No. 17-2290

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Charter Advanced Services (MN), LLC, et al.,

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)

REDACTED BRIEF OF THE DEFENDANT-APPELLANT COMMISSIONERS OF THE MINNESOTA PUBLIC UTILITIES COMMISSION

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This case presents an important question of nationwide significance: whether the rule of law may be rendered obsolete by technological innovation. The United States District Court for the District of Minnesota held that the Appellant Commissioners of the Minnesota Public Utilities Commission have no jurisdiction over Charter Phone, a non-mobile ("fixed") Voice over Internet Protocol ("VoIP") telephone service offered by Appellees to Minnesota consumers. The district court held that because Charter Phone uses VoIP technology to deliver telephone service it is an information service and not a telecommunications service under the Telecommunications Act of 1996. As a consequence, the district court held that regulation of Charter's provision of intrastate telephone service in Minnesota by the MPUC is preempted.

The district court's order granting Charter Advanced's motion for summary judgment should be reversed based on the erroneous and unprecedented legal analysis on which it is based. The court's decision, which strips the MPUC of its authority to regulate VoIP telephone service, is contrary to binding decisions of this Court, FCC precedent, and the longstanding system of cooperative federalism established under the Telecommunications Act.

The MPUC requests oral argument and suggests, due to the complexity and importance of these issues, the Court allot at least 20 minutes for each side.

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STATEMENT OF JURISDICTION

The district court properly exercised jurisdiction over this civil action because it raises questions of law arising under the Constitution and laws of the United States. *See* 28 U.S.C. § 1331 (2016).

On May 8, 2017, on the parties' cross motions for summary judgment, the district court issued a final order on the merits and judgment was entered. Add. 21; App. 253.[1] The MPUC timely appealed the district court's May 8, 2017 order by filing a notice of appeal on June 7, 2017. *See* Fed. R. App. P. 4(a)(1)(A); App. 254. As such, jurisdiction to review the district court's May 8, 2017 order properly lies in this Court. *See* 28 U.S.C § 1291. The scope of this Court's review extends to both the district court's grant of summary judgment to Appellees and denial of summary judgment to Appellants. *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 886-87 (8th Cir. 2014).

[1] "Add." refers to Appellants' Addendum. "App." refers to Appellants' Appendix. "S.App." refers to Appellants' Sealed Appendix.

STATEMENT OF ISSUES

1. Did the district court err by denying the MPUC's motion for summary judgment because, under applicable law and based on undisputed facts in the record, state regulation of Charter Phone is not preempted and Charter Phone is a telecommunications service under the Telecommunications Act?

   Most Apposite Authorities:
   U.S. Telecom Assoc. v. FCC, 825 F.3d 674 (D.C. Cir. 2016)
   Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007)
   Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015)
   Universal Serv. Contribution Methodology, 21 FCC Rcd. 7518 (2006)

2. Did the district court err by granting Charter Advanced's motion for summary judgment based on a superseded legal standard and a disputed fact record?

   Most Apposite Authorities:
   Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)
   Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007)
   Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015)
   Universal Serv. Contribution Methodology, 21 FCC Rcd. 7518 (2006)

3. Did the district court err by overlooking presumptions against preemption of state law? Is this holding contrary to congressional intent and public policy?

   Most Apposite Authorities:
   47 U.S.C. § 152
   Sw. Bell Tel. Co. v. Connect Commc'ns. Corp., 225 F.3d 942 (8th Cir. 2000)

STATEMENT OF THE CASE AND FACTS

This case turns on the regulatory status of fixed, interconnected Voice over IP telephone service ("VoIP"). Just like plain old telephone service ("POTS"), VoIP service "[e]nables real-time, two-way voice communications" and permits users "to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 47 C.F.R. § 9.3 (2016). A "fixed" VoIP service like Charter Phone is not mobile or portable ("nomadic"). *See Minn. Pub. Utils. Comm'n v. FCC* ("*Vonage III*"), 483 F.3d 570, 575 (8th Cir. 2007) (discussing differences between fixed and nomadic VoIP). Just like POTS, fixed, interconnected VoIP is an offering of telephone service used at a single fixed geographic location. The only difference between POTS and fixed, interconnected VoIP is the technology. *See* 47 C.F.R. § 9.3.

This dispute concerns the authority of the Appellant Commissioners of the Minnesota Public Utilities Commission (collectively, "MPUC") to apply state law consumer protections—including rules regarding contribution to funds to support telephone service for low-income and deaf and hard-of-hearing Minnesotans—to Charter Phone, the fixed, interconnected VoIP telephone service offered by Appellees (collectively, "Charter Advanced"). The MPUC Order that Charter Advanced challenged in its Complaint to the district court is a specific and direct response to the carrier's attempt to end-run around state laws.

I. CHARTER PHONE

Charter Phone is the fixed, interconnected VoIP service offered by Charter Advanced.[2] App. 19–20, 122. Charter Phone's functionality, marketing, and technology aid in understanding the proper regulatory status of this service.

A. Functionality

Charter Phone "offers a primary line phone service that is comparable to traditional phone service." App. 124. As confirmed by Charter Advanced, customers use Charter Phone service to make and receive local and long-distance telephone calls. S.App. 6:11–20. A Charter Phone customer simply "can pick up their phone and . . . call another party by dialing the number." S.App. 18:18–19:9. When a customer calls another party using Charter Phone, the other party "will be able to hear the consumer that made the phone call." *Id.* The words spoken by the caller are the words received by the called party. App. 181:14–23. The calling party speaks an analog signal and the called party hears an analog signal. S.App. 39:6–12. Simply stated, Charter Phone is "two-way communication, dial tone, originating, terminating two-way communications." *Id.* 78:10–13; *see also* App. 177:23–178:7.

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[2] In 2014 and 2015, the service was rebranded from "Charter Phone" to "Spectrum Voice." S.App. 7:17–21. The MPUC Order challenged by Charter Advanced in this litigation concerns Charter Phone, and does not reference Spectrum Voice. *E.g.* App. 150–51. Therefore the service at issue is *hereinafter* referred to as "Charter Phone."

Charter Phone is household telephone service. App. 122, 124; S.App. 5:25-6:5. Consumers use Charter Phone at a fixed location. App. 122; S.App. 30:23-31:1. "Just like traditional wire line services, Charter Phone works through regular phone jacks and phones, and provides access to 911 emergency services and directory listings." App. 124. Charter Phone customers can use their existing telephone handsets and jacks. S.App. 36:1–9. "Charter Phone is a 'whole house' service that uses existing phone wiring; this means that all working jacks in the home can be used." App. 122 Moreover, new customers of Charter Phone can keep their existing telephone number. *Id.* 121. Just like non-VoIP carriers, Charter Phone allows customers to "port their phone number from one provider, say, CenturyLink to another, Charter . . . ." S.App. 26:3–15.

Although Charter Phone includes "additional options" along with its dial tone, two-way voice calling and 911 access, those features are unavailable without the underlying basic phone service. S.App. 22:11–19. A customer cannot request Charter Phone's additional features without the basic point-to-point two-way voice communication service. *Id.* 80:12–17. In fact, a customer can disable features that come bundled with Charter Phone. *See id.* 27:12–22.

B. Marketing

Charter Phone is marketed to the public for a fee "as a full-feature voice offering to consumers . . . ." *See id.* 10:9–11. Charter Phone is not marketed as

"VoIP" and Charter Phone marketing does not "get[] into the underlying technologies." *Id.* 9:23–10:11. Accordingly, there is no marketing of the alleged ability of Charter Phone to engage in "protocol conversion." *See id.* 10:23–11:5. As Charter Advanced explained: "[w]e market the capability that protocol conversion can deliver . . . not the fact of how it gets delivered technology-wise." *Id.*

Charter Phone is marketed to consumers is via direct mail. *Id.* 13:16–21. The benefits of Charter Phone emphasized in direct mail relate to the product's ability to function as a telephone service. *Id.* 14:4–15:18. These benefits include unlimited calling, reliability without dropping of calls, unlimited local and long distance, and no added fees like a phone company may charge. *Id.* 13:22–15:18; *see also* App. 202–36.

