

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
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In the Matter of the Complaint of the Minnesota
Department of Commerce Against the Charter
Affiliates Regarding Transfer of Customers

ISSUE DATE: July 28, 2015

DOCKET NO. P-6716,5615/C-14-383

ORDER FINDING JURISDICTION
AND REQUIRING COMPLIANCE
FILING

PROCEDURAL HISTORY

I. The Department's Complaint

On September 26, 2014, the Minnesota Department of Commerce (the Department) filed a complaint against four affiliated telecommunications companies referred to herein as “Charter” or “the Company.” Those companies are Charter Fiberlink CCO, LLC; Charter Fiberlink CC VIII, LLC; Charter Advanced Services (MN), LLC; and Charter Advanced Services VIII (MN), LLC.

All four companies provide fixed, interconnected VoIP (Voice over Internet Protocol) service, which—at least as provided by these companies—is essentially indistinguishable from conventional telephone service. The major difference is that, with VoIP, the voice signal is transmitted using packet switching with Internet protocols rather than circuit switching.

The Department alleged that the two Charter Fiberlink companies, which hold Minnesota certificates of authority to provide intrastate telephone services, had transferred all their residential customers to the two Charter Advanced Services companies, which do not hold Minnesota certificates of authority, and had done so without Commission authorization or notice to customers.

The Department claimed that these transfers—and the service arrangements resulting from them—violated numerous provisions of Minnesota’s telecommunications statute and rules. The alleged violations include, among others, (1) slamming and loading, (2) operating without a certificate of authority, (3) acquiring another company’s property without permission, (4) withdrawing from a service territory without notice to the Commission or customers, and (5) failure to collect and remit surcharges to fund assistance programs for communication-impaired and low-income Minnesotans.¹

¹ Telecommunications Access Minnesota (TAM) and Telephone Assistance Program (TAP).

The Department requested that the Commission find that Charter had knowingly and intentionally violated the statutes and rules cited in the complaint and require the Company to bring its service into compliance with the applicable statutes, rules, and Commission orders.

II. Charter's Initial Response

On October 22, 2014, Charter filed a response to the complaint. Charter argued that the Commission had no subject-matter jurisdiction over the complaint because the Federal Communications Commission (FCC) has preempted state regulation of VoIP services, the service category into which all Charter's services fall. Similarly, Charter argued that it had committed none of the statutory or rule violations alleged in the complaint, because none of the statutes or rules at issue applied to Charter.

III. The Commission's Order Requiring Answer to Complaint and Setting Timelines

On November 18, 2014, the Commission issued its Order Requiring Answer to Complaint and Setting Timelines. The Commission took jurisdiction over the complaint, found that there were reasonable grounds to investigate the Department's claims, and directed Charter to file an answer within 30 days. The Commission also established timelines for parties to comment on the answer.

With regard to the jurisdictional issue raised by Charter, the Commission concluded that neither the FCC nor the Eighth Circuit Court of Appeals had found state regulation of fixed VoIP service to be preempted. However, the Commission acknowledged that the issue had not been fully briefed and took jurisdiction "until such time as it has been demonstrated that jurisdiction over the matter is lacking."

IV. Charter's Answer

In its answer, filed December 18, 2014, Charter continued to assert that state regulation of interconnected VoIP service is preempted by federal law and FCC decisions. In addition, Charter argued that, federal preemption aside, Minnesota law does not grant this Commission authority over VoIP because VoIP is not "telephone service."

Charter responded to the factual allegations in the Department's complaint, asserted several affirmative defenses, and requested that the Commission refer the case to the Office of Administrative Hearings for a contested-case proceeding to resolve the factual issues raised by the Department's complaint.

V. Subsequent Filings and Proceedings

From January 16 to February 2, 2015, the following parties filed comments or reply comments:

- Office of the Attorney General – Residential Utilities and Antitrust Division (the OAG),
- The Department,
- Charter,
- The Commission of Deaf, DeafBlind and Hard of Hearing Minnesotans,²
- The Legal Services Advocacy Project,³ and
- The Minnesota Community Action Partnership.⁴

With the exception of Charter, these parties all urged the Commission to exercise regulatory authority over Charter’s VoIP service.

