
No. 17-2290

**IN THE 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 United States District Court for the District of Minnesota
No. 15-cv-3935 (SRN/KMM)

**BRIEF OF USTELECOM, THE VON COALITION, AT&T,
AND VERIZON AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES CHARTER ADVANCED SERVICES (MN),
LLC AND CHARTER ADVANCED SERVICES VIII (MN), LLC**

Jonathan Banks
Diane G. Holland
UNITED STATES TELECOM
ASSOCIATION
601 New Jersey Avenue, N.W.
Suite 600
Washington, D.C. 20001
(202) 326-7300

*Counsel for Amicus Curiae
United States Telecom Association*

Scott H. Angstreich
Daniel S. Guarnera
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

*Counsel for Amici Curiae
United States Telecom Association,
AT&T Inc., and Verizon*

October 30, 2017

(additional counsel on inside cover)

Christopher M. Heimann
Gary L. Phillips
David L. Lawson
AT&T SERVICES, INC.
1120 20th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 457-3055

Counsel for Amicus Curiae AT&T Inc.

Glenn S. Richards
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 663-8000

*Counsel for Amicus Curiae the
Voice on the Net Coalition*

William H. Johnson
Curtis L. Groves
VERIZON
1300 I Street, N.W., Suite 500E
Washington, D.C. 20005
(202) 515-2400

Counsel for Amicus Curiae Verizon

CORPORATE DISCLOSURE STATEMENTS

In accordance with Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, *amici curiae* USTelecom, the VON Coalition, AT&T, and Verizon submit the following corporate disclosure statements:

United States Telecom Association (“USTelecom”) is a non-profit association of service providers and suppliers for the telecom industry.* Its members provide broadband services, including retail broadband Internet access services, to millions of consumers and businesses across the country. USTelecom has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The Voice on the Net Coalition, Inc. (“VON Coalition”) is a non-profit association of Voice-over-Internet-Protocol (“VoIP”) providers. The VON Coalition has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

AT&T Inc. (“AT&T”) is a publicly traded corporation that, through its wholly owned affiliates, is principally engaged in the business of providing communications services and products (including Internet services) to the general public. AT&T has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

* United States Telecom Association now does business as USTelecom – The Broadband Association.

The **Verizon** companies participating in this filing are various subsidiaries that provide retail VoIP (among other services) and are wholly owned, directly or indirectly, by Verizon Communications Inc. (“VCI”). VCI has no parent company, and no publicly held corporation owns 10 percent or more of VCI’s stock.

TABLE OF CONTENTS

| | Page |
|--|------|
| CORPORATE DISCLOSURE STATEMENTS | i |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF INTEREST AND AUTHORITY TO FILE..... | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 5 |
| I. VOIP SERVICES ARE INFORMATION SERVICES BECAUSE THEY OFFER NET PROTOCOL CONVERSION CAPABILITIES | 5 |
| A. The District Court Correctly Applied the Net Protocol Conversion Test | 5 |
| B. The MPUC and Its <i>Amici</i> Are Wrong To Claim That the Net Protocol Conversion Test Does Not Apply | 8 |
| C. The MPUC Is Wrong To Claim That the Net Protocol Conversion Test Was Not Satisfied | 12 |
| II. CLASSIFYING VOIP SERVICES AS INFORMATION SERVICES FURTHERS THE PURPOSES OF THE COMMUNICATIONS ACT..... | 16 |
| CONCLUSION | 20 |
| CERTIFICATE OF COMPLIANCE | |
| CERTIFICATE OF SERVICE | |

