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STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION

November 6, 2012 - 1:38 p.m.  
Concord, New Hampshire

NHPUC NOV26'12 PM 3:45

RE: DM 12-276  
NORTHERN NEW ENGLAND TELEPHONE OPERATIONS,  
LLC, AND ENHANCED COMMUNICATIONS OF  
NORTHERN NEW ENGLAND, INC.:  
*Objection to Public Utility Assessment.*  
(Prehearing conference)

**PRESENT:** Chairman Amy L. Ignatius, Presiding  
Commissioner Robert R. Scott  
Commissioner Michael D. Harrington  
  
Sandy Deno, Clerk

**APPEARANCES:** Reptg. Northern New England Telephone  
Operations and Enhanced Communications  
of Northern New England:  
Patrick McHugh, Esq.

Reptg. Comcast Phone of New Hampshire:  
Susan S. Geiger, Esq. (Orr & Reno)

Reptg. Verizon Business:  
Alexander W. Moore, Esq.

Reptg. Public Service of New Hampshire:  
Robert A. Bersak, Esq.

Reptg. Granite State Electric Co. and  
EnergyNorth Natural Gas, Inc., d/b/a  
Liberty Utilities:  
Sarah B. Knowlton, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

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

**Reptg. BayRing Communications:**  
Darren Winslow

**Reptg. Residential Ratepayers:**  
Susan Chamberlin, Consumer Advocate  
Stephen Eckberg  
Office of Consumer Advocate

**Reptg. PUC Staff:**  
Edward N. Damon, Esq.  
Kate Bailey, Director/Telecom Division  
Michelle Caraway, Director/Administration

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P R O C E E D I N G .

CHAIRMAN IGNATIUS: Welcome, everyone. I'd like to open the hearing in DM 12-276, which was opened in response to a filing by Northern New England Telephone and Enhanced Communications of Northern New England, a filing objecting to two public utility assessments issued pursuant to RSA Chapter 363-A. By an order of notice dated October 5th, 2012, the Commission called for a notice of this proceeding to be published, and called for a prehearing conference to be held this afternoon, at 1:30, followed by a technical session.

Do we have a notice -- I mean, excuse me, an affidavit of publication? We do. Thank you very much.

All right. Why don't we begin first with appearances, and then address requests for intervention, of which I see six, and there may be more who are here today to orally request. So, appearances please.

MR. McHUGH: Good afternoon, Chair Ignatius, Commissioner Scott, Commissioner Harrington. Patrick McHugh, with FairPoint Communications, on behalf of the Petitioners, Northern New England Telephone Operations, LLC, and Enhanced Communications of Northern

1 New England, Inc. With me today is Kevin O'Quinn, from  
2 our Accounting Department, and Ryan Taylor, from our  
3 Regulatory Department.

4 CHAIRMAN IGNATIUS: Good morning. Thank  
5 you. Ms. Geiger.

6 MS. GEIGER: Good afternoon, Chairman  
7 Ignatius, and Commissioners Harrington and Scott. Susan  
8 Geiger, from the law firm of Orr & Reno, representing  
9 Comcast Phone of New Hampshire, LLC.

10 MR. BERSAK: Good afternoon. Robert  
11 Bersak, for Public Service Company of New Hampshire.

12 MR. MOORE: Alex Moore, for Verizon  
13 Business.

14 MS. KNOWLTON: Good afternoon. Sarah  
15 Knowlton, here for Granite State Electric Company and  
16 EnergyNorth Natural Gas, both d/b/a Liberty Utilities.

17 MR. WINSLOW: Good afternoon. Darren  
18 Winslow, with BayRing Communications.

19 MS. CHAMBERLIN: Good afternoon. Susan  
20 Chamberlin, Consumer Advocate for the residential  
21 ratepayers. And, with me today is Stephen Eckberg.

22 MR. DAMON: Good afternoon. Edward  
23 Damon, for the Staff. And, with me this afternoon are  
24 Kate Bailey and Michelle Caraway.

1                   CHAIRMAN IGNATIUS: Thank you. Welcome,  
2 everyone. Do we have anyone who has not filed a petition  
3 to intervene, but is seeking intervention?

4                   (No verbal response)

5                   CHAIRMAN IGNATIUS: It appears not. The  
6 intervention requests that we have, and I think there's  
7 someone from each one, but let's run through them just to  
8 be certain: Public Service Company of New Hampshire;  
9 Verizon Business; Comcast Phone of New Hampshire; Liberty  
10 Utilities; BayRing; and AT&T. We don't have anyone here  
11 from AT&T, do we?

12                   (No verbal response)

13                   CHAIRMAN IGNATIUS: All right. And,  
14 then, also a notice from the Office of Consumer Advocate  
15 stating its intention to participate.

16                   Does anyone have any objection to any of  
17 the requests for intervention?

18                   (No verbal response)

19                   CHAIRMAN IGNATIUS: Seeing none, thank  
20 you. We have reviewed them, find that they meet the terms  
21 of the requirements for intervention, and will grant all  
22 of the requests, including that AT&T, which is not here  
23 today.

24                   We had a notice from -- a letter from

1 nine of the New Hampshire ILECs, saying that they did not  
2 intend to participate -- did not see a need to intervene.  
3 And, I think that's it for participating parties and who  
4 we've heard from thus far.

5 MR. DAMON: Excuse me. I think segTEL  
6 also filed a Petition to Intervene, if I'm not mistaken.

7 CHAIRMAN IGNATIUS: It's not in our  
8 files, and it's not listed in the docketbook, but it may  
9 have come in since then, sometime today, and not made it  
10 into the files. Well, we'll double check.

11 MR. DAMON: Yes. The copy that I got, I  
12 think I made a copy of it from an e-mail, and it's dated  
13 October 31st.

14 CHAIRMAN IGNATIUS: Well, that's  
15 disturbing, isn't it? And, they may have assumed that an  
16 e-mail was sufficient. We'll take that up with the  
17 Executive Director. Thank you.

18 So, let's move then to positions of the  
19 parties, and, particularly, if there are issues of scope  
20 that you expect to be contentious or any party wants to  
21 have clarity on what they think the scope should be. I  
22 understand that what the Petitioners filed for was  
23 specific to those two companies, that are both affiliates  
24 of FairPoint. But we have many utilities here, so they

1 have taken an interest in the issues as it relates to more  
2 than just FairPoint. And, so, if there are issues about  
3 scope or anything else that you think will be of concern,  
4 whether it's confidentiality or any other matters, think  
5 about that and mention it as you go through your  
6 positions. Mr. McHugh.