Charter Advanced makes comparative claims like "no added fees like the phone company charges you" because "Charter [Phone] does compete against other phone providers, some of which who will charge added taxes and fees, others which may not." S.App. 16:14–16. Charter Advanced's competitors are other telephone providers. *Id.* 11:6–15. Part of the fees other telephone providers pay and that Charter Advanced boasts about avoiding support state funds for low income and deaf and hard of hearing individuals. App. 108.

C. Technology

Charter Phone is a fixed, interconnected VoIP service. *Id*. 19–20, 122. Undisputed evidence in the record confirms that characterization is accurate.

First, Charter Phone is a geographically fixed service. App. 122. Accordingly, Charter Advanced concedes that it can determine the originating and terminating points of its customers' calls. App. 187:19–88:14. [redacted]

Second, Charter Phone is an interconnected VoIP service because Charter Phone interfaces with the PSTN. App. 19–20. Customers use Charter Phone to make and receive local and long-distance telephone calls. S.App. 6:11–20. Charter Phone allows customers to call telephone numbers assigned under the North American Numbering Plan. *See* App. 120. In other words, Charter Phone users can call and receive calls from traditional POTS telephone customers.

Third, Charter Phone uses Internet Protocol (IP). App. 19–20; 124. However, while Charter Phone uses IP, Charter Phone customer calls do not touch the public Internet. *Id.* 124; S.App. 25:16–26:2. According to Charter Advanced, "Charter Phone uses Internet protocol for transporting calls over our own private network, so your calls never touch the public Internet." App. 124, 176–82. Charter Phone does not require that a customer purchase Internet access from Charter or any other internet service provider. App. 177:8–18.

II. CHARTER'S MARCH 2013 REORGANIZATION

Prior to March 2013, Charter Communications, Inc. ("Charter"), parent of Charter Advanced, App. 28–29; S.App. 32:1–16, 111–12, 123–24,[3] offered fixed, interconnected VoIP telephone service to Minnesota consumers through a

[3] [redacted]

subsidiary called "Charter Fiberlink." App. 38–39. During this time, neither Charter nor Charter Fiberlink objected to the MPUC's authority to regulate their offerings of retail telephone service in Minnesota. In fact, Charter Fiberlink is a regulated telecommunications company operating subject to a certificate of authority issued by the MPUC.[4] App. 28–29. As an authorized Competitive Local Exchange Carrier (CLEC), Charter Fiberlink is required to comply with the consumer protection requirements under Minnesota law. *See, e.g.*, Minn. Stat. §§ 237.01, 237.035, 237.16 (2016).

On March 1, 2013, without notice to or approval by the MPUC, Charter unilaterally transferred all its Minnesota residential consumers served by its Charter Fiberlink, subsidiaries, to its new Charter Advanced subsidiaries, which it contends are not subject to the MPUC's jurisdiction. App. 38, 53. [redacted] Charter Advanced does not have and has not sought authority from the MPUC to provide telecommunications service in Minnesota. App. 48.

[4] The Commission has exclusive authority to authorize provision of local telephone service in Minnesota. *See* Minn. Stat. § 237.16. [redacted]

Charter Advanced asserts that it is not subject to the MPUC's jurisdiction and, consequently, that state law consumer protections do not apply to its operations. *Id.* After accepting the MPUC's jurisdiction under state law for over a decade, Charter quietly declared its offering of IP-enabled telephone service in Minnesota free from the MPUC's oversight through this corporate transaction. App. 103–04.

Charter Advanced admits that this unilateral customer transfer was for the purpose of evading state regulation. S.App. 54:19–57:19, 84. The act of unilaterally changing a customer's telephone provider to another provider, without first providing effective notice to the customer and receiving customer permission, is commonly referred to as "slamming." Slamming is prohibited and subject to penalty under Minnesota's anti-slamming consumer protection law. *See* Minn. Stat. § 237.661. State law includes additional protections for consumers who rely on phone services, for example, by supporting programs for low-income and hard of hearing individuals and providing recourse to the MPUC in the event of disputes. *See infra*, Statement of the Case and Facts, Part III.

The March 2013 transfer was solely an assignment of existing customers to new corporate subsidiaries. [redacted]

[redacted]

The telephone inputs Charter Fiberlink furnishes include "interconnection, 911, numbering, operator services, directory assistance, [and] local number portability." *Id.* 46:22-25. [redacted] In fact, Charter's jurisdictional annual reports to the MPUC aggregate revenues from Charter Fiberlink and Charter Advanced. *Id.* 75:19–76:7. Customers pay one bill to the Charter parent, not one of its subsidiaries. App. 247–52. Even still, Charter Fiberlink recognizes that it is subject to the Commission's jurisdiction, *id.* 51–52, while Charter Advanced contends that it is not, *id.* 16–17.

III. PROCEDURAL HISTORY

In response to Charter's attempt to unilaterally deregulate its own operations by transferring its residential telephone consumers to an allegedly unregulated

subsidiary, the Minnesota Department of Commerce ("Department") filed a complaint on September 26, 2014 before the MPUC against Charter Fiberlink and Charter Advanced. App. 103–27. The Department claimed that Charter Fiberlink did not provide effective notification or seek consent from its customers, nor did it seek the MPUC's approval, before transferring customers on March 1, 2013 to Charter Advanced. *Id.* 103–06.

The Department further alleged that Charter's transfer of Charter Fiberlink's customers to Charter Advanced significantly and negatively affected the Minnesota Telephone Assistance Program (TAP) and the Telecommunications Access Minnesota program (TAM). *Id.* 107. TAP is a program that provides monthly assistance to eligible low-income Minnesotans. Minn. Stat. §§ 237.69–71. TAM distributes equipment and provides relay service to enable communication-impaired individuals to communicate by telephone. *Id.* §§ 237.50–56. To fund TAP and TAM, all Local Exchange Carriers must collect monthly bill surcharges from their customers and remit the proceeds to the Minnesota Department of Public Safety. *See id.* §§ 237.701, subd. 1 & 237.52, subd. 3. Carriers must also annually inform subscribers of the availability of TAP assistance. *Id.* § 237.70, subd. 7(b). By failing to contribute to the TAP and TAM programs, the Department alleged, Charter shifted its share of the costs of those programs to gain a competitive advantage over other telephone carriers. App. 108. The Department

pointed out that Charter Phone advertising highlighted this fact, stating its service is indistinguishable from other telephone services and boasting it does not require "added fees like the phone company charges you." *Id.*; *see also id.* 126.

In response, Charter admitted that neither Charter Fiberlink nor Charter Advanced had made contributions to the TAP fund since the mass transfer of customers in March 2013, and asserted that Charter Advanced is not required to comply with Minnesota law. *Id*. 135. For the first time, Charter contended that the MPUC lacks jurisdiction over its telephone service because it offers interconnected VoIP telephone service. *Id.* 134. Charter argued that interconnected VoIP service is not a "telecommunication service" under Federal law, and therefore that the MPUC must dismiss the Department's complaint without further investigation. *Id*. As a result, since March 2013, in Charter's view, its customers are no longer protected by numerous state law consumer protections, including, *inter alia*,: (1) protection from "slamming" practices, *see* Minn. Stat. § 237.661; (2) protection from discriminatory price gouging, *see id.* § 237.60; (3) protection from unauthorized billing charges, *see id.* § 237.665; and (4) customer privacy regulations, *see* Minn. R. 7812.0100, subp. 8, 7812.1000.