On May 6, 2015, the Commission heard oral argument from the parties and, on May 8, met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Summary of Commission Action

For the reasons set forth below, the Commission finds that Charter’s VoIP service constitutes local telephone service subject to the Commission’s authority under Minn. Stat. ch. 237 and related rules. Moreover, the Commission finds that the FCC has not preempted state regulation of the fixed, interconnected VoIP service provided by Charter.

Accordingly, the Commission orders Charter to make a compliance filing (1) explaining how it intends to comply with this order and (2) providing a draft notice to its customers informing them that Charter provides a regulated telephone service and outlining the customer protections provided by law.

II. Factual Background

A. Traditional Telephone Service

Traditional telephone networks—historically referred to as the “public switched telephone network” or “PSTN”—rely on two key technologies to complete voice calls. The first of these, circuit switching, establishes a dedicated pathway between the caller and the recipient for the

² This governor-appointed commission advocates on behalf of the 20 percent of Minnesotans who are deaf, deafblind, or hard of hearing.

³ The Legal Services Advocacy Project, a statewide division of Mid-Minnesota Legal Aid, represents the interests of low-income Minnesotans through legislative and administrative advocacy.

⁴ Minnesota Community Action Partnership is a statewide advocacy organization whose member agencies provide a range of services to families in need.

duration of a call. The second technology, time-division multiplexing (TDM), allows multiple circuit-switched calls to be routed over the same network simultaneously.

B. Voice over Internet Protocol (VoIP)

Recent years have seen increasing use of packet-switching rather than circuit-switching technology to deliver a voice calling service similar to that offered by traditional telephone companies. This newer voice service is known as “Voice over Internet Protocol” (VoIP).

In a VoIP transmission, the analog signal from the caller’s handset is “packetized”—converted into small packets containing both digitized voice data and “header” information, including the sender, the destination, and the packet’s relationship to the other packets that make up the transmission. Rather than traveling to the recipient through a dedicated path as in a circuit-switched network, the individual packets of a VoIP call are independently routed according to the recipient address in the packet header. This packetized transmission of voice calls generally allows for more efficient network usage than the more traditional circuit-switched transmission.

C. Charter’s VoIP Service

Charter’s VoIP service is “fixed,” meaning that customers only receive service in one location, typically their home. The “fixed” label distinguishes Charter’s offering from the nomadic VoIP services offered by other companies, which allow customers to use a computer to place and receive phone calls at any location with broadband Internet access.

Charter’s service is also an “interconnected” VoIP service, which means that its customers can engage in two-way voice calling not only with other Charter VoIP users but also with all telephone-service customers over the public switched telephone network. When a Charter customer places a call to a recipient on the public switched telephone network, Charter performs a “protocol conversion,” changing VoIP traffic to TDM format before passing it on to a circuit-switched carrier. The reverse conversion (TDM to IP) occurs with transmissions passing from the PSTN to Charter’s network.⁵ This protocol conversion is invisible to the end user.

To a customer, the VoIP service offered by Charter is essentially indistinguishable from traditional phone service. The service allows customers to place calls from their home using a traditional touch-tone phone to recipients anywhere on the public switched telephone network.⁶ As acknowledged by Charter, calls using Charter’s VoIP service are placed using traditional phone numbers assigned by the North American Numbering Plan. The service uses a customer’s “existing phone wires, phones, and wall jacks.”⁷ Moreover, Charter’s VoIP service “does not require an Internet connection.”⁸ The service “uses Internet protocol for transporting calls,” but

⁵ Charter clarified at hearing that some calls between Charter customers do not require this protocol conversion.

⁶ See Department’s Complaint, Attachment E at 4 (“Customers with touch-tone phones will not need to purchase new equipment to use Charter Phone service.”).