7 MR. McHUGH: Thank you, Commissioner.  
8 I'm not going to go through sort of the objection, I  
9 thought I set it out and have received no substantive  
10 reply from any of the intervenors, other than they have an  
11 interest and, you know, they generally don't want their  
12 assessments to go up. I think, in terms -- let me address  
13 a couple of the sort of more procedural matters that you  
14 indicated, then I'm happy to take questions on the  
15 objection. I was just not going to go run through it all  
16 again.

17 The scope, I think, is as the  
18 Petitioners requested. This case is solely about the  
19 Petitioners' assessment, as controlled by applicable law,  
20 and nothing else.

21 In terms of confidentiality, that I  
22 guess suppose may be an issue, depending on what  
23 information folks would want from the Petitioners, other  
24 than what we set forth in the objection. Or, if there is



1 some additional public information, you know, that  
2 certainly would not be problematic. I think, getting into  
3 detailed confidential information with competitive  
4 carriers or the electric companies, that may be  
5 problematic. But, as I understand, we're probably going  
6 to have a tech session afterwards, and we can see if we  
7 can, you know, work through any issues and any facts.  
8 And, my general thought is, I think the case probably  
9 lends itself to an agreed upon statement of facts, which  
10 can lead to briefing, subject to the Commission wanting  
11 FairPoint -- FairPoint's companies to answer any  
12 questions. Or, if there is some facts that are in  
13 dispute, certainly, I suppose a hearing would be necessary  
14 to resolve those.

15 So, you know, from my perspective, I  
16 don't think the case should take long to resolve,  
17 understanding you folks have, you know, lots of other  
18 dockets. But I don't imagine this to be a long, detailed  
19 case. At least that's not how I envision it.

20 CHAIRMAN IGNATIUS: Okay. Thank you.

21 (Chairman and Commissioners conferring.)

22 CHAIRMAN IGNATIUS: I think we'll have  
23 some questions as we go through each party, but it may be  
24 that, after we get through it, there will be more.

1 Commissioner Harrington.

2 CMSR. HARRINGTON: I just bring it up  
3 because it may be applicable to what other people say. In  
4 RSA 363-A:4, in the middle of it approximately, it says,  
5 and I'll just read it, because it's only a sentence or two  
6 here: "Within 30 days of the assessment for the first  
7 quarterly payment, each public utility which has any  
8 objection to the amount assessed against it for the prior  
9 fiscal year shall file with the commission its objection  
10 in writing, setting out in detail the grounds upon which  
11 it's claimed that the assessment is excessive, erroneous,  
12 unlawful or invalid."

13 And, with regards to your filing, which  
14 I assume is made under this provision, and you talk about  
15 how you were planning on making the August payment any  
16 ways. And, it would appear, just talking about the OCA  
17 part of it, that since this has to do with last fiscal  
18 year, where the SB 48 had not come into effect, and, in  
19 fact, the OCA was still able to handle complaints and so  
20 forth associated with your companies. Are you a year too  
21 early?

22 MR. McHUGH: I don't read that provision  
23 to be prescriptive in any sense as to the current  
24 assessment. I read that provision to be restrictive, in

1 terms of when you may file an objection for the prior  
2 year's assessment. So, to your point, I was limited to 30  
3 days to raise issues related to the 2012 fiscal year  
4 assessment. And, that's one of the reasons I cited the  
5 statute, and also made sure the filing was made on or  
6 before September 17, which is 30 days from the date of our  
7 assessment.

8 The statute is silent, by my reading,  
9 when you need to object to your current year's assessment.  
10 So, I would say it's restrictive in the sense that, if I  
11 want to object to the 2013 assessment, I can do it no  
12 later than 30 days from whatever, let's just say I'm going  
13 to get an assessment, you know, for the following year,  
14 that's going to be August of 2013. And, I have another 30  
15 days. But that's -- that's restrictive in terms of when I  
16 have to file it, my deadline. There's, in my opinion, no  
17 restrictions in the statute that says when I can make a  
18 complaint concerning the 2013 assessment.

19 CMSR. HARRINGTON: So, to be clear, your  
20 complaint has to do with the 2013 assessment, at least as  
21 far as the OCA part of it, and only the 2013 assessment.  
22 You're not looking back at 2012?

23 MR. McHUGH: That's right. I could read  
24 it to you, but --

1 CMSR. HARRINGTON: No, I just wanted to  
2 make sure.

3 MR. McHUGH: No, that's right. And,  
4 part of the reason for that aspect of it, Commissioner  
5 Harrington, is when you look at the assessment material  
6 that the Commission produces. And, I think it's literally  
7 Page 2, or maybe it's the first substantive page, the  
8 Commission says "Here's what we estimate the expenses  
9 would be for the fiscal year 2013." So, as that estimate  
10 includes the Office of Consumer Advocate expenses, that's  
11 that portion I submit.

12 CMSR. HARRINGTON: And, the remainder  
13 portion, you still didn't, in the 2013 assessment?

14 MR. McHUGH: That's right. I'm not  
15 looking to get anything back for the 2012 fiscal year  
16 assessment related to the Consumer Advocate's expenses.

17 CMSR. HARRINGTON: Thank you. I just  
18 wanted to get that clarified. That's the only question I  
19 have.

20 CHAIRMAN IGNATIUS: All right. Attorney  
21 Geiger.

22 MS. GEIGER: Yes. Thank you. Comcast  
23 shares FairPoint's concerns about the manner in which  
24 utility assessments are calculated for exempt local

1 exchange carriers. And, looks forward to exploring the  
2 issues raised by FairPoint in greater detail as the docket  
3 moves ahead.

4 Comcast also believes that, if  
5 FairPoint's position prevails and the Commission decides  
6 that the fiscal year 2013 assessment should be  
7 recalculated, that all ELEC's assessments should be  
8 adjusted in the same manner as FairPoint's assessment for  
9 fiscal year 2013 and thereafter. Thank you.

