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The Legal Battle over Telecommunications Service Classification in the U.S.: From Network Neutrality to Voice-Over-Internet Protocol Service

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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 AMICUS CURIAE
PROFESSOR BARBARA A. CHERRY
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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STATEMENT OF INTEREST

Amicus is a Professor and lawyer who teaches and writes in the area of communications law. This appeal raises questions of national importance concerning the regulatory treatment of a fixed, interconnected Voice over IP telephone service. Amicus believes that it is important that the Court have a complete understanding of the complex issues raised by this appeal, and of how the outcome of this appeal may influence the development of communications law. Amicus has no interest in the outcome of this litigation except as it relates to these concerns.

STATEMENT OF COMPLIANCE WITH RULES 29(a)(2) and 29(a)(4)(E)

This brief was authored by the undersigned. No party's counsel authored the brief in whole or in part. No party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than the undersigned, contributed money that was intended to fund preparing or submitting the brief.

Counsel for Appellants and Respondents consented to this filing.

ARGUMENT

Charter Advanced Services initiated this litigation by filing a complaint in the U.S District Court for the District of Minnesota, seeking a declaratory judgment that application of Minnesota state public utilities and common carriage requirements to Charter Advanced's fixed, interconnected VoIP service is preempted by the federal Communications Act, and seeking an injunction to enjoin enforcement of Minnesota law. This case comes before this Court upon appeal by the Minnesota Public Utilities Commission (MPUC) as to the federal district court's ruling on cross-motions for summary judgment.

The district court narrowly framed the issue for summary judgment in this case: whether Charter Phone is a "telecommunications service" or an "information service" under the Communications Act of 1934, as modified by the Telecommunications Act of 1996 (47 U.S.C. § 153(46), § 153(20)). This brief discusses numerous flaws in the district court's analysis of this question.

Revealing the flaws in the district court's analysis begins with recognition that the district court's framing of the issue is itself problematic. The core issue is whether the Minnesota Public Utilities Commission is preempted from asserting jurisdiction to regulate the fixed, interconnected VoIP service, known as Charter Phone. Of relevance to this case, there are two potential legal bases for asserting that the Telecommunications Act preempts state law. One is that Minnesota state

law at issue in this case is preempted pursuant to the impossibility exception articulated by the FCC in *Vonage II. Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004) (“*Vonage II*”). Alternatively, a second is that Minnesota state law is preempted because Charter Phone is classified as an information service. In this regard, preemption may derive from implied or conflict preemption, but not express preemption.

Each of these legal bases requires proper analysis of the correct standards of legal inquiry. Unfortunately, the district court did not conduct the proper legal inquiry for evaluating either legal basis for federal preemption of state law. Instead, the district court conflated the inquiries, created confusion, misapplied law and precedent, and reached erroneous conclusions.

Furthermore, proper legal inquiry based on the facts of this case also clarifies the scope of appropriate remedies to be rendered by this Court. As explained herein, based on the facts of this case, this Court should reverse the district court’s summary judgment ruling outright on the basis that the impossibility exception established by the FCC in *Vonage II* does not apply. Should this Court reach the issue of service classification, the facts of this case also support reversal because Charter Phone is a telecommunications service under the

Communications Act. However, this Court should not affirm the district court's summary judgment ruling that Charter Phone is an information service, not only because the facts do not support the district court's ruling, but also because any decision to preempt Minnesota's state authority over fixed, interconnected VoIP service should be made by the Federal Communications Commission (FCC) upon a referral under primary jurisdiction.

I. STATE REGULATION OF CHARTER PHONE IS NOT PREEMPTED UNDER THE *VONAGE* CASES

A. The District Court's Legal Analysis of the *Vonage* Cases is Flawed

The district court agreed with Charter Advanced's argument that Charter Phone provides a net protocol conversion between IP and TDM that renders it an information service under *Vonage I*. *Vonage Holdings Corp. v. Minn. Pub. Utilities Commission*, 290 F. Supp. 2d 993 (2003) ("*Vonage I*"). However, *Vonage I* is not the appropriate test for classification of a service as a telecommunications or information service.