⁷ *Id.*

⁸ *Id.* at 6.

those “calls never touch the public Internet.”⁹ According to Charter, “[t]he difference between Charter Phone [Charter’s VoIP service] and the phone companies’ traditional wire line service is that Charter takes advantage of the latest technology, which allows [Charter] to deliver crystal-clear calls and advanced calling features.”¹⁰

III. Charter’s VoIP service is local telephone service, over which the Commission has jurisdiction under state law.

A. Introduction

Telecommunications services in Minnesota are governed by Minnesota Statutes chapter 237, referred to herein as Minnesota’s telecommunications statute. This statute gives the Commission exclusive authority over the provision of local telephone service: “[T]he commission has the exclusive authority . . . to . . . authorize any person to construct telephone lines or exchanges or to otherwise furnish local service to subscribers in any municipality of this state, and to prescribe the terms and conditions upon which construction or service delivery may be carried on.”¹¹

“Local service” is defined by rules promulgated under this statute as “dial tone, access to the public switched network, and any related services provided in conjunction with dial tone and access.”¹²

B. Positions of the Parties

1. Charter

Charter asserted that its interconnected VoIP service is not telephone service regulated by Minnesota law. The Company stated that the term “telephone service” is not defined in the statute and argued that the Legislature did not intend the phrase to encompass VoIP, a technology that was unknown in 1915, when the telecommunications statute was enacted.

Charter pointed to two occasions when the Minnesota Legislature amended other statutes to specifically refer to “packet-based” or “voice over Internet protocol” service and argued that these actions suggest that the Minnesota Legislature did not intend “telephone service” to encompass interconnected VoIP.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Minn. Stat. § 237.16, subd. 1(a).

¹² Minn. R. § 7812.0100, subp. 33.

In 2005, the Legislature amended a statute requiring telecommunications service providers to offer toll-free 911 service, and to assess fees to support that service, by specifying that these requirements applied to both “switched” and “packet-based” providers.¹³ And in 2008, it amended a statute listing the transactions subject to sales tax, which include “the furnishing for a consideration of telecommunications services.”¹⁴ The Legislature expanded the definition of “telecommunications services” to include

transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing, without regard to whether the service is referred to as *voice over Internet protocol* services or is classified by the Federal Communications Commission as enhanced or value added.¹⁵

Charter asserted that these actions would not have been necessary if VoIP were already regulated as a telephone service.

Finally, Charter argued that the Commission must consider the “substantive evils” that the Legislature sought to remedy through the telecommunications statute in deciding whether to classify fixed VoIP as a telephone service.

In support of its argument, Charter cited *Minnesota Microwave, Inc. v. Public Service Commission*, a Minnesota Supreme Court decision from 1971.¹⁶ In that case, this Commission’s predecessor agency asserted jurisdiction over a unidirectional transmission system intended to transmit educational television materials from the Minneapolis campus of the University of Minnesota to terminals in Rochester.

The Supreme Court held that the system did not provide “telephone service” because it did not permit two-way communication. The Court further observed that the system did not threaten the “usual monopolistic evils” that the Legislature sought to alleviate through the telecommunications statute, such as discriminatory and excessive rates, undercapitalization, and indifferent service.

Charter argued that no monopolistic evils exist in this case, since the Company competes with traditional wireline telephone service, mobile phones, nomadic VoIP, and many other Internet-based services.

¹³ 2005 Minn. Laws ch. 136, art. 10, §§ 7, 12 (amending Minn. Stat. §§ 403.025, subd. 3 and 403.11, subd. 1).

¹⁴ Minn. Stat. § 297A.61, subd. 3(i).

¹⁵ 2008 Minn. Laws ch. 154, art. 12, § 9 (amending Minn. Stat. § 297A.61, subd. 24(b)) (emphasis added).

¹⁶ 190 N.W.2d 661.

