No. 17-2290
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARTER ADVANCED SERVICES (MN), LLC, and
CHARTER ADVANCED SERVICES VIII (MN), LLC,

Plaintiffs-Appellees,

v.

NANCY LANGE, in her official capacity as Chair of the Minnesota Public Utilities Commission, et al.,

Defendants-Appellants.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
No. 15-cv-3935 (SRN/KMM)

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF CASE

This case presents one question: whether Charter's interconnected Voice over Internet Protocol ("VoIP") service, "Spectrum Voice," is an "information service" under the federal Telecommunications Act of 1996. 47 U.S.C. § 153(24).

The District Court concluded that it is. That decision is consistent with the decision of every other federal court that has addressed the classification of interconnected VoIP, and it is correct. Spectrum Voice offers the ability to convert the protocol of calls when Charter's network interconnects with other carriers; the service thus offers the "capability for … transforming [or] processing … information via telecommunications" within the statute's plain text. Classifying interconnected VoIP as an information service is also consistent with FCC precedent, and advances FCC and congressional objectives to encourage growth, innovation, and competition in advanced services by insulating them from state public utility regulations.

The Minnesota Public Utilities Commission, alone among states in which Charter operates, seeks to extend its regulatory reach to encompass advanced services. Its approach not only ignores text and precedent, but would allow every state to impose idiosyncratic rules, creating a nationwide patchwork of requirements that would frustrate the FCC's longstanding policy of insulating advanced services from such a regulatory morass. The District Court correctly rejected the MPUC's effort to exceed its statutory boundaries, and the decision below should be affirmed.

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STATEMENT OF ISSUE

Did the District Court correctly conclude that Spectrum Voice, Charter's interconnected VoIP service, is an "information service" under 47 U.S.C. § 153(24)?

Most Pertinent Authorities:

47 U.S.C. § 153(24).

In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996), *modified in part*, Order on Reconsideration, 12 FCC Rcd 2297 (1997).

Vonage Holdings Corp. v. MPUC, 290 F. Supp. 2d 993 (D. Minn. 2003).

Plaintiffs-Appellees, Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC (collectively, "Charter Advanced" or "Charter"), respectfully request that the Court affirm the District Court's judgment against the members of the Minnesota Public Utilities Commission (collectively, the "MPUC").

STATEMENT OF THE CASE

A. Charter Advanced's Interconnected VoIP Service.

Charter offers video, internet, and voice communications services across the country. Add.2. Charter Advanced, a Charter affiliate, offers an interconnected VoIP service, with the communications features described below, under the "Spectrum Voice" brand.[1] Add.2-3.

1. Real-Time, Two-Way Voice Calling.

One feature of Spectrum Voice is real-time, two-way calling. Add.2-3. This feature is provided using VoIP technology, meaning that voice signals are transmitted using Internet Protocol ("IP") "packets," the same format used to transmit data over the internet. Add.3. Use of IP allows Charter to offer voice service over its broadband network. Add.3.

[1] Charter rebranded its internet, video, and voice products as "Spectrum" in 2014-15; some record materials use the previous "Charter Phone."

Charter provides Spectrum Voice subscribers with a device known as an embedded Multimedia Terminal Adapter ("eMTA"). Add.3. The eMTA and modem (which provides broadband internet access service) are combined into a single device. Add.3. The eMTA changes voice calls from analog electrical signals used by conventional telephone handsets into IP "packets," which are then carried on Charter's network. Add.3.

Spectrum Voice's voice calling feature is an "interconnected VoIP service," meaning that subscribers can exchange calls with traditional telephone users. 47 U.S.C. § 153(25); 47 C.F.R. § 9.3. This requires Charter to interconnect with traditional providers. Add.3-4.

Traditional telephone networks (collectively known as the "public switched telephone network" or "PSTN") utilize "circuit switching" technology, which establishes a dedicated pathway for the duration of a call. Add.3. A technique called Time Division Multiplexing ("TDM") allows multiple circuit-switched calls to share the same line. Add.3. Because Charter's network uses IP packets, not TDM circuits, calls must be converted between IP and TDM for Charter to exchange calls with traditional networks. Add.3. This process of transforming information between different data transmission formats is known as "protocol conversion." Add.3; *see generally Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005) ("*Brand X*") ("protocol conversion" enables "communicat[ion] between

networks that employ different data-transmission formats"). Charter performs this process using a "media gateway" on Charter's side of the interconnection point. Add.3, 10. Most of Charter's Minnesota traffic undergoes this process.

2. Online Access, Call Feature Management, and Future Features.

Spectrum Voice includes additional features. One is an online portal ("Voice Online Manager"), which allows customers to access voicemails as digital files, convert voicemails to text (using integrated software), and forward them via email. Add.4. Voice Online Manager also offers the ability to review and export call logs, manage "contact" lists, and direct numerous calling features, such as specifying a "backup phone" that will ring in the event of an outage, "simultaneous ring" that will cause incoming calls to ring numerous phones at once, call forwarding, selective call blocking, and others. *Id.*; SAA.73-74. [2]

Charter's IP platform lets it keep adding new features as they become available. Add.4. For example, Charter currently offers in numerous markets a "softphone" application, which lets subscribers initiate and receive voice calls, video calls, and text messages from their Spectrum Voice number using a smartphone application. *Id.* At the time of briefing below, Charter was also rolling out

[2] Plaintiffs-Appellees cite to Plaintiffs-Appellees' Sealed Appendix as "SAA" and Plaintiffs-Appellees' Appendix as "AA."

"Nomorobo" service, which uses dynamic databases to identify and block unwanted "robo" calls. *Id*.

B. Provisioning of Spectrum Voice Features.

Charter's network provides every Spectrum Voice subscriber with the service's full range of available features. Add.5. Although subscribers can opt not to utilize certain abilities, Charter's systems do not tailor features by customer. *Id*. Isolating Spectrum Voice's voice calling feature and providing it separately is possible only if Charter personnel deactivate other features manually, which virtually no customers request. *Id*. The protocol conversion capability cannot be deactivated. SAA.87-88.

C. Relationship to Charter's Internet and Cable Services.

Charter must activate a broadband connection to a location in order to offer Spectrum Voice. Add.19; SAA.66-67, 81-82. The eMTA used to provide Spectrum Voice and the modem used to provide broadband internet access share the same physical device. Add.3. Charter offers Spectrum Voice as a service option for customers who subscribe to Charter's internet and cable television services. Add.19. Charter does not attempt to sell Spectrum Voice separately. Add.5.

D. Regulatory History.

Charter's affiliates Charter Fiberlink CCO, LLC, and Charter Fiberlink CC VIII, LLC (collectively, "Charter Fiberlink") are state-certificated carriers that provide regulated wholesale telecommunications services. Prior to March 2013,

Charter offered interconnected VoIP service in Minnesota through Charter Fiberlink. Add.5.

Before 2013, Charter consolidated wholesale and retail operations into the same company. Many VoIP providers are structured differently, offering and obtaining regulated wholesale services (such as interconnection and telephone numbers) through regulated affiliates, while a separate, unregulated entity offers retail VoIP services. The FCC has repeatedly recognized this separated structure, holding that separately-organized VoIP providers are entitled to interconnection through their regulated affiliates,[3] to intercarrier compensation on equal terms as traditional carriers,[4] and to obtain telephone numbers despite their retail affiliates' not holding state certificates.[5]

In March 2013, Charter reorganized its voice operations nationwide to conform to this model. In each state, it transferred its retail VoIP services to new

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[3] *In re Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

[4] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 18,025-28 ¶¶ 968-971 (2011) ("*2011 ICC Transformation Order*").

[5] *In re Numbering Policies for Modern Communications*, Report and Order, 30 FCC Rcd 6839, 6856 ¶ 37 (2015) ("*Numbering Resources Order*") (noting that VoIP providers "do not have any clearly established requirement" to comply with certain telecommunications carrier requirements).

affiliates (the "Charter Advanced Services" companies). Add.5. Charter Fiberlink retained Charter's regulated wholesale operations. Add.5. Charter notified its subscribers a month beforehand, offering them the opportunity to accept the revised terms of service by continuing their subscriptions, along with a contact number to call with any questions. Add.5.

Because the only service they offer is interconnected VoIP, Charter's Advanced Services affiliates have not sought new authorizations from state regulators in Charter's footprint.

E. The MPUC's Decision.

Although the reorganization affected all states in which Charter operates, Minnesota is the only state where it resulted in regulatory litigation. On September 26, 2014, the Minnesota Department of Commerce ("Department") filed a complaint, alleging that Charter's customer transfer from Charter Fiberlink to Charter Advanced Services—both wholly-owned Charter subsidiaries—constituted "slamming," an unlawful practice whereby a customer's telephone service is switched to a different provider without their knowledge. Add.5-6.[6] The Department's complaint requested that, *inter alia*, the MPUC investigate Charter's compliance across all of Chapter 237 of the Minnesota Statutes, the public utility

[6] Under FCC rules, wholesale carrier-to-carrier customer transfers are not slamming, but require 30-day advance notice. *See* 47 C.F.R. § 64.1120(e).

requirements applicable to telephone companies. *See id*. Charter challenged the factual accuracy of numerous complaint allegations and raised state-law defenses, but also explained that the state rules the Department sought to apply to Spectrum Voice were preempted. App.6.

