condition, aren't you asking that the  
16 condition -- that the Commission approve its  
17 order, approving the regulatory settlement  
18 and the change in control upon subsequent  
19 confirmation of the plan?

20 A. (Mr. Kessler) In the form in which it was  
21 presented to the Commission for review.

22 Q. Correct. Now, based -- and then Paragraph 3  
23 says -- or No. 3 says the plan confirmed by  
24 the bankruptcy court does not reject any of

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 the terms of the 2008 settlement agreement,  
2 as modified by the 2010 regulatory  
3 settlement. Let's start with that.

4 Is there anything in the plan that  
5 you've seen, or any of the documents filed  
6 with the bankruptcy court, that suggests  
7 that the debtor is going to reject any of  
8 the 2008 settlement or the 2010 settlement?

9 A. (Mr. Kessler) Not the debtor.

10 Q. Okay. So nothing in the debtors' plan  
11 suggests that they're going to do that.

12 A. (Mr. Kessler) Not the debtors' plan, no.

13 Q. Is there any other plan filed in this case?

14 A. (Mr. Kessler) No, but there are other  
15 parties to that proceeding who could object.

16 Q. Okay. So far, there's no other plan other  
17 than the debtors' plan. And the debtors'  
18 plan doesn't purport to reject any of the  
19 2008 or the 2010; correct?

20 A. (Mr. Kessler) I've answered your question.  
21 There are other parties to this, and we  
22 don't know what their intentions are at this  
23 point.

24 Q. Okay. Now, have you -- were you here when

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1           there was a report given to us about the  
2           vote for the plan at the confirmation  
3           hearing?

4           A.     (Mr. Kessler) I was.

5           Q.     Okay.  And do you remember what that vote  
6           count was?

7           A.     (Mr. Kessler) I remember it was  
8           substantially in favor of confirmation.

9           Q.     Okay.  And wasn't it in fact a hundred  
10          percent of the secured debt and  
11          99-point-something percent of the unsecured  
12          debt?

13          A.     (Mr. Kessler) I don't remember the exact  
14          numbers.  But it was high.

15          Q.     Okay.  Under circumstances like that, do you  
16          expect an objection to confirmation to undo  
17          that vote?

18          A.     (Mr. Kessler) I also know that by the  
19          company's own admissions, the vote by the  
20          equity was a hundred percent against the  
21          plan.  I don't know whether they have any  
22          plans.

23          Q.     I'm sorry.  I didn't hear you.

24          A.     (Mr. Kessler) I don't know whether they have

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 any plans to object.

2 Q. Okay. And typically, equity doesn't get  
3 anything in these plans; isn't that correct?

4 A. (Mr. Kessler) Not necessarily true.

5 Q. Have you seen equity get anything in a plan  
6 in recent years?

7 A. (Mr. Kessler) Well, as Chairman Getz  
8 remembers in the PSNH bankruptcy, equity got  
9 in excess of a hundred million dollars, as I  
10 recall.

11 Q. Okay. And how many years ago was that?

12 A. (Mr. Kessler) Well, that was quite a few  
13 years ago.

14 Q. Okay. Thank you.

15 Now, turning back to the paragraphs of  
16 the regulatory settlement, in particular,  
17 1.1, 1.2, 1.4 and 1.5 -- so it's your  
18 opinion that those paragraphs and the sort  
19 of, I guess I would call it lock-in of the  
20 regulatory settlement to the plan and the  
21 plan confirmation process, is it still your  
22 opinion that those aren't adequately  
23 protective of the state's position and the  
24 PUC's position, that when we reach

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 confirmation hearing we're not going to end  
2 up with a new plan?

3 A. (Mr. Kessler) I believe that the Commission  
4 and these Commissioners have the right to  
5 make that determination, and not FairPoint  
6 or -- and I hate saying this -- but not the  
7 Advocate Staff, either.

8 Q. But I'm asking you. Do you believe that the  
9 regulatory settlement and the posture of the  
10 Chapter 11 case provides a substantial risk  
11 of any kind that at confirmation we're going  
12 to end up with a different plan than what we  
13 bargained for?

14 A. (Mr. Kessler) I believe the risk is small,  
15 but I believe there is risk. And I don't  
16 know how to assess it. And I don't believe  
17 that the conditions that we've proposed  
18 would in any way increase the likelihood  
19 that confirmation would not be granted.

