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For The Eighth Circuit
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September 06, 2017

Mr. James Bradford Ramsay
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RE: 17-2290 Charter Advanced Services, et al v. Nancy Lange, et al

Dear Counsel:

The amicus curiae brief of the NARUC and NASUCA was received on 09/05/2017 and filed on 09/06/2017. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
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AMT

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District Court/Agency Case Number(s): 0:15-cv-03935-SRN

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)

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND THE NATIONAL ASSOCIATION OF STATE CONSUMER ADVOCATES IN SUPPORT OF DEFENDANT-APPELLANTS AND REVERSAL OF DECISION BELOW

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29(a)(4)(A), the National Association of Regulatory Utility Commissioners (NARUC) and the National Association of State Utility Consumer Advocates (NASUCA) respectfully submit these disclosure statements:

Founded in 1889, NARUC is a quasi-governmental nonprofit organization incorporated in the District of Columbia that represents government officials in the fifty States, the District of Columbia (DC), Puerto Rico, and the Virgin Islands, charged with the duty of regulating the intrastate operations of utilities. NARUC is a "trade association" as defined in Rule 26.1(b).

NASUCA is a voluntary association of 44 consumer advocate offices in 41 States and DC, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by State laws to represent the interests of utility consumers before State and federal regulators and in the courts. Members operate independently from NARUC's member commissions as advocates for ratepayers. Some NASUCA member offices are separately established advocate organizations, while others are divisions of larger state agencies (e.g., a state Attorney General's office). Associate and affiliate members of NASUCA also serve utility consumers, but are not created by state law or do not have statewide authority. Neither NARUC nor NASUCA has a parent company, subsidiary, or affiliate that has issued securities

to the public. Nor does any publicly traded company own any equity interest in either.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

ADMINISTRATIVE DECISIONS/REGULATIONS

TABLE OF AUTHORITIES

(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

MISCELLANEOUS

***Authorities upon which Petitioner chiefly relies are marked with an asterisk.**

INTEREST OF AMICI

Congress and the courts[1] have consistently recognized NARUC as a proper entity to represent the generic interests of every State's utility commission. In the Federal Telecommunications Act (Act),[2] Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[3]

NASUCA is also recognized in 47 U.S.C. §254 to provide key inputs into federal universal service policy. NASUCA's members are designated by State laws to represent the interests of utility consumers before State and federal regulators and in the Courts.

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[1] *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985); *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC,* 513 F.2d 1142 (9th Cir. 1976).

[2] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub.L.No. 101-104, 110 Stat. 56 (1996).

[3] *See* 47 U.S.C. §410(c) (1971) (NARUC nominates members to Federal-State boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing the universal service board's functions). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) ("[c]arriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued.").

In 1996, Congress focused on cracking open local phone markets. *Qwest Corp. v. FCC,* 258 F.3d 1191, 1196 (10th Cir.2001); *see also*, *AT&T Corp. v. FCC*, 220 F.3d 607, 611 (D.C. Cir. 2000), (Act "fundamentally restructured local telephone markets" and "sought to eliminate the barriers [to] offering local telephone service"); *Cf. Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 467 (2002). But Congress required the Federal Communications Commission (FCC) to work closely with State Commissions to open local retail telephone service to competition,[4] to "preserve and advance universal service,"[5] and to encourage deployment "of advanced telecommunications to all Americans."[6]

The Congressional plan for enhancing local competition and assuring universal service was constructed to cover *telecommunications services*.

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[4] *See, e.g.*, 47 U.S.C. §252(e) (requiring State approval of interconnection agreements between carriers); *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, LLP, 124 S. Ct. 872 at 876, 882 (2004); Philip Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L.Rev. 1692, 1694 (2001) (1996 Act is "the most ambitious cooperative federalism regulatory program to date").

[5] *See* 47 U.S.C. §254(f) (State universal service programs), §214(e), (States designate *telecommunications carriers* to receive federal subsidies, and §251(f) (States exempt rural *carriers* from Title II requirements.).

[6] *See* 47 U.S.C. §1302(a) (The FCC and State Commissions with jurisdiction over telecommunications services "shall encourage" deployment of advanced telecommunications capability.).

While Congress was pursuing a more deregulatory approach, it also retained specific protections in Title II for both telecommunications services' customers and competition.

47 U.S.C. §253 illustrates this dichotomy.

Section 253(a) hands the FCC the most powerful preemption tool in the statute focused on facilitating competitive entry/competition.

But §253(b) then explicitly preserves protections for customers of *telecommunications services* by allowing *States* to impose:

> requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

No one questions the Minnesota Public Utilities Commission's (MPUC's) authority to impose the consumer-oriented rules at issue on *telecommunications services* that use Time Division Multiplexing (TDM).[7] But the District Court's *Order* below[8] blocks the MPUC from applying the same rules to a competing fixed Interconnected Voice-over–Internet-Protocol (I-VoIP) provider.