On July 28, 2015, the MPUC issued an order finding that its state-law regulations were not preempted, and that "Charter's interconnected VoIP service is a telecommunication service subject to the Commission's authority under Minn. Stat. ch. 237 and related Commission rules." Add.6; App.152.

F. Procedural History.

Charter Advanced brought this action under the Supremacy Clause and under 42 U.S.C. § 1983, seeking a declaration that Spectrum Voice is an "information service" under federal law and accordingly not subject to state public utility regulation. App.15.

The MPUC moved to dismiss, arguing that the FCC permits states to apply public utility regulations to VoIP services provided over "fixed" (as opposed to "nomadic") facilities, and that Spectrum Voice is a "telecommunications service" under the federal Communications Act subject to its regulatory authority. AA.26-28. However, the MPUC conceded that, were Spectrum Voice an "information service," state regulation would be federally preempted. AA.12.

The District Court denied the motion. The Court first rejected the MPUC's argument that the FCC has authorized states to regulate fixed interconnected VoIP services. Add.30-40. It then noted Charter's contention that its service's "ability to convert call protocols offers the 'capability' of 'transforming' and processing information," as well as Charter's further contention that it "offers not only voice call transmission, but also other service features facilitated by its use of IP," and that those features were integrated such that "the overall service is an 'information service.'" Add.39. The Court accordingly found it "plausible that Charter's service is an information service such that state regulation should be preempted" and allowed the case to proceed. Add.25, 106.

Following discovery and cross-motions for summary judgment, on May 8, 2017, the District Court granted summary judgment to Charter and denied the MPUC's cross-motion. It agreed that Spectrum Voice's capability to convert calls between IP and TDM protocols satisfies the statutory definition of an "information service." Add.10-13. Having ruled on this basis, the District Court held that it "need not reach" Charter's additional argument that Spectrum Voice's integration of additional service features independently satisfied the definition as well. Add.10.

The District Court next considered the MPUC's argument that Spectrum Voice is nonetheless not an information service because its protocol conversion capability falls within the statutory exception for functions performed merely "for

the management, control, or operation of a telecommunications system" (the "telecommunications management exception"). Add.14-20. The District Court noted that the FCC has analyzed how the telecommunications management exception applies to protocol conversion capabilities, and that Spectrum Voice's use of protocol conversion falls outside the FCC's recognized applications. Add.15-18. Also applying the FCC's "functional" framework to classification, it held that Spectrum Voice's protocol conversion capability "is a necessity" to users and provides an additional enhancement—the ability for customers "to utilize their internet connection for voice service." Add.18-19. For those reasons, the Court concluded, "what is 'functionally offered' to the consumer is an information service." Add.19.

Finally, the court rejected arguments that the FCC's 2015 *Open Internet Order*[7] compelled a contrary conclusion. Add.20. There, in the context of broadband internet access, the FCC applied the telecommunications management exception to various features such as caching and domain name service ("DNS"), which merely provide "enhanced network efficiency." *Id*. Unlike those features, the District Court found, "the purpose of IP-TDM protocol conversion is not to

[7] *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015), *aff'd*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Sept. 27, 2017) (No. 17-498).

enhance the efficient operation of Charter Advanced's network, but rather to allow consumers to bridge different networks," a "function critical to Spectrum Voice's operation." *Id.*

The Court accordingly granted Charter's motion for summary judgment, denied the MPUC's cross-motion, and entered judgment. Add.21. This appeal followed.

SUMMARY OF ARGUMENT

This case presents only one question: whether Spectrum Voice is an "information service" under 47 U.S.C. § 153(24). If so, federal law preempts extensions of state public utility regulation such as the MPUC's order. The District Court correctly concluded that Spectrum Voice is an information service, conforming to the decision of every other federal court that has addressed the classification of interconnected VoIP. The District Court's order is well-reasoned, consistent with both federal judicial and FCC precedent, and should be affirmed.

First, contrary to the MPUC's arguments, the FCC has neither resolved how interconnected VoIP services are classified under the Communications Act nor permitted states to apply public utility regulations to such services. The FCC orders addressing interconnected VoIP services upon which the MPUC relies—including *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the MPUC*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004)

("*Vonage II*"), *aff'd*, *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) ("*Vonage III*") and *In re Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7536 ¶ 34 (2006) ("*USF Order*"), *aff'd in relevant part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007)—did not decide the classification or preemption issues presented in this case, which were properly before the District Court to resolve. *See infra* Part I.

Second, the District Court correctly concluded that Spectrum Voice satisfies the statutory definition of an "information service," *i.e.*, an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24). It provides the omnipresent capability to convert calls between different protocols (IP and TDM), thereby creating the ability to obtain voice service over broadband connections while communicating with callers on non-IP networks. Moreover, since this feature provides additional functionality to users, and is not merely for management purposes, it falls outside the telecommunications management exception. *See infra* Part II.

Third, the District Court correctly concluded that Spectrum Voice is an "offering" to subscribers of this protocol-conversion capability in conjunction with telecommunications, and not an "offering of telecommunications" standing alone,

which would make it a "telecommunications service" subject to state public utility regulation. 47 U.S.C. § 153(53). Charter provides the "transmission…of information" in order to operate Spectrum Voice features, *see* 47 U.S.C. § 153(50), but the "offering" to users includes the service's protocol conversion capabilities. Add.20. Here too, the District Court's Order is consistent with the text of the Communications Act and settled FCC precedent. *See infra* Part III.

Finally, preempting state public utility regulation here is consistent with FCC and congressional objectives to encourage growth, innovation, and competition in information services by insulating them from traditional state public utility regulations. Reversing the District Court would not merely extend the MPUC's numerous telephone rules to interconnected VoIP services; it would allow *every* state to apply its own idiosyncratic rules, creating a nationwide patchwork of potentially inconsistent requirements undermining longstanding federal policy.

Although the MPUC and some of its supporting *Amici* hypothesize adverse policy consequences from federal preemption, their arguments (1) neglect that the FCC already protects consumers, competition, and public safety through national regulation of interconnected VoIP providers; (2) exaggerate the extent to which state authority is actually displaced by federal preemption; and (3) omit that the norm in other states is *not* to extend telephone regulations to interconnected VoIP

providers—the MPUC's attempt to assert jurisdiction is an outlier, and the District Court's decision restored the *status quo*. *See infra* Part IV.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RECOGNIZED THE CLASSIFICATION OF SPECTRUM VOICE AS DISPOSITIVE.

The District Court correctly held that this case turns on whether Spectrum Voice is an information service or telecommunications service under federal law. At the outset, the MPUC and its *Amici* contest this basic framework, suggesting that the FCC has already resolved the preemption issue or that it is irrelevant. Neither argument is persuasive.

A. The FCC Has Not Yet Decided the Classification of Interconnected VoIP Services and the Issue Is Properly Before the Court.

The MPUC argues that the Court "need not reach the definitional classification" because the FCC has already resolved the question of whether states may regulate fixed interconnected VoIP services. MPUC Br. 20-25. However, that position is foreclosed both by pertinent FCC decisions and by this Court's *Vonage III* decision.

The *Vonage* decisions arose out of the MPUC's similar attempt in 2003 to subject another interconnected VoIP provider, Vonage, to its state telephone requirements. Vonage challenged the MPUC's order in federal district court and at the FCC. The District of Minnesota enjoined the MPUC's order, holding that state utility regulation of Vonage's VoIP service was preempted because the service was

an "information service." *Vonage Holdings Corp. v. MPUC*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) ("*Vonage I*"). The *Vonage I* court applied the identical reasoning as the District Court here. It reasoned that Vonage's service "'act[s] on' the format and protocol of the information" because "[f]or calls originating with one of Vonage's customers, calls in the VoIP format must be transformed into the format of the PSTN before a POTS [Plain Old Telephone Service] user can receive the call," and "[f]or calls originating from a POTS user, the process of acting on the format and protocol is reversed." *Id.*

The FCC ruled in Vonage's favor as well, but on a different ground: that Minnesota's regulations would frustrate the FCC's regulation of the interstate communications market irrespective of how the service is classified. Because Vonage subscribers could use its service from any fixed broadband connection, untethered from subscribers' homes (making the service "nomadic"), Vonage could not meaningfully distinguish intrastate from interstate calls. *Vonage II*, 19 FCC Rcd at 22,418-22,424 ¶¶ 22-32. Contrary to the MPUC's assertion, *Vonage II* did not "reject[]" *Vonage I*'s analysis. *See* MPUC Br. 20. Rather, it preempted the MPUC's order on grounds that did not require reaching the district court's reasoning.[8] This Court then upheld *Vonage II* in *Vonage III*.