10 CHAIRMAN IGNATIUS: And, do you support  
11 the FairPoint filing, and in all of the arguments made,  
12 and sort of legal analysis, or just you said you "shared  
13 the concerns about the status of the ELECs", so --

14 MS. GEIGER: Our preliminary position is  
15 that we do share the concerns. We have not had the  
16 opportunity to delve into great detail concerning  
17 FairPoint's assertions. On their face, they seem  
18 reasonable and appropriate. And, that's all I'm prepared  
19 to say at this point.

20 CHAIRMAN IGNATIUS: Thank you. Mr. -- I  
21 forgot your name.

22 MR. MOORE: Moore.

23 CHAIRMAN IGNATIUS: I apologize.

24 MR. MOORE: Alex Moore for Verizon.

1 CHAIRMAN IGNATIUS: Thank you.

2 MR. MOORE: We agree with FairPoint's  
3 petition and support it in general. Like Comcast, we have  
4 not yet done detailed legal research. But, in broad  
5 outline, we support their position. And, we also believe  
6 that, should the Commission find in favor of FairPoint,  
7 then it would be creating a rule of law that would be  
8 applied to other telecom carriers who fit within the ELEC  
9 description under the statute.

10 CHAIRMAN IGNATIUS: And, I take it, from  
11 both what you said and what Attorney Geiger just said, the  
12 thought is that this not become a generic docket to deal  
13 with every company, but that whatever result emerges as to  
14 FairPoint would be applied without a separate proceeding  
15 to other ELECs?

16 MR. MOORE: Well, I would think so. I  
17 mean, I think the Commission would address that, you know,  
18 in due course, if you get to that point on the substance.  
19 Either you could -- you could require each carrier to file  
20 a similar petition, at the appropriate time, following a  
21 decision in this case, or you might do something a little  
22 more streamlined. But, it doesn't seem that, unless there  
23 was some very specific set of facts, it wouldn't seem  
24 appropriate to have separate proceedings and go through it

1 all over again each time.

2 CHAIRMAN IGNATIUS: All right. Thank  
3 you. Mr. Bersak.

4 MR. BERSAK: Thank you, Chairman  
5 Ignatius. For once, PSNH is not a petitioner in this  
6 docket. We are here to make sure that we are treated  
7 fairly as to how the pie of expenses of this Commission  
8 are allocated amongst the various utilities. PSNH does  
9 pay the largest assessment. Not quite half, but almost  
10 half, over \$3 million a year of assessments to fund the  
11 operations of the Commission and the Consumer Advocate's  
12 Office. We're here today to make sure that we're treated  
13 fairly if there are changes made to how the assessments  
14 are divvied up.

15 FairPoint, in part, seeks to remove from  
16 the calculus of the assessment process. Certain revenues  
17 that are jurisdictional only to the Federal Communications  
18 Commission.

19 Like FairPoint, PSNH has substantial  
20 revenues that are regulated by the federal government, not  
21 the FCC, but the FERC. To the extent that the Commission  
22 makes a determination that revenues that are outside the  
23 regulatory jurisdiction of this Commission should be  
24 excluded from the assessment process. PSNH would urge the

1 Commission to also exclude FERC jurisdictional revenues  
2 from that process.

3 I think we all have to realize that  
4 Chapter 363-A, under which the Commission assesses the  
5 various utilities, comes from a different regulatory era.  
6 It predates the realities of today's competitive markets  
7 in electricity, gas, and communications. There has really  
8 only been one slight change to the assessment statute  
9 since restructuring of the various industries has taken  
10 place. And, that was to recognize the limited scope of  
11 jurisdiction that the Commission has over the New  
12 Hampshire Electric Cooperative and its share of costs at  
13 the Commission was brought down by the legislature.

14 But the world has changed. And, because  
15 of those changes, there are inequities in the way that the  
16 utilities are assessed the various costs of the  
17 Commission. FairPoint points out things that it thinks is  
18 unfair to it, and it's related communications of partners  
19 in the state. But we have, in the electric industry, also  
20 certain things that are unfair. For example, included in  
21 the revenues for Public Service of New Hampshire would be  
22 the revenue that come from the sale of energy through our  
23 Energy Service rate. However, competitors that sell the  
24 exact same product are not subject to assessment. So,



1 there's a inflation, a higher cost of our Energy Service,  
2 because we have to pay for the operations of this  
3 Commission, whereas competitors don't have to pay those  
4 things.

5 The Commission also, in the new world,  
6 has lots of operations and spends lots of time certifying  
7 REC-eligible facilities, they don't pay anything. And,  
8 the Commission of late seems to have become a small claims  
9 court of sorts for competitive entities, taking every  
10 complaint and every problem that they want fixed in the  
11 world here, without paying anything for that service as  
12 well.

13 I think that it's time that the  
14 assessment process and the costs of the Commission to have  
15 a re-investigation from top to bottom. But,  
16 unfortunately, I think the statute is clear. The statute  
17 says that the "gross utility revenues will be the basis  
18 for assessments." I'm not sure that the issue and the  
19 problem that I brought up or that FairPoint brings up is  
20 really amenable to resolution through a adjudicative  
21 hearing. I think it's one where the fix may be  
22 legislative in nature.

23 I think that we need to take a look at  
24 what these inequities are, figure out what does the

1 Commission really do these days. And, I think we need to  
2 figure out how to make sure there are no free riders, that  
3 everybody pays their fair share. Perhaps it's time to  
4 institute filing fees or some other way of paying for the  
5 services that the Commission and the Consumer Advocate's  
6 Office provides.

7 But, in a nutshell, we're here to  
8 protect the interests of our customers, to make sure that  
9 they only pay what their fair share is of the costs at the  
10 Commission.

11 CHAIRMAN IGNATIUS: Thank you.

12 Ms. Knowlton, are you next?

13 MS. KNOWLTON: I think I am. Thank you.  
14 On behalf of Liberty Utilities, fundamentally, our concern  
15 is that, if the Commission were to determine in this  
16 docket that FairPoint's assessment should be something  
17 lower than what it was initially determined to be, that  
18 some share of those costs would be borne by Liberty's gas  
19 and electric customers. So, fundamentally, that is our  
20 concern in participating.

21 I looked at SB 48. I haven't done  
22 extensive legal research. But it's not clear to me from  
23 the face of those statutory changes that OCA is precluded  
24 from participating in dockets that involve FairPoint here

1 at the Commission. So, I don't think it, to me, it  
2 doesn't appear to be a clean legal issue that no OCA  
3 expense should be allocated to FairPoint.