2. The Department

The Department maintained that Charter offers “local service” under Minn. Stat. § 237.035. The agency stated that Minnesota law is agnostic as to the technology used to furnish ordinary local telephone service and argued that the Legislature’s failure to expressly grant the Commission jurisdiction over “interconnected VoIP” does not mean that no such jurisdiction exists.

The Department further argued that the Legislature’s decision to specifically address VoIP service in other contexts did not require an inference that it intended not to regulate VoIP in the telecommunications context. The agency pointed out that the Minnesota Department of Revenue already considered VoIP service a telecommunications service before the 2008 amendment expressly identified it as such, and suggested that the amendment had not substantively changed the statute.¹⁷

Finally, the Department argued that, even though Charter is not a monopoly, there are nonetheless important policy reasons to enforce Minnesota’s telecommunications statute against the Company. Failure to enforce the statute would harm both Charter’s customers, who would be deprived of numerous consumer protections, and other telecommunications carriers, who would be deprived of the ability to compete with Charter on a level playing field.

The Department concluded that, so long as Charter chooses to sell what is, essentially, a voice transmission service functionally indistinguishable from other ordinary wireline phone service, using Minnesota’s public telecommunications network, Charter should abide by the same rules of the road as other carriers and subscribers who provide and pay for that network.

3. The Commission of Deaf, DeafBlind, and Hard of Hearing Minnesotans

The Commission of Deaf, DeafBlind, and Hard of Hearing Minnesotans expressed concern that Charter’s failure to pay into the Telecommunications Access Minnesota (TAM) fund would impair the state’s ability to provide universal service to its constituents. It argued that a telephone is a telephone regardless of the technology used to transmit the data, and urged this Commission to regulate VoIP providers.

C. Commission Action

The Commission concurs with the Department that Charter provides “local service” subject to the Commission’s jurisdiction under Minnesota law. At hearing, Charter confirmed that its VoIP service provides subscribers with dial tone and access to the public switched telephone network. Charter’s service thus falls squarely within the definition of “local service” set forth in the Commission’s rules implementing Minnesota’s telecommunications statute.¹⁸

¹⁷ See April 13, 2009 modified revenue notice #05-03, filed in this docket as a Department hearing exhibit on May 7, 2015.

¹⁸ Minn. R. 7812.0100, subp. 33.

Charter asserts that packet-switched services such as VoIP were not within the Legislature's contemplation. This assertion is simply wrong. The Legislature has amended Minnesota's telecommunications statute numerous times since its enactment, and in particular, since the passage of the federal Telecommunications Act of 1996. Moreover, the Commission's rules adopted under this statute were promulgated after passage of the Act. Thus, Minnesota's telecommunications regulations are neither antiquated nor irrelevant to the post-Telecom Act environment in which this Commission operates.

Tellingly, no laws have been enacted, nor any rules promulgated, that establish different levels of Commission authority based on the technology or protocol used to deliver a service. To the contrary, the statute directs the Commission to exercise its authority consistent with goals that include "encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner."¹⁹

Charter, in essence, takes the position that the Legislature intended to exempt its wireline local service from the regulations that apply to its fixed wireline competitors based on the technology Charter uses to deliver its service. That position cannot be reconciled with the legislative mandate to regulate consistent with the principle of competitive neutrality. Charter's VoIP service, by Charter's own account, provides dial tone and access to the public switched network. As such, it falls expressly within the definition of local telephone service under Minnesota law and there are no statutory or rule provisions suggesting otherwise.

For the foregoing reasons, the Commission finds that Charter provides "local service" under Minn. Stat. § 237.16.

IV. Federal law does not preempt the Commission's exercise of authority over Charter's VoIP service.

A. Introduction

The federal Communications Act, as amended by the Telecommunications Act of 1996, establishes two categories of service relevant to this case: telecommunications services and information services. The Act subjects telecommunications services to mandatory common-carrier regulation but leaves information services largely unregulated.

The Act defines "telecommunications" as "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."²⁰ The Act defines "telecommunications service," in turn, as "the offering of telecommunications for a fee directly to the public."²¹

¹⁹ Minn. Stat. § 237.011(4).