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[7] *See, e.g.*, 47 U.S.C. §332(c) (preserving State authority over "other terms and conditions" of cellular services); §152(a) (limiting FCC authority to interstate services); and §152(b) (specifying that nothing in Chapter 5 gives the FCC authority over intrastate services).

[8] *Charter Advanced Services (MN), LLC v. Lange*, No. 15-CV-3935 (SRN/KMM), 2017 WL 1901414 (D. Minn. May 8, 2017) (*Order*).

However, §253(b), to minimize the impact on competition, also specifies the MPUC's application of such requirements must be imposed "on a competitively neutral basis." To comply with this standard, it is apparent Congress intended that State laws designed to safeguard consumers should be evenly applied to similarly-situated competitors. Charter's service competes directly with TDM-based *telecommunications services*. Even the FCC readily acknowledges that consumers cannot distinguish between competing retail phone service offerings provided via TDM technology and those using I-VoIP.[9]

Some States have chosen to reduce oversight of fixed I-VoIP services via legislation or State commission action. Others continue to regulate. States still certificate[10] and regulate fixed VoIP services either by handling consumer complaints, handling inter-carrier interconnection disputes, insuring the reliability of E911 Emergency services, requiring contributions to State universal service

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[9] *See, e.g., IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6046 (2009), ("From the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service."); *Implementation of the Telecommunications Act of 1996*, 22 F.C.C. Rcd. 6927, 6956 (2007) (finding "these services, from the perspective of a customer making an ordinary telephone call, are virtually indistinguishable.").

[10] *See, e.g., Application of California Internet, L.P. for A Certificate of Public Convenience & Necessity to Operate As A Competitive Local Carrier*, 16-11-003, 2017 WL 2472932, at 3-5 (C.P.U.C. May 25, 2017) (Company received a California Certificate of Public Convenience and Necessity to provide "competitive local exchange telecommunications services" via I-VoIP.).

programs, imposing fees to support State 911 and deaf relay services, or imposing generally applicable rules to protect critical infrastructure and reliability, service quality, and consumers of critical *telecommunications services*.

For example, in *New Hampshire Telephone Association*, 96 N.H.P.U.C. 449 (Aug. 11, 2011), the New Hampshire Public Utilities Commission found "that the cable voice service offered by Comcast and Time Warner constitutes conveyance of a telephone message that falls within the jurisdiction of this Commission." It also indicated that State regulation of fixed I-VoIP service:

> is not expressly or implicitly preempted by federal law. Nor does the regulation of these companies as [competing local exchange carriers] involve discriminatory or burdensome economic regulation that would inhibit the development of a competitive market or conflict with federal law.

Id.

The case was not appealed. Rather industry lobbied the legislature, which five years later amended N.H. Rev Stat §362:7 (2016) to limit commission authority. However, legislators still assured the enacted restrictions did not:

> (b) Affect, mandate, or prohibit the assessment of taxes or nondiscriminatory 911 fees, telecommunications relay service fees, or other fees of general applicability;
> (c) Modify or affect the rights or obligations of any telecommunications carrier, or any duties or powers of the public utilities commission, under 47 U.S.C. section 251 or 252.

A 2015 New York Department of Public Service assessment[11] indicates it has (i) jurisdiction over "Cable VoIP," albeit unexercised in rules, (ii) given an I-VoIP provider a certificate of public convenience and necessity, and designated it a 47 U.S.C. §214 eligible *telecommunications carrier*, and (iii) confirms the agency does handle service complaints on such carriers' services.

In 2012, a Missouri Court confirmed the State commission's authority to order an I-VoIP provider to pay disputed fees citing a 2008 State law, that requires "providers of I–VoIP to register with the PSC and granted the PSC authority "[t]o hear and resolve complaints."[12]

In 2013, the Iowa Utilities Board opened *In Re: Inquiry into the Appropriate Scope of Telecommunications Regulation*, Iowa Utilities Board, ID177020, 2013 WL 5770322 (Oct. 18, 2013), stating, at 3, that:

> the Board has treated non-nomadic VoIP service (which can be identified as intrastate) the same as traditional telephone service . . . some participants identified technological differences between VoIP and traditional service [but] were unable to explain why [they] justified different regulatory treatment,

concluding, at 82, that it could not identify:

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[11] *In the Matter of a Study on the State of Telecommunications in New York State, Staff Assessment of Telecommunications Services*, Case 14-C-0370, Appendix A (June 23, 2015).