20 Q. Okay. That's not the question I asked you.

21 But asking again, didn't you agree with  
22 me a few minutes ago that the only way out  
23 of the regulatory settlement was to reject  
24 it, was to void it before it is approved by

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 the PUC?

2 A. (Mr. Kessler) FairPoint cannot withdraw from  
3 the regulatory settlement before  
4 confirmation. I agree with that.

5 Q. So, in fact, wouldn't it make the most sense  
6 to have the PUC issue an order quickly and  
7 without conditions, to essentially close off  
8 the opportunity of FairPoint to void the  
9 regulatory settlement?

10 A. (Mr. Kessler) Only with adequate  
11 protections.

12 Q. And wouldn't it be a possibility that, if  
13 FairPoint was faced with additional  
14 conditions, such as those -- well, let's  
15 just say additional conditions -- that  
16 FairPoint might say, well, the heck with the  
17 PUC. They're jerking us around. We're  
18 going to go and void this settlement and go  
19 and fight it out in bankruptcy. Isn't that  
20 a risk, too?

21 A. (Mr. Kessler) And that's why the conditions  
22 were limited to the ones we proposed.

23 Q. So you agree with me that that is a risk.

24 A. (Mr. Kessler) If the Commission demanded

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 that FairPoint make unreasonable additional  
2 concessions beyond the -- beyond what is in  
3 their plan, perhaps. I can't speak for  
4 FairPoint.

5 Q. Okay. So if FairPoint looked at this list  
6 of conditions -- and I'm not saying they're  
7 going to do this. I hope they don't -- but  
8 they said we don't like these conditions,  
9 we're going to void this settlement and go  
10 to Judge Lifland in New York, that is a risk  
11 that could happen; correct?

12 A. (Mr. Kessler) There's a risk that it could  
13 happen, even if the Commission approved  
14 their application without conditions. I  
15 mean, there's no such thing as a risk-free  
16 world.

17 Q. How would -- wouldn't that be a breach of  
18 the terms of the agreement by FairPoint to  
19 do that?

20 A. (Mr. Kessler) The Commission isn't bound by  
21 your agreement with FairPoint.

22 Q. That's not what I asked you, though.  
23 Wouldn't it be a breach of the terms of the  
24 agreement if FairPoint were to say, after it

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 was approved, to void it and go to Judge  
2 Lifland instead? That would be a breach of  
3 the agreement, wouldn't it?

4 A. (Mr. Kessler) I think I've answered your  
5 question.

6 MR. KENNAN: Legal conclusion  
7 called for, Mr. Chairman.

8 A. (Mr. Kessler) I think I've answered your  
9 question.

10 Q. Now, in addition, isn't it true, under the  
11 regulatory settlement, that the paragraphs  
12 that -- one of the paragraphs that you --  
13 that I asked you to look at, that if  
14 FairPoint were to void the regulatory  
15 settlement under any circumstance, that all  
16 rights are reserved, and the State -- that  
17 is, the PUC and the Staff could go to New  
18 York and fight the plan? Isn't that  
19 correct?

20 A. (Mr. Kessler) Yes.

21 Q. Now, turning to your Condition No. 3, with  
22 respect to the stipulated settlement terms  
23 by and among FairPoint Communications and  
24 the other, I'll just call that the CLEC

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 settlements and the CLEC agreements. Isn't  
2 it true that all those agreements have been  
3 assumed?

4 A. (Mr. Kessler) Yes.

5 Q. Okay. And with respect to the NHLA pay  
6 phone agreement, the memorandum of  
7 understanding, why didn't you include that  
8 among those conditions, that they assumed  
9 the NHLA agreement?

10 A. (Mr. Kessler) It was an oversight on our  
11 part.

12 Q. We heard yesterday from Mr. Linder that  
13 those -- that agreement also has been  
14 assumed by FairPoint.

15 A. (Mr. Kessler) That was what I heard  
16 yesterday also.

17 Q. Okay. And based on your experience in  
18 bankruptcy, you probably have some  
19 experience dealing with assumption and  
20 rejection of executory contracts in  
21 bankruptcy; correct?

22 A. (Mr. Kessler) Yes, I do.

23 Q. And isn't it essential -- one of the  
24 essential tools of a debtor in

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 reorganization is to review all of its  
2 contracts, accept and reject them as may be  
3 in its business judgment?