²⁰ 47 U.S.C. § 153(50) (2014).

²¹ *Id.* § 153(53).

“Information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”²² However, when such a capability is used “for the management, control, or operation of a telecommunications system or the management of a telecommunications service,” it is not considered an information service.²³

The FCC has not addressed whether the service provided by Charter—fixed, interconnected VoIP—is a telecommunications service or an information service. Instead, the FCC has only preempted state regulation of *nomadic* VoIP service to the extent it is impossible or impractical to separate the intrastate and interstate components of that type of VoIP service. This rationale is recognized as the “impossibility exception,” and it was the basis upon which the FCC found, and the Eighth Circuit affirmed, preemption of this Commission’s regulatory authority over Vonage Holdings Corporation’s nomadic VoIP service.²⁴

The *Vonage* decision involved a 2003 Commission Order in which the Commission asserted jurisdiction over Vonage’s nomadic VoIP service. Like Charter’s service here, Vonage’s service allowed users to place calls to the public switched telephone network using IP-to-TDM protocol conversion. However, unlike Charter’s service, Vonage’s service required that subscribers have broadband Internet access (so-called “over-the-top” VoIP). Moreover, unlike Charter’s service, Vonage’s service was fully portable, which meant that Vonage did not know where its users were when using its service.

Initially, the Minnesota Federal District Court concluded that Vonage’s service was an information service, in part because it offered the capability to transform information through protocol conversion.²⁵ The FCC, however, declined to reach the classification issue. Instead, it preempted state regulation of nomadic VoIP based on the impossibility of determining which calls were intrastate and which were interstate.²⁶ The Eighth Circuit Court of Appeals affirmed the FCC on the same basis, also expressly declining to reach the classification issue.²⁷

Since these *Vonage* decisions more than ten years ago, the FCC has further clarified its view of telecommunications using Internet protocol in its recent *Open Internet Order*, released on March 12 of this year. In that order, the FCC did not rule specifically on the classification of VoIP services. However, the FCC found that broadband Internet access service is a telecommunications

²² *Id.* § 153(24).

²³ *Id.* The latter provision is commonly referred to as the “telecommunications management exception.”

²⁴ See *In re 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).

²⁵ *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 999 (2003) (hereinafter “Vonage I”).

²⁶ 19 FCC Rcd at 22,405 ¶ 14.

²⁷ *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 579 (2007) (hereinafter “Vonage II”).

service within the meaning of the Act. In so finding, the FCC observed that “the critical distinction between a telecommunications and an information service turns on what the provider is ‘offering.’”²⁸ With respect to the offering of Internet access service, the FCC observed:

Broadband Internet access service may use a variety of protocols to deliver content from one point to another. However, the packet payload (*i.e.*, the content requested or sent by the user) is not altered by the variety of headers that a provider may use to route a given packet. . . . Broadband providers thus move packets from sender to recipient without any change in format or content.²⁹

Moreover, the FCC found that, “[t]o the extent that broadband Internet access service is offered along with some capabilities that would otherwise fall within the information service definition, they do not turn broadband Internet access service into a functionally integrated information service.”³⁰ The FCC found specifically that “domain name service (DNS) and caching, when provided with broadband Internet access services, fit squarely within the telecommunications systems management exception to the definition of ‘information service.’”³¹

B. The Positions of the Parties

1. Charter

Charter argued that interconnected VoIP is an information service that the Commission is preempted from regulating, for three reasons.

First, Charter argued that interconnected VoIP is an information service because it offers the capability to perform a protocol conversion between IP and TDM. Charter argued that the FCC’s interpretation of the term “information service” supported this reasoning,³² and cited several federal district court cases, including *Vonage I*, concluding that interconnected VoIP is an information service on this basis.³³

²⁸ *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 ¶ 355 (2015) (hereinafter “Open Internet Order”).

²⁹ *Id.* ¶ 362.