TABLE OF AUTHORITIES

| | Page |
|--|-----------------|
| CASES | |
| <i>Global NAPs, Inc. v. Verizon New England Inc.</i> , 396 F.3d 16 (1st Cir. 2005) | 13 |
| <i>MCI Telecomms. Corp. v. AT&T Co.</i> , 512 U.S. 218 (1994) | 17 |
| <i>Minnesota Pub. Utils. Comm’n v. FCC</i> , 483 F.3d 570 (8th Cir. 2007)..... | 5, 9, 10 |
| <i>National Ass’n of Reg. Util. Comm’rs v. FCC</i> , 851 F.3d 1324 (D.C. Cir. 2017) | 5 |
| <i>PAETEC Commc’ns, Inc. v. CommPartners, LLC</i> , No. 08-Civ-0397 (JR), 2010 WL 1767193 (D.D.C. Feb. 18, 2010)..... | 8, 16 |
| <i>Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n</i> , 461 F. Supp. 2d 1055 (E.D. Mo. 2006), <i>aff’d</i> , 530 F.3d 676 (8th Cir. 2008) | 7 |
| <i>Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n</i> : | |
| 290 F. Supp. 2d 993 (D. Minn. 2003), <i>aff’d</i> , 394 F.3d 568 (8th Cir. 2004) | 7, 8, 9, 10, 11 |
| 394 F.3d 568 (8th Cir. 2004) | 9 |
| <i>Vonage Holdings Corp. v. New York State Pub. Serv. Comm’n</i> , No. 04 CIV. 4306 (DFE), 2004 WL 3398572 (S.D.N.Y. July 16, 2004) | 8 |
| <i>WWC License, LLC v. Boyle</i> , 459 F.3d 880 (8th Cir. 2006)..... | 13 |
| STATUTES, REGULATIONS, AND RULES | |
| Communications Act of 1934, 47 U.S.C. § 151 <i>et seq.</i> | 5, 14 |
| 47 U.S.C. § 153(24)..... | 2, 5, 14, 15 |
| 47 U.S.C. § 230(a)(4) | 17 |
| 47 U.S.C. § 230(b)(2) | 4, 17 |

| | |
|---|-------|
| 47 U.S.C. § 230(f)(2) | 4, 17 |
| 47 U.S.C. § 332(c)(3) | 19 |
| Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 | 5, 6 |
| 47 C.F.R. § 9.3(3) | 14 |
| Fed. R. App. P.: | |
| Rule 29(a)(2)..... | 1 |
| Rule 29(a)(4)(E)..... | 1 |

ADMINISTRATIVE DECISIONS

| | |
|---|--------------------------------|
| Declaratory Ruling, <i>Universal Service Contribution Methodology</i> , 25 FCC Rcd 15651 (2010)..... | 20 |
| First Report and Order and Further Notice of Proposed Rulemaking, <i>Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended</i> , 11 FCC Rcd 21905 (1996)..... | 4, 6, 7, 8, 11, 13, 14, 15, 16 |
| First Report and Order and Notice of Proposed Rulemaking, <i>IP-Enabled Services</i> , 20 FCC Rcd 10245 (2005) | 14, 20 |
| Memorandum Opinion and Order, <i>Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission</i> , 19 FCC Rcd 22404 (2004) | 9, 10, 18, 19 |
| Report and Order, <i>Ensuring Continuity of 911 Communications</i> , 30 FCC Rcd 8677 (2015)..... | 20 |
| Report and Order, <i>IP-Enabled Services</i> , 22 FCC Rcd 11275 (2007)..... | 20 |
| Report and Order, <i>IP-Enabled Services</i> , 24 FCC Rcd 6039 (2009)..... | 20 |

Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, *Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531 (2007).....21

Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 22 FCC Rcd 6927 (2007).....20

Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006).....11, 12, 20

Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015), *petitions for review denied, United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petitions for cert. pending, Berninger v. FCC*, Nos. 17-498 *et al.* (U.S. filed Sept. 27 & 28, 2017).12

OTHER MATERIALS

Stephen J. Blumberg & Julian V. Luke, National Ctr. for Health Statistics, U.S. Dep’t of Health & Human Services, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016* (May 2017), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>19

Industry Analysis & Tech. Div., Wireline Competition Bureau, FCC:

Local Telephone Competition: Status as of June 30, 2010 (Mar. 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-305297A1.pdf19

Voice Telephone Services: Status as of June 30, 2016 (Apr. 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344500A1.pdf.....18, 19

STATEMENT OF INTEREST AND AUTHORITY TO FILE

AT&T, Verizon, the members of USTelecom, and the VON Coalition provide Voice-over-Internet-Protocol (“VoIP”) service to customers nationwide, including customers in the States within this Circuit.¹ The above-referenced *amici* have a substantial interest in the outcome of this appeal because it presents the first opportunity for a federal court of appeals to address a question that affects all VoIP providers and customers: Is VoIP an “information service” or a “telecommunications service” under federal law? The answer to that question has broad implications. Federal law preempts States from imposing common-carrier, public utility regulations on information services. If this Court affirms the district court’s decision that VoIP is an information service — which is consistent with the decisions of the four other federal district courts that have confronted this issue — the Federal Communications Commission (“FCC”) will remain VoIP providers’ primary regulator. If the Court instead adopts the position of the Minnesota Public Utilities Commission (“MPUC”) that VoIP is a telecommunications service, VoIP providers may also become subject to the patchwork of regulations governing traditional local telephone service in more than 50 jurisdictions.

