United States Court of Appeals
For The Eighth Circuit
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October 31, 2017

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RE: 17-2290 Charter Advanced Services, et al v. Nancy Lange, et al

Dear Counsel:

The amicus curiae brief of NCTA-The Internet & Television Association was received on October 30, 2017 and filed on October 31, 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.

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AMT

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

No. 17-2290

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the District of Minnesota, No. 15-CV-3935 (SRN/KMM)

BRIEF OF *AMICUS CURIAE* NCTA – THE INTERNET & TELEVISION ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES CHARTER ADVANCED SERVICES (MN), LLC, *ET AL*.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), NCTA – The Internet & Television Association states that it does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

NCTA – The Internet & Television Association ("NCTA") represents the cable industry, which has led the charge in developing Voice over Internet Protocol ("VoIP") services and providing them to consumers and businesses throughout the United States in competition with incumbent local exchange carriers ("ILECs"). The Federal Communications Commission ("FCC") has sought to promote such competition and benefit consumers by developing a uniform, light-touch national regulatory framework for VoIP services. This regime has been a resounding success, as it encouraged cable operators and others to invest billions of dollars in IP networks and develop new services and features. As a result, consumers today enjoy expanded choice, lower prices, and improved service quality.

This appeal raises important questions for NCTA and its members regarding the regulatory treatment of VoIP services. While the FCC's light-touch framework has been instrumental to the successful roll-out of VoIP, the application of state regulations designed for traditional local exchange services—as threatened by the Minnesota Public Utilities Commission ("MPUC")—would stymie the competition and innovation Congress and the FCC set out to foster. As set forth below, the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* states that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *amicus* or its members or counsel contributed money intended to finance the preparation or submission of this brief. All parties have consented to the filing of this brief.

FCC's regulatory approach to VoIP—which is consistent with the approach taken by all other states—has appropriately balanced the interests in promoting competition, investment, and innovation, on the one hand, and safeguarding consumers' interests, on the other. The district court's judgment is entirely consistent with that balance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Telecommunications Act of 1996 "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). Historically, ILECs held monopoly power in the provision of telephone services. The emergence of VoIP services in the early 2000s, which allowed for secure and reliable transmission of voice traffic over broadband networks (including in particular cable networks), provided a critical opportunity for the development of facilities-based competition—in contrast to early efforts to resell ILECs' voice services, which had failed to deliver meaningful consumer benefits in the years following enactment of the 1996 Act. *See, e.g.*, *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2543 ¶ 17 & n.48 (2005) (explaining congressional preference for facilities-based competition

over "synthetic" competition). It also provided a test case for implementing Congress's directive that the FCC pursue a pro-competitive, deregulatory mission.

The FCC responded faithfully to Congress's mandate, allowing VoIP to develop organically and without unnecessary regulatory interference. The federal agency chose to avoid any "definitive pronouncements" concerning the statutory classification of VoIP, in large part to avoid saddling the service with unnecessary regulatory burdens. *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11541 ¶ 83 (1998). In 2003, the MPUC, disagreeing with the FCC's hands-off posture, sought to impose legacy telecommunications-service regulations on a nascent VoIP service offered by new entrant Vonage, and the FCC responded by broadly preempting state public utility commission regulation of VoIP services. *See Vonage Holdings Corp. Pet. for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, 22404 ¶ 1 (2004) ("*Vonage Order*"). The MPUC appealed, and this Court rejected its petition for review. *MPUC v. FCC*, 483 F.3d 570, 578-79 (8th Cir. 2007). In the wake of that seminal decision, the FCC continued to refrain from treating VoIP as a telecommunications service. Instead, it established a series of discrete regulatory obligations intended to protect consumers, which it applied uniformly throughout the United States, regardless of service classification. The FCC's position was clear: VoIP is an

interstate service, and it is national policy that VoIP should continue to be minimally regulated; thus, states should not—and cannot—impose utility-style regulation because it is inconsistent with this nationwide light-touch regulatory framework.

