Minnesota Public Utilities Commission

Staff Briefing Paper

Meeting Date: September 24, 2015 .... **Agenda Item # 5

Company: Charter Fiberlink CCO, LLC; Charter Fiberlink CC VIII; Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC

Docket No. P-6716, 5615/C-14-383
In the Matter of the Complaint by the Minnesota Department of Commerce (DOC) against the Charter Affiliates regarding Transfer of Customers

Issues:
1. Should the Commission reconsider or reopen its July 28th *Order*?
2. If so, should the July 28th *Order* be modified?

Please Note: Minn. Rules 7829.3000, subp. 6, states that "[t]he commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition.

Staff: Kevin O'Grady..651-201-2218

Relevant Documents

Order Finding Jurisdiction and Requiring Compliance Filing .... July 28, 2015
Charter Petition for Rehearing .... August 17, 2015
Comments: DOC .... August 27, 2015
Comments: OAG .... August 27, 2015

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Background

On September 26, 2014, the Minnesota Department of Commerce (DOC) filed a complaint against four companies:

Charter Affiliates (or Charter) refers to all four companies collectively;

Charter Fiberlink Companies refers to **(1)** Charter Fiberlink CCO, LLC, and **(2)** Charter Fiberlink CC VIII. These companies have obtained authority from the Commission to operate in Minnesota as Competitive Local Exchange Carriers (CLECs); and

Charter Advanced Services Companies refers to **(3)** Charter Advanced Services (MN), LLC, and **(4)** Charter Advanced Services VIII (MN), LLC. Neither company holds a certificate of authority from the Commission.

DOC argued that:

(1) In March of 2013 the Commission-certified Charter Fiberlink Companies unlawfully transferred all of their residential customers to the non-Commission-certified Charter Advanced Services Companies;

(2) This transfer has significantly and negatively affected two Minnesota programs designed to support eligible consumers: Telecommunications Access Minnesota (TAM – for communication impaired consumers) and the Telephone Assistance Program (TAP – for low-income consumers); and

(3) Charter's actions display a knowing and intentional violation of Commission rules and statutes within the meaning of Minn. Stat. § 237.461.

On October 18, 2014, the Commission ordered Charter to file an answer to the Complaint. The Commission found there were reasonable grounds to investigate the claims raised by DOC, claims that implicate the Commission's statutory responsibilities to protect Minnesota consumers, ensure fair and reasonable competition in the local telecommunications market, and maintain or improve the quality of service.

On December 18, 2014, Charter filed its answer to the complaint. Charter argued that:

(1) The residential customers of the Charter Fiberlink Companies were lawfully transferred to the Charter Advanced Services Companies in March of 2013;

(2) The Commission has no jurisdiction under state law over Charter's interconnected VoIP service;

(3) Under the Telecommunications Act of 1996 Charter's interconnected VoIP service is an "information service" and, as such, beyond the reach of the Minnesota Commission;

(4) The Federal Communications Commission (FCC) has asserted its jurisdictional authority as if interconnected VoIP were an information service; and

(5) Charter has continued to provide TAP credits to numerous qualified Minnesota customers, although it is not obligated to do so.

Charter requested that the Commission address the federal preemption and the extent of state authority prior to addressing the alleged regulatory noncompliance issues raised by DOC.

Between January 16 and February 2, 2015, several parties filed comments and/or replies: Charter, DOC, the Minnesota Office of the Attorney General (Residential Utilities and Antitrust Division)(OAG), the Legal Services Advocacy Project, the Minnesota Community Action Partnership, and the Minnesota Commission of Deaf, DeafBlind and Hard of Hearing Minnesotans.

On July 28, 2015, the Commission issued its *Order* finding "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." The Commission ordered Charter to "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."

The Commission did not make a finding with respect to the claim that Charter failed to provide customers TAP or TAM services or to submit payments to the TAP and TAM funds.

The Commission did not make a finding with respect to the allegation that Charter knowingly and intentionally violated Commission rules and statutes.

On August 17, 2015, Charter filed an application for rehearing.

On August 27, 2015, DOC and OAG filed comments recommending denial of Charter's petition.