³⁰ *Id.* ¶ 365.

³¹ *Id.* ¶ 356.

³² *See In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 at ¶ 104 (1996) (hereinafter “Non-Accounting Safeguards Order”) (concluding that protocol-processing services generally are information services).

³³ *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm’n*, 461 F. Supp. 2d 1055, 1081–82 (E.D. Mo. 2006); *Vonage I*, 290 F. Supp. 2d at 999; *Paetec Commc’ns, Inc. v. CommPartners, LLC*, No. 08-Civ.-0397 (JR), 2010 WL 1767193, at *2–3 (D.D.C. Feb. 18, 2010); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm’n*, No. 04-Civ.-4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004).

Second, Charter argued that interconnected VoIP is an information service because its calling features are inextricably intertwined with other, data-processing capabilities. In support of its argument, Charter cited the FCC's 2002 *Internet Over Cable Order*, which found that cable-modem service was an information service because it combined the transmission of data with computer processing, information provision, and computer interactivity.³⁴ Charter stated that it provides numerous information services in conjunction with VoIP, including an online voice-management and voicemail-to-email functionality that converts voicemails to text and provides them to users both as electronic audio files and as text. The Company argued that these services, in combination with its VoIP service, constitute a single, integrated information service.

Finally, Charter argued that interconnected VoIP is an information service based on its use of stored databases and lookup capabilities to access its users' IP addresses, which constitutes "retrieving" and "utilizing" information via telecommunications under the Act.³⁵

Charter relied on the FCC's conclusion in the *Internet Over Cable Order* that cable internet service was an information service based in part on its use of domain name service (DNS), which links a website's IP address to its human-readable domain name.³⁶ Charter stated that its interconnected VoIP service includes an analogous feature that routes traffic using a database linking IP addresses to ten-digit telephone numbers.

2. The Department and the OAG

The Department and the OAG urged the Commission not to relinquish its authority over fixed VoIP when neither the FCC nor the Eighth Circuit Court of Appeals has found state regulation of fixed VoIP to be preempted. Both parties argued that the Commission should not exempt Charter from complying with important consumer protections and contributing to the state TAM and TAP funds. They maintained that doing so would give Charter a competitive advantage over other telephone service providers and could prompt other companies to seek a similar exemption.

3. Legal Services Advocacy Project and Minnesota Community Action Partnership

The Legal Services Advocacy Project and the Minnesota Community Action Partnership stated that the TAP and TAM programs enable their clients to fully participate in society and the economy, and to access emergency and other services. They maintained that the responsibility for supporting these programs should be shared among Minnesota telecommunications providers and concurred with the Department and the OAG that the Commission is not preempted from regulating fixed VoIP service.

³⁴ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002). However, the FCC recently reversed course, finding that broadband Internet service is a telecommunications service. *See In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (2015) (hereinafter "Open Internet Order").

³⁵ 47 U.S.C. § 153(24).

³⁶ 17 FCC Rcd at 4822 ¶ 38. *But see Open Internet Order* ¶ 371 (concluding that DNS falls within the telecommunications management exception to the definition of "information service").

C. Commission Action

The Commission concurs with the Department, the OAG, and other commenters that federal law does not preempt state regulation of Charter's fixed, interconnected VoIP.

As a preliminary matter, neither the FCC nor any court with jurisdiction in Minnesota has preempted the Commission's authority over the fixed VoIP service that Charter provides in this state. Charter relies heavily on the District Court's *Vonage I* decision to support its preemption argument. However, that reliance is misplaced for at least two reasons.

First, as the FCC made clear and the Eighth Circuit affirmed, the Commission's authority over Vonage's service was preempted based on the nomadic nature of the service, not on its use of protocol conversion. Unlike Vonage's nomadic service, which could be accessed from anywhere in the world, Charter's service is a fixed interconnected VoIP offering that is accessed from the customer's home or business "through regular phone jacks and phones" including "access to 911 emergency services and directory listings."³⁷ As such, unlike Vonage's nomadic service, the intrastate and interstate jurisdictional components of Charter's fixed offering can be identified. Therefore, Charter's service is not subject to the impossibility exception that caused the FCC to preempt the Commission's authority over Vonage's service.