The district court incorrectly stated that decisions by the FCC and the 8th Circuit Court of Appeals, subsequent to a Minnesota federal district court's decision in *Vonage I*, classified Vonage as an information service. Specifically, the district court claimed "that subsequent decisions in the Vonage line of cases [by the FCC and the 8th Circuit Court of Appeals] chose to classify Vonage as an

information service based on reasons different from those deployed by the Court in *Vonage I*, they did not in any sense overrule that decision. Thus, while *Vonage I* does not control the outcome of this case, its vitality remains.” Add. 14-15.

Based on this assertion, the district court then applied a “transform” test under *Vonage I*. “In this specific factual context, the touchstone of the information services inquiry is whether [Charter Phone] acts on the customer’s information—here a phone call—in such a way as to ‘transform’ that information.” Add. 13. The district court concluded at the end of the order that the Charter Phone offering is an information service “because inherent in its operation is the ability to engage in protocol conversion—thereby ‘transforming’ the customer’s information for purposes of the Telecommunications Act of 1996.” Add 20.

Contrary to the district court’s claims, however, the FCC and Eighth Circuit line of *Vonage* cases specifically rejected addressing whether interconnected VoIP service is an information service. Rather, under *Vonage II*, the FCC found that federal law preempted state regulation of *Vonage* IP service, a nomadic form of VoIP, based on the impossibility exception because *Vonage* had no ability to distinguish its intrastate voice call traffic from its interstate traffic, making it impossible to ensure that state regulation of *Vonage*’s intrastate traffic would not cross invade the FCC’s exclusive jurisdiction over *Vonage*’s interstate traffic; *in reaching its determination, the FCC specifically declined to classify Vonage’s*

service as a telecommunications or information service. This FCC ruling, that federal preemption of state regulation is based on the impossibility exception and not on service classification, was expressly recognized by the Circuit Court of Appeals in *Minn. Pub. Utils. Comm’n v. FCC v. FCC*, 483 F.3d 570, at 577-578 (8th Cir. 2007) (“*Vonage III*”).

Furthermore, the preemptive effect of Vonage IP does not apply to VoIP providers who can track the geographic endpoints of their traffic, referred to as “fixed” VoIP service. In other words, the impossibility exception applicable to nomadic VoIP, such as Vonage, does not apply to fixed, interconnected VoIP services where the divide between state-regulated intrastate voice call traffic and FCC-regulated interstate traffic is clearly defined, such as is the case with Charter Phone. *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 par. 34 (2006) (“*USF Order*”), *aff’d in relevant part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007) (“*Vonage IV*”).

Thus, given FCC and Circuit Court decisions since *Vonage I*, it is clear that Minnesota’s state regulation of Charter Phone is not preempted under the impossibility exception articulated by the FCC in *Vonage II*. In fact, the FCC said the opposite, that a fixed, interconnected VoIP provider with the capability of tracking the jurisdiction of customers’ calls, like Charter Advanced, would be

subject to state regulation. *USF Order*, 21 FCC Rcd at 7546 par. 56; *Vonage III*, 483 F.3d 570, at 580, 583.

Moreover, to the extent that the issue is whether Charter Phone is a telecommunications or information service, the district court erred as a matter of law in concluding that the purported “transformation test” of *Vonage I* is the proper basis for determining classification of a service or whether state authority over Charter Phone is preempted. As discussed in Section II, the classification of a service as a telecommunications or information service is based on a functional approach, not a transformation test.

B. The Facts in the Present Case are Distinguishable from *Vonage I*

In addition to misusing the transform test in *Vonage I* as the basis for evaluating service classification of Charter Phone, the district court also failed to recognize critical distinguishing facts between provision of Vonage IP service in *Vonage I* and Charter Phone service. The factual differences are important not only for purposes of understanding why the impossibility exception is not applicable to Charter Phone’s fixed, interconnected VoIP service, but also for purposes of considering classification of a service under the proper legal inquiry, the functional approach, discussed in Section II. For this reason, significant factual differences are reviewed here.