4 A. (Mr. Kessler) Yes. Certainly.

5 Q. Okay. And there are consequences if you  
6 reject a contract; correct?

7 A. (Mr. Kessler) Typically there are.

8 Q. Yeah. You pay rejection damages out of the  
9 claim; correct?

10 A. (Mr. Kessler) You may be liable for  
11 rejection damages. But distribution and  
12 having to pay for them is another question.

13 Q. Okay. Fair enough. If you assume a  
14 contract in bankruptcy, there are  
15 consequences for that as well; correct?

16 A. (Mr. Kessler) Correct.

17 Q. And are you aware that the CLECs have filed  
18 claims against FairPoint in the bankruptcy  
19 case for --

20 A. (Mr. Kessler) Yes, I was.

21 Q. And that those claims are -- include the  
22 cure amounts for assuming the contracts?

23 A. (Mr. Kessler) I'm not exactly sure of the  
24 settlement of those.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Q. Okay. The other day when Ms. Hood, and I  
2 believe Mr. Nixon, were speaking about the  
3 claims reconciliation process and their  
4 desire to kind of keep their cards close to  
5 their vest, I suppose, about rejection and  
6 assumption, what did you understand that  
7 they were talking about?

8 A. (Mr. Kessler) I understood that they were  
9 working through what the terms of curing  
10 or -- curing their existing obligations with  
11 the CLECs.

12 Q. So would it be fair to say that where the  
13 company is faced with rejection damages if  
14 they reject and cure damages if they assume,  
15 that there may be circumstances where it's a  
16 difficult choice to make for them, isn't it?

17 A. (Mr. Kessler) Certainly is, yes.

18 Q. And complicated.

19 A. (Mr. Kessler) I agree.

20 Q. Okay. And isn't it true that the CLEC  
21 agreements have the evergreen provision in  
22 them?

23 A. (Mr. Kessler) I don't know.

24 Q. Okay. Now turning to paragraph -- your

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 condition No. 5. You were here yesterday, I  
2 assume, when Ms. Bailey testified?

3 A. (Mr. Gross) Yes.

4 Q. And is it your understanding -- is it your  
5 belief that the PUC Staff is not up to the  
6 task of monitoring the company's compliance  
7 with the regulatory settlement and its  
8 financial performance?

9 A. (Mr. Gross) No, I don't think this language  
10 suggests that at all.

11 Q. Okay. So are you familiar with the various  
12 ways in which the PUC Staff can call the  
13 company in to report on its performance,  
14 comply with the terms of the agreements with  
15 the PUC Staff?

16 A. (Mr. Gross) Not familiar with all of the  
17 details.

18 Q. Would you agree that they have a substantial  
19 toolbox that your clients -- your clients,  
20 the Staff, have a substantial toolbox for  
21 monitoring the compliance of the company and  
22 insuring their compliance both through  
23 hearings like this, dockets, secretarial  
24 letters? I mean, I'm not that familiar with

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1           them either. But they have a lot of tools  
2           that they can use. Wouldn't you agree?

3       A.     (Mr. Gross) I understand there are  
4           provisions and matters in which they can  
5           obtain information to evaluate and monitor  
6           the business.

7       Q.     And so it's your conclusion, based on  
8           including Condition No. 5, that that process  
9           isn't sufficient, that we need to bring in a  
10          separate monitor?

11      A.     (Mr. Gross) It's not the process. It's the  
12          information that's provided. And as we've  
13          said before, we believe that there are some  
14          metrics in the business, not necessarily  
15          just financial results or what -- financial  
16          results are what they are, the results. But  
17          there are some other underlying metrics in  
18          the business that the business will be  
19          undertaking on a daily basis that would be  
20          helpful for the Commission to be able to  
21          monitor that progress.

22      Q.     Okay.

23      A.     (Mr. Kessler) Perhaps, Mr. Roth, maybe I can  
24          add a little bit. It's not that we are

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 recommending that the Commission doesn't  
2 have the tools. We're recommending that  
3 they use them.

4 Q. Are you suggesting that in the past 18  
5 months or so that the PUC Staff has not used  
6 the tools available to it to monitor and  
7 obtain compliance by the company?

8 A. (Mr. Kessler) We're talking about monitoring  
9 a different part of the business in this  
10 case: The implementation of the changes in  
11 business practices and policies that are  
12 going to happen post-bankruptcy.

