No. 17-2290

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARTER ADVANCED SERVICES (MN), LLC;
CHARTER ADVANCED SERVICES VIII (MN), LLC,
Plaintiffs-Appellees,

v.

NANCY LANGE, in her official capacity as Chair of the Minnesota Public Utilities Commission; DAN M. LIPSCHULTZ, in his official capacity as Commissioner of the Minnesota Public Utilities Commission; JOHN TUMA, in his official capacity as Commissioner of the Minnesota Public Utilities Commission; MATTHEW SCHUERGER, in his official capacity as Commissioner of the Minnesota Public Utilities Commission; KATIE CLARK SIEBEN, in her official capacity as Commissioner of the Minnesota Public Utilities Commission,
Defendants-Appellants.

On Appeal from the United States District Court for the
District of Minnesota in Case No. 15-cv-3935 (Nelson, J.)

BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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BRIEF OF THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission is the expert federal agency responsible for administering the Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151 *et seq.*, and has been empowered by

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Congress to regulate all interstate and foreign communications by wire or radio. Because the regulation of communications services "involve[s] a 'subject matter [that] is technical, complex, and dynamic,'" Congress has "le[ft] federal telecommunications policy in this technical and complex area to be set by the Commission." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992, 1002–03 (2005). The FCC submits this brief to explain how Minnesota's sweeping assertion of regulatory authority over VoIP service threatens to disrupt the national voice services market and to address how relevant FCC orders provide more measured and appropriate mechanisms for regulating VoIP service.

BACKGROUND

A. Traditional and VoIP Telephone Technology

Traditional telephone service transmits sound as an analog electrical signal using a technology known as "circuit switching," which establishes a dedicated transmission pathway (or "circuit") between the caller and the receiver. A technique known as Time-Division Multiplexing (TDM) allows multiple circuit-switched calls to be carried simultaneously over the same physical wires by alternating between calls many times per second and dedicating fixed time slices to each call. This

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traditional circuit-switched telephone network, which originates and terminates calls as electrical signals transmitted using TDM, is referred to as the Public Switched Telephone Network or PSTN.

Voice over Internet Protocol (VoIP) technology uses a technique known as "packet switching" instead of circuit switching. Packet switching divides sound into small packets of digital data that are each individually routed to their destination using Internet Protocol (IP). *See, e.g.*, *Cable One, Inc. v. Ariz. Dep't of Revenue*, 304 P.3d 1098, 1100–01 (Ariz. Ct. App. 2013). Unlike the traditional circuit-switched network, which reserves a dedicated transmission pathway for each call, individual VoIP packets may travel different routes between the caller and the receiver and are reassembled at the destination.

VoIP technology, which has undergone rapid proliferation in recent years, now comes in several different varieties. *See IP-Enabled Services NPRM*, 19 FCC Rcd. 4863, 4871–76 ¶¶ 10–15, 4886–90 ¶¶ 35–37 (2004); *Stevens Report*, 13 FCC Rcd. 11501, 11541–44 ¶¶ 83–90 (1998). A VoIP service is "interconnected" if it can make calls to and receive calls from the traditional Public Switched Telephone Network using standard telephone numbers. *See* 47 C.F.R. § 9.3. Interconnected VoIP generally

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enables a customer to do everything that the customer could do using traditional telephone service. *See VoIP E911 Order*, 20 FCC Rcd. 10245, 10256–58 ¶¶ 23–24 (2005), *pet. for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006). Other VoIP services are non-interconnected, including "one-way" VoIP services (which can make calls to or receive calls from the PSTN, but not both) and Internet-only VoIP services (which exist as stand-alone Internet calling products and as a feature in products such as games and webinar software). *See*, *e.g.*, *id.* at 10277 ¶ 58; *IP-Enabled Services NPRM*, 19 FCC Rcd. at 4876–78 ¶¶ 17–19. This case involves an interconnected VoIP service, and this brief uses the term "VoIP" to refer to interconnected VoIP unless otherwise noted.

VoIP service comes in both "fixed" and "nomadic" forms. *See Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007) (*Vonage III*). Fixed VoIP operates from a single geographic location, much like traditional landline telephone service. *Ibid.* Fixed VoIP typically operates as a "facilities-based" service, meaning that the VoIP service provider also provides the physical transmission facilities connecting the customer to the Internet or the PSTN. Nomadic VoIP, by contrast, can be used from anywhere that the caller has access to a broadband Internet

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connection and is not tied to any particular geographic location. *Ibid.* Nomadic VoIP typically operates as an "over-the-top" service, meaning that the VoIP service provider does not provide physical transmission facilities and the customer must have a separate Internet connection to provide the underlying transmission capability.