Meanwhile, the contention that Charter Phone is not subject to the MPUC's jurisdiction, raises the implication that it is not required to: (1) collect or remit TAP and TAM fees or inform customers of the availability of low-income

assistance programs; (2) submit a plan to MPUC detailing how it will provide 911 service to its customers, *see* Minn. R. 7812.0550; (3) comply with Minnesota's service quality standards, *see* Minn. Stat. §§ 237.121 & 237.765, *see also* Minn. R. 7812.0700; (4) report significant service disruptions to MPUC, *see* Minn. R. 7810.0600; (5) comply with notice requirements, such as notices for price increases and significant changes in the terms and conditions of service, *see id*. 7812.2210, subp. 3; (6) follow Commission approved procedures for resolving bill disputes, *id.* 7810.2400; (7) abide by certain customer protections both before and during disconnection of customer service, *id*. 7810.2000–2300; or (8) comply with restrictions on customer deposits, *id.* 7810.1600. *See* App. 137. Charter also asserts that it is no longer required to inform customers of their ability to seek recourse with the MPUC because, according to Charter, the MPUC can no longer legally provide recourse to Charter's customers. *Id.* 136–37; *see also* Minn. R. 7810.1100–7810.1200 (requiring a telephone utility to establish complaint procedures for its customers and keep records of all customer complaints forwarded from the MPUC to the utility).

On November 18, 2014, the MPUC found that it has jurisdiction over the Department's complaint and ordered Charter to answer. App. 140. Charter answered the Department's Complaint on December 18, 2014. *Id.* While addressing some of the Department's allegations, Charter primarily argued that

federal law preempts the MPUC's state law authority over its fixed, interconnected VoIP services. *Id.* 148–49. On July 28, 2015, the MPUC found that Charter's service is a "telecommunications service" and is thus subject to the framework of dual state and federal regulation under the Telecommunications Act. *Id.* 152.

The Commission denied Charter Advanced's request for reconsideration on September 24, 2015. *Id.* 200–01. After the deadline set by the Commission, Charter Advanced filed its Compliance Plan late on November 4, 2015. *Id.* 153-67. In its plan, Charter Advanced indicated that it currently complies, will comply, or will request a variance from compliance with each Minnesota law and rule at issue. *Id.* 154–67. The Commission took comments on Charter Advanced's Compliance Plan, but has not, to date, taken any further action.

On October 26, 2015, Charter Advanced filed suit in the United States District Court for the District of Minnesota to challenge the MPUC's Order. App. 15. The MPUC moved to dismiss Charter Advanced's complaint for failure to state a claim upon which relief can be granted. Add. 64. The district court referred the motion to a United States Magistrate Judge, who, after a hearing, issued findings and recommended that the MPUC's motion be denied to facilitate development of a complete fact record. *Id.* 64, 106. In a July 25, 2016 order, the district court adopted the findings and recommendations of the Magistrate Judge over the MPUC's objections. *Id.* 22–23, 61–62. In a May 8, 2017 order on the

parties' cross motions, the district court granted Charter Advanced's motion for summary judgment and denied the MPUC's motion for summary judgment. *Id*. 1, 20–21. Judgment was entered the same day. App. 253 This appeal followed. *Id.* 254–55.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo and under the same standards as the district court. *Bockelman v. MCI Worldcom, Inc.*, 403 F.3d 528, 531 (8th Cir. 2005). "Summary judgment is warranted if the evidence, viewed in the light most favorable to the nonmoving party, shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Id.*

"[W]here an appeal from an order denying the appellant's motion for summary judgment is raised together with an appeal from an order granting the appellee's cross motion for summary judgment, [the Court] may enter an order directing that summary judgment be granted in favor of the appellant if the record presents no genuine issue of material fact and the appellant is entitled to judgment as a matter of law." *Hawkeye Nat. Life Ins. Co. v. AVIS Indus. Corp.*, 122 F.3d 490, 496 (8th Cir. 1997).

The MPUC's decision asserting jurisdiction over Charter Phone is reviewed de novo for its compliance with federal law. *Connect Commc'ns Corp. v. Sw. Bell Tel., L.P.*, 467 F.3d 703, 708 (8th Cir. 2006).

SUMMARY OF ARGUMENT

Based on binding decisions of this Court, FCC precedents, and recent decisions from other federal courts, the MPUC is not preempted from regulating Charter Phone. The MPUC is entitled to judgment as a matter of law on this basis alone. If the Court reaches the definitional classification issue raised by Charter Advanced, Charter Phone is properly regarded as a telecommunications service subject to the MPUC's jurisdiction. This conclusion follows from the plain text of the Telecommunications Act and the FCC's functional approach to classification.

The district court incorrectly held that Charter Phone is an information service not subject to the MPUC's jurisdiction. This Court should reverse because the district court based its decision on dated and repudiated authority, improperly interpreted the telecommunications management exception to the definition of information service, and glossed over fact disputes material to its analysis.

The district court's decision is contrary to statutory and common law presumptions against preemption of state law, congressional intent, and public policy.

ARGUMENT

I. THE MPUC IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE, ON THE UNDISPUTED FACT RECORD, STATE REGULATION OF CHARTER PHONE IS NOT PREEMPTED AND CHARTER PHONE IS A TELECOMMUNICATIONS SERVICE.

Based on the plain language of the Telecommunications Act, the applicable functional approach to classification, and instructive FCC and judicial precedent, Charter Phone is subject to the Commission's jurisdiction.

Charged with administering the Telecommunications Act, *see, e.g.*, 47 U.S.C. § 201, the FCC has plainly stated that an interconnected VoIP provider with the capability to track whether calls are interstate or intrastate would be subject to state regulation. *See USF Order*, 21 FCC Rcd. 7518, 7546 ¶ 56 (2006). This regulatory framework is consistent with the Telecommunications Act's "scheme of cooperative federalism." *Sw. Bell Tel. Co v. Connect Commc'ns Corp.*, 225 F.3d 942, 948 (8th Cir. 2000). The FCC's *USF Order* alone is dispositive of Charter Advanced's preemption claim.

If the Court reaches the issue of the definitional classification, Charter Phone is properly classified as a telecommunications service. Title II of the Communications Act of 1934, as amended by the Telecommunications Act

of 1996, 47 U.S.C. § 151 *et seq.*, subjects all providers of "telecommunications service" to mandatory common-carrier regulation, *id.* § 153(51), (53), including regulation of intrastate communication service by the states, *id.* § 152(b).[6] Because the Act defines "telecommunications service" in a technologically neutral manner, i.e., "regardless of the facilities used[,]" *id.* § 153(53), this Court can determine Charter Phone is a telecommunications service based on the statutory text alone.

If the Court reaches the issue of definitional classification and the plain language of the statute is insufficient to resolve it, the FCC's "functional" test, consistent with the principle of technological neutrality embedded in the definition of "telecommunications service," applies to determine whether a service is, in fact, a telecommunications service subject to regulation under Title II of the Telecommunications Act. Under this functional approach to classification, Charter Phone is a telecommunications service. FCC decisions and judicial precedents support this conclusion.

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[6] "[T]he 'impossibility exception' of 47 U.S.C. § 152(b) . . . allows the FCC to preempt state regulation of service which would otherwise be subject to dual federal and state regulation where it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies." *Vonage III*, 483 F.3d at 576. Charter Advanced concedes that it can, [redacted] determine whether calls are interstate or intrastate. App. 187:19–88:14; S.App. 72:8–16. The impossibility exception does not affect Charter Phone's definitional classification.

A. Under The *Vonage* Cases, Related FCC Orders, And The Most Recent Federal Court Decisions, State Regulation Of Charter Phone Is Not Preempted.

It is undisputed that Charter Phone is an "interconnected VoIP service," App. 20, that it provides "fixed" rather than "mobile" or "nomadic" interconnected VoIP service, *id.* 122, and that it can [redacted] record whether a call it originates or terminates from its customers is intrastate versus interstate, *id.* 187:19–88:14; S.App. 72:8–16. [redacted] On these undisputed facts, the *Vonage* decisions can only be read to support the conclusion that the MPUC has jurisdiction to regulate Charter Phone.