[12] *Big River Telephone Co., LLC v. Southwestern Bell Telephone*, 440 S.W.3d 503, 506 (Mo. Ct. App. 2014).

> any technological basis for treating non-nomadic VoIP in a different manner than other voice telecommunications services.

In contrast, the District Court *Order*, at 8, determines that (i) fixed I-VoIP is an *information service*, and suggests that (ii) any regulation of information services conflicts with the federal policy of non-regulation.

Those conclusions are inconsistent with both 8th Circuit and FCC precedent. The MPUC regulations unquestionably fall within the §253(b) reservation to safeguard consumer rights. If upheld, the *Order's* finding will eviscerate specific roles Congress assigned States, eliminating not just the MPUC's authority to protect its citizens, but also sparking litigation over State operations across the country. It will undermine other crucial elements of the Congressional competition framework which is premised on classification of competing services as *telecommunications services*. It will also impact universal service policy as only eligible *telecommunications service* providers (ETCs) can qualify to receive federal subsidies. Classification of I-VoIP as an information service will call into question the eligibility of ETCs that qualified based on providing I-VoIP service.[13] For these reasons, Amici were charged by their members to file this amicus.

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[13] *See* discussion at 26-27, *infra.*

RULE 29(a)(4)(E) AND "CONSENT-TO-FILE" CERTIFICATION

The undersigned certify that they authored the brief and that no other entity, party, or parties' counsel contributed funds to support its preparation or submission. Counsel for Charter and MPUC consented to this filing.

ARGUMENT

After explaining why net protocol conversions require classification of Charter's fixed I-VoIP service as an information service, the *Order*, at 3, states that "telecommunications services are subject to state regulation, while information services are not" and implies that is because "any regulation of an information service conflicts with the federal policy of non-regulation."

The *Order* is incorrect on all points.

First, however classified, fixed I-VoIP is already currently subject to State oversight. Second, the presence or absence of a net protocol conversion provides no basis for distinguishing between TDM-based telecommunications services and fixed I-VoIP. Third, even if it is ultimately determined that fixed I-VoIP is an information service, the *Order's* preemption of MPUC regulations contradicts an express Congressional reservation of State authority. Finally, classification of fixed I-VoIP as an information service is inconsistent with the plain text of the Act and the FCC's consistent treatment of the service.

I. CLASSIFICATION AS EITHER TELECOMMUNICATIONS SERVICES OR INFORMATION SERVICES IS IRRELEVANT TO A DETERMINATION OF STATE JURISDICTION.

This Circuit recognized in *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007), that "a distinction can be drawn" between nomadic and fixed I-VoIP services, noting with Cable-based VoIP:

> the geographic originating point of the communications can be determined. . . . [And] the interstate and intrastate portions of the service can be more easily distinguished.

And, in this decision at 580, this Circuit highlighted an FCC determination that stated if an I-VoIP provider can:

> track the jurisdictional confines of customer calls, it may calculate its universal service contributions based on its *actual percentage of interstate calls*.[189] ***Under this alternative [that I-VoIP provider] would be subject to state regulation.***

Universal Service Contribution Methodology, 21 F.C.C. Rcd. 7518, 7546 (2006) (emphasis added).

In the same order, the FCC specified that some I-VoIP providers, presumably fixed/cable providers, were already paying based on *actual percentages of interstate calls* and thus already subject to State oversight:

> [T]his Order does not require interconnected VoIP providers that are currently contributing based on actual revenues to revise their current practices.

Id. at footnote 189.

Recently, this Circuit affirmed a District Court decision that stated:

> In *Vonage Holding Corp.*, the FCC applied the impossibility exception to [a nomadic VoIP service]. This case's service was fixed; the users could call Iowa locations from other Iowa locations. The FCC has explicitly said that *Vonage*'s reasoning does not apply to providers "with the ability to track the jurisdictional confines of customer calls."[] Such providers are "subject to state regulation."

Sprint Communications Co. v. Bernsten, 3d 1144, 1152 (S.D. Iowa 2015), *aff'd sub nom. Sprint Communications Co., L.P. v. Lozier*, 860 F.3d 1052 (8th Cir. 2017) (emphasis added and citations omitted).

Significantly, neither the District Court nor this Circuit determined whether the fixed VoIP service at issue was an information service as alleged. However, both found that the carrier could distinguish the intrastate traffic[14] and that the State had jurisdiction.

II. THE PRESENCE OR ABSENCE OF A NET PROTOCOL CONVERSION CANNOT PROVIDE A BASIS FOR DISTINGUISHING BETWEEN TDM-BASED ACKNOWLEDGED *TELECOMMUNICATIONS SERVICES AND FIXED I-VOIP*.