13 Q. I heard from Mr. Gross a suggestion that  
14 perhaps there were -- there was data that  
15 would come from the company that would be  
16 better analyzed by someone not on the PUC  
17 Staff. Is that what you're suggesting?

18 A. (Mr. Gross) No, I don't think I said it  
19 would be better analyzed by others. I just  
20 said that the information that I believe the  
21 Commission should have would be information  
22 that would not be found typically in public  
23 filings.

24 Q. Okay. Are you aware that the PUC has the

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 ability to obtain confidential and private  
2 information from the company on a regular  
3 basis?

4 A. (Mr. Gross) I am aware that they do have  
5 that opportunity.

6 Q. And that, in fact, the PUC Staff obtains  
7 information of all sorts from the company on  
8 a daily and weekly basis?

9 A. (Mr. Gross) I am. I haven't reviewed -- I'm  
10 not familiar with all of the information  
11 that they receive.

12 Q. Okay. Now, having heard from Ms. Bailey  
13 yesterday, you probably recall her reference  
14 to Paragraph 2.5.3 of the regulatory -- of  
15 the 2008 agreement, the one which dealt with  
16 the -- with FairPoint's having to bring in  
17 projects that -- broadband build-up  
18 evidence. Do you remember that?

19 A. (Mr. Gross) I remember the discussion around  
20 that.

21 Q. Okay. Have you -- have any of you  
22 familiarized yourself with Paragraph 2.5.3  
23 prior to making the recommendations that you  
24 did in your supplemental report?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Gross) No, I haven't specifically.

2 Q. Okay. And are you familiar -- or do you  
3 recall that the regulatory settlement  
4 includes the requirement that FairPoint have  
5 a regulatory subcommittee of its board to  
6 meet with and work with the PUCs in the  
7 different states?

8 A. (Mr. Gross) Yes, I am.

9 Q. And you heard yesterday that FairPoint has,  
10 in fact, hired a local president, Ms.  
11 Rosenberger, who is here today, to help with  
12 the company's relationship with the State  
13 and the regulation?

14 A. (Mr. Gross) Yes, I am aware of that.

15 Q. Okay. And you still think that none of that  
16 is sufficient to actually put the PUC in a  
17 position to monitor what the company does,  
18 all of this information, all of these  
19 mechanisms?

20 A. (Mr. Gross) As I think I've said before --  
21 and if I haven't made it clear, I will  
22 now -- it's not necessarily the people  
23 involved. It's the type of information  
24 that's provided that will allow the

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 Commission to monitor the progress going  
2 forward post-confirmation.

3 Q. I guess I still don't understand that,  
4 because your paragraph -- your condition  
5 says "require FairPoint to retain a  
6 monitor." That sounds to me like you're  
7 asking FairPoint to hire a person that the  
8 Commission will select; correct?

9 A. (Mr. Kessler) When you say "hire," --  
10 "retain" is a word we would have used.  
11 We're not talking about creating an  
12 employee.

13 Q. Okay. All right. And the last point that I  
14 want to make is there was a suggestion made  
15 a moment ago about the Liberty Consulting  
16 Group. And one of you indicated that  
17 perhaps that was along the lines of what you  
18 had in mind. Do you remember that?

19 A. (Mr. Kessler) Yes.

20 Q. And isn't it true that the Liberty  
21 Consulting Group was -- their appointment or  
22 their duties were as part of the 2008  
23 agreement between FairPoint and the PUC  
24 Staff?

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 A. (Mr. Gross) That's my understanding.

2 Q. So that was not a unilateral appointment by  
3 order by the PUC Commissioners, was it?

4 A. (Mr. Kessler) I don't know what the basis  
5 for that retention by the Staff was.

6 MR. ROTH: Okay. Thank you.  
7 I don't have anything else. Thank you very much.

8 CHAIRMAN GETZ: Okay. Let's  
9 take a recess until 11:00, and then we'll turn to  
10 questions from the Bench.

11 Mr. Judd?

12 MR. JUDD: Not attempting to  
13 set your schedule, but would it be possible to  
14 return a little before that. I don't know how  
15 much you have. We do have flight plans here to  
16 try to accommodate.

17 CHAIRMAN GETZ: Okay. Well,  
18 we also have to accommodate the court reporter.  
19 Well, we'll come back before 11:00. How's that?

20 MR. JUDD: Thank you very  
21 much.

22 (Recess taken at 10:41 a.m.)