Second, unlike Vonage's service, Charter's fixed VoIP offering at issue here does not rely on the Internet as its backbone.³⁸ As the District Court observed in *Vonage I*, "[i]f the end user is connected to the PSTN, the information *transmitted over the Internet* is converted from IP into a format compatible with the PSTN."³⁹ And as the Court further observed, "[w]hen Vonage's users communicate with other customers in computer-to-computer IP telephony, the two customers are *again using the Internet* to transmit data packets."⁴⁰ Therefore, the District Court's decision turned significantly on the fact that Vonage relied upon the public Internet as part of its service offering. In contrast, Charter's service does not rely on the Internet. In fact, in describing its VoIP service, Charter emphasizes that "Charter Phone is not an Internet phone service" and that, when a customer uses its VoIP service, "calls never touch the public Internet."⁴¹

Applying the federal Act's definitions of "telecommunications service" and "information service," the Commission finds that Charter's interconnected VoIP service is a telecommunications service over which this Commission has jurisdiction.

An information service constitutes the "offering" of a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." As the record demonstrates, that is not what Charter is offering to its subscribers. Instead, Charter is offering a transmission service—that is, a telecommunications service—and using protocol conversion to facilitate the provision of that service.

³⁷ Department's Complaint, Attachment E at 6.

³⁸ In describing Vonage's nomadic VoIP service, the Court in *Vonage I* stated as follows: "At the outset, the Court must note that the backbone of Vonage's service is the Internet." *Vonage I* at 997.

³⁹ *Vonage I* at 1000 (emphasis added).

⁴⁰ *Id.* (emphasis added).

⁴¹ Department's Complaint, Attachment E at 4 and 6.

The service offered by Charter has the core characteristics of a telecommunications service. First, there is no dispute that Charter's phone service is a transmission service. Nor is there any dispute that this transmission service offered by Charter allows its customers to use a traditional touchtone phone, dial a traditional phone number, and communicate by voice over the public switched telephone network with a recipient using a traditional phone. Second, there is no dispute that the service transmits information of the user's choosing between points specified by the user. Finally, there is no dispute that the service is framed by sound waves going into a phone on one end and sounds waves coming out on a phone on the other end of the call. Moreover, what one party says on one end of the call is heard precisely as stated on the other end. Accordingly, there is no net change in form or content from the user's standpoint.

For all the foregoing reasons, the Commission concludes that Charter's VoIP service is a telecommunications service.

To the extent Charter uses IP-to-TDM conversion as part of its VoIP service, that protocol conversion does not transform Charter's VoIP service into an information service. Charter uses protocol conversion for the management, control, or operation of its telecommunications system or the management of its telecommunications service, placing it within the telecommunications management exception to the definition of an information service.⁴²

The FCC described that exception in its *Non-Accounting Safeguards Order* as applying to a service that "fall[s] within the literal reading" of the information-service definition but that is used to "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service."⁴³ This is precisely what Charter's protocol conversion does. It facilitates establishment of a transmission path for a voice phone call, without altering VoIP's fundamental character as a service that offers the ability to place and receive phone-to-phone voice calls over the PSTN.

As Charter itself emphasizes on its website, its VoIP service "uses Internet protocol for transporting calls."⁴⁴ Charter elaborates that "[t]he difference between Charter Phone and the phone companies' traditional wire line service is that Charter takes advantage of the latest technology, which *allows [Charter] to deliver* crystal-clear calls and advanced calling features."⁴⁵ As such, Charter describes the Internet protocol technology associated with its VoIP service not as the service offered to its customers but as the "latest technology" used to "deliver" or "transport" its customers' calls. Therefore, by its own account, Charter's packet switching and protocol conversion are not the services offered to customers, but are instead technologies or mechanisms used to facilitate the calling or transmission service Charter actually offers to the public.