¹ In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution intended to fund this brief’s preparation or submission. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

Consistent with the decisions of the four other federal district courts that have confronted this issue, the district court below held that Charter's VoIP service — marketed as Spectrum Voice — is an information service under federal law. The district court further concluded that federal law therefore preempts the MPUC from subjecting Spectrum Voice to the same common-carrier, public utility state regulatory regime that applies to traditional telephone service providers because, as the MPUC concedes (at 26), States are preempted from imposing such regulations on information service providers.

Those decisions were correct. VoIP services are information services under federal law because they offer customers the capability to perform “net protocol conversions” and, thereby, “offer[] . . . a capability for . . . transforming [and] processing . . . information.” 47 U.S.C. § 153(24). To enable its customers to call subscribers to traditional telephone services, a VoIP provider must convert the voice signals that enter its network in Internet Protocol (“IP”) format so that they exit that network in Time Division Multiplexing (“TDM”) format, which is used to transmit calls over the legacy telephone network (known as the public switched telephone network, or “PSTN”). The VoIP provider must then perform the same protocol conversion in reverse to allow its customers to receive calls from subscribers to TDM telephone services. It has been settled law for decades that a

service that offers the capability of a net protocol conversion such as this is an information service under federal law, and that information service providers cannot be regulated as common carriers.

As the FCC explains in its *amicus* brief, the MPUC and its *amici* are wrong to argue that the net protocol conversion test is no longer used to identify services that qualify as information services under federal law. In finding and upholding the preemption of Minnesota’s regulation of Vonage Holding Corp.’s (“Vonage”) VoIP service on the basis of inseparability, neither the FCC nor this Court abrogated the net protocol conversion test or called into question judicial determinations that VoIP services are information services under that test. Later FCC orders addressing universal service funding and the regulation of broadband Internet service providers are inapposite here, because those orders also did not present or resolve the question whether services offering the capability for net protocol conversions are information services.

The MPUC and its *amici* are also mistaken in arguing that the net protocol conversion test is not satisfied here. As Charter persuasively demonstrates, the contention that VoIP service does not involve a net protocol conversion is based on a legal error about where a VoIP provider’s network begins. Their reliance on the fact that some VoIP calls — those between two customers of the same provider — will not involve a net protocol conversion also misconceives the legal standard,

which turns on the capabilities a service offers. Finally, the specific net protocol conversion at issue here, which occurs so that a VoIP provider can exchange calls with providers operating legacy TDM telephone networks, does not fall within any of the exceptions the FCC identified in its *Non-Accounting Safeguards Order*.²

Finally, the MPUC and its *amici* are incorrect to suggest that classifying VoIP as an information service is bad public policy. Congress has expressly declared that “information service[s]” should remain “unfettered by . . . State regulation.” 47 U.S.C. § 230(b)(2), (f)(2). Preemption of state common-carrier, public utility regulation does not give VoIP providers an unfair advantage in the marketplace, but instead puts VoIP providers on an equal footing with wireless providers and over-the-top or nomadic VoIP providers, both of which are exempt from such regulation. Nor does preemption of state regulation leave a regulatory gap that would harm VoIP customers. As the FCC explains in its *amicus* brief, even as that agency has declined to resolve the classification of VoIP, it has repeatedly held that VoIP providers remain obligated to comply with a robust array of statutory consumer protections, including 911 access, universal service contributions, and accommodations for subscribers with disabilities.

² First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”).

ARGUMENT

I. VOIP SERVICES ARE INFORMATION SERVICES BECAUSE THEY OFFER NET PROTOCOL CONVERSION CAPABILITIES

A. The District Court Correctly Applied the Net Protocol Conversion Test

Federal law draws a fundamental distinction between telecommunications services and information services. These two categories are mutually exclusive. *See National Ass'n of Reg. Util. Comm'rs v. FCC*, 851 F.3d 1324, 1325 (D.C. Cir. 2017); *see also* MPUC Br. 27; FCC Br. 5. Moreover, while telecommunications services may be subject to state common-carrier regulation, information services may not. *See Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“*Vonage 8th Cir. Opinion*”) (“[S]tate regulation of an information service conflicts with the federal policy of nonregulation.”); FCC Br. 6-7; *see also* MPUC Br. 26 (“A ‘telecommunications service’ is subject to common carrier regulation by the FCC and the states . . . while an ‘information service’ is not.”).