Rules Guiding Reconsideration

Commission rules make provision for reconsideration of an order:

> The commission shall decide a petition for rehearing, amendment, vacation, reconsideration, or reargument with or without a hearing or oral argument. The commission may vacate or stay the order, or part of the order, that is the subject of the petition, pending action on the petition. [Minn. Rules 7829.3000, subp. 6]

And Commission policy guides the motion to reconsider:

> Any action of the Commission may be reconsidered. However, only a Commissioner voting on the prevailing side may move to reconsider. If the motion to reconsider passes, then the matter is before the Commission. The Commission may then alter, amend, rescind, or uphold its previous decision. The same question cannot be reconsidered a second time. (Mason, sec. 457.2.) [Minnesota Public Utilities Commission, *Operating Procedures and Policy, Meeting Procedures*, issued February 1, 1995]

All five current Commissioners supported the motion codified in the *Order* and, as such, any one of them may offer a motion to reconsider.

Petition for Rehearing

Charter Petition

In brief, Charter argues:

1. The Commission erred in finding that federal law did not preempt the Commission's exercise of jurisdiction.

a. Charter's interconnected VoIP service is an information service because it offers the capability to perform net protocol conversion. The FCC holds that both protocol conversion and protocol processing services are information services under the 1996 Act. Applying that analysis to this case, there is no doubt that the IP-to-TDM conversion performed by Spectrum Voice™ and similar interconnected VoIP services is a "protocol conversion"; indeed, the U.S. Supreme Court, in the *Brand X* decision, has characterized "protocol conversion" as the "ability to communicate between networks that employ different data-transmission formats," which is precisely the purpose of the IP-to-TDM conversion.

b. *Vonage I* confirms that Charter's preemption argument is correct. Further, the *Order* states that "unlike Vonage's service, Charter's fixed VoIP offering at issue here does not rely on the Internet as its backbone." This is a factual distinction without any legal significance.

c. Every other federal court has followed *Vonage I*. Three other federal courts have held that facilities-based interconnected VoIP is an information service, and none has held to the contrary.

d. Charter's interconnected VoIP service does not fall within the "telecommunications management exception." In its *Non-Accounting Safeguards Order* the FCC identified three instances in which the telecommunications exception would apply: situations (1) involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; (2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and (3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user). None of these exceptions applies here.

e. Preemption is not reserved for small Internet companies. Nothing in the Act supports the *Order's* view that Congress intended the classification of a service as an "information service" to turn on the size of the provider.

f. Charter's interconnected VoIP service is an information service because its calling features are inextricably intertwined with other data-processing capabilities. The Commission should follow the FCC's lead in *Vonage II* and hold that Spectrum Voice™ is a single, integrated information service. Spectrum Voice™ includes numerous features

which are indisputably information services. For instance, Spectrum Voice™ includes an online portal to the service and web-based functionality that provides voicemail to users as both electronic audio files and as text via voice recognition technology. Information services are constantly evolving in a fast-paced market, which is precisely the reason that Congress established a deregulatory policy that allows providers of information services to burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.

2. The Commission erred in finding that it had jurisdiction under state law over Charter's interconnected VoIP service. When the Legislature first granted the Commission jurisdiction over telephone service a century ago, the Legislature obviously did not conceive of interconnected VoIP, and the technological differences between interconnected VoIP and wireline service preclude any holding that interconnected VoIP is "telephone service" under Minnesota law. Although the Legislature has amended Minnesota's telecommunication statute over the years, it has never enacted an amendment that would give the Commission jurisdiction over interconnected VoIP; to the contrary, as explained in Charter's Answer, it has enacted several amendments that presuppose that interconnected VoIP is not a "telephone" or "telecommunications" service under Minnesota law.

   The Commission appears to argue that interconnected VoIP is "telephone service" because it offers "dial tone" and "access to the public switched network"; but the same could be said for any voice service, including cell phone service, and the Commission does not suggest it has state law authority over such services. Moreover, there is no doubt that interconnected VoIP will continue to encounter vigorous competition from cell phone, nomadic VoIP, and other providers. Thus, regulation of interconnected VoIP is unnecessary to combat monopolies or to establish vigorous competition.

OAG Comments

The Commission should reject Charter's petition because Charter does not raise new issues, point to new and relevant evidence, or expose errors or ambiguities in the *Order*. Charter's application merely repeats arguments it made in its filings and during oral argument and deliberation. The Commission's legal analysis carries with it none of the deficiencies claimed by Charter.