The pro-competitive benefits of this approach manifested quickly. Cable operators in particular seized on the opportunity to challenge ILECs and became new market participants by using VoIP technology to provide voice services to residential and business customers. The ability of cable operators and other entrants to offer innovative VoIP services without running the gauntlet of state "certification" proceedings and otherwise complying with disparate state utility regulations was instrumental to their successful launch of competitive alternatives. This flexibility lowered the cost to offer voice services and reduced prices for consumers. Cable companies also used the inherent flexibility of VoIP to transform consumer expectations of voice service. Voice service evolved to encompass a dynamic suite of features that integrated seamlessly with video entertainment and Internet capabilities, while providing unparalleled flexibility as to where and when consumers could place outbound calls and receive calls placed to their home or business telephone number. Consumers responded in kind and embraced VoIP services, increasing VoIP providers' market share while eroding

the monopoly power of ILECs and lowering costs to consumers. As a result, VoIP became an exemplar of the pro-competitive benefits of a deregulatory framework.

Following the *Vonage Order* and the emergence of robust voice competition, most states responded to these developments by acceding to the FCC's national light-touch framework. Indeed, apart from the MPUC's attempts to regulate Charter's VoIP service, *not a single state* currently requires VoIP providers to comply with public utility regulations. Against the backdrop of this nationwide policy—which carefully balances freedom from entry regulation or other utility-style mandates with targeted consumer safeguards and social policy measures—and the corresponding success of VoIP in the marketplace, the MPUC's overwrought claims that consumers will suffer significant harms in the absence of utility regulation ring hollow. Instead, the MPUC's efforts to undermine the FCC's successful regime make it a distinct outlier, and its continuing calls to impose utility regulation on VoIP providers, far from benefitting consumers, would impede competition and jeopardize continued innovation. The Court should uphold the federal light-touch regime and reject the MPUC's effort to undermine that regime in this appeal.

ARGUMENT

I. PREVENTING THE IMPOSITION OF UTILITY REGULATION ON VOIP WILL PROMOTE CONTINUED COMPETITION AND BENEFIT CONSUMERS

VoIP's innovations have spurred much-needed competition and benefitted consumers. In 2004, when VoIP services were nascent, the FCC recognized that "[t]he rise of the Internet"—and services that rely on Internet Protocol—have "fundamentally changed the ways in which we communicate by increasing the speed of communication, the range of communicating devices, and the platforms over which they can send and receive." *See IP-Enabled Services.*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4869 ¶ 8 (2004). As a result, the proliferation of broadband Internet connections allowed "providers offering VoIP services . . . to challenge traditional telecommunications" and "provide[d] broader functionality and greater consumer choice at prices competitive to those of analogous services provided over the public switched telephone network." *Id.* at 4866 ¶ 3. The FCC correctly anticipated that "before long, providers [would] be able to integrate voice and real-time video to provide new capabilities and service offerings," *id.*, and it recognized the potential for "IP-enabled services . . . [to] provid[e] innumerable opportunities for innovative offerings competing with one another over multiple platforms," *id.* at 4867 ¶ 4. "These developments [were] expected to reduce the cost of communication and to spur innovation and

individualization . . . to provide each end user a highly customized, low-cost suite of services delivered in the manner of his or her choosing." *Id.* at 4867 ¶ 5. Indeed, the FCC anticipated a "transformative effect on the communications landscape" that would give rise to a "'virtuous cycle' in which competition begets innovation, which in turn begets more competition." *Id.* at 4879 ¶ 22.

NCTA and its members likewise recognized the potential for VoIP to alter the telecommunications landscape and fulfill the goals of the Telecommunications Act of 1996. NCTA submitted comments to the FCC explaining that, for too long, "meaningful facilities-based competition in the local phone services market remain[ed] a hope rather than a reality for the vast majority of residential consumers." Comments of National Cable & Telecommunication Association, WC Docket No. 04-36, at 5 (May 28, 2004). VoIP served as a "cost-effective and robust technology that enable[d] . . . compet[ition] head-to-head with the incumbents in the provision of voice services." *Id.* And NCTA predicted that "VoIP technology [would] increase industry investment, foster innovation, and provide consumers with attractive alternatives to plain old telephone service . . . and to other consumer services." *Id.*