The federal Communications Act of 1934 (“Communications Act”), as amended by the Telecommunications Act of 1996 (“1996 Act”), defines an “information service” as one that “offer[s]” the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(24). The FCC long ago concluded that “protocol processing services constitute information

services” under this definition because they “transform or process ‘information.’” *Non-Accounting Safeguards Order* ¶ 104. And, in particular, an “end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information.” *Id.* Likewise, “protocol processing services that interpret and react to protocol information associated with the transmission of end-user content clearly ‘process’ such information.” *Id.*³

As the district court correctly held, VoIP services provide the capability for a net protocol conversion. *See* Summ. J. Op. 13-14 (MPUC Add. 13-14). When a VoIP customer calls someone who subscribes to a traditional telephone service, the VoIP provider must convert the IP data packets that enter its network into the TDM format that the other telephone service provider’s network requires. *See id.* at 3-4 (MPUC Add. 3-4).⁴ Conversely, when a VoIP customer receives a call from someone on a traditional telephone network, the call enters the VoIP provider’s network in TDM format and must be converted to IP for delivery to the VoIP

³ The FCC noted that its conclusion was “consistent with [its] existing practice of treating end-to-end protocol processing services as enhanced services” under the pre-1996 Communications Act. *Non-Accounting Safeguards Order* ¶ 105. The FCC found “no reason to depart from th[at] practice, particularly in light of Congress’s deregulatory intent in enacting the 1996 Act.” *Id.*

⁴ Such IP-to-TDM and TDM-to-IP conversions also typically occur on calls between customers of two different VoIP services, as most VoIP providers are interconnected with other VoIP providers through companies that provide TDM-based service over the public switched telephone network.

customer. Transforming data from IP to TDM, or from TDM to IP, is a net protocol conversion. *See Non-Accounting Safeguards Order* ¶ 104.⁵

All four other federal district courts that have confronted this issue — including two in this Circuit — have reached the same conclusion: VoIP is an information service because it offers the capability of performing a net protocol conversion.⁶ *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) (“*Vonage D. Ct. Opinion*”) (“The process of transmitting customer calls over the Internet requires Vonage to ‘act on’ the format and protocol of the information. For calls originating with one of Vonage’s customers, calls in the VoIP format must be transformed into the format of the [legacy phone network] before a [legacy phone] user can receive the call. For calls originating from a [legacy phone] user, the process of acting on the format and protocol is reversed.”), *aff’d on other grounds*, 394 F.3d 568 (8th Cir. 2004); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1081 (E.D. Mo. 2006) (“Net-protocol conversion is a determinative indicator of

⁵ Although, as the FCC notes, the *Non-Accounting Safeguards Order* did not “directly address[] the regulatory classification of VoIP service,” the district court here applied the net protocol conversion test in that order to “the factual particulars of how [VoIP] technology works and how it is provided,” as the FCC recognizes is the proper approach. FCC Br. 29-30.

⁶ As Charter notes (at 49-51), VoIP is an information service for additional reasons as well. Because the net protocol conversion test is sufficient to classify VoIP as an information service, this Court need not reach those other grounds.

whether a service is an . . . information service.”), *aff’d on other grounds*, 530 F.3d 676 (8th Cir. 2008); *PAETEC Commc’ns, Inc. v. CommPartners, LLC*, No. 08-Civ-0397 (JR), 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010) (stating that the *Vonage D. Ct. Opinion*’s “reasoning is persuasive” and “find[ing] that CommPartners’ transmission and net conversion of the calls is properly labeled an information service”); *Vonage Holdings Corp. v. New York State Pub. Serv. Comm’n*, No. 04 CIV. 4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004) (citing solely to the *Vonage D. Ct. Opinion* as authority for finding that Vonage was likely to succeed on the merits of its preemption claim). No federal court has reached the opposite conclusion.

B. The MPUC and Its *Amici* Are Wrong To Claim That the Net Protocol Conversion Test Does Not Apply

In arguing that the district court erred, the MPUC and its *amici* contend that the net protocol conversion test is no longer a dispositive means of identifying information services. The MPUC and its *amici* are incorrect, as the FCC explains in its *amicus* brief, in which it “reject[s]” their “contention that the *Non-Accounting Safeguards Order* has been implicitly overruled or otherwise disavowed by the FCC.” FCC Br. 29.

1. First, the MPUC is wrong to suggest (at 39-41) that the test, and the *Vonage D. Ct. Opinion* that applied it, has been rejected or superseded. As noted above, that court found that federal law preempted Minnesota from imposing

public utility regulation on Vonage’s VoIP service because that service offers the capability for a net protocol conversion and is therefore an information service under federal law. *See* 290 F. Supp. 2d at 999. The FCC reached the same ultimate result — federal preemption — but relied on different grounds. The FCC “preempt[ed]” Minnesota’s effort to regulate Vonage’s VoIP service because it is inseverably interstate for jurisdictional purposes, a conclusion that the FCC found applied “irrespective of the . . . classification” of Vonage’s service as a “telecommunications or information service.” *Vonage FCC Order*⁷ ¶ 14.