A traditional telephone call may change from analog-to-digital packets, from digital-to-IP packets, electrical-to-optical and back again several times as it is routed

[14] *Sprint*, 860 F.3d at 1059 (Federal law "did not preempt the Board's authority to regulate the non-nomadic, intrastate long-distance VoIP calls.").

through the network. The exact protocols implemented depend not only on the carrier, but also on the specific vendor equipment used.

The simple presence or absence of a net protocol conversion (NPC) cannot logically be the sole determinate of a service's status as an information service.

If NPCs were the determining factor, classifying I-VoIP is easy. A fact that cannot be reconciled with the FCC's studied "inability" to classify VoIP services in order after order[15] 13 years after opening a proceeding on that very issue.[16]

After all, every I-VoIP provider can raise the same NPC-based argument accepted by the Court below.

The FCC, in a 1998 report to Congress focused on the possible impact of NPCs on the status of VoIP services.[17] After implying that "phone-to-phone" IP telephony service is not an information service, the agency pointed out it was not "appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." But even in this 1998

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15 *See Telephone Number Requirements for IP-Enabled Service Providers*, 22 F.C.C. Rcd. 19531, 19538–39 (2007) at ¶14.

16 *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 F.C.C. Rcd 4863 (2004).

17 *See Federal-State Joint Board on Universal Service*, 13 F.C.C. Rcd. 11501, ¶ 88-89, 90 (1998).

discussion, the agency recognized that the ultimate "classification of a service under the 1996 Act depends on the functional nature of the end-user offering."

Under a functional approach, an NPC that defines an information service consists of the technological interface between an end user and a communications network of the end user's choice, but certainly not the formatting conversion *chosen by telecommunications service* providers to permit an interface between two networks based on different network protocols. Those are exactly the type of changes that required Congress to include an exception in 47 U.S.C. §153(24)'s information services definition – an exception excluding such data transformations if they are used for "the management of a *telecommunications service*."

But it is not necessary to understand this difference to see why NPCs cannot provide a basis for classifying I-VoIP as an *information services* in this context.

Simple logic will suffice.

The telephone network has gone through several technology upgrades. The most recent is the ongoing shift from TDM data packets to Internet Protocol data packets — which includes I-VoIP.[18] A T-1 link uses TDM to allow 24 voice, video,

[18] *Technology Transitions*, 31 F.C.C. Rcd. 8283 (2016) ("In recent years, the Commission has focused closely on the ongoing transitions from networks based on [TDM] voice services [to] all-Internet Protocol.").

and/or data conversations to share the same path.[19] But TDM is not as efficient as new technologies like VoIP in which voice and data are interspersed whenever possible, rather than, as in TDM, at timed intervals.[20] Already over a third of all wireline retail local telephone service connections are I-VoIP.[21]

The flaws in using NPCs as a benchmark for what constitutes an information service in this context are obvious.

What happens when all current networks have converted to a VoIP protocol? Using the NPC theory as applied by the *Order*, overnight Charter's I-VoIP service would shift from being a purported information service to a *telecommunications service*. This makes no sense. Indeed, under the theory the *Order* espouses, a current TDM-based *telecommunications service* could likewise become an information service overnight, if the provider chose to convert TDM-to-IP before passing off its TDM traffic to Charter.

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19 Annabel Dodd, *The Essential Guide to Telecommunications, Fourth Edition, at 18* (Prentiss Hall 2005).

20 *Id*.

21 *Numbering Policies for Modern Communications*, 30 F.C.C. Rcd. 6839 (2015) (*Portability Order*) citing *Local Telephone Competition: Status as of December 31, 2013, FCC, Wireline Competition Bureau, Industry Analysis and Technology Division*, at 3, (Oct. 16, 2014).

What is it about moving the conversion of the packetized data to the TDM carrier that suddenly makes the functional definition of "telecommunications services" inapplicable? Is it logical to assume Congress intended that a carrier could escape Title II obligations so easily? What about wireless carriers? These common carriers use a range of network protocols – from Code Division Multiple Access on Verizon and Sprint's networks to Global System for Mobiles protocol on AT&T and T-Mobile's networks.[22] Customer calls between Verizon and AT&T necessarily result in NPCs, as do calls between either of their networks and either a TDM-based or I-VoIP-based service. Does that mean that courts should ignore the fact that these services meet the functional definition of commercial mobile services in 47 U.S.C. §332(d), classify them as information services, and preempt the §332(c)(3)(A) preservation of State authority over "other terms and conditions" of service?

Charter concedes it can segregate interstate traffic, and Charter's network routing software has to identify which connecting networks require a protocol conversation. Traffic routed to other VoIP providers, where no NPC occurs, is necessarily easily identifiable. So, why exactly is it that calls from Charter to another fixed I-VoIP provider are not considered a *telecommunications service* subject to State oversight? Many carriers offer both a *telecommunications service* and an

[22] Sascha Segan, *CDMA vs. GSM: What's the Difference?* PC Magazine (July 11, 2017).

information services. How do these identifiable calls that require a NPC immunize the calls that do not from State oversight?