First, as discussed above, Charter can clearly distinguish its intrastate and interstate voice call traffic from one another. Thus, the rationale for applying the impossibility exception to state regulation of Vonage voice traffic does not apply in this case.

Second, in *Vonage I*, the court found “[e]ssential to using Vonage’s services is that a third-party Internet service provider (“ISP”), provides a broadband Internet connection. Vonage does not function as an ISP for its customers” 290 F.Supp.2d at 995. Moreover, Vonage does not provide, nor even resell, the underlying physical facilities; instead, a third party must provide the physical facilities and access to the Internet.

Similarly, in a different proceeding, the FCC classified Pulver’s Free World Dialup (FWD) offering as an information service for various reasons, one of which is that FWD “members must have an existing broadband Internet access service as Pulver does not offer any transmission service or transmission capability”. *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307, 3309 (2004) (footnote omitted). “Rather, FWD members ‘bring their own broadband’ transmission to interact with the FWD server.” *Id.* at 3312 footnote omitted). In addition, FWD is free of charge to its users. *Id.* at 3312-3313.

Unlike Vonage and Pulver, Charter Communications, through its intermediate entities and affiliates provides the physical facilities, the CLEC operations, and the VoIP service to Charter Phone customers. That is, Charter Communications, of which Charter Advanced is a wholly-owned subsidiary, provides the physical facilities and transmission service and capability to Charter Phone customers, who in turn receive and pay one bill to Charter Communications. This constitutes the provision of telecommunications service under the functional approach, discussed in the next section.

II. THE DISTRICT COURT HAS NOT PROPERLY RECOGNIZED OR APPLIED THE FUNCTIONAL APPROACH FOR SERVICE CLASSIFICATION

In ruling on the motion to dismiss in this case, the district court declined to determine whether the functional approach was a more appropriate framework for analyzing Charter Phone than that propounded in the *Non-Accounting Safeguards Order. Implementation of the Non-Accounting Safeguards of Sections 271 & 271 of the Communications Act of 1934, as amended*, First Report & Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”). In ruling on the cross-motions for summary judgment, the district court then found that Charter Phone is an information service even if the functional approach is applied, by rejecting the applicability of the

telecommunications management exception in the definition of information service. Add 18-19.

As explained below, in its rulings the district court did not properly acknowledge the primacy of the functional approach to determining service classification, nor did it properly apply the functional approach. Subsection A explains the functional approach to service classification. Subsection B explains how the district court misapplied that approach by rejecting applicability of the telecommunications management exception to Charter Phone's IP-TDM protocol conversion capability. Finally, Subsection C explains why the facts of this case support a finding that Charter Phone is a telecommunications service.

A. The Functional Approach to Service Classification

The origins of the functional approach to service classification lie in the legal status of common carriers under the common law, continuing under federal statutory law of common carriers and FCC jurisdictional authority. In its *2015 Open Internet Order*, the FCC explains and applies the functional approach of service classification in declaring that broadband Internet access services are telecommunications services. *Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5763 par. 363 (2015) ("*2015 Open Internet Order*").¹

¹ In so doing, the FCC frequently cites and quotes the research paper I coauthored with Prof. Jon Peha of Carnegie Mellon University that was filed in the underlying (Footnote Continued on Next Page.)