[8] *Vonage II* indicated in *dicta* that the FCC was inclined to grant similar relief to non-nomadic providers. *See* 19 FCC Rcd at 22,432 ¶ 46 ("To the extent other

In its later *USF Order*, the FCC considered whether interconnected VoIP providers should contribute to the federal universal service fund under 47 U.S.C. § 254. The FCC acknowledged it had "not yet classified interconnected VoIP services as 'telecommunications services' or 'information services' under the definitions of the Act," and expressly declined to do so, instead concluding that it would require such contributions irrespective of how the services are classified. 21 FCC Rcd at 7537 ¶ 35. Because federal universal service contributions are assessed only against *inter*state revenues, the FCC "recognize[d] that some interconnected VoIP providers do not currently have the ability to identify whether customer calls are interstate and therefore subject to the section 254(d) contribution requirement." *Id.* at 7546 ¶ 56. Accordingly, it allowed such providers to "rely on traffic studies" or on an FCC-created "safe harbor" percentage "in calculating its federal universal service contributions," or, "[a]lternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls," to "calculate its universal service contributions based on its actual percentage of interstate calls." *Id.*

It was in that context that the FCC cautioned that providers opting for the last alternative could "no longer qualify for the preemptive effects of our *Vonage Order*

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entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.").

and would be subject to state regulation" because "the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider." *Id.* The MPUC seizes on this language and infers that the FCC has already held that the state regulation of interconnected VoIP providers is not preempted if they can distinguish between interstate and intrastate calls. MPUC Br. 23-25. It has not.

First, the MPUC's reading conflicts with this Court's opinion in *Vonage III*. *Vonage III* addressed that exact language from the *USF Order* and concluded that the FCC was not resolving whether federal law preempts state regulation of non-nomadic VoIP providers. Rather, the *USF Order* was addressing only the reach of *Vonage II* itself: "the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the Vonage order," but the "contention that state regulation of fixed VoIP services should not be preempted *remains an open issue*." *Vonage III*, 483 F.3d at 583 (emphasis added). Put differently, the *USF Order* neither reaches nor decides whether state regulation of fixed VoIP providers might be preempted on grounds other than those in *Vonage II*.

Second, the MPUC's reading is not a plausible interpretation of the *USF Order*. The *USF Order* explicitly stated that it was *not* resolving the classification of interconnected VoIP services, a statement the FCC has repeated on countless

occasions, as the District Court noted.[9] Add.92-93. As the District Court acknowledged, it would be surprising if the FCC had resolved a significant question of federal preemption in a passing dictum "embedded in the middle of a detailed discussion of three calculation options." Add.93. In context, the FCC was merely reminding filers that providers able to track the jurisdictional endpoints of calls are not exempted from state regulation under *Vonage II* itself. Thus, the District Court correctly held that the classification question remained open.

B. The MPUC's Regulations May Not Be Applied to Information Services.

Amici the National Association of Regulatory Utility Commissioners and the National Association of State Utility Consumer Advocates ("NARUC/NASUCA"), take a different approach to the basic legal framework governing this appeal, contending that the FCC lacks statutory authority to preempt state public utility

[9] *See, e.g.*, *In re Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13,911, 13,925 ¶ 40 n.68 (2016) ("The Commission has not classified interconnected VoIP service as telecommunications service or information service as those terms are defined in the Act, and we need not and do not make such a determination today."); *Numbering Resources Order*, 30 FCC Rcd at 6856-57 ¶ 37 (allowing VoIP providers to obtain numbering resources even absent state certification because "the Commission has not classified interconnected VoIP services as telecommunications services or information services"); *In re Rural Call Completion*, Report and Order, and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16,154, 16,172 ¶ 35 & n.101 (2013) ("*Rural Call Completion*") (similar); *2011 ICC Transformation Order*, 26 FCC Rcd at 17,685 ¶ 63 & n.67 (similar); *In re IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, 6043 ¶ 8 & n.21 (2009) (similar).

regulation of information services—providing the MPUC with regulatory authority irrespective of Spectrum Voice's classification. *See* NARUC/NASUCA Br. 16-18. That contention fails for at least two reasons. First, this Court expressly held otherwise in *Vonage III*. 483 F.3d at 580 ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation."). This Court is bound by that prior panel's decision. Second, the MPUC expressly conceded the point below. AA.12 (MPUC's agreement that "[i]nformation services are subject to the FCC's jurisdiction but not to state regulation"). The MPUC's concession of this point places this argument beyond the scope of this appeal. *See, e.g.*, *United States v. Iqbal*, 869 F.3d 627, 631 (8th Cir. 2017).[10]

The MPUC, having conceded this point below, does not join the arguments of its *Amici*. It suggests, however, that the District Court's decision is nonetheless contrary to the "dual regulatory system" and reservation to the states of authority over intrastate communications. MPUC Br. 51. But insofar as the MPUC is complaining that the FCC has displaced state authority to regulate information services, that argument just recasts the very argument already addressed in *Vonage*

[10] *See also In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services (2012-109)*, 2013 VT 23, ¶ 28 (reversing Vermont Public Service Board order extending authority over VoIP services and holding that "information service" classification would necessarily preempt any state regulations analogous to federal telecommunications service requirements).

III and conceded below. In any event, the MPUC's cited authority recognizes that "[w]ith regard to purely state law issues, the state commissions may have the final say," but, where "a state commission is not regulating in accordance with federal policy, [federal courts] may bring it to heel." *Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 948 (8th Cir. 2000) (internal quotation marks omitted). Here, assuming that Spectrum Voice is an information service, the MPUC's attempted regulation does not comport with federal policy, and is preempted.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PROTOCOL CONVERSION COMPONENT OF INTERCONNECTED VOIP IS AN INFORMATION SERVICE CAPABILITY.

The Communications Act defines information services as:

> [t]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(24). Spectrum Voice provides the capability of converting the protocol of voice calls between IP and TDM; the District Court held that this constitutes the capability for "transforming" and "processing" information within the statute's plain text. Add.13-14. Moreover, the purpose of that conversion is not to manage Charter's internal systems, but to provide additional functionality to users. Add.18-20. Those holdings follow from the plain language of the statute and

are consistent with the decisions of both the FCC and of every federal court to consider the issue.[11]

A. Spectrum Voice Offers the Capability of "Transforming" and "Processing" Information via Protocol Conversion.

1. Plain Text of the Communications Act.

As the District Court held, the "protocol conversion" Charter performs "transforms" and "processes" information within the meaning of § 153(24): "the touchstone of the information services inquiry is whether Spectrum Voice acts on the customer's information—here a phone call—in such a way as to 'transform' that information. By altering the protocol in which that information is transmitted, Charter Advanced's service clearly does so." Add.13 (citation omitted). The "protocol conversion" Charter performs to enable calls between IP-based Spectrum Voice and TDM-based traditional networks is an information service capability under the Communications Act's plain text.

2. Federal Decisions in VoIP Classification Litigation.

Given the statute's plain terms, it is unsurprising that federal courts have uniformly reached the same conclusion. As catalogued by the District Court, four federal courts including *Vonage I* have reached the identical holding and no federal

[11] Whether Charter offers Spectrum Voice via Charter Fiberlink (as prior to 2013) or Charter Advanced is immaterial; a provider is subject to telecommunications carrier obligations "only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51).

court has held to the contrary. Add.11-12 (citing *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008) ("*Southwestern Bell*"); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 Civ. 4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004) ("*Vonage v. NYPSC*"), *subsequent determination*, 2005 WL 3440708 (SDNY Dec. 14, 2005)); *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, Civ. A. No. 08-0397 (JR), 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010) ("*PAETEC*").

The MPUC's efforts to distinguish these authorities are unpersuasive. It initially characterizes them, inaccurately, as inapposite because "they concern nomadic VoIP." MPUC Br. 24. Although *Vonage I* and *Vonage vs. NYPSC* involved nomadic VoIP, *Southwestern Bell* and *PAETEC* had nothing do with nomadic services; they involved VoIP traffic exchanged over carriers' own facilities. More importantly, the *basis* for all four decisions was the IP-to-TDM conversion, as to which the nomadic or fixed nature of the retail offering is irrelevant. *Southwestern Bell*, 461 F. Supp. 2d at 1082 ("IP-PSTN traffic is an information service … because it involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN") (citations omitted); *Vonage v. NYPSC*, 2004 WL 3398572, at *1 (following *Vonage I*); *PAETEC*, 2010 WL 1767193, at *3 (adopting as "persuasive" the reasoning in *Vonage I* and *Southwestern Bell*).

Nor is it a relevant distinction that *PAETEC* and *Southwestern Bell* arose in the context of carrier compensation disputes rather than challenges to state authority over terms and conditions of retail service, as *Vonage I* and *Vonage v. NYPSC* did.[12] MPUC Br. 25 n.8. The *analysis* of those cases—that VoIP services are information services by virtue of the IP-to-TDM conversion—carries over in identical form.