4 I echo PSNH's concerns about the  
5 equities or inequities of how expenses are sliced.  
6 Liberty Utilities has a gas company, EnergyNorth Natural  
7 Gas, which presumably pays some share of the Telecom  
8 Division's expenses. But, you know, I think we can't  
9 engage in that level of parsing of the expenses of the  
10 Commission as they relate to particular divisions based on  
11 the type of industry that's involved.

12 So, yes, I look forward to participating  
13 in the docket and getting a better understanding of the  
14 issues. I do think there are fundamentally some legal  
15 issues involved in terms of the interpretation of SB 48  
16 and its scope.

17 CHAIRMAN IGNATIUS: Thank you.  
18 Commissioner Harrington.

19 CMSR. HARRINGTON: Yes. Ms. Knowlton, I  
20 just had one question. Public Service had mentioned that  
21 they pay -- part of their revenues come from things that  
22 are regulated by FERC. Now, is that also true for the gas  
23 companies? Is part of your gross revenues to be  
24 attributed to gas pipeline fees that you pay, in order to

1 get gas, which is also regulated by FERC?

2 MS. KNOWLTON: I'm assuming that that  
3 would be the case. That there would be some wholesale  
4 costs included as well.

5 CMSR. HARRINGTON: And, so, that's in  
6 your gross revenues and you pay then, that's what's used  
7 as a percentage to determine what your assessment is?

8 MS. KNOWLTON: Subject to check.

9 CMSR. HARRINGTON: Yes. Thank you.

10 CHAIRMAN IGNATIUS: Thank you.

11 Mr. Winslow.

12 MR. WINSLOW: Yes. At this point,  
13 BayRing is just here to monitor this proceeding. We don't  
14 take a specific position on any of FairPoint's detailed  
15 assertions. We do share Comcast's and Verizon's concerns  
16 that, if there's a different assessment procedure applied  
17 to FairPoint, that that would be applied to all similar  
18 ELECs. Thank you.

19 CHAIRMAN IGNATIUS: Thank you.

20 Ms. Chamberlin.

21 MS. CHAMBERLIN: Good afternoon. The  
22 application of SB 48, in its various manifestations, is a  
23 subject of numerous different dockets. And, if we were to  
24 carve out the utility assessment part for FairPoint alone,

1 it would not address the underlying factors that the other  
2 two, other utilities face.

3 As Mr. Bersak pointed out, this  
4 assessment was started when the utility world was very  
5 different. The OCA's assessment is not done by a strict  
6 accounting. And, it's not as if we spend 100 percent of  
7 our time because there's legislation on  
8 telecommunications. It doesn't mean that our assessment  
9 changes for that year.

10 The next year we spend 95 percent of our  
11 time at the -- over electric regulation. That's just the  
12 way these winds of change go. So, if we were to open this  
13 up, it should be generic, it should be all-encompassing.  
14 And, it should look at everybody's assessment.

15 On the flip side, I would say we should  
16 make a fundamental or a threshold determination whether SB  
17 48 applies to the utility assessment at all. I'd look at  
18 362:7, III, which states that the prohibitions of Senate  
19 Bill 48 do not "prohibit the assessment of taxes...or  
20 other fees of general applicability." Arguably, this is a  
21 fee of general applicability, in which case it would not  
22 extend to the assessment at all.

23 CHAIRMAN IGNATIUS: So, is your position  
24 at this point that we should -- you said it should be a

1 "generic, all-encompassing investigation", but is that  
2 only if you first pass the initial question of whether SB  
3 48 prohibits or does not prohibit the application of this  
4 assessment at all?

5 MS. CHAMBERLIN: Well, our position  
6 would be that it does not affect the assessment. It does  
7 not create an unfair assessment for FairPoint. And, that  
8 that would be the end of it. However, I do appreciate  
9 that regulations have changed, and that perhaps it is time  
10 to look at the assessment. And, I'd be certainly happy to  
11 work with all the parties.

12 But, just as an example, the OCA does  
13 not get half of the PUC's assessment. And, so, the  
14 numbers proposed are without foundation. I mean, it just  
15 doesn't make any sense at all. So, we would have to  
16 really look at the numbers proposed and how they play out  
17 over all the utilities. And, I think it would be a  
18 comprehensive analysis. And, whether or not we want to go  
19 that far right now is a separate question.

20 CHAIRMAN IGNATIUS: So, it would be to  
21 deny the objection filed by FairPoint, and then open a new  
22 proceeding to look at all of these questions in totality?

23 MS. CHAMBERLIN: Yes.

24 CHAIRMAN IGNATIUS: Commissioner

1 Harrington.

2 CMSR. HARRINGTON: Just you had said  
3 that there would be -- what's the section you quoted, it's  
4 RSA something there?

5 MS. CHAMBERLIN: 362:7, III. So, it's a  
6 question in my mind whether or not SB 48 even touches the  
7 assessment. So, that would be a threshold question as we  
8 go forward.

9 CMSR. HARRINGTON: Okay. Thank you.

10 CHAIRMAN IGNATIUS: Thank you.

11 Mr. Damon.

12 MR. DAMON: Thank you. The Staff, as to  
13 the question of scope, finds itself in agreement with  
14 FairPoint, that this should be a docket solely about  
15 FairPoint's own assessment and nothing else. The ELECs  
16 have asked that, whatever relief is granted to FairPoint,  
17 apply to them. They have not said on what basis that  
18 should be the case. And, Staff doesn't know what that is.

19 Regarding the question of the claim made  
20 regarding the OCA's expenses, I think the statute, RSA  
21 363-A:4, is clear on its face. That the objection filed  
22 must relate to the prior fiscal year. In other words, to  
23 the fiscal year ended 2012. And, I say that, because the  
24 way the assessment system works, there is a true-up at the

1 end of each fiscal year, to true up the estimated expenses  
2 for the prior fiscal year and the actual expenses  
3 incurred. And, then, the assessment, though, for each  
4 year is calculated on the basis of estimated expenses.  
5 But the first quarterly bill, which I believe is the one  
6 issued in August, does have the adjustment true-up. And,  
7 the adjustment true-up that I'm speaking about you can  
8 find in RSA 363-A:3, the last sentence.