In granting summary judgment to Charter Advanced, the district court improperly relied on *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n* ("*Vonage I*"), 290 F. Supp. 2d 993 (D. Minn. 2003), which reached the conclusion that Vonage's *nomadic* interconnected VoIP service constituted an "information service" and was thus not subject to state regulation. The FCC subsequently rejected the *Vonage I* court's analysis, however. The FCC specifically declined to classify Vonage's service as either a telecommunications service or information service and instead focused on the fact that Vonage's nomadic VoIP service is subject to the impossibility exception to

preemption under the Telecommunications Act because it is impossible to determine the portions of its service that are interstate as opposed to intrastate. *Vonage Holdings Corp.* ("*Vonage II*"), 19 FCC Rcd. 22404, 22413–14 ¶¶ 17–18 (2004).

While jurisdictionally mixed services are generally subject to dual federal and state jurisdiction, state regulation is preempted where it is impossible or impractical to separate the service's interstate and intrastate components and thus the application of state regulation could affect interstate components in violation of federal rules and policies. *Id.* The FCC concluded that because of its nomadic nature, there was no practical way to divide the voice communications of Vonage's VoIP service into distinct interstate and intrastate communications. This triggered the FCC's authority to preempt Minnesota's regulation of Vonage's intrastate communications, which the FCC determined would inevitably impact interstate communications subject to exclusive federal jurisdiction. *Id*. at 22423–24 ¶ 31.

On appeal of *Vonage I* the Eighth Circuit issued a limited decision that did not review the Minnesota district court's classification of Vonage as an information service under the Telecommunications Act. Instead the Court of Appeals determined that the FCC's *Vonage II* decision was "binding" and therefore "affirm[ed] the judgment of the district court on the basis of the

[FCC's *Vonage II*] Order." *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004) (mem.).[7]

Later, the MPUC and others petitioned for review of the FCC's *Vonage II* decision. This Court denied the petitions, holding that the FCC's application of the impossibility exception to Vonage's nomadic VoIP service was proper because, as a nomadic service, the jurisdiction of Vonage users' calls could not be determined. *Vonage III*, 483 F.3d at 578. This Court observed that state authority to regulate fixed VoIP services like Charter Phone "remains an open issue" because *Vonage II* only issued a "mere prediction" as to how fixed VoIP services would be classified in the future. *Id.* at 582–83. Importantly, this Court also noted that the FCC itself had recently signaled that its prediction was subject to reevaluation where a VoIP provider is able to track the jurisdiction of customer calls. This Court observed:

> In proceedings to address VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated

[7] This conclusion comports with the Supreme Court's decision in *Brand X* that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* ("*Brand X*"), 545 U.S. 967, 982–86 (2005). The *Vonage I* court recognized that there is no "explicit statutory language" classifying interconnected VoIP as an information service. *See* 290 F. Supp. 2d at 1001. Therefore, *Vonage I* does not displace the FCC's subsequent decision in *Vonage II* to resolve the jurisdictional issue before it on the impossibility exception instead of an express service classification determination. *See* 19 FCC Rcd. at 22411–12 ¶ 14.

> An interconnected VoIP provider with a capability to track the jurisdictional confines of customers calls would no longer qualify for the preemptive effects of our *Vonage* [*II*] *Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage* [*II*] *Order* would no longer be applicable to such an interconnected VoIP provider.
>
> *Universal Serv. Contribution Methodology* [("*USF Order*")], 21 [FCC Rcd.] 7518[,] 7546 ¶ 56 (2006) [].
>
> Similarly, we emphasize the limited scope of our review of the FCC's [*Vonage II*] decision. Our review is limited to the issue whether the FCC's determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined.

Id. at 580; *see also Centurytel of Chatham LLC v. Sprint Commc'ns Co. LP*, 185 F. Supp. 3d 932, 944 (W.D. La. May 4, 2016), *aff'd* 861 F.3d 566 (5th Cir. 2017), (citing *USF Order*, 21 FCC Rcd. at 7546 ¶ 56; *Vonage III*, 483 F.3d at 582–83) ("[T]he FCC expressly reversed its Vonage dictum" in issuing its USF Order and "abandon[ed] the dictum in briefing before the Eighth Circuit," a fact that the Eighth Circuit Court of Appeals "specifically acknowledged" in its *Vonage III* decision).

In sum, the *Vonage* cases do not support classifying Charter Phone as an information service. Instead the ultimate direction provided by the FCC and recognized by this Court is that "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls *would no longer qualify for*

the preemption effect of [the FCC's] Vonage [II] Order and would be subject to state regulation." *Vonage III*, 483 F.3d at 580, 583 (emphasis added). Since Charter Advanced is just such an interconnected VoIP provider that can track the jurisdictional confines of its customers' calls, the *Vonage* decisions provide no basis for the district court's declaration that the MPUC may not regulate Charter Advanced's provision of intrastate local and long-distance service to Minnesotans. Instead, these decisions support judgment in favor of the Commission.

The most recent federal district court decisions to consider application of state authority to regulate fixed, interconnected VoIP follow this Court's rule stated in *Vonage III*. *See Centurytel of Chatham*, 185 F. Supp. 3d at 943–45; *Sprint Commcn's Co. v. Bernsten*, 152 F. Supp. 3d 1144, 1152 (S.D. Iowa 2015), *aff'd sub nom. Sprint Commcn's Co., L.P. v. Lozier*, 860 F.3d 1052 (8th Cir. 2017). As stated above, *Vonage I* and its progeny are not the law and nonetheless inapposite because they concern nomadic VoIP. *See* 290 F. Supp. 2d at 995, 999-1000, (observing that Vonage cannot determine the geographic location of its customers and therefore is distinguishable from phone-to-phone VoIP); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04-civ-4306 (DFE), 2004 WL 3398572 (S.D.N.Y. July 16, 2004) (concerning Vonage service and citing

Vonage I). The FCC definitively limited this analysis to nomadic VoIP in the *USF Order*.[8]

This Court need not reach the definitional classification of Charter Phone to conclude that state regulation is not preempted. Just as in the recent *Lozier* decision, the FCC's determination that the Telecommunications Act preserves state authority to regulate fixed, interconnected VoIP alone is dispositive. *Cf.* 860 F.3d 1052, 1056–59 (8th Cir. 2017) (affirming district court's opinion that did "not decide whether the calls were information services or telecommunications services" when relevant FCC precedents provided that state regulation was not preempted). Under the *Vonage* cases, related FCC precedent, and the most relevant and recent court decisions, Charter Phone is subject to the MPUC's jurisdiction.

[8] Other federal court decisions that follow *Vonage I* are also not the applicable law. These decisions are factually distinct because they concern carrier-to-carrier access services and did not analyze those VoIP services from the perspective of the end-user, as the FCC's functional approach to classification requires. *See PATEC Comms., Inc. v. Commpartners, LLC*, No. 08-0397 (JR), 2010 WL 1767193, at *1 (D.D.C. Feb. 18, 2010); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1062 63 (E.D. Mo. 2006). Moreover, these two decisions mistakenly rely on analysis the FCC did not follow in its *USF Order*, which this Court recognized as the law in *Vonage III*. 483 F.3d at 580, 583.

B. If The Court Reaches The Issue, Charter Phone Is A Telecommunications Service Under The Plain Language Of The Telecommunications Act.

Decisions of the FCC and this Court definitively hold that the MPUC's regulation of Charter Phone is not preempted. If this Court seeks to resolve the definitional classification of fixed, interconnected VoIP services like Charter Phone,[9] analysis must "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The Telecommunications Act definitions of "telecommunications," "telecommunications service," and "information service" are the starting point for analysis of whether the MPUC is preempted from regulating Charter Phone. A "telecommunications service" is subject to common carrier regulation by the FCC and the states under Title II of the Telecommunications Act, while an "information service" is not. *See U.S. Telecom Assoc. v. FCC* ("*USTA*"), 825 F.3d

[9] The FCC has not "generally classified VoIP as a telecommunications service or information service . . . ." *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd. 3962, 4059 ¶ 262 n.709 (2016). The MPUC highlighted this regulatory gap in its briefing to the district court by requesting, in the alternative, that the Court refer the classification issue to the FCC on primary jurisdiction grounds if it was deemed dispositive. The district court did not expressly discuss this request in its order on the parties' motions for summary judgment.