No federal court, by contrast, has ever adopted the MPUC's position. The two cases on which it relies, *Centurytel of Chatham LLC v. Sprint Communications Co. LP*, 185 F. Supp. 3d 932, 944 (W.D. La. 2016), *aff'd*, 861 F.3d 566 (5th Cir. 2017) and *Sprint Communications Co. v. Bernsten*, 152 F. Supp. 3d 1144 (S.D. Iowa 2015), *aff'd sub nom. Sprint Communications Co., L.P. v. Lozier*, 860 F.3d 1052 (8th Cir. 2017), neither address nor decide the classification of interconnected VoIP services. *See* MPUC Br. 24-25. Rather, both involved a different issue unique to intercarrier compensation—payment obligations applicable to wholesale exchange of VoIP traffic under Section 251(g) of the Communications Act. Both cases merely held that the classification of VoIP services was not relevant to the Section 251(g)

[12] At the time, the FCC's "ESP Exemption" entitled information service providers to purchase certain interstate telecommunications inputs at lower rates; the precise boundaries of that exemption were frequently litigated. *See In re Access Charge Reform*, First Report and Order, 12 FCC Rcd 15,982, 16,133-35 ¶¶ 344-348 (1997), *aff'd sub nom. Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). The *2011 ICC Transformation Order* equalized such rates for VoIP providers. 26 FCC Rcd at 18,002-30 ¶¶ 933-975.

inquiry. *See Centurytel of Chatham*, 185 F. Supp. 3d at 942 (court "need not reach the determination as to the classification of the calls" to decide the dispute); *Chatham*, 861 F.3d at 574-76 (affirming under *2011 ICC Transformation Order*, also without addressing the classification); *Bernsten*, 152 F. Supp. 3d at 1152 ("the Court does not decide whether VoIP is an information service"); *Lozier*, 860 F.3d at 1058 ("Regardless of the classification of the calls as information services or telecommunications services, state law determined the pre-Act obligation relating to compensation for the intrastate traffic exchanged between Windstream and Sprint.").

The MPUC concedes that neither *Bernsten* nor *Lozier* decided the classification of interconnected VoIP services, but asserts that the cases stand for the proposition that "[t]he Communications Act preserves state authority to regulate fixed, interconnected VoIP." MPUC Br. 25. This conflates two different questions: (1) whether states have the authority to regulate the market entry, terms and conditions of information service providers; and (2) whether Section 251(g) of the Communications Act allowed states to regulate the pricing of wholesale/carrier-to-carrier intrastate telecommunications services used to carry VoIP traffic until "such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission." 47 U.S.C. § 251(g).[13] The consequences of the information

[13] The *2011 ICC Transformation Order* implemented such superseding regulations.

service classification of a retail service on related wholesale services under Section 251(g) is an unrelated issue not before the Court.

3. The FCC's *Non-Accounting Safeguards Order*.

The FCC has also issued on-point guidance applying the "information service" definition to protocol conversion capabilities and reached the same result. Thus, even if the Communications Act were ambiguous, the FCC's interpretation resolving that protocol conversion is an information service capability would be entitled to deference. *See Brand X*, 545 U.S. at 980.

In its *Non-Accounting Safeguards Order*,[14] the FCC concluded that "both protocol conversion and protocol processing services are information services under the 1996 Act." 11 FCC Rcd at 21,956 ¶ 104. It reasoned that "an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information," and that "other types of protocol processing services that interpret and react to protocol information associated with the transmission of end-user content clearly 'process' such information." *Id.*

[14] *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996), *modified in part*, Order on Reconsideration, 12 FCC Rcd 2297 (1997).

That analysis clearly applies to IP-to-TDM conversion as performed by Spectrum Voice. The Supreme Court has characterized "protocol conversion" as the "ability to communicate between networks that employ different data-transmission formats," which is precisely the purpose of the IP-to-TDM conversion. *Brand X*, 545 U.S. at 977.

The MPUC's efforts to distinguish the *Non-Accounting Safeguards Order* are unavailing. First, the MPUC points out that the *Non-Accounting Safeguards Order* arose under Sections 271-272 of the Communications Act, which prohibited the Bell Companies from offering, *inter alia*, "information services" absent competitive safeguards. 47 U.S.C. § 272(a)(2)(C); MPUC Br. 41. However, the FCC expressly stated it was construing the "statutory definition of [an] information service," for which Sections 271 and 272 utilize the 47 U.S.C. § 153 definition. 11 FCC Rcd at 21,954 ¶ 99 & n.224 (internal quotation marks omitted). The decision is applicable as precedent.

Next, the MPUC insists that the *Non-Accounting Safeguards Order* does "not supply the rule of decision" because it does not discuss whether a provider is "offering" an information service. MPUC Br. 42. But that is a *non sequitur*. As explained in Part III, the FCC evaluates services including both transmission and information service components by assessing whether the "offering" to consumers combines those features or offers each separately. But nothing in the FCC's

precedents suggests that providing an information service capability could ever *not* be an offering of an information service. An information service is *defined as* an "offering" of an information service capability to the public; the *Non-Accounting Safeguards Order*'s decision that protocol conversion services are information services necessarily decides that they are an "offering" of protocol conversion.

The MPUC asserts also that the *Non-Accounting Safeguards Order* was silently overruled by the *USF Order* because the latter finds that VoIP provides "telecommunications," which requires "transmission…without change in the form or content." MPUC Br. 42; 47 U.S.C. § 153(50). But of course VoIP includes telecommunications; providers transmit calls between the customer premise and the media gateway. Add.3, 10-11. It is entirely consistent for this transmission of calls to be telecommunications while the additional protocol conversion the service then performs at the media gateway is an information service capability. Indeed, that is the very issue that the *USF Order* declined to decide. *See infra* 40-42.

B. The Telecommunications Management Exception Is Inapplicable.

1. Plain Text of the Exception.

The District Court correctly rejected the MPUC's contention that Spectrum Voice's protocol conversion is not an information service capability because it "use[s] … such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service,"

which would place it within the "telecommunications management exception." 47 U.S.C. § 153(24).

The telecommunications management exception addresses situations in which features literally encompassed by the "information service" definition merely facilitate transmission. For instance, telephone systems route calls using signaling data and database queries (nominally the "utilizing" and "retrieving" of information) and multiplex calls so they can share the same lines (nominally the "transforming" of information); the exception captures such functions. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,958 ¶ 107 (exception is for services that "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service"); *In re Request for Review by Intercall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10,731, 10,735 ¶ 11 & n.32 (2008) (service that merely "facilitate[s] the routing of ordinary telephone calls" is not an information service). Conversely, the exception does not encompass features adding additional enhancements beyond pure transmission; enhanced capabilities are not "for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

Protocol conversion in the context of interconnected VoIP services, as the District Court correctly concluded, adds such additional capabilities. First, it offers

the capability to "bridge *different* networks." Add.20 (emphasis added). Second, it enables users to "utilize their internet connection for voice service," adding significant convenience and obviating the need for multiple service providers.[15] *See* Add.19. These capabilities go well beyond the "management, control, or operation" of Charter's system and are thus outside the plain text of the telecommunications management exception.

2. *Non-Accounting Safeguards Order*.

The *Non-Accounting Safeguards Order* confirms the inapplicability of the exception here. After concluding as a *general* matter that protocol conversion is an information service capability, the order delineated three instances in which the exception would apply—situations:

> 1) involving communications between an end user and the network itself (*e.g.*, for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user).

In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, Order on Reconsideration, 12 FCC

[15] Charter also submitted evidence that the protocol conversion ability enables additional advanced features, including readable voicemail, voice online manager, and its "softphone" application. SAA.12-13, SAA.79, SAA.82-86.

Rcd 2297, 2298 ¶ 2 (1997) ("*Order on Reconsideration*"). The District Court persuasively reasoned that protocol conversion in the context of interconnected VoIP services implicates none of those three scenarios.

As to the first, although the MPUC insists without support that protocol conversion "is used primarily to communicate with Charter's own network," MPUC Br. 45, the District Court explained that it "[f]airly plainly does not apply here—the purpose of IP-TDM protocol conversion, at least as applied by Spectrum Voice, is to facilitate communication between users of VoIP and legacy telephony services, not simply to facilitate connection between the user and the network." Add.16.

As to the second, the MPUC argues that the "alleged protocol conversion is to maintain compatibility with a customer's existing telephone equipment." MPUC Br. 44-45. That assertion confuses unrelated parts of the call flow. Although eMTAs used in conjunction with interconnected VoIP services format calls from conventional telephones into IP, that process is separate from and unrelated to the IP-TDM conversion performed by the network itself, at media gateways adjacent to interconnection points with TDM-based carriers. The District Court correctly found that the pertinent "net protocol conversion that occurs comes much later in the process, when the Media Gateway acts to provide a bridge to the PSTN," and that "[t]hus, maintaining compatibility with CPE is not a concern here." Add.16.