Therefore, the FCC did “not reach” the question whether VoIP services are information services or telecommunications services. *Id.* In upholding the FCC’s preemption decision, this Court noted that it was “sensible for the FCC to address [the inseverability] question first” in the *Vonage FCC Order* “without having to determine whether VoIP service should be classified as a telecommunication[s] service or an information service.” *Vonage 8th Cir. Opinion*, 483 F.3d at 578.⁸

The MPUC, therefore, is wrong to assert (at 20) that the FCC “rejected the *Vonage* [district] court’s analysis.” Indeed, the FCC, appearing as *amicus* here,

⁷ Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) (“*Vonage FCC Order*”).

⁸ As the MPUC notes (at 21-22), this Court also separately upheld the *Vonage D. Ct. Opinion* on the ground that the *Vonage FCC Order* required the same preemption of Minnesota law. *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 394 F.3d 568, 569 (8th Cir. 2004).

agrees: “Appellants are incorrect that the *Vonage [FCC] Order* . . . somehow held that fixed VoIP providers are subject to state regulation.” FCC Br. 27. That order “did not say or imply . . . that the state regulations could not *also* be preempted on separate grounds if VoIP were ultimately classified as an information service.” *Id.* at 27-28.

The MPUC is similarly wrong to claim support (at 22) from this Court’s statement, in upholding the *Vonage FCC Order*, that it “remains an open issue” whether the agency’s inseverability rationale extends to fixed VoIP services like Charter’s because the *Vonage FCC Order* contained only a “prediction” that the FCC would apply that rationale to those services. *Vonage 8th Cir. Opinion*, 483 F.3d at 583. Instead, the district court correctly recognized that, while the *Vonage D. Ct. Opinion* “does not control the outcome of this case” and “subsequent decisions in the *Vonage* line of cases” relied on a different rationale, the information service conclusion in the *Vonage D. Ct. Opinion* retains its “vitality.” Summ. J. Op. 14-15 (MPUC Add. 14-15).

2. Equally flawed are the MPUC’s repeated assertions that the FCC’s *USF Order*⁹ abrogated the net protocol conversion holding in the *Non-Accounting Safeguards Order* and the application of that holding in the *Vonage D. Ct. Opinion*. See, e.g., MPUC Br. 25, 27, 39-40, 42. In the *USF Order*, the FCC

⁹ Report and Order and Notice of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (“*USF Order*”).

noted that a VoIP provider “with the capability to track the jurisdictional confines of customers’ calls would no longer qualify for the preemptive effects of [the] *Vonage [FCC] Order*.” *USF Order* ¶ 56. But, as the FCC explained in that same paragraph, that is because the “central rationale justifying preemption set forth in the *Vonage [FCC] Order*” was that “it was impossible to determine whether calls by Vonage’s customers stay within or cross state boundaries.” *Id.*

The FCC did not proceed in the *USF Order* to address the question whether States would remain preempted from imposing public utility regulation on such VoIP services on the independent ground that they are information services. Instead, the FCC noted that it “ha[d] not yet classified interconnected VoIP services as ‘telecommunications services’ or ‘information services’” and that it did “not classify these services” in the *USF Order*. *Id.* ¶ 35. And the FCC, in its *amicus* brief, confirms that the *USF Order* did not “in any way suggest that federal law would permit states to impose legacy public-utility regulation on VoIP providers if VoIP were determined to be an information service.” FCC Br. 28-29. The *USF Order*, therefore, has no bearing on the validity of the district court’s judgment here.¹⁰

¹⁰ The MPUC also notes (at 27) that the FCC stated in the *USF Order* that “VoIP providers ‘provide’ telecommunications.” *USF Order* ¶ 40. Because *all* information services are “offer[ed] . . . via telecommunications,” 47 U.S.C. § 153(24), the MPUC is wrong to claim that the FCC’s statement is incompatible with classifying VoIP services as information services. The MPUC’s claim also

3. Lastly, the MPUC errs by suggesting that the 2015 *Open Internet Order*¹¹ has any bearing on this appeal. See MPUC Br. 46-48; see also Cherry Br. 12-15. The *Open Internet Order* did not discuss net protocol conversions at all, and for good reason: Internet traffic enters a broadband provider’s network in IP format, and then leaves that same network in IP format.¹² The *Open Internet Order*, therefore, gives no guidance on whether VoIP services, which convert voice signals between IP format and TDM format, are information services. See Summ. J. Op. 20 (rejecting the MPUC’s reliance on the *Open Internet Order* because VoIP uses an “IP-TDM protocol conversion” to “allow customers to bridge *different* networks”) (MPUC Add. 20).