The FCC's—and NCTA's—expectations have become realities in today's marketplace. Indeed, VoIP providers have played a critical role in providing consumers with expanded choice, exciting new features, and lower prices. The

number of consumers who have subscribed to VoIP services reflects this increase in competition. More than 60 million Americans now subscribe to "interconnected" VoIP services,[2] with millions more using "non-interconnected" services. FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Voice Telephone Services: Status as of June 30, 2016*, at 2 (Apr. 2017) ("*June 30, 2016 Report*"), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344500A1.pdf. The cable industry plays a key role in providing facilities-based VoIP services. As of August 2017, more than 31 million cable subscribers are taking advantage of interconnected VoIP service. *See* NCTA, *Cable's Customer Base*, https://www.ncta.com/industry-data?share_redirect=undefined#colorbox=node-2800 (last visited Oct. 27, 2017).

The benefits of this technological innovation and competition have flowed directly to consumers. One key benefit to consumer welfare has been a steady decline in prices. Prior to the introduction of VoIP, consumers generally purchased local and long-distance telephone service separately, with high-volume users bearing particularly high costs. But VoIP shifted the paradigm by popularizing unlimited, flat-rate, any-distance bundles—including free or flat-rate

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[2] Interconnected VoIP services are those that provide the ability to place calls to and receive calls from the traditional public switched telephone network, using a broadband connection and IP-compatible customer premises equipment. *See* 47 C.F.R. § 9.3.

international calling—delivering significant savings to consumers. *See, e.g.*, Spectrum, *Voice Features*, https://www.spectrum.com/home-phone.html (last visited Oct. 27, 2017); Xfinity, *Voice Unlimited Features*, https://www.xfinity.com/learn/home-phone-services/voice-unlimited-features (last visited Oct. 27, 2017). The opportunity to provide VoIP service as part of a "double-play" or "triple-play" bundle with cable television and broadband Internet access service enhanced cable companies' ability to offer competitively priced home phone services, providing additional convenience and savings for consumers. *See, e.g.*, Spectrum, *Packages*, https://www.spectrum.com/packages.html (last visited Oct. 27, 2017); Xfinity, *X1 Triple Play Offers*, https://www.xfinity.com/learn/bundles/triple-play (last visited Oct. 27, 2017); Xfinity, *X1 Double Play Offers*, https://www.xfinity.com/learn/bundles/internet-cable-packages (last visited Oct. 27, 2017). As a result, according to the latest FCC report on retail telephone service rates, the cost to consumers for landline service declined by roughly 22 percent between 2000 and 2009 (the last year the FCC tracked such data), during a period in which the quality and capabilities of VoIP service steadily improved. *See* FCC, *Trends in Telephone Service*, at 3-5 & Table 3.3 (2010), https://apps.fcc.gov/edocs_public/ attachmatch/DOC-301823A1.pdf; *see also, e.g.*, FCC, *Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service*, at I-5 & Table 1.15 (2008),

https://apps.fcc.gov/edocs_public/attachmatch/DOC-284934A1.pdf (reflecting a 25 percent decline in carriers' long distance revenues between 2001 and 2006).

The widespread success of VoIP services and resultant consumer benefits also stem from the innovative capabilities enabled by VoIP technology. VoIP offers an unparalleled combination of convenience and control over residential and commercial voice communication. Unlike traditional telephone service, VoIP allows for dynamic integration of voice services with home multimedia entertainment. For example, consumers are no longer limited to Caller ID on the telephone itself; instead, cable VoIP subscribers can receive Caller ID alerts on their television sets. *See, e.g.*, Spectrum, *Voice Features*, *supra*; Xfinity, *Voice Unlimited Features*, *supra*. Moreover, consumers can read, delete, or listen to voicemails through remote interfaces and apps on computers, tablets, smartphones, or televisions. *See, e.g.*, Spectrum, *Voice Features*, *supra*, (Voice Online Manager); Xfinity, *Voice Unlimited Features, supra*. VoIP even enables a customer's home phone to act more like a mobile phone; for example, consumers can have their calls forwarded to their personal mobile phones or to multiple mobile phones. *See, e.g.*, Spectrum, *Voice Features*, *supra* (unconditional and selective call forwarding); Xfinity, *Voice Unlimited Features*, *supra* (discussing Xfinity Connect); Xfinity, *What is Voice2go?*, https://www.xfinity.com/support/phone/voice-2go-faqs/ (last visited Oct. 27,