The classification of a service as a “telecommunications service” under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, is based on the *functionality* of the service. In turn, this functionality is evaluated in two parts. The first part of functionality evaluates the nature of the function – does it constitute “telecommunications”, that is, “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent or received” (47 U.S.C §153(43)). The second part of functionality evaluates whether telecommunications (the first part of functionality) is being “offer[ed] ... 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” (47 U.S.C. §153(46)). It is this second part of functionality that differentiates private carriage from common carriage. The FCC evaluates the second part of functionality based on the offering

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2014 Notice of Proposed Rulemaking proceeding. Barbara A. Cherry & Jon Peha (December 22, 2014), “The Telecom Act of 1996 *Requires* the FCC to Classify Commercial Internet Access as a Telecommunications Service,” *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Federal Communications Commission. The FCC cites the Cherry & Peha paper nine times in Section IV of the Order that contained the declaratory ruling that broadband Internet access services are telecommunications services. (Section IV of the Order consists of paras. 306-430.) The web link to this paper is provided here. <https://ecfsapi.fcc.gov/file/60001010836.pdf>

of the service from the customer's perspective, which is subject to *Chevron*² deference to agency interpretation given the ambiguity as to the meaning of "offering". *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

When the functionality of service consists of both parts, then the service *is* a telecommunications service. That is, the legal classification of the service is *nondiscretionary*. "A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so" (*National Association of Regulatory Commissioners v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976)). This mandatory classification based on the functionality of the service arose under the common law and is maintained under the statutory framework.

In its *2015 Open Internet Order*, declaring that certain functions such as DNS and caching are information services, the FCC also explains the telecommunications management exception to the definition of what constitutes an information service is a third factor that must be analyzed in applying the functional approach. Under the definition of information service, the functional approach requires evaluation of three parts: (1) the nature of the function in terms of some statutorily specified capabilities; (2) the "offering" of the capabilities; and

² *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

(3) an express exception, known as the telecommunications management exception. The definition of information service is provided below, with the telecommunications management exception italicized.

The term “information service” means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, *but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.* 47 U.S.C. § 153(20) (emphasis added).

Thus, under the telecommunications management exception, a capability that might otherwise be an information service is expressly *not* an information service if such capability is used for the management, control, or operation of a telecommunications system or the management of a telecommunications service. In the *2015 Open Internet Order*, the FCC found that functions such as DNS and caching were not information services because they fall within the telecommunications management exception.

B. The District Court Improperly Classified IP-TDM Protocol Conversion of Charter Phone as an Information Service

Given the functional approach to service classification, the district court did not properly follow controlling law on how to classify a service as an information service. More specifically, the district court misapplied the FCC’s older *Non-Accounting Safeguards Order* of 1996, which is clear from the FCC’s more recent

analysis in the *2015 Open Internet Order*. As a result, the district court did not properly apply the telecommunications system management exception to the definition of information service when it considered the protocol conversion capability of Charter Phone.

The district court analyzed Charter Phone in terms of the three categories of protocol processing services that the FCC has treated as basic (telecommunications) services, rather than as enhanced (information) services under its *Computer Inquiries* framework.³ These three categories of protocol processing telecommunications services are explained in para. 106 of the *Non-Accounting Safeguards Order*, and the MPUC found that Charter Phone falls within each of them.⁴

³ In what is referred to as the *Computer Inquiries* proceedings during the 1970s and 1980s, the FCC created a framework for determining whether data processing services should be regulated under Title II of the Communications Act. The FCC created a framework of mutually exclusive categories of service: basic services and enhanced services. Basic services were telecommunications services regulated under Title II, but enhanced services were not. The FCC has found that this framework continues to be reflected in the definitions of telecommunications service and information service, respectively, under the Telecommunications Act. *Federal –State Joint Board on Universal Service*, 13 FCC Rcd 11501 (1998) (“*Universal Service Report*”). A comprehensive discussion of the *Computer Inquiries* proceedings is provided in Robert Cannon (2003), “The Legacy of the Federal Communications Commission’s Computer Inquiries,” *Fed. Comm. L. J.*, 55(2), 167-207.

⁴ “These categories include protocol processing: 1) involving communications between and end-user and the network itself...rather than between or among users; 2) in connection with the introduction of a new basic network technology...; and 3) (Footnote Continued on Next Page.)