B. Classification of Communications Services Under the Communications Act

The Communications Act distinguishes between two mutually exclusive categories of communications services: "telecommunications services" and "information services." *See generally Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975–77 (2005) (*Brand X*); *Stevens Report*, 13 FCC Rcd. at 11520–23 ¶¶ 39–43.

"Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public * * * regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications," in turn, "means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received." *Id.* § 153(50). Put differently, telecommunications services "enable[] the consumer to transmit an ordinary-language message to another point, with no computer

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processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network—such as via a telephone or facsimile." *Brand X*, 545 U.S. at 976.

"Information service," on the other hand, is generally defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(24), but excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service," *ibid.* In other words, unlike the basic transmission capability offered by telecommunications services, information services integrate data-processing capabilities that go beyond mere transmission. *See Brand X*, 545 U.S. at 990–91, 997–99.

The Communications Act instructs that a communications provider "shall be treated as a common carrier * * * only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). Telecommunications services thus are subject to comprehensive utility-style regulation as set forth in Title II of the Communications Act,

whereas information services cannot be subject to any such common-carriage requirements unless authorized by some other provision of federal law. *See Verizon v. FCC*, 740 F.3d 623, 649–51 (D.C. Cir. 2014).

C. Federal Preemption of State Communications Regulation

As relevant here, state regulation of VoIP service may be preempted by federal law in several independent ways.

1. Federal Authority over Interstate and Intrastate Communications

With respect to *interstate* communications, federal law broadly preempts all state communications regulation. State regulation of interstate communications is expressly preempted because, in dividing regulatory authority over communications services between the federal and state governments, the Communications Act confers the federal government with exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged * * * in such communication." 47 U.S.C. § 152(a). Thus, for interstate communications, Congress has "occup[ied] the field" of communications regulation to the exclusion of state law. *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 490–92 (2d Cir. 1968).

For purely *intrastate* communications, on the other hand, the Communications Act expressly preserves state jurisdiction, but only so long as state regulations do not directly conflict with any applicable FCC rules. *See* 47 U.S.C. § 152(b) ("[C]harges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service" fall under state jurisdiction, "[e]xcept as otherwise provided" under certain provisions administered by the FCC); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377–83 (1999) (holding that the FCC may prescribe rules governing intrastate communications when implementing provisions added by the Telecommunications Act of 1996); *Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 948 (8th Cir. 2000). States retain broad authority over intrastate communications, but state law remains subordinate to federal regulations and policies administered by the FCC.

To determine whether a call is interstate or intrastate, the Communications Act employs an "end-to-end analysis" based on the geographic endpoints of the communication. *See Vonage Preemption Order*, 19 FCC Rcd. 22404, 22413 ¶ 17 (2004), *pet. for review denied*, *Minn. Pub. Utils. Comm'n v. FCC* (*Vonage III*), 483 F.3d 570 (8th Cir. 2007) (*Vonage III*). When both endpoints are within the boundaries of

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the same state, a call is treated as intrastate; when the two endpoints are in different states, the call is considered interstate. *Ibid.*; *see* 47 U.S.C. § 153(28).

When it is impossible or impracticable to divide some aspect of a communication into separate interstate and intrastate components, the FCC may preempt state regulation under a doctrine known as the "impossibility exception" to state jurisdiction. *See Vonage Preemption Order*, 19 FCC Rcd. at 22413–15 ¶¶ 17–19, 22418–24 ¶¶ 23–32 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986), and *Pub. Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990)). Otherwise, if states were free to enact laws that necessarily regulate both intrastate and interstate communications, state regulation could impermissibly interfere with the exclusive federal authority over interstate communications.

The FCC applied the impossibility exception in the *Vonage Preemption Order*, which this Court upheld in *Vonage III*, to preempt state regulation of Vonage's over-the-top nomadic VoIP service. The record in that proceeding indicated that there was no practical or reliable way for Vonage to identify a user's geographic location, which "ma[de] jurisdictional determinations * * * based on an end-point approach

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difficult, if not impossible." 19 FCC Rcd. at 22418–19 ¶¶ 23–24. Because there was "no practical way to sever [these calls] into interstate and intrastate communications," and thus no way for a state to regulate "only * * * intrastate calling functionalities without also reaching interstate aspects," the FCC preempted state regulation of Vonage's nomadic VoIP service. *Id.* at 22423–24 ¶ 31. This Court affirmed the FCC's ruling that state regulation of nomadic VoIP service is preempted, *Vonage III*, 483 F.3d at 578–81, but the Court cautioned that preemption under the impossibility exception might not apply to fixed VoIP providers who could reliably determine the location of a customer's calls, *id.* at 583.