2017). And VoIP also enables consumers to screen and block unwanted calls with ease. *See, e.g.*, Spectrum, *Voice Features*, *supra*; Xfinity, *Voice Unlimited Features*, *supra*. In other words, VoIP services allow consumers to respond to a call to their home phone from almost anywhere in the world, while also ensuring that consumers receive only the calls they want to receive.

In short, the proliferation of VoIP services advances the goals of the Telecommunications Act of 1996 and fulfills the expectations set by the FCC. VoIP has increased available consumer options, lowered consumer costs, and altered the very nature of what consumers expect to receive from their voice services. Maintaining the light-touch federal framework—as the district court's judgment accomplishes—will ensure that consumers continue to enjoy the benefits flowing from VoIP services. By contrast, saddling VoIP providers with onerous and unnecessary utility regulation would jeopardize continued investment and innovation and related consumer welfare gains.

II. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT THE MPUC'S EFFORTS TO SUBJECT VOIP TO UTILITY REGULATION WOULD CONFLICT WITH IMPORTANT NATIONAL POLICIES

A. The FCC's Nationwide, Light-Touch Regulatory Framework for VoIP Has Played an Instrumental Role in Promoting Competition and Delivering Consumer Benefits.

The FCC facilitated the remarkably successful roll-out of VoIP services by intentionally adopting a light-touch regulatory framework that (a) avoided unduly

burdensome obligations designed for incumbent monopolists, and (b) ensured uniformity and consistency by preempting the application of disparate state utility regulations to VoIP. The FCC recognized at the outset that "VoIP services are not necessarily mere substitutes for traditional telephony services, because the new networks based on the Internet Protocol are, both technically and administratively, different from the PSTN." *IP-Enabled Services*, 19 FCC Rcd at 4866 ¶ 4. At the same time, the FCC drew on Congress's direction in the Telecommunications Act of 1996 to promote competition and deregulate wherever possible. In particular, Congress directed the FCC to ensure that "the Internet and other interactive computer services" would remain "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). More generally, the FCC recognized that its implementation of the statute should promote "new and innovative services" to advance the development of competition, consistent with the "express mandates and directives" of Congress and "the pro-competitive deregulatory policies the [FCC] is striving to further." *Vonage Order,* 19 FCC Rcd at 22416-17 ¶¶ 20-21, 22425-27 ¶¶ 33-37.

In furtherance of these core policies, the FCC has consistently declined to classify any form of VoIP—including interconnected VoIP, whether as a fixed service like those provided by cable companies or as a nomadic "over the top" service like Vonage—as a "telecommunications service," which would trigger comprehensive common carrier regulation under Title II of the Communications

Act. Instead, despite various parties' entreaties to adopt such a classification, the FCC has decided to leave the classification issue unresolved. *See, e.g.*, *Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154, 16172 ¶ 35 n.101 (2013) ("*Rural Call Completion Order*") ("The Commission has not determined whether VoIP services should be classified as 'telecommunications services' or 'information services' under the Communications Act, and we do not decide that issue here."); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18026-28 ¶¶ 970-71 (2011) ("*USF/ICC Transformation Order*") ("[W]e acknowledge that the Commission has not classified interconnected VoIP services as 'telecommunications services' or 'information services.' We need not resolve this issue here . . . ."); *IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, 6043 ¶ 8 n.21 (2009) ("*Discontinuance Order*") ("The Commission to date has not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act, and we do not make that determination today.").