As to the third, the MPUC maintains that the conversion takes place "solely within the carrier's network." MPUC Br. 45. Not so. As the District Court explained, the "internetworking" exception "applies where there is no net protocol conversion, such that the only conversion occurs on the carrier's network, for the carrier's convenience." Add.16-17. "Thus, where a call originates in TDM format, is converted by the provider to IP format for transmission across its network, and is converted a final time to TDM before being handed off to another provider, the internetworking exception would apply." Add.17 (citing *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7457-58, 7465 ¶¶ 1, 12 (2004)); *see also PAETEC*, 2010 WL 1767193, at *3 & n.3 (distinguishing interconnected VoIP from "*non*-net protocol conversions" in which "a company converts a TDM signal to VoIP and then back to TDM *before* handing it off" (emphasis added)). Spectrum Voice, conversely, offers a *net* protocol conversion: calls enter Charter's network in IP and exit in TDM, and vice versa.

Resisting this conclusion, the MPUC claims to identify three factual disputes under the "internetworking" exception. Each purported factual dispute, however, presents a question of law the District Court properly decided on summary judgment. *See* Add.18 n.1.

First, the MPUC insists that Charter's service does not involve a net protocol conversion at all, on the theory that Charter merely "transports analog voice telephone calls." MPUC Br. 48. As the District Court correctly held, "[t]his argument is flawed for the simple reason that it mischaracterizes the demarcation point of Charter Advanced's network." Add.17.

To understand why the District Court was correct, it is useful to summarize the call path:

(1) A subscriber speaks into a telephone, generating sound waves;

(2) The telephone converts the sound waves into analog electric signals;

(3) The analog signals enter the eMTA, which converts them to IP packets;

(4) The IP packets leave the caller's home and travel to Charter's Media Gateway, which converts them to TDM;

(5) Charter hands TDM signals off to the interconnecting carrier; and

(6) The other provider transports those signals to the called party's premises, where they are converted back into sound waves.

Add.3, 10-11; SAA.80-81, 86-88.

The demarcation points of the network are significant. As a matter of law, Charter's network begins at step (4) outside the consumer's home, where voice signals enter Charter's network in IP, not during the preceding analog portions of the call. The eMTA is customer premises equipment ("CPE"), and as the District Court explained, "[u]nder FCC precedent, CPE is, by definition, outside the carrier's

network." Add.17-18 (citing *In re Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership In Unserved and Underserved Areas, Including Tribal and Insular Areas*, Twenty-Fifth Order on Reconsideration, Report and Order, Order, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 10,958, 10,067 ¶ 18 (2003) (defining CPE as "equipment that falls on the customer side of the demarcation point between customer and network facilities")).

In addition, FCC rules define the "demarcation point," *i.e.*, where the provider's network ends and the customer's network begins, as "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's premises." 47 C.F.R. § 76.5(mm)(1); 47 C.F.R. § 68.105(c), (d) (similar, for telephone networks); *In re Rural Health Care Support Mechanism*, Report and Order, 27 FCC Rcd 16,678, 16,748 ¶ 154 (2012) ("the demarcation point is the point at which responsibility for the connection is 'handed off' to the customer."). As the District Court held, "[b]ecause it is at the eMTA that the customer's voice signal is converted from analog to IP, as a matter of law the customer's data must *enter* the network in that format." Add.18.

Charter's network ends when it hands off the call to another network—because at that point and thereafter, Charter exercises no control whatsoever over the call. Thus, when Charter's network ends, voice signals are in TDM. It follows that Charter effectuates a net protocol conversion—IP to TDM.

The MPUC's second purported factual dispute is whether the eMTA, which converts signals from analog to IP, is CPE. MPUC Br. 49. This is a legal dispute on how an eMTA is classified under the FCC's regulations. And the answer to that legal dispute is clear: the eMTA is CPE. As the MPUC acknowledges (MPUC Br. 3), Spectrum Voice is an "Interconnected VoIP service" under FCC rules. 47 C.F.R. § 9.3. The FCC has acknowledged as much. *See, e.g.*, *Rural Call Completion*, 28 FCC Rcd at 16,166 ¶ 22 ("[E]nd users are increasingly obtaining service from interconnected VoIP providers, such as cable companies"). FCC rules define "Interconnected VoIP" to "[r]equire [IP]-compatible customer premises equipment." 47 C.F.R. § 9.3. Moreover, the FCC's Vonage Order expressly denoted Vonage's "Multimedia Terminal Adapter (MTA)" as "specialized CPE." *Vonage II*, 19 FCC Rcd at 22,407 ¶ 6; *see also id.* at 22,424 ¶ 32.[16] Thus, as a matter of law, the eMTA constitutes CPE—there is no fact dispute to resolve.

The third purported factual dispute is whether "rules applicable to cable providers render immaterial any fact dispute concerning the endpoint of Charter's network." MPUC Br. 49-50. But the applicability of a particular set of rules is a

[16] The MPUC notes that a Charter affiliate owns the eMTA, but ownership is irrelevant under FCC precedents. *Cf. In re Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Service (Second Computer Inquiry)*, Seventh Report and Order, 1986 WL 292558, ¶ 1 n.l (FCC Jan. 23, 1986) (CPE can include "equipment provided by common carriers").

question of law. The MPUC's assertion that Spectrum Voice is not a "cable service" is irrelevant. That Charter's physical network is a "cable system" is beyond question. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333 (2002) ("If one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.'"). The question is thus not whether VoIP is a "cable service," but whether Charter's cable system includes eMTAs inside the house. *See* 47 C.F.R. § 76.1 (pertinent provisions of 47 C.F.R. § 76.1 *et seq.*, apply to any "cable television system[]"). Moreover, even if Charter's network were governed by telephone rather than cable rules, the demarcation point would be in the same place: outside the customer's residence. 47 C.F.R. § 68.105(c), (d).

3. The *Open Internet Order* and "Adjunct-to-Basic" Doctrine Are Inapposite.

Nothing in the FCC's *Open Internet Order*, on which the MPUC relies, conflicts with the analysis above. In the *Open Internet Order*, the FCC decided that certain capabilities provided in connection with Broadband Internet Access Service ("BIAS") fall within the telecommunications management exception.[17] The order

[17] The FCC has since proposed to reverse the *Open Internet Order* and restore its longstanding classification of BIAS as an information service. *See In re Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434, 4414-52 ¶¶ 25-51 (2017).

did not address VoIP services; the stray statements upon which the MPUC seizes address legally inapposite and factually distinguishable service features.

The MPUC initially points to a statement in the *Open Internet Order* that "IP conversion" falls within the telecommunications management exception. MPUC Br. 46-48. However, that statement had nothing to do with converting the protocol of data transmissions. It relates to the unrelated phenomenon of converting *routing* information as ISPs switched from an older routing system (IPv4) to a newer one (IPv6). The *Open Internet Order* found this conversion "analogous to traditional voice telephone calls to toll free numbers, pay-per-call numbers, and ported telephone numbers that require a database query to translate the dialed telephone number into a different telephone number and/or to otherwise determine how to route the call properly." *Open Internet Order*, 30 FCC Rcd at 5772 ¶ 375. Conversion of routing information internal to a provider's network is distinguishable from (as here) converting the protocol of the transmitted data itself to bridge distinct network types.

The MPUC also cites a different portion of the *Open Internet Order* comparing certain BIAS features to "adjunct-to-basic" services. MPUC Br. 47-48. At the outset, "adjunct-to-basic" services and the telecommunications management

exception are the same thing.[18] The *Non-Accounting Safeguards Order* discussed the adjunct-to-basic category and did *not* deem protocol conversion within it, foreclosing the doctrine's application here. *See* 11 FCC Rcd at 21,958 ¶ 107.

In the *Open Internet Order*, the FCC concluded that two features provided in connection with BIAS, "domain name service (DNS) and caching" fell within the telecommunications management exception. *Open Internet Order*, 30 FCC Rcd at 5758 ¶ 356 (footnote omitted). It reasoned that DNS "matches the Web site address the end user types into his browser (or 'clicks' on with his mouse) with the IP address of the Web page's host server," which "allows more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party." *Id.* at 5766 ¶ 366, 5768 ¶ 368. Likewise, "caching" is the "storing of copies of content at locations in the network closer to subscribers than their original sources," which "like DNS[] is simply used to facilitate the transmission of information so that users can access other services." *Id.* at 5770 ¶ 372.

[18] Prior to the 1996 Act, the FCC's categorization scheme included "basic," "enhanced," and "adjunct-to-basic" services; the 1996 Act renamed "basic" and "enhanced" services into "telecommunications services" and "information services," respectively; "adjunct-to-basic" services became encompassed by the "telecommunications management exception." *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 691 (D.C. Cir. 2016), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Sept. 27, 2017) (No. 17-498).