23 (Proceedings resumed at 10:57 a.m.)

24 CHAIRMAN GETZ: Okay. We're

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 back on the record and turning to questions from  
2 the Bench.

3 Commissioner Ignatius?

4 CMSR. IGNATIUS: I have no  
5 questions.

6 CHAIRMAN GETZ: Okay.

7 Gentlemen, I have a couple of questions.

8 **CROSS-EXAMINATION**

9 **BY CHAIRMAN GETZ:**

10 Q. I'd like to follow up on the line of  
11 questions I think that Mr. Kennan was  
12 pursuing. And what I'm focusing on are two  
13 places. There's the Staff Advocate's  
14 Exhibit 1, the testimony on Page 5, and also  
15 the supplemental report Page 2. And if I  
16 look at the summary of the findings, it  
17 says, "If FairPoint is successful in meeting  
18 the goals and will support the assumptions  
19 in the plan of reorganization, FairPoint  
20 will be able to meet its regulatory  
21 obligations, as well as the commitments made  
22 to the State of New Hampshire in 2008." So  
23 what I understand it to be saying there is,  
24 I guess as a general matter, the financial

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 plan is a reasonable thing if the -- in  
2 meeting the goals. But I guess it devolves  
3 to are the goals reasonable, are the goals  
4 themselves feasible. And I think you were  
5 making a distinction in the discussion with  
6 Mr. Kennan between the financial plan and  
7 the operational plan, or the execution that  
8 would get you to the financial goals. Am I  
9 understanding your distinctions?

10 A. (Mr. Kessler) Precisely, Mr. Chairman. The  
11 plan as laid out, based on the projections  
12 the company has produced, produces a  
13 financially viable company with adequate  
14 capital and access to capital, and a company  
15 that will be able to service its debt and  
16 provide reliable service. Again, what I  
17 said was if they meet their projections.  
18 And the question is will they be able to  
19 meet their projections. Most particularly,  
20 will they be able -- are their projections  
21 with regard to their ability to generate  
22 revenue reasonable.

23 Q. And is it fair to make a distinction, then,  
24 that assumptions about -- from your

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 perspective, assumptions about line loss  
2 that they're relying on are reasonable, but  
3 you're unable to go the next step to say  
4 that their execution of their operational  
5 plan will achieve the revenues and forestall  
6 worse line loss?

7 A. (Mr. Gross) In general, I think that's  
8 accurate. What we -- we believe that the  
9 company has applied in their forecast the  
10 current trends, the current trends for line  
11 loss, and the associated revenue elements  
12 that follow line loss.

13 With regard to risk, really what  
14 we're -- or with regard to revenue, what  
15 we're focused on is the risk, because it all  
16 kind of starts -- it all starts with  
17 revenue. And what I mentioned earlier is  
18 that what we just need to be -- or the  
19 Commission needs to be cognizant of is, you  
20 know, a missing revenue has a more  
21 significant impact on the cash flows of the  
22 business. A 10-percent miss -- just  
23 applying the math in the same way that Mr.  
24 Lisciandro did, a 10-percent miss on revenue

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 still allows the company to, you know,  
2 execute its plan, but it has a significant  
3 impact, a more significant impact on the  
4 cash flows of the business. So, from our  
5 standpoint, I mean, it's kind of all about  
6 the attainment of revenue.

7 Q. If I can attempt another paraphrase. So  
8 that in the abstract, in the industry, based  
9 on the parameters that they're relying on in  
10 their plan, would even include some cushion  
11 a good organization could achieve the  
12 financial goals and the revenue goals. Is  
13 that a fair way to look at it?

14 A. (Mr. Gross) I think their plan is  
15 reasonable. I think the plan is -- in my  
16 opinion, the plan is attainable. As it  
17 always is, it's all about execution.

18 Q. And do you have no opinion on that? You  
19 don't have the information to give us an  
20 opinion on that with respect to their  
21 capability to execute?

22 A. (Mr. Gross) I believe that the company has  
23 the experience and, you know, the resources  
24 to execute the plan. In Mr. Lisciandro's

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 testimony, you know, he referenced the fact  
2 that the revenue assumptions seem optimistic  
3 as compared to peers. And I believe the  
4 peers that he mentioned are reasonable peers  
5 for FairPoint. So, again, I think I agree  
6 with that conclusion, that the revenue's a  
7 bit optimistic. But in managing the  
8 business, if there is revenue misses,  
9 there's other things that you can do in the  
10 business from a cost standpoint to still  
11 arrive at the planned EBITDAR and cash-flow  
12 levels.