9           So that, you know, in Staff's view, I  
10 mean, it just seems clear on its face that the claim  
11 regarding the OCA's expenses is untenable. The OCA's  
12 authority to represent the interests of residential  
13 customers was not curtailed in any way by Senate Bill 48  
14 during the prior fiscal year, because it became effective  
15 only on, I believe, August 10 of this year, after the  
16 start of the current fiscal year. So, in Staff's view,  
17 it's premature to raise that issue at this time. If  
18 FairPoint wants to pursue that, it could do so a year  
19 hence, but not now.

20           CHAIRMAN IGNATIUS: And, is your view  
21 that the other utilities that are here should -- are  
22 welcome to monitor and watch what goes on as it relates to  
23 FairPoint, but not have their -- anything of their  
24 circumstances play into this discussion?



1 MR. DAMON: Well, I think, you know,  
2 Staff would definitely agree that their views on the  
3 correctness of FairPoint's arguments should be taken into  
4 account. But, to then expand the docket and have it flow  
5 over into granting relief to them in some way, without any  
6 way -- a good solid legal basis for doing that, is not  
7 what the objection statute, Section 4, has in mind.

8 CMSR. HARRINGTON: And, just so I get  
9 that clear then, what you would be saying is, let's say,  
10 for the sake of argument, part of -- we found in favor of  
11 part of FairPoint's objection, that other companies in  
12 similar circumstances would then -- should file their own  
13 separate objection [sic] -- or, objection in the future,  
14 and there wouldn't be any, you know, wide findings, is  
15 that what you're referring?

16 MR. DAMON: That's correct. And, I  
17 think to challenge the assessment for the prior fiscal  
18 year is too late, because they're past the 30 days. And,  
19 so, it's too late for this year. If they want to join in  
20 next year, we can deal with it then.

21 CMSR. HARRINGTON: Okay. Thank you.

22 CHAIRMAN IGNATIUS: Commissioner Scott.

23 CMSR. SCOTT: Yes. So, just to put a  
24 finer point on it. So, what we just heard from FairPoint,

1 I believe, I'll put words in his mouth, sorry.

2 MR. McHUGH: That's okay.

3 CMSR. SCOTT: Is, because the assessment  
4 gave an approximation of the next year's assessment, that  
5 was his basis. You're suggesting that A:4, the language  
6 "prior fiscal year" is the operating -- is the overriding  
7 part of that statement, is that correct?

8 MR. DAMON: Yes. I mean, it says "the  
9 amount assessed against it for the prior fiscal year." I  
10 just -- I can't see another way to read it. You know,  
11 going to the question of whether or not, let's say that  
12 the Staff's view is incorrect or the Commission believes  
13 it's incorrect, the question of whether or not the ELECs'  
14 OCA expenses, as a whole, should be taken up, I mean, they  
15 have not explained why it -- why they can ride on the  
16 coattails of FairPoint. It's possible, I suppose, that  
17 there is a new statute by the Senate Bill 48, Section  
18 362:8, I believe, which urges the Commission to treat all  
19 ELECs the same. And, whether or not they're relying on  
20 that, I don't know, but that's the only thing I can think  
21 of.

22 CMSR. HARRINGTON: Just for clarity, as  
23 far as putting aside the OCA portion of this, do you feel  
24 that FairPoint is correct in at least being able to file

1 to challenge the interstate portion based on last year's  
2 assessment?

3 MR. DAMON: Yes, I do. A few more  
4 points I think I would raise. And, I won't go through  
5 everything that I've written down here. But, one of the  
6 arguments that it makes on the interstate revenues  
7 question is based on a statutory interpretation that only  
8 its gross revenues from providing telephone messages  
9 entirely within New Hampshire can be counted on in the  
10 revenues ratio that's applied to the expenses to determine  
11 the assessment.

12 However, Staff notes that the reports  
13 that FairPoint files, pursuant to the Commission's own  
14 rules, are based on "revenues derived from New Hampshire  
15 operations", which is a quite different standard, I think,  
16 than "revenues derived from New Hampshire regulated  
17 operations" or something like that. So, just like to  
18 point that out. And, obviously, this gets into the whole  
19 question of how to properly apply the assessment statute.

20 Finally, FairPoint raises a  
21 constitutional claim of an unconstitutional taking and so  
22 on. And, obviously, it's for the administrative agency to  
23 agree to that. It's kind of a sensitive issue and we'd  
24 have to figure out what to do with that.

1                   CHAIRMAN IGNATIUS: Commissioner  
2 Harrington.

3                   CMSR. HARRINGTON: Yes, just a follow-up  
4 on something that was stated by the people from Public  
5 Service. And, I'll use them as an example, because I'm  
6 more familiar with that than on the gas side. Clearly,  
7 there are revenues collected by Public Service that  
8 represent transmission costs. And, the transmission costs  
9 are not assessed by this Commission, they're approved by  
10 the FERC. And, some of them are regional costs having to  
11 do with ISO-New England. Those would clearly be  
12 out-of-state regulated costs. It seems, do you agree that  
13 there's a similarity on that and the interstate issue that  
14 is being brought up with the telephone?

15                  MR. DAMON: I would think, to that  
16 extent, yes. Uh-huh.

17                  CMSR. HARRINGTON: And, I guess that  
18 would also apply to the gas companies as well?

19                  MR. DAMON: Yes, I do.

20                  CHAIRMAN IGNATIUS: I guess I'm curious,  
21 to Mr. McHugh, and others may want to weigh in on this, to  
22 suggest that, well, first of all, you have a statutory  
23 issue that the current statute says "base assessments on  
24 gross utility revenues". And, yet, we have heard

1 description of "the world changing and perhaps there's  
2 some inequity in the way it's structured." But we have to  
3 do what the statute tells us to do. So, how do we have  
4 the authority to grant your request and to use something  
5 other than gross utility revenue?

6 MR. McHUGH: Statutes from New Hampshire  
7 can never trump preemption, nor can they trump  
8 constitutional rights. So, there's plenty of authority, I  
9 think, for the Commission to correct what we have raised.

10 CHAIRMAN IGNATIUS: Well, but  
11 "preemption" is a different question, isn't it, than what  
12 the statute tells us to assess on the basis of? And, I  
13 think of "preemption" is there's something else that  
14 governs, and the state would be standing in the way of  
15 that other scheme set up on a federal level to go forward.  
16 How does the use of gross utility revenues, which has been  
17 in place forever, and this issue has been here forever,  
18 why is that a "preemption" issue?