DNS (which routes traffic) and caching (which enhances network speed) thus serve purely internal network functions, consistent with the FCC's limitation of "adjunct-to-basic services" services to those that merely facilitate transmission itself without adding additional functionality. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,965 ¶ 123. As the District Court correctly explained, the protocol conversion capability of Spectrum Voice provides additional capabilities beyond transmission, chiefly to "allow consumers to bridge *different* networks," which "function is critical to Spectrum Voice's operation." Add.20. That distinction, the District Court ruled, differentiates it from functions such as "caching and DNS" for which the "main benefit" is "enhanced network efficiency," a "difference … sufficient to vitiate any relevant similarities between the factual considerations in the *Open Internet Order* and the matter before the Court today." *Id*. This reasoning correctly summarizes the pertinent authorities and should be affirmed.[19]

[19] *Payton v. Kale Realty LLC*, 164 F. Supp. 3d 1050 (N.D. Ill. 2016), cited by the MPUC, neither mentions interconnected VoIP nor cites the pertinent caselaw. The service at issue in *Payton* allowed users to send text messages from a computer. 164 F. Supp. 3d at 1054. Insofar as the *Payton* court assumed without analysis that converting the format of a communication to bridge disparate networks falls within the telecommunications management exception, it is wrongly decided. *See, e.g.*, *Brand X*, 545 U.S. at 994 (addressing network-bridging services).

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SPECTRUM VOICE IS AN "OFFERING" OF AN INFORMATION SERVICE CAPABILITY.

After determining that Spectrum Voice's protocol-conversion capability is an information service capability, the District Court correctly concluded that Spectrum Voice is an "offering" of that capability—not an "offering" of mere telecommunications—and is therefore an information service, not a "telecommunications service." Add.14, 19.

"Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50). Two mutually exclusive services utilize "telecommunications." A "telecommunications service" is an "offering of telecommunications for a fee directly to the public … regardless of the facilities used." *Id.* § 153(53). An "information service" is an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." *Id.* § 153(24) (emphasis added).

Classifying a service featuring transmission, therefore, turns on whether it is offered separately or integrated with information service capabilities. The District Court correctly concluded that since Spectrum Voice's protocol conversion capability is a "necessity" that provides subscribers the additional "functionality

necessary to utilize their internet connection for voice service," what is "'functionally offered' to the consumer is an information service." Add.14, 19.

A. Both Information Services and Telecommunications Services Can "Provide" Telecommunications.

The *USF Order* provides important background. There, the FCC considered interconnected VoIP providers' Universal Service Fund contribution obligations. Such contributions are mandatory for telecommunications carriers, who "offer" telecommunications. *See* 47 U.S.C. § 254(d); 47 U.S.C. § 153(51). "Telecommunications providers," conversely, are not necessarily subject to this statutory mandate, but the FCC can assess USF contributions under its permissive authority. *Cf.* 47 U.S.C. § 254(b)(4).

The FCC chose the second option, concluding that interconnected VoIP services *provide* telecommunications—they transmit voice information within their networks—and are hence subject to the FCC's permissive authority. *USF Order*, 21 FCC Rcd at 7539-40 ¶ 41. It declined, however, to decide whether interconnected VoIP services *offer* telecommunications, reasoning that "[u]nlike providers of interstate telecommunications services, … providers of interstate telecommunications do not necessarily 'offer' telecommunications 'for a fee directly to the public,'" because "'provide' is a different and more inclusive term than 'offer.'" *Id.* at 7538-39 ¶¶ 38, 40. Per the FCC, the "offer[ing]" is the "finished

service," while the term "provides" also encompasses any "components of a service," such as "transmission." *Id.* at 7539 ¶ 40.

The D.C. Circuit affirmed in relevant part, confirming that an entity can *provide* telecommunications as part of an information service *offering*. *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1239 (D.C. Cir. 2007) ("the verb 'provide' is broad enough to include the act of supplying a good or service as a component of a larger, integrated product"). Thus, the Court agreed that although "VoIP does in fact include telecommunications as a component," a "provider of 'information services'" could "also be a 'provider of telecommunications.'" *Id.* at 1239, 1241. "Indeed, the Act clearly contemplates that 'telecommunications' may be a component of an 'information service.'" *Id.* at 1241.

The District Court analyzed the *USF Order* consistent with this analysis. Add.35-40. The MPUC, attempting to lead the Court astray, seizes on the *USF Order*'s statement that interconnected VoIP "provides" telecommunications and reasons that it is thus a "telecommunications service." MPUC Br. 27-28. But the MPUC fails to mention the portion of the *USF Order* rejecting that very theory. The MPUC also relies on *Brand X* for the proposition that a "telecommunications service" is one that "offer[s] telecommunications for a fee directly to the public." MPUC Br. 28. But as the District Court noted, whether interconnected VoIP

services "offer," as opposed to "provide," telecommunications is the very question the *USF Order* left open. Add.38.

B. The Protocol Conversion and Transmission Components of Spectrum Voice Are Components of the Same Finished Service Offering.

As explained above, Spectrum Voice both includes at least one information service component (protocol conversion) and "provides" telecommunications by transmitting calls. The District Court reasoned, correctly, that these were combined in the same finished product, making Spectrum Voice an information service. Add.19. That decision tracks both the statute and common sense. No one could plausibly contend that Charter is offering transmission separate from the protocol-conversion capability that interconnects Spectrum Voice to the public telephone network.

That decision also comports with FCC orders, which recognize, consistent with the *USF Order* and *Vonage v. FCC*, that a provider is not offering a "telecommunications service" every time it includes a telecommunications or transmission component in an information service:

> [A] single entity offering an integrated service combining basic telecommunications transmission with certain enhancements, specifically "capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," *offers only an information service*, and not a telecommunications service, for purposes of the [Telecommunications] Act if the telecommunications and information services are sufficiently intertwined.

In re Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14,989, 14,997 ¶ 15 (2005) (emphasis added).

Spectrum Voice's protocol conversion capability is "functionally integrated" with the transmission component of the service: the capability to bridge IP and TDM networks is always on, continuously providing subscribers with the capability to receive incoming calls from traditional providers, and available for outgoing calls every time a subscriber picks up the phone. The MPUC's contrary argument rests on the fact that this capability is not *activated* on every call—for instance, Charter-to-Charter VoIP calls do not activate it—leading the MPUC to characterize it as an "add-on" feature. MPUC Br. 38, 36-37. The District Court correctly rejected this proposition under the statutory text, reasoning that "[a]t no point does the Telecommunications Act suggest or require that a customer use an information service's transformative features all the time. Indeed, the very language of the definition of an 'information service,'—which merely mandates that there be an 'offering of a capability' to, *inter alia*, transform information—belies such a conclusion." Add.14.

To be sure, the FCC has held that a provider may not circumvent telecommunications service requirements simply by bundling its telecommunications service with an information service at the point of sale, such as

"by packaging [telephone] service with voice mail." *In re Federal-State Joint Board on Universal Service*; Report to Congress, 13 FCC Rcd 11,501, 11,530 ¶ 60 (1998). However, the FCC's "functional integration" inquiry distinguishes such circumvention from instances in which the finished product offered to consumers combines telecommunications and information service capabilities.

Vonage II analyzed this issue specifically in the context of a VoIP service featuring an online portal and voicemail-to-digital-file conversion. There, the FCC characterized the advanced capabilities of the service as together "form[ing] an integrated communications service." 19 FCC Rcd at 22,420 ¶ 25.

The FCC's "functional integration" framework looks broadly to whether features are provisioned, used, and marketed on an integrated basis, and the FCC has rejected any formalistic requirement that each component be activated with every use. *See, e.g.*, *In re Inquiry Concerning High-Speed Access To the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822-23 ¶ 38 (2002) (considering the "nature of the functions that the end user is offered … [t]aken together" and "regardless of whether subscribers use all of the functions provided as part of the service") ("*Cable Modem Declaratory Ruling*"), *aff'd in part, vacated in part sub nom. by Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *In re Appropriate*

Framework for Broadband Access to the Internet Over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14,853, 14,910-11 ¶ 104 (2005) (looking to whether subscribers "expect to receive (and pay for) a finished, functionally integrated service," or "two distinct services.") ("*Wireline Broadband Order*").

The MPUC's argument that capabilities "must always be invoked, used without exception" to be functionally integrated rests on an out-of-context citation from the *Open Internet Order*. MPUC Br. 38. There, the FCC deemed certain features occasionally offered alongside BIAS, such as ISP-provided email accounts, not "functionally integrated" with BIAS's web-browsing capabilities, contrasting them with information-processing capabilities integrated with telecommunications such that "the consumer always uses them as a unitary service." *Open Internet Order*, 30 FCC Rcd at 5740 ¶ 323 (quotation marks omitted). But the FCC's analysis did not turn on whether email and similar features were "invoked…without exception." MPUC Br. 38. It turned on an examination of how customers use them and how ISPs provision and market them. *Open Internet Order*, 30 FCC Rcd at 5743-57 ¶¶ 331-354.