Although the FCC has intentionally left VoIP's classification unresolved, the Commission adopted a tailored but relatively comprehensive set of regulatory requirements for interconnected VoIP services to achieve key social policy and

consumer protection objectives that apply irrespective of how VoIP is classified. In particular, the FCC's regulatory framework includes the following:

- The FCC has required VoIP providers to ensure customer access to E911 service, which entails the delivery of all 911 calls with the customer's location and call-back information to a designated public safety answering point via the dedicated wireline E911 network. *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257 ¶ 24 (2005) ("*E911 Order*").
- In order to ensure continuous 911 access, the FCC also requires VoIP providers to offer consumers a backup power solution in the event of a power outage. *Ensuring Continuity of 911 Communications*, 30 FCC Rcd 8677, 8678 ¶ 3 (2015).
- To facilitate lawful electronic surveillance, the FCC requires VoIP providers to comply with the Communications Assistance for Law Enforcement Act. *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14989 ¶ 1, 14990 ¶ 4 (2005) ("*CALEA Order*").

- The FCC requires VoIP providers to contribute to the federal universal service support programs, which defray the cost of serving high-cost areas, low-income consumers, schools and libraries, and rural health clinics. *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7536-37 ¶¶ 34-35 (2006) ("*2006 USF Order*"). Relatedly, the FCC requires VoIP providers to contribute to the Telecommunications Relay Service ("TRS") Fund, which provides reimbursement to service providers that implement TRS services for individuals with hearing or speech disabilities. *IP-Enabled Services*, Report and Order, 22 FCC Rcd 11275, 11279-80 ¶¶ 7-8, 11294-96 ¶¶ 36-41 (2007) ("*TRS Order*").
- Beyond contributions to the TRS program, the FCC requires VoIP providers to comply more broadly with various disabilities access provisions in the Communications Act, including the requirements established for providers of "advanced communications services" under the Twenty-First Century Communications and Video Accessibility Act of 2010 ("CVAA"). *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of*

2010, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14557, 14570-74 ¶¶ 33-45 (2011); *see also TRS Order*, 22 FCC Rcd at 11283-291, ¶¶ 17-31 (extending pre-CVAA disabilities access requirements to VoIP). The FCC further ensures that VoIP customers have access to 711 dialing service to be connected to a relay operator. *TRS Order*, 22 FCC Rcd at 11296 ¶ 42.

- To make sure that consumers have the freedom to choose their preferred provider, the FCC has extended local number portability obligations to VoIP providers when consumers change voice providers. *Telephone Number Requirements from IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19532 ¶ 1 (2007).
- To protect consumer privacy, the FCC has imposed limitations on how VoIP providers can use customer data. *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57 ¶¶ 54-59 (2007).

- The FCC has imposed certain reporting requirements on VoIP providers to maintain the accuracy of its marketplace data. Specifically, VoIP providers are required to report end user subscriber data on FCC Form 477 to enable the FCC to obtain accurate figures on VoIP subscribership. *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9704-07 ¶¶ 25-31 (2008).
- The FCC has extended domestic discontinuance obligations under Section 214 of the Communications Act to VoIP providers, so that consumers will receive notice before any service offering is withdrawn from the marketplace and the agency can intervene if replacement services are not immediately available. *Discontinuance Order*, 24 FCC Rcd at 6046 ¶ 12.
- The FCC also has specifically included VoIP providers in its intercarrier compensation framework. *USF/ICC Transformation Order*, 26 FCC Rcd at 18026-28 ¶¶ 970-71.

- Additionally, the FCC has extended its rules addressing rural call completion issues—including recordkeeping, retention, and reporting requirements—to VoIP providers. *Rural Call Completion Order*, 28 FCC Rcd at 16164 ¶ 19.
- And to ensure that VoIP service is up to the task of supporting services during public emergencies, the FCC requires VoIP providers to report service outages. *Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order, 27 FCC Rcd 2650, 2655 ¶ 8, 2683 ¶ 80 (2012).