674, 691-92 (D.C. Cir. 2016) (explaining statutory framework and relevant decisions). Categorization of a service as a telecommunications service or an information service under the Act is a mutually exclusive proposition. *Vonage Holdings Corp. v. FCC* ("*Vonage IV*"), 489 F.3d 1232, 1241 (D.C. Cir. 2007). If this Court views resolution of the service's definitional categorization as necessary, Charter Phone fits squarely within the Act's definition of "telecommunications service" and is therefore subject to regulation by the MPUC.

"The term 'telecommunications' means 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). In its 2006 *USF Order*, the FCC specifically stated that interconnected VoIP provides "telecommunications" because it provides "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 21 FCC Rcd. 7518, 7538 ¶ 39 (2006) (quoting 47 U.S.C. § 153). Charter Phone is interconnected VoIP, App. 20, and thus indisputably provides "telecommunications."

"Telecommunications" becomes a "telecommunications service" when it is offered directly to the public for a fee, regardless of the technology employed to do so. 47 U.S.C. § 153(53) ("The term 'telecommunications service' means the

offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."). It is undisputed that Charter offers Charter Phone directly to the public for a fee. App. 24. Furthermore, because it does not matter what "facilities" are used, facts surrounding the technology Charter Phone uses to provide its fixed, interconnected VoIP service to consumers are irrelevant. As such, Charter Phone plainly qualifies as a telecommunications service as a matter of law based on the Telecommunications Act's definitions alone.

The district court improperly rejected this argument out of hand, stating that this reading would require it to "disregard twenty years of case law and administrative decisions." Add. 100. To the contrary, precedent supports this interpretation of the Telecommunications Act's definitions and FCC authority. The United States Supreme Court has credited this straightforward interpretation of the definition of a "telecommunications service." *See Brand X*, 545 U.S. at 996 ("The Act's definition of "telecommunications service . . . hinges solely on whether the entity "offer[s] telecommunications for a fee directly to the public[.]") (citations omitted) (first emendation in original). Under the plain language of the Telecommunications Act and the FCC's pronouncement that interconnected VoIP provides "telecommunications," Charter Phone is indisputably a "telecommunications service."

C. If The Court Reaches The Issue And The Plain Language Of The Telecommunications Act Is Not Dispositive, The Applicable Functional Approach To Classification Dictates That Charter Phone Is A Telecommunications Service.

In the event the Court reaches the issue of whether a fixed, interconnected VoIP service like Charter Phone should be classified as a "telecommunications service" or an "information service," and the text of the statute alone does not resolve the dispute, the FCC exclusively employs a functional approach to determine the definitional classification question. This approach must be afforded due deference. The district court erred by misapplying it in this case. Add. 18–19.

1. The FCC's functional approach controls classification of Charter Phone.

The methodology for resolving classification of Charter Phone has been settled by the FCC and affirmed by the courts: classification turns on the nature of the functions offered from the customer's perspective. *See Brand X*, 545 U.S. at 986–99 (affirming the FCC's determination that the regulatory classification of cable modem service turned on the nature of functions offered to the end user). As emphasized most recently by the D.C. Circuit Court of Appeals in affirming the FCC's *Open Internet Order*, the functional approach relies on consumer perception to determine the classification of a service:

> Under the Act, a service qualifies as a "telecommunications service" as long as it constitutes an "offering of telecommunications for a fee

> directly to the public." 47 U.S.C. § 153(53). . . . [W]hen interpreting this provision in *Brand X*, the Supreme Court held that classification of broadband turns on consumer perception.

USTA, 825 F.3d at 697–700, 708 (citing *Brand X*, 545 U.S. at 990, and *Protecting and Promoting the Open Internet* ("*Open Internet Order*"), 30 FCC Rcd. 5601, 5750–73 ¶¶ 341–42, 347–52, 354, 356, 361, 365–66, 372, 376 (2015)).

The Supreme Court has stated that the FCC's functional approach is the law and is due *Chevron* deference. *Brand X*, 545 U.S. at 982, 1000 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844–45 & n.11 (1984) ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")); *see also Friends of the Boundary Waters v. Bosworth*, 437 F.3d 815, 822 (8th Cir. 2006) (agency's choice of methodology is entitled to deference).

The FCC's functional approach is consistent with the Telecommunications Act. Congress made it clear in drafting the Telecommunications Act that distinctions in technology deployed to transmit voice communication are not relevant to whether a service is a "telecommunications service." A service accordingly meets that definition "regardless of the facilities used." 47 U.S.C. § 153(53). And a telecommunications service does not become an information service by virtue of information service-type capabilities that "manage[], control, or operat[e] a

telecommunications system or manage[] a telecommunications service." *Id.* § 153(24). The text of the Telecommunications Act in these definitions is expressly neutral with respect to technology used.

Under the functional approach, "the critical distinction between a telecommunications service and an information service turns on what the provider is 'offering.'" *Open Internet Order*, 30 FCC Rcd. at 5757 ¶ 355. The FCC and courts hold that consumer perception drives the determination of an "offer." *Id*. at 5750 ¶ 342; *accord Brand X*, 545 U.S. at 988–89; *USTA*, 825 F.3d at 697–98. The "functional approach[] focus[es] on the nature of the service provided to consumers, rather than . . . on the technical attributes of the underlying architecture." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd. 3019, 3023 ¶ 7 (2002).

The touchstone of the analysis is the nature of the product offered to consumers. Under the functional approach, a telecommunications service is offered where "[t]he telecommunications component of [a] service retains such ample independent identity that it must be regarded as being on offer—especially when seen from the perspective of the consumer." *Open Internet Order*, 30 FCC Rcd. at 5757–58 & n.971 ¶ 356 (quoting *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting)).

Applying this functional approach to broadband Internet service in the *Open Internet Order*, the FCC determined that "providers today market separate services that are best characterized as (1) a broadband Internet access service that is a telecommunications service; and (2) 'add-on' applications, content, and services that are generally information services." *Id.* at 5750 ¶ 341. The FCC drew on how consumers use the product and how the product is marketed to reach this conclusion. *Id*. at 5743 ¶ 330. The FCC rejected its previous conclusion, that broadband Internet access is a functionally integrated information service, because the information services "are not so inextricably intertwined with broadband transmission, but rather are a 'product of the [provider's] marketing decision not to offer the two separately.'" *Id.* at 5773 ¶ 376 (quoting *Brand X*, 545 U.S. at 1009 n.4 (Scalia, J., dissenting)).

2. Under the functional approach Charter Phone is a telecommunications service.

Applying the functional approach to the undisputed fact record in this case supports a parallel conclusion: in selling Charter Phone, Charter Advanced markets separate services that are best characterized as (1) a telephone service that is a telecommunications service; and (2) add-on applications, content, and services. Charter Advanced's marketing of Charter Phone confirms that the telecommunications component of Charter Phone retains an independent identity as an offering of telecommunications.

Charter Phone is an offering of a pure, transparent, real-time, two-way voice telecommunications path to consumers. Charter Advanced's marketing materials offer Charter Phone as voice transmission service and compare the service to other telephone services. Direct mail highlights solely the real-time, two-way voice transmission capability of Charter Phone. *E.g.* App. 202–03. Charter highlights consumers' ability to:

- "Talk all you want without dropped calls. Stay connected with unlimited local and long distance calling." App. 126, 202, 205, 219, 225, 227, 229.
- "Talk all you want without counting minutes with unlimited local and long distance calling." App. 207, 215, 221.
- Use "[a]dvanced voice service with unlimited local and long distance calling plus more clarity and more reliability than ever before." App. 211.
- "Enjoy unlimited local and long distance calling with more clarity and more reliability than ever before." App. 213, 231, 233.