The district court disagreed. Add. 15-16. However, in so doing, the district court ignored para. 107 of the *Non-Accounting Safeguards Order* regarding “adjunct-to-basic” services. The FCC explains in para. 107: (1) why “adjunct-to-basic” services are classified as telecommunications services, even though they may fall within a literal reading of the enhanced service definition; and (2) such adjunct-to-basic services are covered by the telecommunications management exception to the statutory definition of information service under the 1996 Act.

Para. 107. We further find...that services that the Commission has classified as “adjunct-to-basic” should be classified as telecommunications services, rather than information services. In the NATACentrex order, the Commission held that the enhanced services definition did not encompass adjunct-to-basic services. Although the latter services may fall within the literal reading of the enhanced service definition, they facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service. Similarly, we conclude that “adjunct-to-basic” services are also covered by the “telecommunications management exception” to the statutory definition of information services, and therefore are treated as telecommunications services under the 1996 Act. *Non-Accounting Safeguards Order*, 11 F.C.C. Rcd 21905 at 21958 (citations omitted).

It is par. 107 that provides the critical link to understanding the FCC’s application of the telecommunications system management exception to DNS and caching in the *2015 Open Internet Order*, which the district court also rebuffed in

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involving internetworking”. 11 F.C.C. Rcd 21905 at 21957-21958 (citation omitted).

its summary judgment order. In the *2015 Open Internet Order*, DNS and caching are services that are “adjunct-to-basic” broadband Internet access service, which the FCC classified as a telecommunications services. What the district court did not recognize is that, analogous to DNS and caching, the protocol conversion at issue is used to facilitate the Charter Phone voice transmission service offered to consumers and is, therefore, adjunct to the telecommunications service offered by Charter.

This functional role of an “adjunct-to-basic” service was also not recognized in the district court’s attempt to distinguish Charter Phone from DNS and caching when it asserted that the main benefit of DNS and caching was enhanced network efficiency: “By contrast, the purpose of IP-TDM protocol conversion is not to enhance the efficient operation of Charter Advanced’s network, but rather to allow consumers to bridge *different* networks” (slip op p. 20, emphasis in original). Yet the bridging of different networks is precisely the third category of protocol processing – i.e. internetworking –which was expressly acknowledged in the *Non-Accounting Safeguards Order* as a basic – i.e. telecommunications – service.⁵

⁵ IP-TDM protocol conversion allows calls between Charter’s network and the public switched telephone network (PSTN). It is this very protocol conversion that defines “interconnected VoIP,” such as the Charter Phone offering from Charter Advanced. Therefore, Charter Phone clearly falls within internetworking exception, which is the third category listed in the *Non-Accounting Safeguards Order*. See, footnote 3, *supra*.

Finally, the district court's analysis would necessarily lead to a conclusion that all fixed, interconnected VoIP services are information services - a conclusion that finds no support in FCC precedent. The purpose of the IP-TDM protocol conversion is to allow interconnection between Charter's network and the PSTN. This is true for all interconnected VoIP service since interconnected VoIP is defined by this interconnection to the PSTN. Therefore, if this protocol conversion is the basis for classifying a service as an information service, then all fixed interconnected VoIP services would be information services – a ruling that the FCC has specifically declined to make.

C. Under the Facts in this Case, Charter Phone is a Telecommunications Service

Applying the functional approach in the FCC's *2015 Open Internet Order* does not support the finding that Charter Phone is an information service. Rather, the undisputed facts on the record establish that Charter Phone is a telecommunications service under the functional approach to service classification, which requires analyzing a service from the customer's perspective.

First, Charter Phone is an interconnected VoIP service as defined by the FCC. As such, it transmits voice calls across the PSTN and is, therefore, a telecommunications service. An independent, unaffiliated third party does not provide the telecommunications function –the transmission service and capability –

used by customers of Charter Phone. This differentiates Charter Phone from Vonage, as explained in Section I.B.