Features such as an ISP-provided email address are easily distinguishable from protocol conversion, both factually and under the statute. Users can decline to use features such as ISP-provided email addresses, and thus use BIAS's web-

browsing capabilities without even the email account's "capability." 47 U.S.C. § 153(24). Interconnected VoIP users, conversely, might not always activate the protocol conversion feature but cannot forgo its "capability." It is omnipresent even when not actively invoked: the service can receive incoming calls from traditional telephone networks at any time, and stands perpetually ready to allow such outgoing calls. As the District Court concluded, unlike "add-on" features, "protocol conversion is a necessity" without which interconnected VoIP service loses core functions, and is thus necessarily part of what is "'functionally offered' to the consumer." Add.19.

C. Protocol Conversion Capability Adds Additional Functionality.

The MPUC also invokes the FCC's broader "functional" framework to service classification, which looks broadly to a service's capabilities to distinguish integrated from separable features. MPUC Br. 29-38. The District Court correctly applied this framework, holding that Spectrum Voice's protocol conversion capacity enhances the service's features, as evidenced by the fact that "Charter Advanced makes clear that its offering gives customers the ability to use their internet connection to talk to anyone with a phone connection." Add.19 n.9. Protocol conversion gives users the added benefit of being able to consolidate and "use their internet connection for voice communication." Add.19. The MPUC's arguments to the contrary are foreclosed by FCC precedent.

One batch of arguments raised by the MPUC is that Spectrum Voice is "functionally" a telephone service because it replicates a telephone service's voice-calling capabilities. MPUC Br. 32-35. Of course, as the District Court observed, Spectrum Voice offers at least one additional capability that traditional telephone services do not—the ability to consolidate voice service onto a broadband connection. Add.19. Moreover, the *Non-Accounting Safeguards Order* rejected the MPUC's logic in concluding that network-bridging capabilities are also information service functions.

There, one set of parties had "argue[d] that protocol processing services are not information services, because they do not transform or process the content of the information transmitted by the subscriber…" *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,955 ¶ 101. The FCC expressly rejected that position, concluding "that the statutory definition makes no reference to the term 'content,' but requires only that an information service transform or process 'information.'" *Id.* at 21,956 ¶ 104. The FCC reasoned that "an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information." *Id.* The MPUC's argument that voice-to-voice functionality is necessarily a "telecommunications service," therefore, is precluded by the FCC's decision that network-bridging transformations are themselves relevant enhancements.

This principle is longstanding. *Brand X* explicitly distinguishes services offering pure transmission capability from those that, like Spectrum Voice, provide transmission together with protocol processing:

> Examples of [enhanced] services included … 'value added networks,' which lease wires from common carriers and provide transmission as well as protocol-processing service over those wires. These services "combined communications and computing components," yet the Commission held that they should "always be deemed enhanced" and therefore not subject to common-carrier regulation.

Brand X, 545 U.S. at 994 (citations and brackets omitted).

The MPUC's contention that the *Non-Accounting Safeguards Order* has been superseded by the functional standard is likewise mistaken. MPUC Br. 42. Although the FCC began labeling its framework to service classification as a "functional" approach shortly thereafter, the *Non-Accounting Safeguards Order*'s logic is in harmony with the FCC's subsequent decisions under that framework: it concludes that (barring certain exceptions) converting the "form" of information is a functional enhancement. Moreover, the FCC has continued to cite the order as good law,[20] and has at no point revisited its classification of protocol conversion services.

[20] *E.g.*, *In re Petition of US Telecom for Forbearance Pursuant to 47 U.S.C. § 160(C) From Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd 6157, 6196 ¶ 68 n.219 (2015) (reaffirming "enhanced" status of protocol processing services).

Equally unpersuasive is the MPUC's argument that Spectrum Voice's protocol conversion capability should be disregarded because Charter does not advertise it by name. MPUC Br. 33. Although marketing can be informative to whether service features are separate or functionally integrated, *see, e.g.*, *Open Internet Order*, 30 FCC Rcd at 5755-57 ¶¶ 351-354, it also matters "how the service at issue works." *See, e.g.*, *In re Universal Service Methodology*, Order, 31 FCC Rcd 13,220, 13,224 ¶ 12 (WCB 2016). Insofar as marketing is relevant, the District Court correctly reasoned that what matters is that Charter markets the capabilities provided by Spectrum Voice's protocol conversion feature, not whether those advertisements name the technology. *See* Add.19 n.9 ("[I]t is sufficient that Charter Advanced makes clear that its offering gives customers the ability to use their internet connection to talk to anyone with a phone connection.").

D. Spectrum Voice's Additional Features Are Not Necessary to Resolve this Appeal.

A second batch of arguments raised by the MPUC focuses on an alternative theory presented by Charter—that Spectrum Voice's non-voice-calling features are *also* functionally integrated with the service's transmission component. Add.10; *see also Vonage II*, 19 FCC Rcd at 22,420 ¶ 25 (characterizing similar capabilities of VoIP service as "form[ing] an integrated communications service"). This additional theory formed no part of the District Court's decision and the MPUC's arguments under it are irrelevant.

Evaluating the functional integration of service components under the FCC's precedents looks to numerous factors. *See, e.g.*, *Open Internet Order*, 30 FCC Rcd at 5750-77 ¶¶ 341-387. Charter had proffered extensive evidence, including advertising, market research, and technical explanations of its network architecture and provisioning systems to illustrate the pervasive integration of Spectrum Voice's features. SAA.10-16, 20-25 (marketing); SAA.72-77 (provisioning); SAA.79, 82-86 (network technology). The District Court, however, "agree[d] with" Charter's protocol conversion argument and thus declined to reach arguments predicated upon the integration of further service features. Add.10.

The MPUC's assertions that the District Court's decision rested on this alternate argument are thus inaccurate. MPUC Br. 35 ("The district court erred in its assessment of Charter Phone as an information service under the functional approach because Charter Phone is offered with other products."). And the MPUC's lengthy series of arguments seeking to litigate this issue are beside the point. *See* MPUC Br. 33-37.

Because the legal significance of other service capabilities offered by Spectrum Voice was neither reached by, nor necessary to, the District Court's decision, the Court can affirm without reaching it. However, in the event this Court were to disagree with the District Court's resolution of the protocol conversion issue, the District Court should consider, on remand, this alternate theory and supporting

evidence in the first instance. *See, e.g.*, *Metro. Prop. & Cas. Ins. Co. v. Calvin*, 802 F.3d 933, 936, 939 (8th Cir. 2015) (remanding for consideration of alternate theory).

IV. THE DISTRICT COURT'S ORDER COMPORTS WITH SOUND FEDERAL POLICY OBJECTIVES.

The District Court's decision should be affirmed as conforming to the statutory text and governing precedents. It also comports with the longstanding federal policy of "allowing providers of information services to burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements." *Vonage III*, 483 F.3d at 580 (internal quotation marks omitted). The FCC has recognized that "patchwork regulation" can operate as a barrier to entry limiting innovation and adoption of new technologies. *Vonage II*, 19 FCC Rcd at 22,424 ¶ 32.

The MPUC and its supporting *Amici* raise policy objections to the supposed effect of the order on various regulatory priorities. MPUC Br. 50-52. Such arguments are appropriately directed at Congress and the FCC, but also misplaced.

A. State-Specific Entry Requirements and Regulations Frustrate Competition and Innovation in Advanced Services.

The Communications Act specifically contemplates that regulatory regimes may vary by technology, particularly where, as here, Congress and the FCC seek to encourage adoption of new technologies. Classifying interconnected VoIP services as "telecommunications services," as the MPUC wishes, would frustrate that

objective. Not only could Minnesota apply its own regulatory scheme to such services, but *any* state could do so, proliferating requirements whose cumulative effect could impair providers' incentives to launch enhanced features. *Cf. Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016) (preempting state insurance regulations because "[i]f the scheme is not pre-empted, plans will face the possibility of a body of disuniform state reporting laws and, even if uniform, the necessity to accommodate multiple governmental agencies."); *Vonage II*, 19 FCC Rcd at 22,437 (Statement of Chairman Michael K. Powell) (noting adverse consequences of "disparate local regulatory treatment by 51 different jurisdictions").

Charter's voice service is already governed by FCC regulations and generally-applicable state consumer protection laws. *See* Part IV.D *infra*; App.154-167. Adding a secondary layer of state public utility regulation, however, would create challenges illustrating why federal policy has traditionally insulated information services from such requirements.