In short, the FCC has developed a carefully crafted and well balanced regime to ensure the protection of consumers and the achievement of other key social goals, *without* subjecting VoIP providers to full-blown utility regulation—either at the federal or state level. *See Numbering Policies for Modern Communications*, Report and Order, 30 FCC Rcd 6839, 6848 ¶ 21 (2015) (noting that the FCC has adopted targeted regulations for VoIP providers while acknowledging that "interconnected VoIP providers generally receive neither state certification nor a federal license before initiating service").

The MPUC and its supporting *amici* assert that, absent state utility regulation, consumers will be left adrift in a sea of corporate opportunism, suggesting that the district court's decision creates a consumer protection vacuum. MPUC Br. 13. Mid-Minnesota Legal Aid, for instance, contends that Charter is attempting to "circumvent the regulatory system in place in Minnesota that protects consumer health, safety, and security . . . and ensures . . . reliable, nondiscriminatory service." MMLA Br. 13. And AARP similarly asserts that "[t]he district court's holding . . . eliminates all consumer protection and jeopardizes the health, safety, and well-being of the most vulnerable members of society." AARP Br. 5.

But these hyperbolic claims ignore the comprehensive requirements included in the FCC's nationwide framework—which proactively prevents consumer harms and provides additional avenues for redress in the event of consumer complaints. Indeed, as shown above, the FCC has consistently demonstrated its willingness to adopt rules where necessary to address identified competitive or consumer-related concerns. And it has made clear that, "should the need arise, [it] stand[s] ready to expand the scope or substance" of its rules "if necessary to ensure that the public interest is fully protected." *E911 Order*, 20 FCC Rcd at 10260 ¶ 25.

The MPUC and its supporting *amici* further disregard the FCC's clear intention that its regulatory framework should apply uniformly and consistently nationwide, and that state public utility commissions should not seek to impose traditional common carrier mandates on VoIP providers. The seminal *Vonage Order*—which was adopted in response to the MPUC's earlier efforts to regulate VoIP as a utility service—held: "[T]his Commission, *not the state commissions*, has the responsibility to and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities." *Vonage Order* 19 FCC Rcd at 22405 ¶ 1 (emphasis added); *see also TRS Order*, 22 FCC Rcd at 11282 ¶ 14. The *Vonage Order*'s rationale was based in large part on maintaining a light-touch regulatory approach that would avoid entry barriers and related burdens for new market participants. Specifically, the FCC explained that it maintains an open entry policy for non-dominant providers that would be undermined by the imposition of local certification and tariffing requirements—i.e., the very regulations the MPUC now seeks to impose. *Vonage Order*, 19 FCC Rcd at 22415-17 ¶¶ 20-21. The FCC based its policy on its previous determination that "entry requirements could stifle new and innovative services whereas blanket entry authority—i.e., unconditional entry—would promote competition." *Id.* at 22416 ¶ 20. And, as noted, the FCC has carefully balanced this pro-

investment/innovation policy with its adoption of measures to safeguard the interests of consumers.

Allowing state public utilities commissions to impose utility regulations on VoIP would undermine the carefully calibrated federal regime. Obtaining operating authority (typically known as a certificate of public convenience and necessity) from a state "can take months and result in denial of a certificate, thus preventing entry altogether." *Id.* Likewise, state requirements to file tariffs for VoIP services would fly in the face of the FCC's determination that "*prohibiting* such tariffs would promote competition and the public interest." *Id.* (emphasis added). In Minnesota in particular, the MPUC's ruling would subject VoIP providers to a host of ill-fitting and burdensome state law obligations. For instance, as Charter points out, VoIP providers in Minnesota would be required to offer unbundled "basic local" service—even though the technology employed by Charter and others to provide VoIP service is "not designed to be disaggregated this way" and would need to be overhauled significantly to meet such a requirement. Charter Br. 52 (citing Minn. Stat. § 237.626, Subd. 2). VoIP providers in Minnesota also would be subject to state-specific limitations on how they discount and promote VoIP services. *See* Minn. R. § 7812.2210, Subp. 5, 6, 8. The FCC intentionally sought to avoid this type of "patchwork regulation" of VoIP services, *Vonage Order*, 19 FCC Rcd at 22424 ¶ 32, under which regional

and national providers finally challenging ILECs' market power would "have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations," *id.* at 22429 ¶ 41.