Moreover, the ancillary services or "advanced calling features," such as voicemail, that Charter packages with its transmission service do not transform that service from a telecommunications service into an information service. As the U.S. Supreme Court recognized in its *Brand X* decision, a local telephone company cannot escape regulation as a telecommunications carrier simply by

⁴² See 47 U.S.C. § 153(24).

⁴³ *Non-Accounting Safeguards Order* ¶ 107. See also *id.* ¶ 123.

⁴⁴ Department's Complaint, Attachment E at 6.

⁴⁵ *Id.* (emphasis added).

packaging its calling service with voicemail or other similar services.⁴⁶ This is because a telephone company that packages voicemail with telephone service offers a “transparent transmission path—telephone service—that transmits information independent of the information-storage capabilities provided by voice mail.”⁴⁷

Finally, the fundamental policy grounds for exempting protocol-processing services from common-carrier regulation do not apply here. The regulatory exemption for protocol-processing services was intended to avoid overburdening small Internet service providers and thereby stifling their ability to offer new, innovative services.⁴⁸ The exemption was not intended to protect the interests of large cable companies that choose to offer fixed voice transmission services over their extensive networks using the most efficient technology available.

In this case, Charter began offering its fixed VoIP service before it began treating that service as outside the Commission’s regulatory authority. So clearly, the Commission’s regulatory authority did not stifle Charter’s deployment of its service. Moreover, there is no evidence that the Commission’s regulatory oversight has stifled, or would stifle, the continuation or expansion of that service.⁴⁹

V. Conclusion

For the foregoing reasons, the Commission finds that Charter’s interconnected VoIP service is a telecommunication service and “local service” subject to the Commission’s authority under Minn. Stat. ch. 237 and related Commission rules.

Charter has to this point maintained that its service falls outside the Commission’s authority and has largely declined to participate in any discovery or discussions regarding its compliance with Minnesota telecommunication regulations. Thus, the record does not reflect the extent to which the Company is in compliance with Minnesota law or demonstrate any commitment to future compliance.

To help ensure compliance going forward, the Commission will order Charter to file within 30 days a description of how it will comply with this order. The Commission will also direct the Company to file a draft notice to its customers informing them that Charter provides a regulated telephone service and outlining the customer protections provided by law. The Commission will establish comment periods as set forth in the ordering paragraphs.

⁴⁶ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 997–98 (2005).

⁴⁷ *Id.* at 998.

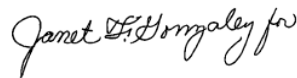
⁴⁸ *See Non-Accounting Safeguards Order* ¶ 105 (“Because the market for protocol processing services is highly competitive, such regulation is unnecessary to promote competition, and would likely result in a significant burden to small independent ISPs that provide protocol processing services. Thus, policy considerations support our conclusion that end-to-end protocol processing services are information services.”).

⁴⁹ Charter has not filed any complaint or offered any argument alleging that it is adversely affected or unduly burdened by any specific Commission rule. Charter is free to petition the Commission for a variance of any of its rules. And the Commission has authority to vary or waive the application of its rules to the extent that enforcement of any such rules are shown to impose an excessive burden and granting the variance would not adversely affect the public interest or conflict with standards imposed by law. *See* Minn. R. 7829.3200.

ORDER

1. The Commission finds that Charter's interconnected VoIP service is a telecommunication service subject to the Commission's authority under Minn. Stat. ch. 237 and related Commission rules.
2. Charter shall file within 30 days a description of how Charter will comply with this order and a draft notice to its customers informing them that Charter provides a regulated telephone service and outlining the customer protections provided by law.
3. The parties shall have 30 days to comment on Charter's compliance filing. The Commission authorizes the Executive Secretary to alter the comment periods for good cause.
4. This order shall become effective immediately.

BY ORDER OF THE COMMISSION



Daniel P. Wolf
Executive Secretary



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