19 MR. McHUGH: Well, I'm not sure I  
20 completely understand the question. So, let me give it a  
21 shot, and then we can go back and see what you're trying  
22 to address, I suppose. I feel the regulation is so  
23 consumed by the federal government and one of its  
24 agencies. And, I don't see how a state agency can

1 interpose itself and do anything in that field, if, in  
2 fact, it's true preemption. So, based on the  
3 interpretation of the statutes that I've applied in the  
4 submission of September 17th, I think there's a way to  
5 reconcile it. And, I think I set that out.

6 CHAIRMAN IGNATIUS: Well, but it sounds  
7 to me like, if the regulation that is so controlling, and  
8 the state agency shouldn't do anything to get in the way  
9 of that, to me suggests you never needed a Senate Bill 48,  
10 the state would simply had been preempted, the state  
11 commission would have been preempted from any of its state  
12 statutes. What I'm not following is how the assessment  
13 becomes preempted, as opposed to the scheme of regulation?

14 MR. McHUGH: Well, I guess, let me  
15 address the first point. Again, I'm not sure I  
16 understand. Senate Bill 48, in my view, freed FairPoint  
17 specifically as an ILEC, and other ELECs, from most of the  
18 Commission's jurisdiction over state-regulated retail  
19 services. I've never conceded that any of our interstate  
20 services were subject to Commission regulations, at least  
21 -- I mean, it might be too broad of a statement. Buff,  
22 depending on what you want to talk about, so, for example,  
23 I'll pick broadband or, you know, long distance service.  
24 I don't think FairPoint, to my knowledge anyway, to my

1 knowledge, has ever conceded that the Commission's -- the  
2 state commissions had jurisdiction over those interstate  
3 services. So, I guess I wanted to address that first,  
4 prior to your question. Having done that, I will tell you  
5 I forgot the second part of your question.

6 CHAIRMAN IGNATIUS: So my plan worked.

7 MR. McHUGH: Nicely done.

8 CHAIRMAN IGNATIUS: No. I think what I  
9 was trying to say is if it -- I think of "preemption" in  
10 terms of regulatory structures in place, and the governing  
11 scheme, if it's dominated through a federal scheme of  
12 regulation, then the states are going to interfere with  
13 that, that's the kind of preemption analysis that I know  
14 of. To say that "we're not talking about that, we're  
15 talking about the assessment being -- the state assessment  
16 being preempted", because why? There's no federal  
17 assessment that is in conflict with the state assessment.  
18 So, that's where I'm losing you.

19 MR. McHUGH: Well, I don't know that I  
20 would agree with that. We get assessed by the Federal  
21 Communications Commission based upon our interstate  
22 revenues. And, you're essentially, the way I would phrase  
23 it, is taxing us twice. Because you're subjecting both  
24 the state and interstate portion to your assessment, when

1 you have, in my opinion, no jurisdiction over our  
2 interstate revenues.

3 CHAIRMAN IGNATIUS: And, hasn't that  
4 been the case? If that's your theory, hasn't that been  
5 the case for many years?

6 MR. McHUGH: Oh, sure. Yes. I was only  
7 State President in the last year. So, I can't really  
8 speak to, you know, what Verizon chose to do or not do, or  
9 what other folks at FairPoint chose to do or not do.

10 CHAIRMAN IGNATIUS: So, it's -- we've  
11 been talking a lot about Senate Bill 48, but the issue is  
12 broader than whether Senate Bill 48 applies or does not to  
13 the assessment question?

14 MR. McHUGH: Correct.

15 CHAIRMAN IGNATIUS: And, there's also  
16 been talk about "we ought to be looking at who the  
17 regulator is with jurisdiction" or "what is the  
18 Commission's jurisdiction over your services?" But is it  
19 also appropriate to ask "how are the facilities in New  
20 Hampshire that are under New Hampshire jurisdiction being  
21 used?" Is it important or is it immaterial that New  
22 Hampshire regulated facilities are part of the operations  
23 that extend to, say, long distance service?

24 MR. McHUGH: Well, I guess my first



1 reaction is, that's immaterial, because the statute says  
2 you can assess based on gross utility revenue. And, I've  
3 interpreted that statute consistent with what I think is  
4 in both Senate Bill 48, as well as the preemption issues  
5 I've raised as I set forth in the objection. So, I think  
6 it needs to be -- I'm not saying that the statute  
7 necessarily, you know, has to be thrown out, *per se*. I  
8 think it needs to be interpreted consistent with existing  
9 state and federal law. And, I've set forth a path that I  
10 think it passes both constitutional muster, as well as  
11 statutory interpretation muster under New Hampshire law.

12 CHAIRMAN IGNATIUS: And, your view is we  
13 should grant the objection under the analysis that it  
14 simply would be unconstitutional to impose the statute as  
15 written? We can't apply the terms of the statute, because  
16 to do so would be impermissible constitutionally?

17 MR. McHUGH: No. I think -- well, I  
18 guess it depends on how broad you want to apply it. I  
19 think I set forth of Pages 3 and 4 a path as to how it  
20 should be interpreted, understanding that past history is  
21 simply past history. But that, if the assessment is going  
22 to be on our "gross revenues", which includes interstate,  
23 then I don't think that would pass constitutional muster.

24 CHAIRMAN IGNATIUS: Which I think got to

1 Mr. Damon's point. It's for an agency to reject the  
2 language of a statute.

3 MR. McHUGH: If you adopt my Section 2,  
4 you don't have to reject the statute.

5 CHAIRMAN IGNATIUS: Other questions?  
6 Commissioner Scott.

7 CMSR. SCOTT: Also, for clarification --  
8 for clarification, on your September filing, I notice you  
9 put in the footnote, obviously, that you're making in a  
10 timely manner the first installment of the assessment. If  
11 this takes a long time, for instance, is there an  
12 implication one way or another for the rest of that or --

13 MR. McHUGH: I haven't decided one way  
14 or the other. I simply wanted to make the payment and get  
15 the issue teed up with what I thought was a timely basis.  
16 And, I think, we, at FairPoint, subject to check, did we  
17 not already pay the second installment?

18 MR. TAYLOR: I would have to check and  
19 --

20 MR. McHUGH: Well, I mean, let me put it  
21 to you this way. I authorized the processing of payment  
22 for Installment Number 2. I do recall that. And, it was  
23 also, you know, I didn't do a lot of research on what you  
24 folks might be able to charge us for interest, you know.