Each of these statements particularly and distinctly offer the telephone service's voice transmission path—"talk," "stay connected," "local and long distance calling," "clarity," and "reliability"—to the exclusion of ancillary features. Charter's website likewise touts the telephone voice transmission capabilities of Charter Phone separate from its ancillary features. *E.g.* App. 123–24.

Furthermore, the statement that Charter Phone "offers a primary line phone service that is comparable to traditional phone service" solidifies the fact that Charter Phone offers an independent telecommunications service and places that fact beyond reasonable dispute. App. 124. Collectively, these statements

constitute as a matter of law a separate and distinct offering of a telecommunications service. *See Open Internet Order*, 30 FCC Rcd. at 5755–57 ¶¶ 351–54 (reviewing marketing of broadband Internet access and concluding that providers' emphasis on aspects of transmission—speed and reliability—impress upon consumers that "transmission capability . . . is being offered . . . even if complementary services are also included as part of the offer.") Plaintiffs' similar emphasis of transmission capabilities, including reliability, clarity, and interconnectedness of the network, distinctly and separately offers telecommunications to consumers because "[a]s the [FCC] has recognized, the heart of telecommunications is transmission." *USF Order*, 21 FCC Rcd. at 7539 ¶ 41 (footnote and quotation marks omitted).

On this evidence, it cannot be reasonably disputed that, viewed from the consumer's perspective, Charter Phone plainly "offers" "telecommunications" and is therefore a "telecommunications service." *See* 47 U.S.C. § 153(50), (53). As viewed from the consumer's perspective, this service is "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Brand X*, 545 U.S. at 976 (quoting *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* ("*Computer II*"), 77 F.C.C.2d 384, 420 ¶ 96 (1980)). Charter Phone offers "a communications path that enable[s] the consumer to

transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network[.]" *Id.* This transparent, real-time, two-way voice telecommunications path is the "indispensable function" of Charter Phone. *See Open Internet Order*, 30 FCC Rcd. at 5743 ¶ 330.

3. Charter Phone is not an information service under the functional approach.

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. Add. 18–19. "As the Supreme Court [has] recognized, an entity may not avoid . . . regulation of its telecommunications service simply by packaging that service with an information service." *Open Internet Order*, 30 FCC Rcd. at 5769 ¶ 369 (2015) (citing *Brand X*, 545 U.S. at 997–98); *see also Fed.-State Joint Bd. on Universal Serv.*, Report to Congress, 13 FCC Rcd. 11501, 11530 ¶ 60 (1998).

Relatedly, the fact that a provider bundles various services is not determinative of regulatory classification. *See Open Internet Order*, 30 FCC Rec. at 5773 ¶ 376; *Fed.-State Joint Bd. on Universal Serv.*, Fourth Order on Reconsideration, 13 FCC Rcd. 5318, 5474–75 ¶ 282 n.827 (1997) ("For example, if a reseller offers basic voice-grade telephone service with Internet service for one

flat monthly fee, the fact that the reseller provides an enhanced service with a basic service for a single price does not render the basic voice service an enhanced service. In that instance, the enhanced service is not combined with the basic service into a single enhanced offering because, functionally, the consumer is receiving two separate and distinct services, voice-grade telephone service and Internet service."). *Contra* Add. 19–20.

Like broadband Internet access, Charter Phone "is not a functionally integrated information service consisting of a telecommunications component 'inextricably intertwined' with information service components." *Open Internet Order*, 30 FCC Rcd. at 5776 ¶ 385. A service is "inextricably intertwined" where information-processing capabilities and data transmission converge "such that the consumer *always* uses them as a unitary service." *Id*. at 5740 ¶ 323 (quoting *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Order, 20 FCC Rcd. 14853, 14860 ¶ 9 (2005)) (emphasis added); *see also Brand X*, 545 U.S. at 988. The district court was incorrect to conclude to the contrary, as "add-on information services" do not permit a provider to evade regulation. *Open Internet Order*, 30 FCC Rcd. at 5773 ¶ 376.

Charter Phone is not inextricably intertwined with any of the added features Charter Advanced may present with the product. Users do not *always* employ Charter Phone's add-on features in tandem as a unitary service with the core voice

transmission offering of Charter Phone. In fact, Charter Advanced admits the opposite: the features can be turned off, either by Charter Advanced or by the end user. S.App. 27:12–22, 96:18–103:3. The features are not "'part and parcel'" of the service provided to the Charter Phone end user, "'integral to its other capabilities.'" *See Brand X*, 545 U.S. at 988 (quoting *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4823 ¶ 39 (2002)).

Charter Advanced cannot evade regulation by packaging its telecommunications service with voice mail or similar services. *Open Internet Order*, 30 FCC Rcd. at 5773 ¶ 376 (quoting *Brand X*, 545 U.S. at 997–98). These ancillary features are properly characterized as "adjunct-to-basic" because they simply facilitate use of the voice transmission service and do not alter its fundamental character. *See USTA*, 825 F.3d at 705. These ancillary features are within the telecommunications management exception to the definition of "information service" and do not affect classification of the core voice transmission service as a "telecommunications service." *Id.* at 705-06; *see infra*, Argument, Part II.B.

Charter Phone's use of IP technology is not even marketed to consumers as the functionality of the product. See S.App. 10:23–11:11. As the functional approach is an extension of the principle of technological neutrality embedded in

the definition of "telecommunications service," this aspect of Charter Phone is wholly irrelevant under the functional approach.

In any event, the use of IP is not inextricably intertwined with the core voice telecommunications service Charter Phone offers to consumers. Charter Advanced admits that not all calls made by Charter Phone subscribers undergo a protocol conversion. App. 182:20–183:20. Protocol conversion, like the features discussed above, is therefore not inextricably intertwined with Charter Phone because consumers do not *always* use protocol conversion and the voice communications service as a unitary service. *See Open Internet Order*, 30 FCC Rcd. at 5740 ¶ 323. Because Charter Phone does not *necessarily* invoke the protocol conversion that Charter Advanced contends is part of the product, the conversion is not an inextricable feature of the product. An inextricable feature is not occasionally invoked or even invoked "within the majority" of occasions. It must always be invoked, used without exception, to be found an inextricable part of a unitary service. Charter Advanced admits that some calls do not undergo the protocol conversion it alleges occurs on its network. App. 182:20–183:20. Furthermore, even to the extent a protocol conversion allegedly occurs, it would fall squarely within the telecommunications management exception to the definition of information service. *See infra*, Argument, Part II.B.

II. THE DISTRICT COURT IMPROPERLY GRANTED CHARTER ADVANCED'S MOTION FOR SUMMARY JUDGMENT BASED ON A SUPERSEDED LEGAL STANDARD AND DISPUTED FACT RECORD.

The district court applied the wrong legal standard to contested issues of fact when it granted Charter Advanced's motion for summary judgment. The district court's legal standard, which evaluates whether a service engages in "protocol conversion" to determine whether it is a telecommunications service or an information service, is contrary to the Telecommunications Act and its interpretation in FCC and judicial decisions. As detailed *supra* in Argument, Part I.C., the functional approach to classification is the law and is due deference.

A. Net Protocol Conversion Is Not The Proper Criterion For Service Classification Under The Telecommunications Act.

The district court's reliance on *Vonage I* and the FCC's 1996 *Non-Accounting Safeguards Order* for the proposition that classification is determined based on whether a service engages in a net protocol conversion is misplaced. *See* Add. 10–11.

1. The district court erred by following *Vonage I*.

As discussed *supra* in Argument, Part I.A., *Vonage I* and cases relying on its reasoning do not state the law applicable to this case. The district court's citation of these authorities as applicable to fixed services offered to the public directly conflicts with the FCC's disclaimer in Paragraph 56 its *USF Order* that it would not preempt state regulation of fixed, interconnected VoIP. *See Brand X*, 545 U.S.

at 982 ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps."). This agency pronouncement alone negates Charter Advanced's claim that the MPUC is preempted.