2. The Federal Policy of Nonregulation for Information Services

Under the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation.[1] *See*

[1] The federal policy of nonregulation "refers primarily to economic, public utility-type regulation, as opposed to generally applicable commercial consumer protection statutes, or similar generally applicable state laws." *Vonage Preemption Order*, 19 FCC Rcd. at 22417 n.78; *see also id.* at 22405 ¶ 1. While the FCC has imposed certain non-economic obligations on VoIP service when necessary to address matters such as customer safety and network management, it has generally refrained from imposing economic regulation on VoIP

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generally Pulver Ruling, 19 FCC Rcd. 3307, 3316–23 ¶¶ 15–25 (2004); *see also Vonage III*, 483 F.3d at 580–81. This overarching federal policy of nonregulation for information services takes root in several provisions administered by the FCC.

First, by directing that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services," 47 U.S.C. § 153(51), the Communications Act expressly forbids federal or state common-carriage regulation of information services. *See Verizon*, 740 F.3d at 649–51; *In re Investigation into Regulation of Voice over Internet Protocol*, 70 A.3d 997, 1006–07 (Vt. 2013) (*Vermont VoIP*) ("[S]tate regulations [of information services] are preempted * * * to the extent they conflict with federal law or policy."). Information services therefore cannot be subject to traditional public-utility regulation or other common-carriage requirements, like those found in Title II of the Communications Act, unless those requirements are independently authorized by some other provision of federal law.

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service. *See*, *e.g.*, *VoIP Discontinuance Order*, 24 FCC Rcd. 6039, 6039 ¶ 3, 6047–48 n.49 (2009).

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Second, in Section 230 of the Communications Act, Congress declared a federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2), (f)(2); *see Vonage Preemption Order*, 19 FCC Rcd. at 22425–26 ¶¶ 34–35. This provision makes clear that "federal authority [is] preeminent in the area of information services" and that information services "should remain free of regulation." *Pulver Ruling*, 19 FCC Rcd. at 3316 ¶ 16.

Third, Section 706 of the Telecommunications Act of 1996 directs the FCC to "encourage the deployment * * * of advanced telecommunications capability" through "measures that promote competition in the local telecommunications market," including by "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 1302(a). Consistent with this congressional directive, the FCC has found that keeping information services free from any federal or state economic regulation by maintaining a federal policy of nonregulation facilitates the development of Internet applications and increases demand for broadband service, which will in turn drive further broadband investment and deployment.

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See Vonage Preemption Order, 19 FCC Rcd. at 22426–27 ¶ 36; *Pulver Ruling*, 19 FCC Rcd. at 3319–20 ¶¶ 18–19.

D. FCC Regulation of VoIP Service

Although the FCC has occasionally been asked to address the overarching regulatory classification of VoIP service, it has thus far declined to resolve that issue,[2] finding that it instead can address specific regulatory needs through more targeted measures.

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[2] *See, e.g.*, *USF–ICC Transformation Order*, 26 FCC Rcd. 17663, 18013–14 ¶ 954 (2011) (explaining that "the Commission has not classified interconnected VoIP services or similar one-way services as 'telecommunications services' or 'information services'") (footnote omitted), *pets. for review denied*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). The FCC did issue two declaratory rulings in early 2004 addressing two specific uses of early VoIP technology. *See IP-in-the-Middle Ruling*, 19 FCC Rcd. 7457 (2004) (ruling that a traditional telephone service that originated and terminated calls on the PSTN, but used IP format internally to transmit long-distance calls between local exchanges, was a telecommunications service); *Pulver Ruling*, 19 FCC Rcd. 3307 (2004) (ruling that an Internet-only application that enabled users to make peer-to-peer VoIP calls, but was not involved in call transmission and instead "act[ed] as a type of directory service," should be treated as an information service). Those rulings were limited to the specific services at issue and did not speak to any other use of VoIP technology or to the regulatory classification of VoIP more generally. *See IP-in-the-Middle Ruling*, 19 FCC Rcd. at 7457 ¶ 1 ("We emphasize that our decision is limited to the type of service described by AT&T in this proceeding"); *Pulver Ruling*, 19 FCC Rcd. at 3308 n.3 ("We thus limit the determinations in this Order to Pulver's present FWD offering" and "specifically decline to extend our classification to * * * communications that originate or terminate