1 So, I didn't want to even get into that discussion.

2 CMSR. SCOTT: Okay.

3 MR. McHUGH: We paid it and there's no  
4 interest. And, if we prevail -- if FairPoint prevails, it  
5 makes sense just to get it worked out, because we timely  
6 filed the objection.

7 CMSR. SCOTT: Okay. Fair enough. Thank  
8 you.

9 CHAIRMAN IGNATIUS: Commissioner  
10 Harrington.

11 CMSR. HARRINGTON: Just a couple more  
12 clarifying questions. Getting just to the interstate  
13 portion for this, and forgetting about the OCA part, does  
14 SB 48 change anything there or is this the same argument  
15 you could have made a year ago, for instance?

16 MR. McHUGH: I would say Senate Bill 48  
17 does not -- so, I think, on the one attachment where we  
18 put in some public data from the ARMIS reports, we were  
19 filing consistent with, or at least what I believe to be  
20 consistent with, the Commission's Merger Approval Order  
21 back in 2008, as well as the related Settlement Agreement.  
22 And, there was lots of reporting. And, so, that's what we  
23 did. I mean, these were the reporting requirements,  
24 here's how we reported. And, in there, there was a

1 requirement that Verizon, then FairPoint impute  
2 \$26 million worth of revenues associated with the sale of  
3 the Yellow Pages. Which, to me, is essentially sort of a  
4 mythical number to FairPoint. We never had Yellow Pages,  
5 it was all Verizon's. It was done a long time ago. This  
6 Commission found, I think a long time ago, and I don't  
7 remember what year Verizon did it, whether the right  
8 phrase is to say they did it illegally or not, it was done  
9 without Commission authority. And, so, there was always  
10 this revenue imputation that was made, which was really a  
11 nonfactor, did it from, in large part, in the sense that  
12 it really would have only hurt if you came in with a rate  
13 case, up your rates, you would have had to impute that  
14 revenue.

15 CMSR. HARRINGTON: Excuse me. You're  
16 completely losing me. How does this have anything to do  
17 with SB 48?

18 MR. MCHUGH: Because the assessment  
19 includes that \$26 million, that I -- that phantom \$26  
20 million, to me, under Senate Bill 48, needs to go away.

21 CMSR. HARRINGTON: Okay. And, you're  
22 saying, Senate Bill 48 would take away that part of the  
23 assessment?

24 MR. MCHUGH: Correct.

1 CMSR. HARRINGTON: Yes. So, just that  
2 26 million. And, there was some discussion earlier about  
3 "are there other types of utilities", and, again, I'll use  
4 the example of electric utilities. I assume you have an  
5 electric bill, and you've looked at it, you see a large  
6 and growing portion of that bill is transmission costs.  
7 Would you think that the electric distribution companies  
8 have a similar case to be made, as far as inter versus  
9 intrastate charges, because since the transmission costs  
10 are not regulated by or set by this body, but, in fact,  
11 are done by FERC?

12 MR. McHUGH: They haven't raised it, I  
13 don't know the law, and my wife pays the bills.

14 CMSR. HARRINGTON: Okay. Fair enough.

15 MR. McHUGH: So, I have not looked at it  
16 at any time period at all.

17 CMSR. HARRINGTON: One last question.  
18 On the interstate portion again, you had said that, in  
19 some ways, you were being assessed twice, because you were  
20 assessed by the FCC and now the PUC for that, is that  
21 correct? Did I understand what you were saying earlier  
22 correctly?

23 MR. McHUGH: Yes.

24 CMSR. HARRINGTON: Okay. And, having to

1 do with an interstate phone call that would be placed from  
2 someone who has -- is a, I'll just use FairPoint customer,  
3 the phone call has multiple parts, obviously, going from a  
4 person's house, to the central office, from the central  
5 office to someplace else. And, eventually, it gets from,  
6 let's just say, Dover to Chicago. Are you saying that  
7 that whole call would be, all the revenues associated with  
8 that call, would be considered "interstate", and then not  
9 subject to the assessment? Or, just the portion, if it  
10 can be broken down, of the interstate part of that call,  
11 the part associated with getting out of New Hampshire, not  
12 the part about moving around in New Hampshire?

13 MR. McHUGH: Subject to check with my  
14 accounting expert here, the entire call is classified  
15 jurisdictionally, under federal law, as "interstate in  
16 nature".

17 CMSR. HARRINGTON: Okay. That was all I  
18 had. Thank you.

19 CHAIRMAN IGNATIUS: All right. There  
20 may be other issues, Mr. McHugh, you wanted to respond to  
21 that you heard go around, and then I'll see if there are  
22 other people who want to chime in on any other responses.  
23 But, first, Mr. McHugh, anything you wanted to add that --  
24 from other people's comments or questions?

1 MR. McHUGH: No. I would simply  
2 reiterate briefly the position on scope. That I do agree  
3 with the Staff. We were the only ones to file, and the  
4 scope should not be -- there should be no scope brief.  
5 Certainly, if people want to file briefs, that's fine. I  
6 mean, you know, but, I mean, in terms of scope brief,  
7 issues to be decided, are the issues set forth, I think,  
8 in my petition of September 17th.

9 CHAIRMAN IGNATIUS: Thank you.

10 MR. McHUGH: Thank you.

11 CHAIRMAN IGNATIUS: Does anyone have  
12 anything further they want to add to what they have  
13 already said? Attorney Bersak.

14 MR. BERSAK: Thank you, madam Chairman.  
15 Regarding the scope of the proceeding, I have to disagree  
16 with what Attorney Damon and what Attorney McHugh just  
17 said, regarding the involvement and the impact on the  
18 other utilities of this proceeding. The assessment of the  
19 costs of the Commission are a zero sum game. If we were  
20 to assume that FairPoint was to prevail in its petition,  
21 it would not pay the Commission roughly half a million  
22 dollars worth of the expenses that have been incurred by  
23 the Commission. The Commission's not going to eat those  
24 costs. Those costs are eventually going to be assessed

1 amongst all the other utilities that are here today. When  
2 we get that bill, if we're not allowed to participate  
3 today, we will appeal then, we'll have an evergreen string  
4 of proceedings, as the assessments trickle downhill,  
5 ultimately, to fall probably on the water companies, who  
6 don't seem to be here today. And, I don't think that's an  
7 efficient way of doing business. This affects everybody  
8 in the room, and that's why we're here today.