Furthermore, the district court's application of *Vonage I* glosses over fundamental fact distinctions with this case. First, Charter Advanced can [redacted] track the jurisdiction of customer calls. App. 187:19–88:14; S.App. 72:8–16 The service at issue in Vonage was nomadic and therefore could not. *See Vonage II*, 19 FCC Rcd. at 22423–24 ¶ 31. This factual distinction alone is dispositive based on the FCC's subsequent pronouncement that "[a]n interconnected VoIP provider with a capability to track the jurisdictional confines of customers calls would no longer qualify for the preemptive effects of our *Vonage* [*II*] *Order* and would be subject to state regulation." *USF Order*, 21 FCC Rcd. at 7546 ¶ 56.

Perhaps more importantly, Vonage did not offer a conduit for telecommunications to its consumers. An Internet connection was required for the Vonage service to provide its customers telecommunications. *Vonage II*, 19 FCC Rcd. at 22406 ¶ 5. Charter Phone, by contrast, offers a transparent telecommunications path to consumers via a telecommunications network that does not route calls over the public Internet. This is a crucial fact distinction where the FCC's approach to classification on the Telecommunications Act turns on whether

consumers are offered a pure, transparent communications path. *See Brand X*, 545 U.S. at 976.

2. The *Non-Accounting Safeguards Order* does not apply.

The district court improperly based its decision in-part on the FCC's 20-year-old *Non-Accounting Safeguards Order*. *See Implementation of the Non-Accounting Safeguards, as amended* ("*Non-Accounting Safeguards Order*"), First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996), *modified in part*, Order on Reconsideration, 12 FCC Rcd. 2297 (1997). The *Non-Accounting Safeguards Order* was issued by the FCC shortly after the 1996 amendments to the Communications Act, in the context of a separate and distinct portion of the Act that has no application to the facts of this case. It solely concerns the separate affiliate and nondiscrimination requirements of the Act. *See Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21910, ¶ 5. ("This order addresses *only* the non-accounting separate affiliate and nondiscrimination safeguards in sections 271 and 272.") (emphasis added). This factual context is far removed from the classification question in issue. By its own terms, the order does not extend to, much less address, the classification of a voice transmission service like Charter Phone, which is not sold to customers as a protocol conversion service but instead as a voice transmission telephone service. S.App. 10:23–11:5.

What's more, the *Non-Accounting Safeguards Order* does not discuss the definition of an "offering" under the Telecommunications Act. It therefore does not supply the rule of decision on the question whether Charter Advanced is "offering" an information service, which is necessary to be classified as an information service. Nevertheless, the district court erroneously relied on the *Non-Accounting Safeguards Order* to advance the proposition that Charter Phone is an information service by virtue of the protocol conversion it alleges the service employs. Add 10–11, 13.

The *Non-Accounting Safeguards Order* predates more recent and relevant decisions identified in the foregoing discussion of the proper standard for classification under the Telecommunications Act. The district court's interpretation of the *Non-Accounting Safeguards Order* directly conflicts with more recent statements of the law by the FCC, this court, and other federal courts. The FCC's unqualified statement in the *USF Order* that interconnected VoIP is telecommunications, 21 FCC Rcd. at 7538 ¶ 39, necessarily includes the conclusion that the protocol conversions invariably associated with interconnected VoIP do not change the form of the transmission. S.App. 93:24–95:24. After the *USF Order*, the *Non-Accounting Safeguards Order* provides no support for the claim that Charter Phone should be classified as an information service because of the technology used.

Furthermore, the district court's reliance on the *Non-Accounting Safeguards Order* is curious in light of the undisputed facts of this case, which indicate that Charter Phone does not uniformly employ a net protocol conversion, that is, change from a POTS TDM signal to an IP signal used by Charter Phone's VoIP network. Whether calls go through a conversion depends on the called party's network.[10] App. 182:20–183:20 This fact further distances the circumstances of this case from those at issue in the *Non-Accounting Safeguards Order*.

3. Even under the *Non-Accounting Safeguards Order* Charter Phone would not be an information service.

The *Non-Accounting Safeguards Order* recognizes the primacy of the telecommunications management exception to the definition of "information service" discussed in Argument, Part II.B., *infra*. In the *Non-Accounting Safeguards Order*, the FCC excepted certain services from treatment as an information service because "they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service." 11 FCC Rcd. at

[10] When asked to enumerate the various ways that a call traverses Charter's network, Charter's counsel stated that a "subset of calls" are routed in a way that requires an IP to TDM conversion but "not all calls are routed that way." Charter's counsel elaborated: "It depends on whether or not the call was routed through an interexchange carrier that uses TDM in between. So maybe, maybe not." App. 182:20–183:20

21958 ¶ 107. These services are therefore treated as telecommunications services pursuant to the telecommunications management exception. *Id.*

In the *Non-Accounting Safeguards Order* the FCC specifically exempted from classification as an information service protocol conversions that (i) involve communication with the network, (ii) exist in connection with new network technology, or (iii) involve internetworking. *See Implementation of the Non-Accounting Safeguards*, Order on Reconsideration, 12 FCC Rcd. 2297, 2298 ¶ 2 (1997). Each of these exceptions would be applicable in this case. *Contra* Add. 15–17.

First, the alleged protocol conversion is exempt from classification as an information service because it exists solely in connection with new network technology. Under this exemption, the FCC evaluates whether the alleged protocol conversion occurs "in connection with the introduction of a new basic technology (which requires protocol conversion to maintain compatibility with *existing* [Customer Premises Equipment])[,]" *Non-Accounting Safeguards Order*, Order on Reconsideration, 12 FCC Rcd. 2297 ¶ 2 (emphasis added). Charter Advanced markets Charter Phone as a "whole household" product that integrates with existing equipment on a customer's premises and allows customers to use existing phones and wires. Add. 122, 124. The alleged protocol conversion is to maintain

compatibility with a customer's existing telephone equipment and therefore is not an information service under the Telecommunications Act.

Second, Charter Phone's alleged protocol conversion is not classified as an information service because it is used primarily to communicate with Charter's own network. As the FCC has explained, such a conversion "involve[s] communication between an end user and the network itself (*e.g.* for initiation, routing, and termination of calls) rather than between or among users[.]" *Non-Accounting Safeguards Order*, Order on Reconsideration, 12 FCC Rcd. at 2298 ¶ 2. Charter Phone's use of IP is therefore incidental to the two-way voice communication that the service enables. It is a network function. Charter Phone's alleged protocol conversion is an excepted function of the network that establishes a transmission path, and thus fails to render Charter Phone's telecommunications service an information service.

Third, the protocol conversion allegedly employed by Charter Phone is for the purposes of internetworking, and therefore not an information service. "Internetworking" conversions take place solely within the carrier's network to facilitate provision of a basic network service, with no net conversion to the end user. *Id.* Charter Phone's alleged protocol conversion functions solely within the network to facilitate provision of the voice telephone service. The conversion of some calls from TDM to IP is expressly for the purpose of connecting two

communications networks when necessary. *E.g.* App. 182:20–183:20. Any such conversion is therefore excepted under the *Non-Accounting Safeguards Order* and not an information service under the Telecommunications Act.

B. Alternatively, Any Net Protocol Conversion Would Be Immaterial To Charter Phone Because It Would Fall Within The Telecommunications Management Exception.

The telecommunications management exception is an exception to the definition of "information service" under the Telecommunications Act. *See* 47 U.S.C. § 153(24). Under the telecommunications management exception, an information service expressly does not include the use of any capability "for the management, control, or operation of a telecommunications system or management of a telecommunications service." *Id.* The alleged protocol conversion Charter Phone employs falls within this exception.