Charter mischaracterizes its service as the offering of a packet conversion service to argue that its fixed, interconnected VoIP service is an information service rather than a telecommunications

service. The Commission, meanwhile, framed the offering differently – and correctly – as a "transmission service" that uses protocol conversion to facilitate the provision of that service.

The Commission properly found that the facts in this matter are distinguished from the holding in *Vonage I*. A closer reading of *Vonage I* however, suggests that Vonage's reliance on the public internet was of utmost significance to its ultimate conclusion. Charter's service does not require the user to have internet access service, or even a computer.

The Commission properly found that it had jurisdiction to regulate Charter's fixed, interconnected VoIP service because it is a "local service" under Minnesota law.

The Commission's *Order* ensures that customers are protected under the traditional telecommunications regulatory scheme. It is important to remember that the consumers' role in this arena is not to be a corporate watchdog, alerting regulators whenever a corporate restructuring could have an impact on the regulatory jurisdiction of the service they receive. That is the role of state regulators. The consumers' role is more akin to the proverbial canary in a coal mine. Some consumers sound an alert when a company acts improperly. The power, then, of a state regulator like the Commission lies within that body's capacity to investigate such complaints and, importantly, to do something to correct the wrong.

DOC Comments

DOC recommends that the Commission deny the Charter petition for rehearing without further argument, pursuant to Minnesota Rule 7829.3000, subp. 6. The petition raises no new issues, points to no new and relevant evidence, and exposes no errors or ambiguities in the *Order* to demonstrate that the Commission should rethink the decisions set forth in that *Order*. The decisions in the *Order* are consistent with the facts, the law, and the public interest.

The Charter petition continues to make the same erroneous assertions that Charter previously made: that (i) the Commission should classify Charter's voice service as an information service because it is capable of a net protocol conversion and is not within the "telecommunications management exception," and (ii) that because Charter bundles its service with a voicemail service that, (like innumerable other products on the market) forwards voicemail in written form, such as email or text, and subscribers with internet access can view their account information on a website. These assertions are not new, and are no more persuasive now than when previously offered.

Charter's petition states that Commission's authority over its various regulated service offerings

is not at issue in this docket, and the Commission therefore erred in finding that it had jurisdiction under state law over Charter. These assertions are inaccurate. As the *Order* correctly observes, misconduct by Charter, including misconduct by Charter's certificated CLECs in Minnesota is very much at issue.

The Charter petition inaccurately asserts that technological differences between Charter's voice service and other wireline service necessarily precludes Charter's voice service from being treated as a telephone service under Minnesota law. This assertion is inaccurate because the Commission's *Order* wisely directed Charter itself to devise a plan for how Charter's voice service could be treated, so as to meet Minnesota's regulatory requirements; upon receipt of such a plan, if compliance with regulatory provision appears infeasible due to technological differences between Charter's voice service and other wireline voice services, the Commission has authority to waive any of its rules if such a waiver is appropriate.

Staff Comment

Staff recommends the Commission deny Charter's petition for rehearing. Charter does not raise new issues, does not point to new and relevant evidence, and does not expose errors or ambiguities in the *Order*.

To this point in this docket, Charter's interconnected VoIP service has been referred to in a variety of ways, including "Charter VoIP service" and "Charter Phone." In its petition for rehearing Charter refers to its interconnected VoIP service as "Spectrum Voice™." Staff is unclear as to the similarities or differences between Spectrum Voice™ and Charter Phone, and as such, will refrain from using the term Spectrum Voice™. However, brand name aside, Charter acknowledges that the service in question in this docket is "interconnected VoIP service" as defined by Congress and the FCC.[1]

<u>State Authority</u>

Staff agrees with the Commission, OAG and DOC that Charter's service is local telephone service pursuant to Minnesota statutes and rules. Charter has not offered any new arguments to the contrary.

[1] 47 U.S.C. 153(25) and 47 C.F.R. § 9.3.

Federal Preemption:* Vonage I *(2003) and* FCC Vonage Order *(2004)

Staff agrees with the Commission, OAG and DOC that the Commission is not preempted by *Vonage I* or the *FCC Vonage Order* from regulating Charter's interconnected VoIP service. Charter's service is distinguishable from the Vonage decisions.

Federal Preemption: Protocol Conversion

Charter argued at the hearing, and again in its petition for rehearing, that its use of protocol conversion necessarily renders its interconnected VoIP service an information service and, further, a service beyond the reach of the "telecommunications management exception." Staff disagrees.