Consistent with this understanding, the FCC ensured this nationwide, light-touch approach by ruling that states may not regulate VoIP as a legacy telephone service under state law. *See id.* at 22414-21, ¶¶ 18-25. The FCC explained that its preemption of state law applied not only with respect to the particular service offered by Vonage at the time, but also to services with similar characteristics. And, of particular relevance here, it further emphasized: "to the extent other entities, *such as cable companies*, provide VoIP services," the agency "preempt[s] state regulation to an extent comparable" to its decision in the *Vonage Order*. *Id.* at 22424 ¶ 32 (emphasis added). This Court upheld that decision, acknowledging the FCC's analysis was "a largely fact-driven inquiry requiring a high level of technical expertise," to which the FCC was afforded "a high level of deference." *MPUC*, 483 F.3d at 578-79.

Contrary to the MPUC's assertion, as Charter explains in its brief and as the district court correctly recognized, the FCC did not reverse course and hold in the *2006 USF Order* that fixed VoIP services are subject to state regulation. Rather, in determining how VoIP providers should calculate their required contributions to the federal universal service fund, the FCC merely observed (in dicta) that where a

VoIP provider can determine the end points of a call, the specific "impossibility" rationale for preemption identified in connection with "nomadic" services does not apply. *See 2006 USF Order*, 21 FCC Rcd at 7546 ¶ 56. In doing so, the FCC in no way suggested that *other* grounds for applying federal preemption are no longer applicable. *See* Charter Br. 16-17. Particularly in light of the FCC's successful balancing of the various interests at stake, there is no basis for this Court to depart from its prior holding regarding the preemption of state utility regulation of VoIP services and upset the well-settled status quo.

B. The MPUC's Continuing Efforts To Impose Utility Regulation Are at Odds with the Approach Taken by All Other States.

In the wake of the FCC's *Vonage Order*, all other states[3]—through the actions of their public utility commissions, legislatures, or both—have acceded to the uniform federal regime, both deferring to the FCC to resolve the appropriate classification of VoIP under the Communications Act and refraining from imposing utility regulation that would impede continued investment and innovation. *See, e.g.*, Cal. Pub. Util. Code § 710(a) (California Public Utilities Commission "shall not exercise regulatory jurisdiction or control over Voice over

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[3] Some VoIP providers have elected to hold themselves out as common carriers and voluntarily submitted to legacy telephone regulation, in some cases to qualify for federal universal service subsidies. *See* Charter Br. 58. But NCTA is not aware of any other state that currently *compels* VoIP providers to comply with utility regulation. This deregulatory status has resulted from a mix of voluntary hands-off postures adopted by state public utility commissions and state legislation barring regulation.

Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law."); 35-a Me. Rev. Stat. § 7234 (VoIP providers are "not subject to any regulation . . . as a telephone utility or as a public utility unless the person is providing provider of last resort service."); N.H. Rev. Stat. Ann. § 362.7(II) (providing that "no department, agency commission, or political subdivision of the state, shall enact, adopt, or enforce, either directly or indirectly, any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law that regulates or has the effect of regulating the market entry, market exit, transfer of control, rates, terms or conditions of any VoIP service or IP enabled service or any provider of VoIP service or IP-enabled service."); *see also* Charter Br. 57 & n.28. As a result, the district court's decision holding that the MPUC cannot regulate VoIP as a telecommunications service places VoIP providers in Minnesota on an equal regulatory footing with nearly all other VoIP providers throughout the country. Contrary to the MPUC's suggestion that the district court's judgment produced an anomalous result, it ensures national consistency and uniformity and avoids upending federal policy.