C. The MPUC Is Wrong To Claim That the Net Protocol Conversion Test Was Not Satisfied

The MPUC also argues that, even if the net protocol conversion test applies here for purposes of identifying information services, VoIP services either do not offer the capability of a net protocol conversion or fall within one or more of the

conflicts with the FCC’s explicit statement in the *USF Order* that it was not determining the classification of VoIP services. See *USF Order* ¶ 35.

¹¹ Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (“*Open Internet Order*”), *petitions for review denied, United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petitions for cert. pending, Berninger v. FCC*, Nos. 17-498 *et al.* (U.S. filed Sept. 27 & 28, 2017).

¹² That is true even when the packets enter a broadband provider’s network in one version of IP format (version 4) and leave it in a different version of IP format (version 6). See MPUC Br. 46; *Open Internet Order* ¶ 375.

exceptions the FCC identified in the *Non-Accounting Safeguards Order*. The MPUC is wrong on all counts.¹³

1. The MPUC offers two arguments in claiming that VoIP service does not involve net protocol conversions. Each lacks merit.

First, the MPUC claims (at 48-49) that VoIP customers' calls enter and exit the VoIP provider's network in the same analog/TDM format. As Charter persuasively demonstrates, the MPUC's claim is based on a legal error about where Charter's network begins. *See* Charter Br. 31-33. More generally, federal law recognizes that *all* VoIP services that enable customers to exchange calls with subscribers to legacy TDM services "[r]equire[] [IP]-compatible customer premises equipment," or "CPE," which is what "transmits IP packets" to the VoIP provider's network. 47 C.F.R. § 9.3(3); *VoIP 911 Order*¹⁴ ¶ 24 & n.77. Thus, calls enter the VoIP provider's network in IP format after leaving the IP-compatible

¹³ *Amicus* Mid-Minnesota Legal Aid argues (at 7-11) that the district court should have deferred to the MPUC's conclusion that Spectrum Voice is a telecommunications service under federal law. But "[s]ince the FCC, and not the individual state commissions, is the agency with the power granted by Congress to administer the [federal Communications Act], through the formulation of policy, rulemaking, and regulation, [courts] do not afford deference to the [state public utility commission's] interpretation of the statute under *Chevron*." *Global NAPs, Inc. v. Verizon New England Inc.*, 396 F.3d 16, 23 n.7 (1st Cir. 2005); *see also* *WWC License, LLC v. Boyle*, 459 F.3d 880, 889-90 (8th Cir. 2006) ("We owe no deference to the [state Public Service] Commission's interpretations of federal law.").

¹⁴ First Report and Order and Notice of Proposed Rulemaking, *IP-Enabled Services*, 20 FCC Rcd 10245 (2005) ("*VoIP 911 Order*").

CPE, not after leaving the customer's telephone as analog voice signals. *See* Summ. J. Op. 17 (“Under FCC precedent, CPE is, by definition, outside the carrier's network.”) (MPUC Add. 17).

Second, the MPUC observes (at 45-46) that not every call placed by a VoIP customer involves a net protocol conversion, as calls between two customers of the same VoIP service can remain in IP format throughout. This is true but irrelevant. The Communications Act defines information services as those that “offer[] [the] *capability*” of transforming or processing information, and VoIP services do so. 47 U.S.C. § 153(24) (emphasis added); *see* Summ. J. Op. 14 (“At no point does the [C]ommunications Act suggest or require that a customer use an information service's transformative features all the time.”) (MPUC Add. 14).

2. The MPUC also argues (at 43-46) that, even if VoIP services offer the capability of net protocol conversions, VoIP services fall within at least one of three exceptions to the *Non-Accounting Safeguards Order*'s determination that services offering that capability are information services.¹⁵ None of these

¹⁵ Those three exceptions are the FCC's implementation of the portion of the information services statutory definition that excludes services used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 157(24); *see Non-Accounting Safeguards Order* ¶ 106. The FCC similarly recognized that the pre-1996 category of “adjunct-to-basic” services — on which *amicus* Professor Cherry relies (at 14) — is no broader than “the ‘telecommunications management exception’ to the statutory definition of information services.” *Non-Accounting Safeguards Order* ¶ 107.

exceptions applies to VoIP, and the district court correctly rejected the MPUC's arguments. *See* Summ. J. Op. 15-18 (MPUC Add. 15-18).