Primacy of the "Offering"

In examining Charter's interconnected VoIP service and its protocol conversion argument it is particularly important to remember that **the FCC determines classification in terms of the service offered**. This is a longstanding practice. In its *Report to Congress* in 1998 the FCC emphasized that the functional nature of an end-user offering is central to distinguishing information services from telecommunications services:

> This functional approach is consistent with Congress's direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers.[2]

The FCC restated that principal again in February of 2015:

> We observe that the critical distinction between a telecommunications and an information service turns on what the provider is "offering."[3]

There is sound logic behind the focus on the "offer." That is, customers respond to an offer, to what is presented as desirable to them. The "offer" represents a focal point for the analysis that

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[2] Report to Congress. *In the Matter of Federal-State Joint Board on Universal Service*. FCC 98-67, CC Docket No. 96-45, April 10, 1998, ¶ 59. Occasionally referred to as the *Stevens Report*.

[3] Report and Order on Remand, Declaratory Ruling, and Order. *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, released March 12, 2015, ¶ 355. (*Open Internet Order*).

the technical underpinnings of services do not. The same service may be delivered using a variety of technologies, and any given technology may deliver a variety of services, more or less desirable. To focus on the technology is to step into a formless, shifting quagmire, a focus that is at considerable remove from what is more immediately relevant: service offerings that meet the public's needs and wants. To focus on technology as the core criterion at the expense of the service (offer) is to allow the tail to wag the dog. Further, rapidly changing technological specifications can be a fickle foundation for policy.

The recognition of the primacy of "offering" is important in parsing Charter's arguments because Charter suggests that its customers are "offered" protocol conversion services, when indeed they are not. This is of particular importance for interpreting the FCC's *Non-Accounting Safeguards Order*[4].

Non-Accounting Safeguards Order

Charter relies on the FCC's *Non-Accounting Safeguards Order*, a reliance that is misplaced. That *Order* was issued only months after the signing of the Act in 1996 and it addressed the relationship between the Bell Operating Companies (BOCs), their affiliates and their competitors, the Competitive Local Exchange Carriers (CLECs). Prior to the signing of the Act, and as a vestige of the breakup of AT&T in the 1980s, BOCs (such as US WEST, now CenturyLink QC in Minnesota) were constrained from offering interLATA long distance service.[5] That is, US WEST could not offer long distance service traversing any of boundaries of the five LATAs in Minnesota. To BOCs, the ability to offer such service would allow them to provide a more comprehensive service bundle, one more attractive to end-users.

The lifting of the interLATA restriction by the Act for any given BOC was conditioned upon a number of constraints to be placed on the BOC and its affiliates, the conditions being designed to prevent the BOC and its affiliates from leveraging their market power and from discriminating against the CLECs. Thus, the FCC's *Non-Accounting Safeguards Order* focused on the wholesale relationship between BOCs and CLECs.

Within the context of the wholesale relationship between BOCs and CLECs the FCC addressed protocol conversion services. As argued by Charter, the FCC found that protocol conversion services were information services (but for three specific exceptions). However, that finding is irrelevant to the classification of Charter's interconnected VoIP service. The *Non-Accounting Safeguards Order* may be relevant to a transaction whereby a CLEC, say AT&T, approaches a

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[4] First Report and Order and Further Notice of Proposed Rulemaking. *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 271 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, released December 24, 1996.

[5] LATA refers to Local Access and Transport Area.

BOC, say US WEST, specifically seeking to purchase protocol conversion services. That transaction no way resembles a transaction where an end-user, say Mary Jane Doe, approaches Charter to purchase a service that provides basic voice transmission service. Charter's argument seeks to blur the distinction between protocol conversion as a technical input to a simple voice conversation, and protocol conversion as a service sought and purchased explicitly as a service in its own right.

In addressing the *Order* Charter argues that, by the Commission's logic, protocol conversion could never be an information service, a finding that is contrary to the *Non-Accounting Safeguards Order.* Not so. If the service offered explicitly by the seller and sought explicitly by the purchaser, is protocol conversion, then that service may be characterized as an information service (but for the three exceptions). If the service offered explicitly by the seller and sought explicitly by the purchaser, is basic voice transmission, then that service is a telecommunications service.