13 Q. Okay. One other area. I think this would  
14 be for you, Mr. Kessler. And I think  
15 there's been some issues already raised  
16 about what's a legal conclusion, what's  
17 legal advice. I mean, obviously, your  
18 resume says that you're an attorney, that  
19 you have experience with the bankruptcy code  
20 and with some bankruptcy proceedings. And  
21 I'm interested in understanding a couple  
22 things about your opinion of what might  
23 occur next or how things operate in the  
24 bankruptcy court.

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1           As I understand what would happen  
2           towards confirmation of the plan, that  
3           essentially the bankruptcy court, the judge,  
4           will have to make some kind of determination  
5           about the feasibility of the plan. Is that  
6           a fair understanding of how this works?

7           A.   (Mr. Kessler) That's correct.

8           Q.   And so what would that -- how does that  
9           work? What does that entail? What would  
10          you expect to occur?

11          A.   (Mr. Kessler) There will be hearings and  
12          presentations made to the judge. All  
13          parties will have an opportunity to  
14          participate and to present witnesses. And  
15          at this point, barring anything unusual, I  
16          would suspect that it will be FairPoint  
17          making its presentation and nobody objecting  
18          to the plan. That is our hope. Part of  
19          that presentation will be a presentation of  
20          the orders of the three Commissions and  
21          FairPoint presenting their request to have a  
22          final confirmation order issued.

23          Q.   But what's the obligation of the court in  
24          that instance to approving the plan in

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 which -- and determining feasibility?

2 A. (Mr. Kessler) I'm sorry. The obligation of  
3 the court is to act in the best interest of  
4 the creditors.

5 Q. Which, as I understand it, implies that the  
6 plan is feasible, that they're not going to  
7 be in six months having to deal with the  
8 issue again.

9 A. (Mr. Kessler) Correct. Correct. Based on,  
10 you know, reasonable projections and  
11 reasonable assumptions, will the plan  
12 adequately provide for and protect the  
13 interests of creditors on a going-forward  
14 basis.

15 MR. COOLBROTH: Mr. Chairman?

16 A. (Mr. Kessler) But I don't presume to be a  
17 bankruptcy lawyer.

18 CHAIRMAN GETZ: Mr. Coolbroth?

19 MR. COOLBROTH: I'm going to  
20 try to make the record clear. On May 11th there  
21 was a confirmation hearing held on the Bankruptcy  
22 Code that dealt with many of these issues,  
23 including feasibility. The hearing has come and  
24 gone on feasibility. There is a brief order of

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 the bankruptcy court with respect to the  
2 proceedings that were held on the 11th continuing  
3 the matter until July for specific remaining  
4 items, including the regulatory settlement. The  
5 State was also represented at those proceedings.

6 But I'm just concerned that  
7 this is going on about speculation about  
8 something that's to come, when in fact it has  
9 already occurred.

10 A. (Mr. Kessler) And I didn't mean to imply  
11 that.

12 MR. McHUGH: Well, and just to  
13 be clear, Mr. -- I want to add one additional  
14 comment on that, Mr. Chairman. The record on the  
15 viability has closed in the bankruptcy court.

16 CHAIRMAN GETZ: The record has  
17 closed. But the judge has or has not ruled?

18 MR. McHUGH: No, that's --  
19 there is going to be another hearing on July 8th,  
20 but not on the viability of the plan. The  
21 regulatory settlements are outstanding, in terms  
22 of regulatory approvals. And I believe there  
23 is -- Verizon has objected to the litigation  
24 trust. That's all that's open on July 8. The

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 court is expecting that it will have decisions  
2 from the three state regulatory bodies with  
3 respect to the regulatory settlements before or  
4 for that July 8th hearing.

5 CMSR. IGNATIUS: And Mr.  
6 McHugh, is there an order yet of the bankruptcy  
7 court on the feasibility question? Or just the  
8 record's closed, and all of those issues will be  
9 rolled into one final order? Or Mr. Coolbroth.