The fact is that all fixed providers, whether their service is based on TDM-packet technology, or the latest and more efficient VoIP-packet technology, offer their voice services in exactly the same way: to the public for a fee, frequently as part of bundle of video, data, and voice services. They are functionally equivalent. Fixed I-VoIP providers, just like their TDM counterparts, do not use the Internet to route traffic on their own systems. Both have working 911 services and offer options to voice service, e.g., voice mail, caller ID, call forwarding services, etc. Both originate and terminate calls to and from the exact same range of carriers using different network protocols.

Use of NPCs as a determinative factor in these circumstances is a prescription for incoherent policy and wasteful litigation. Moreover, treating functionally equivalent carriers competing head-to-head for retail phone customers more favorably based on the presence of a NPC on a carrier's network *directly undermines* the very retail local telephone competition Title II was designed to enhance.

III. ASSUMING *ARGUENDO*, FIXED VOIP IS AN INFORMATION SERVICE, PREEMPTION OF MPUC REGULATIONS THAT "SAFEGUARD CONSUMERS" CONTRADICTS A CONGRESSIONAL RESERVATION OF STATE AUTHORITY.

A. THE ACT NOWHERE PROVIDES SPECIFIC AUTHORITY TO PREEMPT STATE OVERSIGHT OF INFORMATION SERVICES.

The *Order* states "as this court has previously recognized" information services are not subject to state oversight and cites three cases for the proposition that "state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated."[23] It did not cite to any statutory provision specifically authorizing preemption of State oversight of information services.

That's because there is not one.

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[23] *Order*, WL 1901414, at *3 (D. Minn. May 8, 2017) citing *Minnesota PUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (*Vonage III*); *Vonage Holdings Corp. v. MPUC*, 290 F. Supp. 2d 993 (D. Minn. 2003); and *Charter Advanced Services (MN), LLC v. Heydinger*, No. 15-3935 (SRN/KMM), 2016 WL 3661136 (D. Minn. July 5, 2016). The cited cases add little support to the proposition presented. The *Vonage III* discussion, at 483 F.3d 580, is not relevant, except to highlight the flaws in the *Order* on review. There, this Circuit first determined that the traffic could not be identified as inter- or intrastate and was completing the last part of the standard conflict analysis to see if application of the State rules to mixed traffic would result in a conflict with federal policy. Here, Charter has conceded the traffic is identifiable. The 2003 decision is also factually distinct as it involved nomadic VoIP and relied, in part on the fact that "the backbone of Vonage's service is the Internet." 290 F. Supp. 2d 997. Neither circumstance is present here. *On Charter's network*, Charter's I-VoIP calls are managed end-to-end and never touch the Internet. In any case, that decision was superseded by the subsequent 8th Circuit's decision.

In contrast, the authority to preempt State oversight of both intrastate and mixed intra- and interstate *telecommunications services* is very specific.

The single most preemptive provision in the Act is 47 U.S.C. §253, which states:

> (a) In general – No State . . . regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority – Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Based on their arguments, Charter and the *Order* concede that the MPUC can apply the service quality regulations at issue to a TDM-based *telecommunications service* provider. In so doing, they also must both concede the MPUC rules fall squarely within the §253(b) reservations. Congress explicitly preserves State authority to impose, *inter alia*, rules to safeguard consumer's rights even if those rules prohibit or have the effect of prohibiting competitive provision of "any interstate or intrastate telecommunications service."

This isn't simply a Congressional goal. It is a Congressional mandate.

Even where the State regulation does not fall within the listed protective categories, §253(d) specifies the FCC can preempt only "to the extent necessary to correct" the flawed rule.

But, significantly, Congress provided no analogous provision specifically or "expressly" authorizing the FCC to preempt any State law involving "information services."[24] Instead, Congress mandated a rule of statutory construction in §601(c)(1) of the 1996 Act**,** captioned NO IMPLIED EFFECT, which provides:

> [t]his Act and the amendments made by this Act *shall not be construed to modify, impair, or supersede . . . State,* or local *law unless expressly so provided in such Act or amendments*.

47 U.S.C. §152 (§601(c)(1) codified in the notes to this section) (emphasis added).

It is clear Congress knew how to specify if it intended the FCC to be able to preempt any State regulations that impact either inter- or interstate or mixed information services.

It is also clear Congress chose not to do so.

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[24] *See Qwest Corp. v. Scott*, 380 F.3d 367, 374 (8th Cir. 2004) (noting that "pre-emption is not to be lightly presumed.").