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But while the agency has not yet resolved the overarching classification issue, the FCC has nonetheless issued an extensive series of orders regulating many different aspects of VoIP service as needed. Among other things, these orders have addressed:

- access charges[3] and interconnection obligations[4] for VoIP–PSTN traffic;
- federal[5] and state[6] universal service contribution requirements;

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on the public switched telephone network * * * . Rather, we will address the legal status of those communications in [a subsequent] rulemaking."). Later that year, the FCC opened a proceeding seeking comment on the proper regulatory classification of VoIP and other IP-enabled services, and that proceeding remains open. *See IP-Enabled Services NPRM*, 19 FCC Rcd. 4863 (2004); *see also USF–ICC Transformation NPRM*, 26 FCC Rcd. 4554, 4582 ¶ 73 (2011) (seeking further comment on whether and how to classify VoIP service).

[3] *USF–ICC Transformation Order*, 26 FCC Rcd. at 18025–27 ¶¶ 968–970 (allowing VoIP providers to recover access charges through a LEC partner); *In re FCC 11-161*, 753 F.3d at 1147–49, 1154–58; *see also USF–ICC Second Recon. Order*, 27 FCC Rcd. 4648, 4657–68 ¶¶ 27–42 (2012).

[4] *USF–ICC Transformation Order*, 26 FCC Rcd. at 18028–29 ¶¶ 972–974 (prohibiting blocking of VoIP traffic passing through the PSTN); *In re FCC 11-161*, 753 F.3d at 1149–54.

[5] *Interim USF Contribution Order*, 21 FCC Rcd. 7518, 7536–49 ¶¶ 34–62 (2006), *pet. for review denied in relevant part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1235–41 (D.C. Cir. 2007) (*Vonage IV*).

[6] *Kansas/Nebraska Contribution Ruling*, 25 FCC Rcd. 15651 (2010).

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- access to federal universal service subsidies;[7]
- E-Rate support for service to schools and libraries;[8]
- customer privacy protections;[9]
- E911 and related public safety requirements;[10]
- rules governing assistance to law enforcement;[11]
- accessibility requirements and funding to support communications access for people with disabilities;[12]
- discontinuance obligations;[13]

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7 *USF–ICC Transformation Order*, 26 FCC Rcd. at 17684–86 ¶¶ 62–64 & n.67, 17688–90 ¶¶ 67–71; *In re FCC 11-161*, 753 F.3d at 1044–54.

8 *2009 E-Rate Order*, 25 FCC Rcd. 6562, 6567–68 ¶¶ 11–13 (2009).

9 *2007 Customer Privacy Order*, 22 FCC Rcd. 6927, 6954–57 ¶¶ 54–59 (2007).

10 *VoIP E911 Order*, 20 FCC Rcd. 10245 (2005), *pet. for review denied*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *VoIP Battery Backup Order*, 30 FCC Rcd. 8677 (2015).

11 *VoIP Law Enforcement Assistance Order*, 20 FCC Rcd. 14989 (2005), *pet. for review denied*, *Am. Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

12 *VoIP Disability Access Order*, 22 FCC Rcd. 11275 (2007) (service and equipment accessibility requirements and TRS fund contributions); *2015 Hearing Aid Compatibility Order*, 30 FCC Rcd. 13845, 13855–56 ¶¶ 18–20 (2015). After the *VoIP Disability Access Order* was adopted, and while the FCC's proposal to extend its hearing aid compatibility rules to VoIP service was pending, *see id.* at 13851–52 ¶¶ 12–13, Congress codified these requirements by enacting the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (codified in scattered sections of Title 47).

13 *VoIP Discontinuance Order*, 24 FCC Rcd. 6039 (2009).

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- phone number access, administration, and portability;[14]
- rural call completion rules;[15] and
- numerous reporting requirements.[16]

The FCC has been able to address each of these issues under sources of authority separate from its Title II authority to regulate telecommunications service as common carriage, and thus the agency has not needed to definitively resolve the overarching regulatory classification of the myriad forms of VoIP service at this time.

E. Charter's Spectrum Voice Service

Charter's Spectrum Voice service provides interconnected, fixed VoIP telephone service to residential subscribers. Add. 2–4, 49 n.18; PUC Order at 4. Spectrum Voice works with customers' existing telephone handsets and home wiring. PUC Order at 4. Sound is transmitted to

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[14] *VoIP Numbering Order I*, 22 FCC Rcd. 19531 (2007) (local number portability and numbering administration); *VoIP Numbering Order II*, 30 FCC Rcd. 6839 (2015) (direct number access), *pet. for review dismissed*, *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 851 F.3d 1324 (D.C. Cir. 2017) (*NARUC*).