10 MR. COOLBROTH: There is an  
11 order following the May 11th hearing. And we can  
12 submit that as a late exhibit. The specific  
13 content of it -- it's not the full confirmation  
14 order. My recollection is it's three or four  
15 pages in length. But it does recite what the  
16 court had before it, what remains to be heard in  
17 July, and what portion of the record is open and  
18 closed.

19 CHAIRMAN GETZ: Well, let's  
20 submit that as FP 29.

21 CMSR. IGNATIUS: Thank you.

22 **(FP 29 reserved.)**

23 MR. ROTH: For the record, in  
24 the bankruptcy court docket, that was entered on

{DT 10-025}[DAY 3 - A.M. Session - Public]{5-26-10}

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 May 14th. And it's bankruptcy court, their  
2 number, 1373.

3 MR. McHUGH: I'm sorry. Order  
4 what, Peter?

5 MR. ROTH: The order signed on  
6 May 14th under 1129 regarding plan confirmation  
7 process was 1373.

8 CHAIRMAN GETZ: Okay. Thank  
9 you.

10 MR. KENNAN: And may I ask,  
11 Mr. Chairman? I presume that the company will  
12 circulate that to all the parties?

13 CHAIRMAN GETZ: It's going to  
14 be admitted as an exhibit which will be available  
15 to everyone.

16 MR. KENNAN: Thank you.

17 CHAIRMAN GETZ: Okay. I have  
18 no further questions for the panel.

19 Is there anything further?  
20 Any redirect, Mr. Judd?

21 MR. JUDD: Briefly, if I may.

22 **REDIRECT EXAMINATION**

23 **BY MR. JUDD:**

24 Q. Mr. Kessler, during cross-examination there

[WITNESS PANEL: KESSLER|GROSS|CASSEL]

1 were some questions about the regulatory  
2 settlement and your proposed -- your  
3 recommended conditions. Were you suggesting  
4 that you expected FairPoint to move between  
5 the time an order is issued here and the  
6 effective date to ask the bankruptcy court  
7 to reject either the regulatory settlement  
8 or the order of this Commission?

9 A. (Mr. Kessler) No, I was not.

10 MR. JUDD: Thank you.

11 CHAIRMAN GETZ: Okay. There  
12 appears to be nothing further for the panel.  
13 Thank you, gentlemen. You're excused.

14 Okay. I think we addressed  
15 many of these issues yesterday, but is there any  
16 objection to striking identifications and moving  
17 all of the prefiled, pre-identified exhibits into  
18 evidence?

19 (No response)

20 CHAIRMAN GETZ: Hearing no  
21 objection, then all of the identified exhibits  
22 will be moved into evidence.

23 MR. ROTH: Mr. Chairman, we  
24 are still in the process of attempting to distill

1 the Staff Advocates 3.

2 CHAIRMAN GETZ: Three.

3 MR. ROTH: -- yeah, into a  
4 kind of prettier version.

5 CHAIRMAN GETZ: Yes. Thank  
6 you. I saw the attempt last evening to make a  
7 copy. And it appears not -- that some of the  
8 green did not come through very well. So is  
9 there any objection to Staff Advocate compiling  
10 an exhibit substantially similar to the one that  
11 was dealt with yesterday, and which we do have a  
12 copy of?

13 MR. ROTH: Correct. We have  
14 that, which is not as -- to the extent that that  
15 is not pretty, the printout of it is less pretty.  
16 But we have one that we're working up that has  
17 all the colors, nice type and everything, and  
18 we're just trying to figure out how to fit it all  
19 in on one page. And we expect to have that by  
20 the end of the week.

21 CHAIRMAN GETZ: Okay. Well,  
22 we'll put the less pretty into the record. And  
23 to the extent that you can come up with a pretty  
24 one, we'll include that as well.

1 MR. ROTH: Okay. Thank you.

2 MR. JUDD: Mr. Chairman, two  
3 matters. One, I'd like to request reserving an  
4 exhibit number for another document that has yet  
5 to be completed; and that is, our friends at  
6 FairPoint are working on a compilation, a  
7 combination of the 2008 and the 2010 settlements,  
8 producing one document, so that marching forward  
9 we would have one document to look at.  
10 Representatives of the CLECs who are here today  
11 agree to this request. Unfortunately, given the  
12 detail and the length of this document, it is not  
13 ready for presentation now. Mr. McHugh can  
14 certainly speak to when they would be able to  
15 offer it.