One exception applies where protocol processing is used “in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE).” *Non-Accounting Safeguards Order* ¶ 106. The MPUC asserts (at 44-45) that this exception applies because the protocol conversion occurs “to maintain compatibility with a customer's existing telephone equipment.” In fact, as the district court correctly found, the net protocol conversion — from IP-to-TDM or TDM-to-IP — occurs to enable communication between the VoIP provider's network and a legacy telephone service provider's TDM network. *See* Summ. J. Op. 16 (MPUC Add. 16); FCC Br. 17 (recognizing that the “conver[sion] between IP and TDM format” occurs “between Charter's network and the [public switched telephone network]”).

Another exception is for protocol processing “involving communications between an end-user and the network itself.” *Non-Accounting Safeguards Order* ¶ 106. Here, too, the MPUC erroneously focuses (at 45) on the communication between the VoIP customer and the VoIP provider. As just shown, that is not the relevant protocol conversion. *See* Summ. J. Op. 16 (MPUC Add. 16).

The final exception is for protocol processing “involving internetworking,” a term the FCC defined to mean a “conversion[] taking place *solely within* the

carrier’s network” so that there is “no net conversion to the end-user.” *Non-Accounting Safeguards Order* ¶ 106 (emphasis added). The MPUC concedes that the “conversion of some calls from TDM to IP is expressly for the purpose of connecting *two* communications networks.” MPUC Br. 45-46 (emphasis added). That conversion, therefore, does not meet the FCC’s definition of internetworking.¹⁶ Instead, an internetworking conversion occurs when a company “converts a TDM signal to VoIP and then back to TDM *before* handing it off.” *PAETEC*, 2010 WL 1767193, at *3 & n.3 (emphasis added); *see also* Summ. J. Op. 16-17 (same) (MPUC Add. 16-17).

II. CLASSIFYING VOIP SERVICES AS INFORMATION SERVICES FURTHERS THE PURPOSES OF THE COMMUNICATIONS ACT

The district court’s holding that VoIP services are information services is not only correct as a matter of statutory interpretation and precedent, but also furthers policies Congress sought to promote when it distinguished between telecommunications services and information services. Telecommunications services are subject to common-carrier, public utility regimes that arose decades ago to address the “virtual monopoly over the Nation’s telephone service” that historically existed. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994). But for newer, computer-based services, Congress declared that “[i]t is the

¹⁶ *Amicus* Professor Cherry rewrites the *Non-Accounting Safeguards Order* when she claims (at 15) that “internetworking” includes the “bridging of different networks.”

policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2); *see also id.* § 230(a)(4) (finding that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation”); *id.* § 230(f)(2) (defining “interactive computer service” to include “any information service”).

The rapid expansion and technological advancements of VoIP are a testament to the wisdom of Congress’s approach.¹⁷ As the FCC recognized in 2004, the “imposition of 50 or more additional sets of different economic regulations” on VoIP services “could severely inhibit [their] development.” *Vonage FCC Order* ¶ 37. And the FCC reiterates in its *amicus* brief the “threat[.]” of “disrupt[ion] [to] the national voice services market” if VoIP service were classified as a telecommunications service, which “risk[s]” subjecting those providers to “a patchwork of different and potentially conflicting [state] rules.” FCC Br. 26. Such overregulation would “ignore the [1996] Act’s express

¹⁷ Indeed, the most recent federal data show that VoIP providers that, like Charter, enable their customers to exchange calls with subscribers to legacy TDM networks had 60.3 million subscribers as of June 2016, while traditional telephone companies served 62.3 million lines. *See* Industry Analysis & Tech. Div., Wireline Competition Bureau, FCC, *Voice Telephone Services: Status as of June 30, 2016*, at 3 (Apr. 2017) (“*June 2016 Voice Telephone Services Report*”), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344500A1.pdf.

mandates and directives” and “risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet.” *Vonage FCC Order* ¶ 37.

The MPUC objects (at 51) that ensuring that VoIP services remain insulated from that patchwork of state common-carrier regulatory regimes will “undermine[] competitive neutrality” and give VoIP providers an unfair competitive advantage. Not so. Charter and other fixed VoIP providers already compete with over-the-top or nomadic VoIP providers — such as Vonage and Skype — which the MPUC recognizes (at 21-22) it cannot subject to its public utility regulation as a result of the *Vonage FCC Order*. Fixed VoIP providers also compete with wireless carriers, which are exempt from such state regulation by federal law. *See* 47 U.S.C. § 332(c)(3). This competition is extensive. According to the most current federal data, more than half of all American households — and 53 percent of those in the Midwest — have “cut the cord” and rely exclusively on wireless phones.¹⁸ In addition, the most current federal data show that over-the-top VoIP providers

¹⁸ Stephen J. Blumberg & Julian V. Luke, National Ctr. for Health Statistics, U.S. Dep’t of Health & Human Services, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016*, at 1, 7 (May 2017), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>. These data are already 10 months old. In light of the steady increase in cord-cutting over time, *see id.*, the current percentage of wireless-only households is likely higher.

doubled their number of subscribers between June 2010 and June 2016, and now have 6.6 million subscribers.¹⁹ Saddling fixed VoIP providers with a common-carrier, public utility regime designed for a long-gone period of monopoly service would reduce competition in the rapidly evolving and highly competitive marketplace for communications services.