[15] *2013 Rural Call Completion Order*, 28 FCC Rcd. 16154, 16172–74 ¶¶ 35–39 (2013).

[16] *VoIP Outage Reporting Order*, 27 FCC Rcd. 2650 (2012) (outage reporting); *2008 Broadband Data Collection Order*, 23 FCC Rcd. 9691, 9704–07 ¶¶ 25–31 (2008) (domestic subscriber data collection); *2013 Int'l Telecomms. Reporting Order*, 28 FCC Rcd. 545, 564–70 ¶¶ 73–86 (2013) (international telecommunications reporting requirements).

and from the user's handset as an analog electrical signal that travels along the customer's internal home wiring until it reaches a device known as a Multimedia Terminal Adapter, which converts the analog signal into IP data packets and transmits them onto Charter's IP network (or vice versa). Add. 3. When a customer makes a call to or receives a call from a PSTN user, the call is converted between IP and TDM format by a "Media Gateway" that sits between Charter's network and the PSTN. Add. 10.

Charter initially operated its residential VoIP service (originally known as Charter Phone) through its Charter Fiberlink subsidiaries, which provided local telephone service as defined and regulated by Minnesota law. Add. 5, 67. In March 2013, Charter transferred its residential VoIP customers to its Charter Advanced subsidiaries, which do not operate under Minnesota's traditional telephone regulatory scheme. *Ibid.* In July 2015, the Minnesota Public Utility Commission ("Minnesota PUC") issued an order directing Charter Advanced to comply with Minnesota's legacy telephone regulations; Charter maintains that federal law preempts the PUC's attempt to apply state public-utility regulations to its fixed VoIP service. Add. 6, 67–68.

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ARGUMENT

I. The Minnesota PUC's Sweeping Assertion Of Regulatory Authority Over VoIP Service Threatens To Disrupt The National Voice Services Market.

The Minnesota PUC's sweeping demand that Charter comply with the state's full panoply of legacy telephone regulations, even though the FCC has not classified VoIP as a telecommunications service, threatens to disrupt the national voice services market. By subjecting fixed VoIP service to an extensive array of state public-utility requirements, the PUC's Order is likely to stifle competition and innovation in emerging VoIP technology and could deprive consumers of access to valuable new services.

The potential ramifications of the PUC's actions here extend far beyond the confines of Minnesota. A judicial declaration that VoIP is a telecommunications service—which is what Appellants seek in this appeal—could potentially subject VoIP providers not only to Minnesota's state regulatory scheme, but also to the full panoply of federal common-carriage requirements found in Title II of the Communications Act. And if the Minnesota PUC's efforts to regulate VoIP service were upheld, all 50 states could potentially seek to impose a patchwork of separate and

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potentially conflicting requirements on VoIP service. *Cf. Vonage Preemption Order*, 19 FCC Rcd. at 22427 ¶ 37 ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations"); *Pulver Ruling*, 19 FCC Rcd. at 3323 ¶ 25 ("[I]f Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 states and other jurisdictions"). Thus, if the Minnesota PUC's Order were allowed to stand, it could throw the national voice services market into disarray.

To our knowledge, no other state requires VoIP providers to comply with such a broad range of legacy telephone regulations. Other states have had no apparent difficulty overseeing VoIP providers within the mechanisms established by existing FCC orders, raising serious doubt as to whether the Minnesota PUC's unprecedented order here is either necessary or appropriate. And the Minnesota PUC's far-reaching order is particularly questionable because each of the specific regulatory needs invoked by the PUC is already addressed, as we next discuss, by existing FCC orders.

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II. The Regulatory Concerns Invoked By The PUC Can Be Adequately Addressed Under Existing FCC Orders, Irrespective Of How VoIP Service Is Classified.

While the FCC has not yet resolved the overarching regulatory classification of VoIP service, the agency has nonetheless played an active role in VoIP regulation by issuing a series of orders addressing significant issues raised by VoIP service. Many of those orders provide mechanisms for states to address legitimate regulatory needs arising from the proliferation of VoIP technology and to do so irrespective of how VoIP service is classified.

In fact, existing FCC orders provide substantial guidance as to many of the specific regulatory requirements at the core of the dispute here. The Minnesota PUC stated that its order was necessary to address specific regulatory concerns pertaining to (1) entry certification, (2) funding for state public assistance programs, and (3) protection against slamming (*i.e.*, the practice of changing a customer's telephone service provider without the customer's knowledge). *See* PUC Order at 1. But the PUC appears to have overlooked that each of these regulatory concerns is the subject of existing FCC orders, and the PUC Order fails to meaningfully engage with those orders or to explain why its concerns cannot be adequately addressed through existing legal mechanisms.