As the FCC plainly and unequivocally declared when it interpreted the exception in the *Open Internet Order*, "IP conversion functionality is akin to traditional adjunct-to-basic services, which fall under the telecommunications systems management exception." 30 FCC Rcd. at 5772 ¶ 375. Protocol conversion "does not alter the information being transmitted, but rather enables the transmission of the information," and as such, "the inclusion of this functionality does not somehow convert the basic telecommunications service offering into an information service." *Id.* The FCC reached this conclusion by comparing protocol

conversion to traditional "adjunct-to-basic" services—like speed dialing, call forwarding, and computerized directory assistance—which are incidental to the underlying telecommunications service and do not alter its fundamental character. *See id.* at 5765–68 ¶¶ 366–67. These statements by the FCC are directly contrary to the district court's conclusion that the telecommunications management exception does not apply. *See* Add 14–20.

To the extent Charter Phone uses protocol conversion, it does so solely for the management of Charter Advanced's basic telecommunications service. This excepts treatment of the service as an information service under the plain language of the Telecommunications Act. *See* 47 U.S.C. § 153(24). The protocol conversion Charter Advanced claims takes place facilitates use of the network by establishing a transmission path between two voice callers. *See supra*, Statement of the Case and Facts, Part I. Charter Phone's occasional use of IP still results in a transmission of customer information without change in form or content. *Compare* S.App. 37:2–21 (Charter Phone's "payload" is "a digital representation of the voice signal" that remains unaltered across the network.) *with Open Internet Order*, 30 FCC Rcd. at 5761–63 ¶¶ 361–62 (determining that broadband Internet access is a telecommunications service irrespective of the protocols employed because the "packet payload (*i.e.*, the content requested or sent by the user) is not altered . . . .").) Like the protocol conversion discussed in the *Open Internet*

Order, Charter Phone's alleged protocol conversion "does not somehow convert the basic telecommunications service offering into an information service." *Id.*; *see also id.* at 5761–63, 5766 ¶¶ 361–62, 376 n.1029; *Payton v. Kale Realty LLC*, 164 F. Supp. 3d 1050, 1056 (N.D. Ill. 2016) (text messaging service's ability to "convert messages into a format a downstream carrier can understand" does not affect classification as a telecommunications service).

C. The District Court Improperly Sidestepped Fact Disputes Material To Classification Of Charter Phone As An Information Service Based On Its Alleged Net Protocol Conversion.

The district court decision improperly disregards fact disputes material to classification of Charter Phone as an information service. *See* Fed. R. Civ. P. 56(a).

First, Charter Phone transports analog voice telephone calls and therefore, viewed end-to-end, does not engage in protocol conversion at all. The district court's order does not address this fact dispute. Charter Advanced admits that when using Charter Phone, the calling party speaks an analog signal and the called party hears a representation of that analog signal. S.App. 39:6–12. A Charter Phone subscriber initiates a telephone call by speaking their voice message—an analog audio sound wave—into their handset, and the call terminates by presenting an analog audio sound wave with the same voice content to the called party. Charter Advanced admits that Charter Phone's "payload" is "a digital

representation of the voice signal" that remains unaltered across the network. S.App. 37:2–21. There is therefore no net protocol conversion involved with the service.

Second, any alleged protocol conversion incident to using Charter Phone takes place entirely on Charter's network and is used to facilitate transmission. Protocol conversions are ubiquitous in all voice telephony systems that access the PSTN, including VoIP and traditional telephone service. S.App. 93:24–95:24. [redacted] the MPUC specifically disputed Charter Advanced's assertion that the eMTA is consumer premises equipment and not part of Charter's own network. This is a material dispute of fact because, if part of Charter's network, any protocol conversion that occurs is wholly within the network, and therefore not a *net* protocol conversion and not an information service. *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd. 7457, 7465 ¶ 12 (2004).

The district court's response to this fact dispute was legally mistaken. Citing the FCC's *Vonage II* decision, the district court stated that "[t]here is no dispute that the eMTA is CPE." Add. 18. But the FCC's *Vonage II* decision did not analyze the functionality of Charter Phone, and thus did not resolve, as a matter of

law, the same facts presented in the record before the district court. [redacted]

see Vonage II, 19 FCC Rcd. at 22407 ¶ 6 & n.16 (stating that Vonage customers choose among several different types of CPE, including an MTA, an IP phone, and a personal computer and observing that a router is often also necessary).

Furthermore, the district court erred by holding that rules applicable to cable providers render immaterial any fact dispute concerning the endpoint of Charter's network. The district court's blanket application of cable facility rules to Charter Phone was error. *Compare* Add. 17 *with IP-Enabled Servs.*, 19 FCC Rcd. 4863, 4909–10 ¶ 70 (2004) (seeking comment, but not resolving, whether cable facility rules apply to providers of interconnected VoIP). Rules applicable to cable service should not apply because Charter Phone plainly does not meet the definition of "cable service" under the Telecommunications Act. See 47 U.S.C. § 522(6). The district court erred by citing inapplicable law to attempt to obviate plain disputes of fact relevant to the (incorrect) legal standard that the court applied to reach its decision.

III. THE DISTRICT COURT'S DECISION IS CONTRARY TO PRESUMPTIONS AGAINST PREEMPTION OF STATE LAW, CONGRESSIONAL INTENT, AND PUBLIC POLICY.

This Court should reverse the district court's decision because it is inconsistent with Congress' established framework of shared federal and state

regulation of telecommunications services. Contrary to congressional intent, it invites carriers to artificially alter technical aspects of their service to evade regulation and undermines competitive neutrality. Furthermore, a classification rule based on the particular technology a carrier uses is nonsensical in an industry that is undergoing a significant and arguably, in Charter's view, permanent transition. App. 238–46.

First, Congress did not preempt the field of telecommunications from state regulation when it passed the Telecommunications Act of 1996. It preserved the authority of state commissions to enact "regulations for or in connection with intrastate communication service . . . ." 47 U.S.C. § 152. Furthermore, Congress indicated that the Telecommunications Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . . ." Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 143. The district court's decision upends the dual regulatory system that this Court has recognized Congress enacted in the Telecommunications Act. *See Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 948 (8th Cir. 2000) (the Telecommunications Act is a "scheme of cooperative federalism").

Second, contrary to the plain language of the Telecommunications Act, *see, e.g.*, 47 U.S.C. § 153(53), the district court's decision allows telecommunications carriers to evade state authority under the Telecommunications Act—and any

attendant support obligations for funds for low income and deaf and hard of hearing individuals—simply by changing technology

Third, Federal and state telecommunications law share the premise of technological and competitive neutrality. *See, e.g.*, *USF Order*, 21 FCC Rcd. at 7541 ¶ 44; Minn. Stat. § 237.011(4). Yet Charter seeks to gain a competitive advantage simply by changing technology to avoid regulations applicable to its competitors. *See, e.g.*, App. 126 (boasting that Charter Phone has "no added fees like the phone company charges . . . .").

A classification criterion based on the technology that a telecommunications system uses is meaningless. Evaluating state authority over telephone services based on a technologically neutral, functional basis is not only consistent with the plain language of the Telecommunications Act and the FCC's functional approach, *see supra* Argument, Parts I.B. and I.C., it also ensures that the Telecommunications Act's objectives will be carried out without regard to technological fluidity.

CONCLUSION

Charter Phone is a fixed, interconnected VoIP telephone service with clearly distinguishable interstate and interstate call traffic that is subject to the dual state and federal regulatory scheme of the Telecommunications Act. In the event the

Court decides to reach the issue, Charter Phone is properly classified as a telecommunications service under the Telecommunications Act.

The district court's classification of Charter Phone as an information service violates the Telecommunications Act. The effect of the district court's order is to upend a framework of cooperative federalism that guarantees state jurisdiction to enforce consumer protection laws that protect the public interest in the telecommunications industry.

Technological change may obviate old networks but it does not displace the rule of law. For the reasons stated above, the Appellant Commissioners of the MPUC respectfully request that the Court reverse the district court's May 8, 2017 Order and remand with instructions to enter judgment in favor of the MPUC and dismiss all claims asserted by Charter Advanced.

Dated: August 24, 2017

Respectfully submitted,

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