As noted above, this is not the first time the MPUC has sought to undermine federal policy by attempting to treat VoIP as if it were a traditional circuit-switched telephone service. As this Court knows, the MPUC's attempts stretch back to 2003, when it issued an order requiring Vonage to comply with legacy telephone

regulations. *See Vonage Holdings Corp. v. MPUC*, 290 F. Supp. 2d 993, 996 (D. Minn. 2003); *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, Docket No. P–6214/C–03–108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003). Once the FCC responded by establishing that states are preempted from regulating VoIP, the MPUC unsuccessfully challenged the FCC's order. *See MPUC*, 483 F.3d 570. And despite the broad consensus that has since emerged regarding the success of the FCC's light-touch approach, the MPUC has continued to foster regulatory uncertainty and increase costs by once again attempting to regulate VoIP as a utility service.

The nationwide experience over the last decade powerfully rebuts the MPUC's and its supporting *amici*'s claims regarding the purported need for heavy-handed utility regulation. For example, Mid-Minnesota Legal Aid claims that "[t]he District Court's ruling confiscates the rights of consumers to obtain universal access to vital phone services," placing "[t]he once sacred assurance of reliability of phone service" and a "fair marketplace" in jeopardy. MMLA Br. 15. AARP similarly contends that the district court's ruling "increases the risk that phone service will not be available, affordable, or reliable," with "potentially devastating consequences for the nation's most vulnerable older people." AARP Br. 2. According to AARP, only this Court can ameliorate the risk of delayed first

responders by reversing the district court and allowing MPUC to regulate VoIP as a public utility.

But conspicuously absent is any *evidence* that this self-described "parade of horribles," MMLA Br. 16, has come to pass in any state where VoIP is not regulated as a public utility. Despite the fact that *no other state* currently regulates VoIP as a utility service, neither the MPUC nor any *amicus* can point to any tangible harm that has befallen consumers based on the absence of heavier regulation. Indeed, even in Minnesota, VoIP was not subject to efforts to impose utility regulation for *years*—a fact that belies any claim that state-level utility regulation is somehow necessary to safeguard the public interest. In contrast to the overheated rhetoric employed by the MPUC's supporting *amici*, nowhere has—or could—"[v]irtually all meaningful consumer protection . . . be[en] eliminated," MMLA Br. 15, given the FCC's universally applicable regulatory framework for interconnected VoIP. By the same token, the supposed threat that "older people [will suffer] from unintended, but potentially life threatening consequences," AARP Br. 9, lacks credibility in light of the FCC's E911 requirements, battery backup rules, and other safeguards. Nor does any party present a shred of evidence to substantiate the assertion that deregulation will make "the cost of phone service inaccessible." AARP Br. 10. To the contrary, as shown above, the FCC's light-

touch approach with respect to VoIP has fueled robust competition that has imposed downward pricing pressure in the retail voice marketplace.

In short, the MPUC seeks to fix a regulatory framework that is not broken. The FCC's light-touch regime has appropriately protected the interests of consumers while shielding service providers from needless burdens. In turn, providers have invested billions of dollars, introduced innovative service improvements, expanded consumer choice, and driven prices lower. To the extent that consumers wish to purchase regulated utility services from local exchange carriers, they remain free to do so, but the fact that there are now as many interconnected VoIP subscriptions nationwide as regulated fixed telephone connections speaks volumes about consumers' comfort level with lightly regulated VoIP alternatives. This Court should preserve these benefits, which derive from a uniform, nationwide scheme.

CONCLUSION

For all the foregoing reasons, the Court should deny the MPUC's challenge to the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), the foregoing brief contains 5,695 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the Word Count feature of Microsoft Word. This brief has been prepared in 14-point Times New Roman font.

/s/ Matthew A. Brill
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

/s/ Matthew A. Brill
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CERTIFICATE OF FILING AND SERVICE

I, Matthew A. Brill, hereby certify that on October 30, 2017, I caused the foregoing Brief of NCTA – The Internet & Television Association as Amicus Curiae in Support of Plaintiffs-Appellees to be filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the electronic CM/ECF system. Within five days of receiving notice that the brief has been accepted for filing, I will cause ten paper copies of the foregoing brief to be filed with the Clerk of Court by first-class mail.

Participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system. Some participants, marked with an asterisk, are not CM/ECF users; I certify that I have caused paper copies of the foregoing document to be served on those participants by first-class mail.

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