B. NEITHER CONFLICT NOR FIELD PREEMPTION APPLIES IN THE CIRCUMSTANCES PRESENTED.

Lacking any statutory basis for preemption, the *Order* falls back on its own previous flawed analysis suggesting State regulation must be preempted because it conflicts with a "federal policy of non-regulation."[25]

But that is not what Congress specified as federal policy in the Act.

And it is not what the FCC says is federal policy in its orders.

1. STATE RULES TO SAFEGUARD THE RIGHTS OF CONSUMERS PURSUANT TO AN EXPRESS CONGRESSIONAL MANDATE ARE NOT INCONSISTENT WITH FEDERAL POLICY.

Nothing in the MPUC regulations applicable to Charter raises barriers to competition or competitive entry. Certainly, the District Court did not cite any evidence to that effect.

But, as noted *supra*, §253 also protects State regulations that, unlike the MPUC's, do raise barriers to both inter- and intrastate entry of competitive services. But, in either case, the preemption protection only applies if the targeted rules fit squarely into one of the listed categories.

If, like the MPUC regulations, they do, *whatever their impact*, the FCC cannot preempt. Nor can a court logically find that such regulations conflict with Congressional goals or a general federal bias against regulation.

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[25] *See* note 23, *supra*.

A careless reader might argue that this preservation of State rules that impact both inter- and intrastate services is limited to *telecommunications services,* not the putative *information services* postulated by the *Order*.

But a closer look at §253(b) reveals the logical link. Only State rules in those categories that are "imposed on a *competitively neutral basis*" are protected.

That means of course that the States must impose the same consumer protection rules on all competitors.

In §253(b), Congress explicitly preserved consumer protections, protections for the public health and welfare, and universal service. But it also recognized that those regulations might inhibit or prevent some competitors from entering the market. The only way to assure such rules do not tilt the competitive playing field is to make sure all carriers operate under the same rules. Hence, the requirement for States to impose such rules on a competitively neutral basis.

So, who are the direct competitors of telecommunications service providers?

Well, according to the FCC's regular *Local Telephone Competition Reports,* the direct competitors of Title II TDM-based *telecommunication services* are I-VoIP-based services.[26]

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[26] *See* note 21, *supra.*

Congress created Title II to break open the local telephone service market. The FCC has been regularly reporting on progress noting, as referenced above, that as of the end of 2013, "over a third of all wireline *retail local telephone service* connections" are provided using I-VoIP.[27]

While the FCC recognizes that both TDM-based and I-VoIP-based networks provide *retail local telephone service*, the agency *claims* not to have classified I-VoIP services as either an information or a *telecommunications service*. At the same time, the FCC concedes that the other two-thirds of *retail local telephone service providers*, are, as Congress intended, *telecommunications carriers* subject to both the privileges and the burdens of Title II.

Assuming, *arguendo*, there is a logical way to construe I-VoIP as an information service, still there is no conflict with the Act's goals. Whatever the federal policy favoring less regulation, Congress expected "rules to safeguard the rights of consumers" to apply to direct competitors of telecommunications services in the retail local telephone market. Neither a conflict nor an impossibility theory can apply.

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[27] *Id.*

2. APPLICATION OF MPUC'S REGULATION IS CONSISTENT WITH THE FCC'S TREATMENT OF VOIP AS A TITLE II *TELECOMMUNICATIONS SERVICE.*

There also is no conflict, apparent or otherwise, between the FCC's policies and treatment of fixed VoIP services.

After all, the Commission has ruled favorably on State rules imposing State universal service assessments on both fixed and nomadic I-VoIP providers. It is not a coincidence that State universal service policy is one of the categories of regulations referenced in §253(b). This oversight issue was raised when a federal district court enjoined a State's imposition of universal service assessments on nomadic I-VoIP service. The injunction was appealed to this Circuit. While the FCC was not a party, it did file an amicus brief supporting the State's argument against preemption.[28] The Eighth Circuit's opinion in *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009), upheld the preliminary injunction and did not address or acknowledge the FCC's amicus. Ultimately, the FCC issued a declaratory ruling concluding State universal service contribution requirements on fixed and nomadic I-VoIP do "not conflict" with federal policies.[29]

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[28] *Universal Service Contribution Methodology*, 25 F.C.C. Rcd. 15651, 15655, n.29 (2010).

[29] *Id*. at 15658.

Moreover, logically, given the FCC's track record on VoIP, it would be difficult for any court to find it is an information service. It would be perverse if Minnesota were barred from treating Charter as a *telecommunications service* provider while the FCC has been doing exactly that for years.