9 To the extent that FairPoint has a  
10 change in the process of assessments, whether it's because  
11 of a federal versus state jurisdictional matter, whether  
12 it's because of the OCA, somebody pays the bill. And, we  
13 think we have to look at all those questions at once,  
14 otherwise we're going to be here forever on an evergreen  
15 basis, year after year, as the assessments trickle down.

16 CHAIRMAN IGNATIUS: Could I ask you a  
17 question about that before you go on. Does that mean in  
18 your mind that the docket should be broadened to include  
19 all utilities? And, the particular circumstances of each  
20 of their services, and what should be in and what should  
21 be out, what revenues should be considered and what should  
22 not? Or, are you saying, it should still be simply  
23 FairPoint's petition, but all of the utilities should be  
24 welcomed to participate and show the consequences to their



1 customers, if FairPoint prevails?

2 MR. BERSAK: I think it's the former.  
3 Which is that, to the extent that the Commission makes a  
4 determination that FairPoint's contention of assessments  
5 only being based upon revenues that are jurisdictional to  
6 this Commission, that should apply to all utilities who  
7 have revenues that are jurisdictional to some other  
8 Commission, whether it's the FERC, for the electric and  
9 gas companies, whether it's the FCC for communications  
10 companies, and I have no idea about water or steam,  
11 whether they have anything that is federally  
12 jurisdictional. That we have to be treated equally.

13 To the extent that Public Service did  
14 not contest its assessment this year, it was because it  
15 was done in a way that was consistent, where all the  
16 utilities were treated in the same way. If the applecart  
17 is going to be upset, we need to be treated fairly, at the  
18 same time and in the same manner as the other utilities.

19 Finally, with respect to the statute's  
20 use of "gross utility revenues" as the basis for divvying  
21 up the costs, that's a "rough justice" way of allocating  
22 the costs of the Commission. Clearly, as Attorney  
23 Chamberlin said, it's not based upon what exactly the  
24 Commission did or that the OCA did last year. It's a

1 rough way of divvying up the costs. There is not a  
2 preemption issue here from the vantage point of Public  
3 Service of New Hampshire.

4 To the extent that the statute has  
5 things that are unfair in it, it needs to have a new  
6 statute. We don't think that this issue really is  
7 jurisdictional at the Commission at this time. You know,  
8 we certainly were willing to work with the parties here,  
9 as well as Staff and OCA, to see if a recommendation to  
10 the Legislature can be crafted and change how the costs of  
11 this Commission are recovered. But we really do not see  
12 that this docket has a lot of room to change the way that  
13 the statute dictates that the assessments are governed.

14 CHAIRMAN IGNATIUS: Thank you.  
15 Commissioner Harrington.

16 CMSR. HARRINGTON: Yes. Just to clarify  
17 one point, so I just make sure I'm not working on a false  
18 assumption. Getting back to the FERC jurisdictional  
19 transmission costs. When I pay my electric bill, I have a  
20 bottom line on there, some of which includes those. Are  
21 those costs or revenues, are they included in your gross  
22 utility's revenues?

23 MR. BERSAK: Yes, they are. Not only  
24 are those included, but also, to the extent that we get

1 revenues from providing transmission services to other  
2 utilities in the state, whether it's the Co-op or Unitil,  
3 those are included in the assessments as well.

4 CMSR. HARRINGTON: Thank you.

5 CHAIRMAN IGNATIUS: All right. Any  
6 other comments from parties? Attorney Geiger.

7 MS. GEIGER: Just very briefly. As  
8 Attorney Damon noted, I did not indicate in my opening  
9 remarks the legal basis upon which Comcast relies for its  
10 position that it, as an ELEC, should be similarly treated  
11 to Verizon, should Verizon -- excuse me, to FairPoint,  
12 should FairPoint and/or Verizon prevail in their positions  
13 here. And, I do believe that the statute cited by  
14 Mr. Damon of 362:8 compels that result, because it  
15 provides that "notwithstanding any other provision of law,  
16 rule or order, the Commission shall have no authority to  
17 impose or enforce any obligation on any excepted local  
18 exchange carrier that is not also applicable to all other  
19 excepted local exchange carriers, excluding providers of  
20 commercial mobile radio service", and then there are some  
21 exceptions noted, which do not apply here.

22 So, for purposes of the scope issue,  
23 Comcast's position is that it, as an ELEC, should be  
24 treated similarly to FairPoint.

1                   CHAIRMAN IGNATIUS: All right. Thank  
2 you. Anything further?

3                   (No verbal response)

4                   CHAIRMAN IGNATIUS: All right. I know  
5 there's a call for a technical session after this and  
6 development of a schedule. I get the sense there won't be  
7 one uniform position that emerges from this, but it's  
8 possible. And, even if there are sort of two or three  
9 camps and a coalescing of positions around those that  
10 people want to submit, we're always interested in seeing  
11 that. If not, we'll make our best judgment of how to move  
12 forward. So, I encourage people to make use of the time  
13 that you've got this afternoon, see if there can be any  
14 agreement on any of the procedural questions. I know,  
15 Attorney McHugh, you said that you thought a stipulated  
16 set of facts might be in order in this case or narrowing  
17 down the number of disputed facts, if there are any. So,  
18 that's another thing that perhaps people can think about,  
19 what should be the procedure to identify any facts in  
20 dispute and to resolve those. Is this something that  
21 should be done through kind of the normal adjudicative  
22 process, is it something to be done on the papers, some  
23 staging of events, in order to deal with one issue before  
24 another, whether it's a legal issue first or factual, or

1 whatever it may be. And, I don't say that with any  
2 thought in my own mind of how it ought to play out, I  
3 think this is a complicated one.

4 So, I guess, if you can come up with any  
5 good, efficient process that people agree on, we're happy  
6 to see it. And, if not, we'll do our best to come up with  
7 what we think will work.

8 So, unless there's anything further?

9 (No verbal response)

10 CHAIRMAN IGNATIUS: We appreciate your  
11 attention to it this afternoon, and we'll stand adjourned.

12 **(Whereupon the prehearing conference**  
13 **ended at 2:32 p.m., and a technical**  
14 **session was held thereafter.)**

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