To use one example, Minnesota law requires telephone providers to offer unbundled "basic local" service. Minn. Stat. § 237.626, Subd. 2. Charter provides Spectrum Voice via software not designed to be disaggregated this way—and would need to either make software changes or use cumbersome manual workarounds to disaggregate local calling from Spectrum Voice's wider feature set. Add.5. Similarly, MPUC rules prescribe specific disconnection procedures for non-

payment. *See* Minn. R. § 7810.1800-.2200. Such procedures create unique challenges for providers who provision BIAS and VoIP over shared connections and CPE, making *seriatim* disconnections impractical and effectively extending state rules to BIAS services beyond state jurisdiction. *See Open Internet Order*, 30 FCC Rcd at 5804 ¶ 433; SAA.66-69. At minimum, they require manual workarounds creating opportunities for customer confusion and dissatisfaction. SAA.69.

Requiring VoIP providers to reconfigure national practices to meet individual state requirements, and to obtain state certifications for each retail affiliate, would yield cost, delay, and operational difficulties. Worse, smaller providers and new entrants may find such "patchwork regulation" a barrier to entry, creating precisely the types of adverse consequences feared by the FCC. *Vonage II*, 19 FCC Rcd at 22,424 ¶ 32.

B. Federal Policy Does Not Dictate Identical Treatment of Providers Irrespective of Technology.

The MPUC also complains of shielding fixed VoIP services from regulations to which traditional telephone services, with which they compete, are subject. MPUC Br. 51-52. However, regulatory regimes often vary by technology when policy objectives so warrant. *See, e.g.*, *In re Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Third Report and Order, 14 FCC Rcd 17,388, 17,425 ¶ 82 n.123 (1999) (explaining that consistent with principles of competitive and technological neutrality, FCC has, "in the past,

adopted different rules for different technologies"); *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4866-67 ¶ 4 (2004) (noting that "VoIP services are not necessarily mere substitutes for traditional telephony services, because the new networks based on the Internet Protocol are, both technically and administratively, different from the PTSN" and emphasizing differences with respect to delivery of enhanced features).

The FCC has also long "recognize[d] that some enhanced services may do some of the same things that regulated communications services did in the past" and "are not dramatically dissimilar from basic services." *In re Amendment of Section 64.072 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 434-35 ¶¶ 130, 132 (1980). And in any event, the market for voice services includes wireless and nomadic VoIP providers, both exempt from the requirements the MPUC seeks to extend here.

C. State Universal Service Efforts Are Unaffected by the District Court's Order.

Federal preemption of state regulation of the market entry and the terms and conditions of information services does not apply to state universal service contributions, which the Act authorizes. *See* 47 U.S.C. § 254(f). States may assess such contributions from interconnected VoIP providers "so long as a state's particular requirements do not conflict with federal laws or policies." *In re*

Universal Service Contribution Methodology, Declaratory Ruling, 25 FCC Rcd 15,651, 15,651 ¶ 1 (2010).

There is thus no merit to the MPUC's contention that the District Court's decision threatens states' ability to ensure universal service, such as the MPUC's "TAP" and "TAM" programs. *See* MPUC Br. 12-14; *see also* MMLA Br. 13-15; AARP Br. 6-9.[21] Nothing has prevented the MPUC, since the FCC authorized states to assess universal service contributions from VoIP providers in 2010, from funding TAP and TAM using mechanisms complying with the FCC's order,[22] nor does the District Court's decision do so.

D. *Amici* Overstate the Effects of Federal Preemption.

The MPUC and its *Amici* also conjure parades of horribles of how federal preemption supposedly frustrates state regulatory priorities such as consumer protection and public safety. These arguments overstate the extent to which federal preemption displaces state regulation, neglect the role of the FCC, and ignore the

[21] The MPUC's insinuation that Charter somehow seeks competitive advantage under these programs is implausible. Their cumulative contributions total only 8 cents. Minnesota's 911 surcharge—which Charter does not contest—is $0.95, over ten times higher. *See* Minnesota Commerce Department, *TAP, Lifeline & Linkup*, https://mn.gov/commerce/industries/telecom/tap/ (last visited Oct. 13, 2017).

[22] These requirements are assessed as flat fees without regard to interstate usage and thus do not conform to federal methodology. They are also not "equitable and nondiscriminatory" insofar as they exempt nomadic VoIP and wireless providers. *See* 47 U.S.C. § 254(b)(4).

pervasive norm among the states *not* to impose cumulative regulation on VoIP services.

AARP and MMLA claim, for instance, that preemption creates a "regulatory void" because the FCC regulates only interstate services. AARP Br. 6-12; MMLA Br. 15-17. However, no such "regulatory void" exists.[23] The FCC can clearly regulate "jurisdictionally mixed" services and has promulgated a series of regulations governing interconnected VoIP services, addressing topics such as E911 connectivity, privacy, backup power during outages, number porting, compliance with law enforcement, and many others.[24] Most of the topics on which AARP and MMLA assert there would be a "regulatory void" absent state PUC regulation are already the subject of explicit and longstanding FCC protections.[25]

Amici also misapprehend the scope of federal preemption and thus overstate its effects. Information services are insulated from public utility rules such as those governing market entry and terms and conditions of service, not immune from all state laws. Nothing precludes states from continuing to oversee wholesale

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[23] Whether preemption extends to purely *intrastate* information services—were such service ever offered—is not before the Court.

[24] *See* n.9 *supra*; *see also In re Ensuring Continuity of 911 Communications*, Report and Order, 30 FCC Rcd 8677 (2015) (VoIP backup power rules).

[25] NARUC/NASUCA's argument—that classifying VoIP as an information service would jeopardize *existing* FCC VoIP regulations—is mistaken. NARUC/NASUCA Br. 22-28. The FCC explicitly premised each on legal grounds not dependent upon classification. *See* n.9 *supra*.

telecommunications services such as interconnection,[26] or from exercising functions expressly delegated by federal law, such as administering 911 systems.[27]

AARP, in a similar vein, argues that such preemption cannot extend to certain customer protections adopted pursuant to general police powers. AARP Br. 15-20. State laws of general applicability, such as those addressing unfair trade practices, are not public utility regulations enforced by the PUC and are not within the scope of federal preemption or the district court's order.

E. Non-Regulation of VoIP Services by Other States Belies the MPUC's and *Amici*'s Policy Concerns.

Objections to the supposed policy consequences of federal preemption founder on another problem: the MPUC's regulatory efforts here are an outlier. Other states *already* forgo extending state telephone rules to regulate interconnected VoIP services,[28] dispelling *Amici*'s ruinous predictions.

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[26] Carrier-to-carrier telecommunications services remain telecommunications services when VoIP providers purchase or sell them. *See, e.g., Time Warner Interconnection Order*, 22 FCC Rcd 3513.

[27] *See* 47 U.S.C. § 615a-1(d) (allowing FCC to delegate 911 responsibilities to states); 615a-1(a) (extending 911 responsibilities to "IP-enabled voice service providers").

[28] *See, e.g.*, Sherry Lichtenberg, NRRI, *Examining the Role of State Regulators as Traditional Oversight Is Reduced* 2 (July 11, 2015), http://nrri.org/wp-content/uploads/2016/04/2015-Jul-Sherry-Lichtenberg-Role-of-State-Regulators.pdf (noting that as of July 2015, "44 states had specifically eliminated oversight of VoIP and other IP-enabled services").

NARUC/NASUCA provide purported examples of regulation by other states, but they consist of states that have (i) declined to regulate[29] or (ii) expressly deregulated[30] VoIP services, (iii) instances in which individual VoIP providers have *willingly* submitted to non-mandatory state regulation to obtain some other regulatory benefit,[31] and (iv) states exercising the limited jurisdiction that federal law expressly delegates.[32] The uniqueness of the MPUC's attempt to assert regulatory authority over the terms and conditions of VoIP services belies predictions as to the supposed policy consequences of federal preemption.

CONCLUSION

Charter respectfully requests that the Court affirm the District Court's judgment.

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[29] NARUC/NASUCA at 6 n.11 (New York report expressly "not exercising" jurisdiction over VoIP).

[30] New Hampshire, cited by NARUC/NASUCA, deregulated VoIP providers while an appeal from an order extending regulation was pending. Compare NARUC/NASUCA Br. 5 *with Appeal of Comcast Phone of New Hampshire, LLC*, Case No. 2011-0762 (N.H. 2011); N.H. House Bill 542, 2013 Reg. Sess. (July 27, 2013). Missouri, also cited by NARUC/NASUCA, legislatively reversed a similar order during a legal challenge. S*ee Comcast IP Phone of Missouri, LLC v. Davis*, No, 08-4005-CV-C-NKL (W.D. Mo.); Mo. House Bill 1779, 94th Gen. Assembly, 2d Reg. Sess. (Aug. 28, 2008).

[31] California, also cited by NARUC/NASUCA, expressly deregulates VoIP services. *Compare* Cal. Pub. Utils. Code § 710 with NARUC/NASUCA at 4 n.10. The cited certification decision expressly notes the commission's lack of regulatory jurisdiction.

[32] *See* NARUC/NASUCA Br. 5 (New Hampshire legislation allowing PUC to regulate interconnection and 911); *id*. at 6 (Missouri interconnection decision).

Respectfully submitted,

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