And there is additional precedent to consider. In 2014, the DC Circuit ruled that the FCC cannot generally apply Title II common carrier obligations to information services.[30]

That ruling means, if fixed I-VoIP is an information service, it could cause problems as the FCC has applied *seriatim* Title II common carrier rights and obligations to I-VoIP providers - obligations Congress only imposed on *telecommunications services*.

The FCC defined the type of VoIP service Charter provides 12 years ago[31] as part of the still open docket to classify the service. I-VoIP is a telephone service that allows a person to make a real-time two-way voice call to another person or business

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[30] *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (rejecting the FCC's reliance on general §1302 authority to impose common carrier regulation precluded by 47 U.S.C. §153(51) on information services). Section 153(51) specifies a carrier "shall only be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." *Id*.

[31] *See IP-Enabled Services*, 20 F.C.C. Rcd. 10245, 10257 (2005).

by using a phone number.[32] The FCC categorizes I-VoIP as *retail telephone services* in the earlier referenced *Local Telephone Competition Reports*. According to the agency "nearly 48 million interconnected VoIP *retail local telephone service* connections" constitute "over a third of all wireline *retail local telephone service* connections."[33] The other two-thirds of *these local service providers are* classified by the FCC, as Congress intended, as *telecommunications services* providers subject to Title II.[34]

I-VoIP service clearly meets the definition of *telecommunications service*[35] and unquestionably competes head-to-head against other *telecommunications services* to provide *retail telephone service*. Moreover, according to the FCC, *consumers perceive* I-VoIP as offering the *same* functionalities as TDM-based phone service.[36]

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32 *Id.* (describing I-VoIP as "a service that enables a customer to do everything . . . the customer could do using an analog telephone.").

33 *See* note 21, *supra.*

34 *Id.*

35 47 U.S.C. §§153(50), (51) & (53).

36 *See* note 9, *supra.*

Although the FCC has yet to confirm its decision on whether I-VoIP service is a telecommunications or information service, the FCC has been extending piecemeal "certain Title II obligations to interconnected VoIP providers"[37] based on those *same* characteristics. VoIP providers have been required to provide, *e.g.*, 911 service (2005), fund universal service (2007), protect customer information and provide disabled access (2007), and port telephone numbers (2015).[38] All five are Title II duties Congress imposes only on *telecommunications carriers*.[39]

In the most recent 2015 *Number Portability* Order the FCC also reminds all I-VoIP providers that, even though *they* may not be classified as *telecommunications carriers*, the FCC also expects them to comply with the §251 obligation to "negotiate in good faith" that Congress only imposed on *telecommunications carriers*.[40]

The FCC also amended its rules to actually define I-VoIP as a *telecommunications carrier* providing *telecommunications services* for purposes of its portability rules. 47 C.F.R. §§52.5(i) & (j) (2015). Carriers subject to the

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37 *Telephone Numbers for IP-Enabled Service Providers*, 22 F.C.C. Rcd. 19538-39, ¶14 (2007).

38 *See* note 21, *supra*.

39 Although 47 U.S.C. §254 also allows the FCC to assess "other provider[s] of interstate telecommunications."

40 *Portability Order* at 6869.

numbering order and all I-VoIP providers are, by the FCC's own definition – *telecommunications service* providers.[41]

Classification of I-VoIP as an information service cannot be squared with how the FCC is operating the federal universal service system either. In 2011, the FCC *claimed* that it had not decided the regulatory classification of I-VoIP and, rather presumptuously, *that the 1996 Act's classification scheme was irrelevant to whether carriers could be designated to receive federal universal service funding*:

> Our authority to promote universal service in this context does not depend on whether interconnected VoIP services are telecommunications services or information services under the Communications Act.

Connect America Fund, 26 F.C.C. Rcd. 17663, 17685 (2011) (*CAF Order*).

The FCC was continuing[42] to try to maneuver around Congress's mandate that only *telecommunications service* providers can qualify for federal subsidies. The

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41 The FCC contended for some time that VoIP carriers can be either be deemed, as in this rule, or "volunteer/elect" to be a "telecommunications service" provider. But the statutory text is clear. An entity cannot "be deemed" or volunteer/consent to be a *telecommunications carrier*, unless that entity – in the words of the statute — is actually offering "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public." Obviously, a carrier cannot meet the definition of a "telecommunications service" and simultaneously be an "information service." Carriers are either offering a service that matches the characteristics of this functional definition or they are not.

42 *See, e.g., Lifeline & Link Up Reform & Modernization*, 31 F.C.C. Rcd. 3962, 4059 n.4 (2016) ("We recognize that we have not generally classified VoIP [but] we nonetheless have recognized that providers might elect to offer interconnected VoIP

CAF Order specified that a carrier had to offer only one service to qualify for federal universal support: voice telephony, which could be based on any technology including the still "unclassified" I-VoIP.[43]

In the resulting decision, the 10th Circuit confirmed that carriers must be designated as an eligible *telecommunications carrier* and have *common carrier* status to access funds.[44] That should have settled the I-VoIP classification issue. Yet it lingers.