16 My other matter was that it  
17 would probably be appropriate if we could have  
18 some determination as to when exhibits that were  
19 reserved, when they will be provided. There's  
20 been some concern whether they'll be available in  
21 time for folks to provide their written  
22 statements.

23 CHAIRMAN GETZ: Mr. McHugh?

24 MR. McHUGH: I believe we

1 should have all of the open record requests  
2 completed by Friday. I don't see any impediment  
3 to that right now. And I can advise the service  
4 list if there's something that comes up to that  
5 effect.

6 The compilation of the  
7 settlement agreements, 2008 and 2010, into sort  
8 of one document will most likely be Monday of  
9 next week. But I will try to have it done by  
10 Friday. It's -- yeah, the settlement, it's just  
11 a very large document to work with.

12 CHAIRMAN GETZ: But I don't  
13 take it that that's necessary for --

14 MR. JUDD: Oh, no. That's  
15 correct.

16 CHAIRMAN GETZ: -- doing  
17 written submissions moving forward.

18 MR. McHUGH: No, I wouldn't  
19 think so.

20 CHAIRMAN GETZ: Okay. Any  
21 problem with that? All right.

22 MR. McHUGH: I'm sorry, Mr.  
23 Chairman. I didn't mean to interrupt. But it  
24 was just pointed out to me by State President

1     Rosenberger that Monday is a holiday. So I will  
2     do my best to get it in by Friday. However, it  
3     most likely will be Tuesday for the compilation  
4     document we're going to label FairPoint 30.

5                   **(FP 30 reserved.)**

6                   CHAIRMAN GETZ: Okay. Thank  
7     you. Of course, the annual report that we had  
8     held as FP 20 won't be due until June 4.

9                   Ms. Geiger?

10                  MS. GEIGER: Yes, Mr.  
11     Chairman. Along the same lines about when things  
12     might be available for review by the parties for  
13     purposes of meeting the June 4th deadline for  
14     submission of their post-hearing comments in lieu  
15     of oral closing statements, I was just wondering  
16     whether we could have an estimate as to when the  
17     transcript from these hearings might be  
18     available.

19                  CHAIRMAN GETZ: I spoke to  
20     Mr. Patnaude last night. And I understand they  
21     are in process. And he's going to -- they're his  
22     first priority. So I don't know if they'll be  
23     here on Tuesday or Friday. I'm not sure. But we  
24     will -- we'll talk to Staff and make sure that

1 the information gets out to the parties on the  
2 availability of the transcripts.

3 MS. GEIGER: Thank you.

4 CHAIRMAN GETZ: There was one  
5 other item we had -- actually, did you have one  
6 other item?

7 MR. JUDD: No, sir.

8 CHAIRMAN GETZ: It was the  
9 item about providing the opportunity for oral  
10 closing about the motion for interim suspension  
11 of the March 31 broadband deployment deadline, or  
12 allow parties the opportunity to address that in  
13 the written submission. Does anyone want to  
14 address that issue orally today?

15 (No response)

16 CHAIRMAN GETZ: Okay. Thank  
17 you.

18 Okay. Is there anything else  
19 we need to address before we close the hearings?

20 (No response)

21 CHAIRMAN GETZ: Okay. Hearing  
22 nothing, then we'll close the hearing and await  
23 the written submissions and the filing of the  
24 record requests. And thank you, everyone.

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MR. MCHUGH: Thank you, Mr.  
Chairman.

(**WHEREUPON**, the hearing was adjourned  
at 11:20 a.m.)

**C E R T I F I C A T E**

1  
2 I, Susan J. Robidas, a Licensed  
3 Shorthand Court Reporter and Notary Public  
4 of the State of New Hampshire, do hereby  
5 certify that the foregoing is a true and  
6 accurate transcript of my stenographic  
7 notes of these proceedings taken at the  
8 place and on the date hereinbefore set  
9 forth, to the best of my skill and ability  
10 under the conditions present at the time.

11 I further certify that I am neither  
12 attorney or counsel for, nor related to or  
13 employed by any of the parties to the  
14 action; and further, that I am not a  
15 relative or employee of any attorney or  
16 counsel employed in this case, nor am I  
17 financially interested in this action.

18  
19 \_\_\_\_\_  
20 Susan J. Robidas, LCR/RPR  
21 Licensed Shorthand Court Reporter  
22 Registered Professional Reporter  
23 N.H. LCR No. 44 (RSA 310-A:173)  
24