Finally, as the FCC confirms (at 14-16, 20-25), the MPUC and its *amici* are wrong to claim that consumers will be harmed if VoIP service is classified as an information service. *See* MPUC Br. 51-52; AARP Br. 12-15; Mid-Minnesota Legal Aid Br. 15-17. The FCC has repeatedly held that, even if classified as an information service, VoIP providers remain subject to an array of consumer protection regulations that also apply to traditional telephone service providers. These include obligations to contribute to federal and state universal service funds,²⁰ to provide Telecommunications Relay Services to customers with hearing

¹⁹ Compare *June 2016 Voice Telephone Services Report* at 5 with Industry Analysis & Tech. Div., Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2010*, at 5 (Mar. 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-305297A1.pdf. The FCC's calculation of 6.6 million over-the-top VoIP subscribers does not include subscribers to certain popular providers such as Skype. *See June 2016 Voice Telephone Services Report* at 1 n.1.

²⁰ *See USF Order* ¶ 35; Declaratory Ruling, *Universal Service Contribution Methodology*, 25 FCC Rcd 15651, ¶ 1 (2010).

or speaking disabilities,²¹ to enable their customers to call 911 in an emergency,²² to protect customer proprietary network information,²³ to provide advance notice when discontinuing services,²⁴ to ensure that customers have backup power in case of an electrical outage,²⁵ and to allow customers to take their telephone numbers with them when switching to another provider.²⁶ And, as the federal regulator of all VoIP providers, the FCC remains in the best position to implement uniform rules that “apply nationwide” and promote technological innovation while also expanding access to communications for all consumers. FCC Br. 26.

CONCLUSION

This Court should affirm the decision of the district court.

²¹ See Report and Order, *IP-Enabled Services*, 22 FCC Rcd 11275, ¶ 1 (2007).

²² See *VoIP 911 Order* ¶ 1.

²³ See Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 22 FCC Rcd 6927, ¶ 54 (2007).

²⁴ See Report and Order, *IP-Enabled Services*, 24 FCC Rcd 6039, ¶ 12 (2009).

²⁵ See Report and Order, *Ensuring Continuity of 911 Communications*, 30 FCC Rcd 8677, ¶ 29 (2015).

²⁶ See Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, *Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531, ¶ 1 (2007).

Jonathan Banks
Diane G. Holland
UNITED STATES TELECOM
ASSOCIATION
601 New Jersey Avenue, N.W.
Suite 600
Washington, D.C. 20001
(202) 326-7300

*Counsel for Amicus Curiae
United States Telecom Association*

Christopher M. Heimann
Gary L. Phillips
David L. Lawson
AT&T SERVICES, INC.
1120 20th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 457-3055

Counsel for Amicus Curiae AT&T Inc.

Glenn S. Richards
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 663-8000
glenn.richards@pillsburylaw.com

*Counsel for Amicus Curiae the
Voice on the Net Coalition*

October 30, 2017

Respectfully submitted,

/s/ Scott H. Angstreich

Scott H. Angstreich
Daniel S. Guarnera
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
sangstreich@kellogghansen.com
dguarnera@kellogghansen.com

*Counsel for Amici Curiae
United States Telecom Association,
AT&T Inc., and Verizon*

William H. Johnson
Curtis L. Groves
VERIZON
1300 I Street, N.W., Suite 500E
Washington, D.C. 20005
(202) 515-2400

Counsel for Amicus Curiae Verizon

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,941 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

The undersigned further certifies that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman font.

In accordance with Eighth Circuit Rule 28A(h)(2), the electronic (PDF) version of the foregoing brief has been scanned for viruses and is virus-free.

/s/ Scott H. Angstreich
Scott H. Angstreich

CERTIFICATE OF SERVICE

I hereby certify that, on October 30, 2017, I electronically filed the foregoing Brief of USTelecom, the VON Coalition, AT&T, and Verizon as *Amici Curiae* in Support of Plaintiffs-Appellees Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, pursuant to Eighth Circuit Rule 25A.

/s/ Scott H. Angstreich
Scott H. Angstreich