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1. As this Court recognized in *Vonage III*, 483 F.3d at 580–81, the FCC has already addressed entry-certification requirements for VoIP service by declaring state entry conditions to be harmful. *See Vonage Preemption Order*, 19 FCC Rcd. at 22415–18 ¶¶ 20–22. In 1999, the FCC eliminated all entry-certification requirements for interstate telephone service, finding that entry requirements stifle competition and innovation. *Section 214 Streamlining Order*, 14 FCC Rcd. 11364, 11370–75 ¶¶ 8–18 (1999). Inasmuch as it would be impossible or economically impracticable for a new entrant to provide interstate service without offering intrastate service, state entry conditions threaten to impede entry into the interstate communications market and thereby conflict with federal policy. Thus, regardless of whether VoIP is classified as a telecommunications service or an information service, Minnesota's state entry-certification requirements appear to interfere with the federal objective of promoting entry into the voice services market. *See Vonage III*, 483 F.3d at 580–81; *Vonage Preemption Order*, 19 FCC Rcd. at 22415–18 ¶¶ 20–22.

2. The FCC currently requires VoIP providers to contribute to federal public assistance programs to support communications services for low-income consumers and people with disabilities, and existing FCC

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orders provide a mechanism for states to administer similar programs at the state level, such as Minnesota's Telephone Assistance Plan (TAP), Minn. Rev. Stat. §§ 237.69–.72, and Telecommunications Access Minnesota (TAM), *id.* §§ 237.50–.56, irrespective of how VoIP service is classified.[17]

In 2006, the FCC ruled that VoIP providers, like providers of traditional telephone service, must collect and remit federal universal service contributions. *Interim USF Contribution Order*, 21 FCC Rcd. 7518, 7536–47 ¶ 34–57 (2006), *pet. for review denied in relevant part*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1235–41 (D.C. Cir. 2007) (*Vonage IV*). The following year, the states of Kansas and Nebraska petitioned the FCC for a declaratory ruling to address whether they can likewise require VoIP providers to collect state universal service contributions. In the *Kansas/Nebraska Contribution Ruling*, 25 FCC Rcd. 15651 (2010), the FCC ruled that states can require VoIP providers to collect universal service contributions if the state requirements are

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[17] TAP mirrors the federal Lifeline universal service program that subsidizes communications service for low-income consumers, *see* 47 C.F.R. §§ 54.400 *et seq.*, and TAM is analogous to federal programs that support communications access for people with disabilities, *see id.* §§ 64.601 *et seq.*

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properly structured.[18] *See also* 47 U.S.C. § 254(f) ("A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service."). The FCC has also ruled that VoIP providers must contribute to the federal TRS fund to support communications access for people with disabilities and must comply with service and equipment accessibility requirements. *VoIP Disability Access Order*, 22 FCC Rcd. 11275 (2007).

States can thus require VoIP providers to collect and remit surcharges to fund state public assistance programs so long as those requirements are properly structured to comply with certain federal rules.[19] Appellants and their *amici* are therefore incorrect in arguing (*e.g.*, Appellants' Br. 13–14, 51–52) that Minnesota will be unable to

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[18] The FCC thereby abrogated this Court's decision in *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009) (*Vonage V*), which had interpreted the *Vonage Preemption Order* to preempt state universal service contribution requirements.

[19] Among other things, states must "calculate the amount of their universal service assessments in a manner that is consistent with the [federal] rules," which "give [VoIP] providers three options" for allocating revenues between interstate and intrastate calls. *Kansas/Nebraska Contribution Ruling*, 25 FCC Rcd. at 15658 ¶ 17. States must also "have a policy against collecting universal service assessments [for calls] that an interconnected VoIP provider has properly allocated to another state under that state's rules" in order to avoid "duplicative state assessments." *Id.* at 15660 ¶ 21.

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maintain state public assistance programs unless VoIP is classified as a telecommunications service.

3. The FCC likewise has been addressing how consumer-protection rules, including rules against slamming,[20] should apply to VoIP providers. In 2004, the FCC sought comment on whether the federal Truth-in-Billing rules, which prohibit slamming and other practices, should apply to VoIP providers. *IP-Enabled Services NPRM*, 19 FCC Rcd. at 4910–11 ¶ 72. The FCC sought further comment on this issue in 2009 and again in 2011. *2009 Truth-in-Billing NOI*, 24 FCC Rcd. 11380, 11387–88 ¶¶ 14–18, 11399–401 ¶¶ 61–63 (2009); *2011 Truth-in-Billing NPRM*, 26 FCC Rcd. 10021, 10050 ¶ 69, 10054–55 ¶¶ 83–85 (2011).