Second, Charter Phone is marketed, advertised and offered to customers as a telecommunications service. Charter Phone is marketed to the public for a fee “as a full-feature voice offering to consumers without getting into the underlying technologies;” Charter Phone is not marketed as VoIP; there is no marketing of the “protocol conversion” of Charter Phone; the advertising of Charter Phone to customers is positioned as competing with phone companies; and customers are billed by and make payments to one entity, Charter Communications, Inc., the parent company. *See* Appellants Opening Brief at 5-6.

Third, as explained in Section II.B, the IP-TDM protocol conversion of Charter Phone is an internetworking function that falls under the telecommunications management exception to the definition of information service and therefore should be treated as a telecommunications service. The FCC found in the *2015 Open Internet Order* that the offering of broadband Internet access service “along with some capabilities that would otherwise fall within the information service definition...do not turn broadband Internet access service into a functionally integrated information service.” 30 FCC Rcd at 5765. Analogously, the offering of IP-TDM capability of Charter Phone does not turn the

telecommunications service offered by Charter Communications into an integrated information service.

Finally, that Charter Communications has chosen to internally reorganize its corporate structure with a series of wholly owned subsidiaries is irrelevant given these facts. Under the functional approach, from the customers' perspective, Charter Phone is being offered as a telecommunications service.

III. THE DISTRICT COURT SHOULD HAVE CONSIDERED REFERRAL OF THE SERVICE CLASSIFICATION TO THE FCC UNDER PRIMARY JURISDICTION

As the district court considered the cross-motions for summary judgment, the Defendant-Appellant Commissioners of the Minnesota Public Utilities Commission specifically raised the alternative of referring the issue of service classification of Charter Phone to the FCC under the doctrine of primary jurisdiction.⁶ The FCC has signaled it intends to address the classification of interconnected VoIP services as a general matter. The FCC has opened a proceeding to consider classification of such VoIP services, which is still pending. *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004)

⁶ See Memorandum of Law in Support of Defendants' Motion for Summary Judgment, Civil No. 15-3935 (SRN/KMM) (filed Nov. 1, 2016), pp. 28-29.

(“*IP-Enabled Services NPRM*”). The district court failed, however, to even address the matter of referral to the FCC in its order upon summary judgment.

Based on the facts and procedural posture of this case, referral of the issue to the FCC is not necessary. Rather, this Court should simply reverse the district court’s decision for two reasons. First, current law set forth by the FCC and recognized by this Court in *Vonage III* holds that state authority over fixed, interconnected VoIP service such as Charter Phone has not been preempted. The analysis can and should stop there. Second, even if the analysis goes further into service classification, based on the facts of this case, Charter Phone is clearly a telecommunications service, and not an information service, under the functional approach established by the FCC. Therefore, again, Minnesota’s state authority to regulate Charter Phone is not preempted.

CONCLUSION

Charter Phone is a fixed, interconnected VoIP telephone service under Minnesota law that is not preempted by federal law under the impossibility exception set forth by the FCC in *Vonage I*. In the event this Court decides to reach the issue of service classification under the Telecommunications Act of 1996, Charter Phone is properly classified as a telecommunications service; it is clearly not an information service as the IP-TDM protocol conversion falls within

the telecommunications management exception to the definition of information service.

In no event should this Court uphold the district court's summary judgment ruling that Charter Phone is an information service and that the Minnesota Public Utilities Commission is preempted from asserting jurisdiction to regulate the fixed, interconnected VoIP service, known as Charter Phone. This is not only because the facts do not support the district court's ruling, but also because any decision to preempt Minnesota's state authority over fixed, interconnected VoIP service should be made by the FCC.

Respectfully submitted,

Dated: September 5, 2017

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CERTIFICATE OF COMPLIANCE

1. I certify that this document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4313 words.
2. I certify that this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Barbara A. Cherry

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I certify that on September 6, 2017, I electronically filed the foregoing 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.

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