But in the interim, States have designated I-VoIP carriers under §214 as eligible to receive subsidies – assuming it is a telecommunications service. For example, New Mexico approved a VoIP-only provider as an ETC based on its "common carrier regulation as an interconnected-VoIP provider."[45]

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as a telecommunications service. *IP-Enabled Services*, 20 F.C.C. Rcd 10245 n.128 (2005) (arguing an interconnected VoIP provider can obtain the rights available to "telecommunications carriers" under Title II if it voluntarily "holds itself out as a telecommunications carrier and complies with appropriate federal and state requirements")). *Cf.* n.40, *supra*.

[43] *CAF Order* at ¶¶ 77-81.

[44] *See In Re: FCC 11-161*, 753 F.3d 1015, at 1048-1049 (10th Cir. 2014).

[45] *Transworld Network, Corp. Petition For Designation as an Eligible Telecommunications Carrier Pursuant to §214(E)(2) of the Communications Act of 1934, and 17.11.10.24 NMAC*, Before the New Mexico Public Regulation Commission, Case No. 11-00486-UT, FINAL ORDER (issued 20 February 2013) Exhibit 1, at 16; *Cf. In re: Application of Cox California Telcom, LLC (U5684C) for Designation as an ETC, Application 12-09-014*, Decision 12-10-002 (10/3/2013),

If the required voice telephony service in these and related State designations, which is provided using IP technology, is not a *telecommunications service*, then the FCC's *CAF Order* could be viewed as allowing an information service provider to illegally access federal subsidies.

IV. THE UNAMBIGUOUS TEXT REQUIRES CLASSIFICATION OF I-VOIP AS A TELECOMMUNICATIONS SERVICE

In the reports on local competition cited above, the FCC categorizes both legacy *telecommunications services* and I-VoIP as "retail local telephone service." So how can this Court determine if a retail phone service is a *telecommunications service* that Congress intended to be to be subject to its Title II framework to enhance local phone competition – or something else?

This Court need only decide two things.

First, is Charter offering *telecommunications*.

Second, is that *telecommunications* offered to the public at large for a fee.

Decision Approving Settlement (rel. 10/07/2013), at 8-9 ("Cox does not distinguish between circuit-switched and packet-switched telephone services. The customer is merely ordering telephone service.").

Neither decision requires any reference to or understanding of the underlying technology.[46] Obviously, no special expertise in any technology is required to look at the definition of *telecommunications* in §153(50) and decide if Charter's service:

> transmit[s], between or among points specified by the user . . . information of the user's choosing, without change in the form or content of the information as sent and received.

It is. If a Charter customer dials a lawyer, and they converse, the customer's voice is "transmitted between points specified by the user" – from the customer to the lawyer and from the lawyer to the customer. If the lawyer can understand the customer, then it is also "without change in the form or content of the information as sent and received." It is therefore telecommunications. But this poses no issue as the FCC has already ruled, and this Circuit confirmed, that I-VoIP includes "telecommunications."[47] So what remains of the required analysis? Well, §153(53) defines a *telecommunications service* as:

> offering 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*.

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[46] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C. Rcd 24011, 24032 (1998) ("Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service . . . The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology.").

[47] *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007).

Again, the statute specifies that in making this determination the facilities (technology) used to provide the service is not relevant. But even if it did not make that specification, no reference to any technology is required to figure out if Charter is charging fees to provide service.

Obviously, it is. The only question remaining is Charter offering the service to the public at large.

Again, there can be no doubt that Charter is doing just that. Its target market is the same market currently consuming TDM-based Title II *telecommunications services* and it advertises using the same mediums to the same customers.

Moreover, as referenced earlier, the FCC has already found, what any adult in the United States already knows: consumers can't really distinguish between the services.[48] The conclusion is inescapable: fixed I-VoIP is a *telecommunications service*.

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48 *See* notes 9 & 32, *supra.*

CONCLUSION

Charter concedes the traffic over its fixed, interconnected VoIP telephone service can be distinguished. The Act provides no basis for preemption in this circumstance. Indeed, the only coherent application of law and precedent is to confirm that Charter's service is a *telecommunications service*. Amici request this Court to reverse the *Order* and remand with instructions to enter judgment in favor of the MPUC.

Respectfully submitted,

/s/ James Bradford Ramsay

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 6384 words. In making this certification, counsel has relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit on this 5th day of September, 2017 through the CM/ECF electronic filing system, and thus also served on counsel of record.

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