Ultimately, in final rules promulgated in 2012, the FCC found that "the record does not demonstrate a need for rules to address * * * VoIP customers at this time." *2012 Truth-in-Billing Order & FNPRM*, 27 FCC

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[20] "Slamming" is the practice of changing a customer's telephone service provider without the customer's knowledge. *2012 Truth-in-Billing Order & FNPRM*, 27 FCC Rcd. 4436, 4440 n.17 (2012). The federal rules against slamming are primarily administered by the states. *See 2000 Truth-in-Billing Order*, 15 FCC Rcd. 8158, 8169–72 ¶¶ 22–28 (2000). The federal rules permit states to adopt and enforce their own rules only if those state requirements are consistent with the federal requirements. 47 C.F.R. § 64.2400(c).

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Rcd. 4436, 4455 ¶ 47 (2012). Nevertheless, the FCC pledged "to ensure that our consumer protection efforts are sufficient to address [VoIP] services, if necessary," promised to "continue to monitor [the VoIP industry] to determine whether and when additional Commission action may be appropriate," and invited further comment. *Id.* ¶47 & n.145.

Earlier this year, the FCC proposed to further amend the Truth-in-Billing rules and again sought comment on whether they should be extended to VoIP providers. *Slamming & Cramming NPRM*, 32 FCC Rcd. 6022, 6026–27 ¶ 12, 6028–29 ¶ 18, 6031 ¶ 25 (2017). If the Minnesota PUC has concerns about slamming by VoIP providers, that rulemaking presents an appropriate forum to address them.[21]

* * *

If the Minnesota PUC had other regulatory needs (beyond the three recited in its order) that it wished to address, but was unsure of its authority to do so, it could have raised those concerns with the FCC by

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[21] Appellants' *amici* express other concerns about consumer protection, customer privacy, public safety, and continuity of service, but they are incorrect that VoIP must be classified as a telecommunications service to regulate these matters. *See supra* pp. 14–16. The FCC has consistently acted to preserve regulatory authority over VoIP service when necessary, ensuring that no parade of horribles is likely to ensue if the decision below is affirmed.

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requesting a declaratory ruling or a new rulemaking, as the Kansas and Nebraska state commissions did when they sought to extend state universal service contribution requirements to VoIP providers. That would allow the FCC to offer a solution that would apply nationwide and avoid the risk that VoIP providers will be subject to a patchwork of different and potentially conflicting rules across more than 50 different state and local jurisdictions. Instead, the Minnesota PUC has adopted a blunderbuss approach to VoIP regulation that threatens to disrupt the national voice services market.

III. The FCC Authorities Discussed By The District Court Remain Valid, But Do Not Purport To Resolve The Proper Regulatory Classification Of VoIP Service.

Because the FCC has not yet resolved how VoIP service generally should be classified under the Communications Act, we take no position on that issue in this brief. If the Court nevertheless reaches the issue, we offer the following observations to aid the Court's understanding of certain past FCC authorities.

The district court examined several past FCC pronouncements, including the 1996 *Non-Accounting Safeguards Order* and the 1998 *Stevens Report*. Those FCC pronouncements remain good law: Contrary

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to Appellants' contentions, the FCC has neither explicitly nor implicitly disavowed or overruled them, nor would an FCC order cease to be valid precedent merely because time has passed and economic or technological circumstances have changed. At the same time, the principles adopted and applied in past orders do not always fully resolve the questions that arise when new technologies are introduced into the telecommunications marketplace. Thus, in our view, the various FCC authorities invoked by the district court and the parties continue to provide important guidance on how to interpret and apply the Communications Act, but none purports to decide (nor should be read to definitively resolve) the regulatory classification of VoIP service in general or of the particular VoIP service at issue in this case.

1. At the outset, Appellants are incorrect (Br. 23–25, 39–40) that the *Vonage Preemption Order* or the *Interim USF Contribution Order* somehow held that fixed VoIP providers are subject to state regulation.

In ruling that state regulation of Vonage's nomadic VoIP service was preempted because it was impossible to distinguish between interstate and intrastate communications, the *Vonage Preemption Order* did not say or imply—as Appellants would have it (Br. 23–25)—that the

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state regulations could not *also* be preempted on separate grounds if VoIP were ultimately classified as an information service.[22] On the contrary, the *Vonage Preemption Order* expressly refrained from deciding how VoIP should be classified or how that classification would affect state regulation. *See* 19 FCC Rcd. at 22411 ¶ 14 & n.46; *accord Vonage III*, 483 F.3d at 577–78 (recognizing that the *Vonage Preemption Order* "deferred resolution" of how VoIP should be classified); *Vermont VoIP*, 70 A.3d at 1005 (same).

Similarly, the FCC's observation in the *Interim USF Contribution Order* that "an interconnected VoIP provider with the capability to track the jurisdictional confines of customers' calls would no longer qualify for the preemptive effects of our *Vonage [Preemption] Order*," 21 FCC Rcd. at 7546 ¶ 56, does not mean that state regulation of VoIP service could not be independently preempted for other reasons. Like the *Vonage Preemption Order*, the *Interim USF Contribution Order* did not address the regulatory classification of VoIP service, nor did it in any way suggest

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[22] For the same reason, when this Court affirmed an earlier injunction against state regulation of Vonage based on the FCC's intervening *Vonage Preemption Order*, *see Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (per curiam) (*Vonage II*), it neither repudiated nor endorsed the district court's conclusion that Vonage was an information service.

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that federal law would permit states to impose legacy public-utility regulation on VoIP providers if VoIP were determined to be an information service.

2. The FCC's *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905 (1996), likewise did not purport to classify VoIP service. On the one hand, as the district court observed, the FCC recognized in that order that protocol conversion can sometimes fall within the definition of an information service. *See id.* at 21956 ¶ 104. On the other hand, the same order identified situations where services that involve protocol conversion should nonetheless be classified as telecommunications services. *Id.* at 21957–58 ¶¶ 106–107; *cf. Stevens Report*, 13 FCC Rcd. at 11526–27 ¶¶ 49–52 & n.106.

Thus, while we reject Appellants' contention (Br. 41–42) that the *Non-Accounting Safeguards Order* has been implicitly overruled or otherwise disavowed by the FCC, we do not believe that this order, standing alone, directly addresses the regulatory classification of VoIP service. Determining the regulatory classification of a specific communications service turns "on the factual particulars of how [a] technology works and how it is provided," *Brand X*, 545 U.S. at 991—

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questions that the abstract discussion in the *Non-Accounting Safeguards Order* did not seek to address.

3. The *Stevens Report*, 13 FCC Rcd. 11501 (1998)—sometimes referred to as the *Universal Service Report*—also did not purport to resolve the regulatory classification of VoIP service. The *Stevens Report* expressed a tentative view that phone-to-phone interconnected VoIP could be a telecommunications service if a provider holds itself out as offering standard telephone service and the service works with ordinary home telephone equipment. *Id.* at 11543–44 ¶ 88–89. At the same time, the *Stevens Report* expressly and repeatedly stated that it was not deciding that issue, because "[w]e do not believe * * * that it is appropriate to make any definitive pronouncements [about VoIP classification] in the absence of a more complete record focused on individual service offerings." *Id.* at 11544 ¶ 90; *accord id.* at 11503 ¶ 3, 11508 ¶ 14, 11529 ¶ 55, 11541 ¶ 83. Instead, the FCC "defer[red] a more definitive resolution of these issues pending the development of a more fully developed record[,] because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible." *Id.* at 11544 ¶ 90.

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The *Stevens Report* remains an important source of guidance for courts and regulators, but the tentative discussion in that 1998 report purported to offer only general observations and disclaimed any effort to definitively resolve the classification of VoIP service. Meanwhile, VoIP technology has evolved considerably in the nearly two decades since the *Stevens Report* was issued, *cf. IP-Enabled Services NPRM*, 19 FCC Rcd. at 4886–90 ¶¶ 35–37, as has the economic and regulatory context in which it operates. Thus, while the principles set forth in the *Stevens Report* remain valid, we do not believe that the *Stevens Report* resolves the regulatory status of VoIP service today.

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CONCLUSION

Although the proper regulatory classification of VoIP service has not yet been resolved by the FCC (contrary to Appellants' suggestions), numerous FCC orders provide important guidance on this and other issues. The Minnesota PUC's sweeping demand that Charter comply with Minnesota's full panoply of legacy telephone regulations does not meaningfully engage with these FCC orders and raises serious questions as to whether the PUC Order can be squared with the federal regulatory scheme.

Dated: October 26, 2017

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Scott M. Noveck, hereby certify that on October 26, 2017, I caused the foregoing Brief of the Federal Communications Commission 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.

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