Telecommunications Management Exception

Charter has argued that its interconnected VoIP service **transforms** and **processes** user information, thus placing its service squarely within the definition of information service. Congress defines information service as follows:

> 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**.[6]

Charter further argues that protocol conversion places its interconnected VoIP service beyond the reach of the "telecommunications management exception" (the bold-faced clause above). Here Charter points to the three exceptions to the FCC's finding that protocol conversion services are information services, arguing that its service does not fall within those exceptions. Those exceptions are:

> These categories include protocol processing: 1) involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; 2) in connection with the introduction of a new basic network technology (which requires

[6] 47 U.S.C. § 153(24). Emphasis added.

> protocol conversion to maintain compatibility with existing CPE); and 3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion to the end user). … Because the listed protocol processing services are information service capabilities used "for the management, control, or operation of a telecommunications system or the management of a telecommunications service," they are excepted from the statutory definition of information service. These excepted protocol conversion services constitute telecommunications services, rather than information services, under the 1996 Act.[7]

First, as argued above, Charter's reliance on the three exceptions is misplaced, a diversion, because the FCC, in its *Non-Accounting Safeguards Order*, addressed protocol conversion services, not the technical function of protocol conversion.

Second, Charter is arguing that there is something special about protocol conversion that allows a service employing that technology to evade Congress' telecommunications management exception. To respond, it is useful to put protocol conversion into a broader context. Consider that voice communication supported by electronic technologies begins with a human voice, that is, sound waves. These waves travel an inch or two before the information in those waves is translated into an electric signal, an electric wave of voltage and current.[8] From that point on the signal can be manipulated in a variety of ways to ensure its quality and to enhance the efficiency of the communications network. Indeed the history of electronic communications can be seen in terms of innovations in the engineering (manipulation) of electric currents carrying information sufficient to effectively and efficiently meet the needs of the human ear. This context begs the question of why the FCC would single out protocol conversion as a form of signal manipulation that is sufficiently different from other manipulations to justify immunity from Congress' telecommunications management exception. Charter provides no technological or policy justification for this immunity other than the FCC's *Non-Accounting Safeguards Order*, and that *Order*, upon examination, is silent as to any rationale that would distinguish protocol conversion from any other technical manipulation that processes, transforms, stores, retrieves, generates, or acquires information. And, most tellingly, the *Order* explicitly refers to the telecommunications management exception in stating that "it covers services that may fit within the literal reading of the information services definition, but that are used to facilitate the provision of a basic telecommunications transmission service, without altering the character of that service."[9]

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[7] Order on Reconsideration. *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 271 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, FCC 97-52, released February 19, 1997, ¶ 2, footnote omitted.

[8] John R. Pierce and A. Michael Noll. Signals: The Science of Telecommunications. New York: Scientific American Library, 1990.

[9] *Non-Accounting Safeguards Order*, ¶ 123.

Third, with respect to the three exceptions, and aside from the fact that they are off-point, Staff does not concede that none of the three exceptions apply to Charter's service. In particular consider the second exception: "in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE)." Charter's service introduces IP signaling into a traditional network. Customers use their traditional handsets and internal wiring, that is "existing CPE," (CPE; Customer Premises Equipment) in combination with information packetizing equipment (phone modems) introduced into the network and installed by Charter. Charter's packetizing equipment creates the need for IP-TDM conversion. Charter characterizes its packetizing equipment as CPE, shoe-horning it into "existing CPE" masking the fact that Charter has introduced a technology that ultimately requires protocol conversion to make some voice traffic compatible with "basic network technology." Charter's packetizing equipment is not a component of "existing CPE" and it need not be installed in the customer's residence or business at all.

Staff believes that the third exception may also apply to Charter's use of protocol conversion technology, that is "conversions taking place solely within the carrier's network to facilitate provision of a basic network service, that result in no net conversion **to the end user**."[10] From the end-users perspective the service provided is "voice in – voice out." Charter uses protocol conversion to that end.

Telecommunications

Charter argues that protocol conversion changes the **form** of the communication. If this argument is correct then Charter's interconnected VoIP service would fail to meet the definition of telecommunications and, as such, would necessarily be classified as an information service. Congress defines telecommunications as follows:

> The term "telecommunications" 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 and received.[11]

With respect to the definition of "telecommunications" Charter has not offered any support for its argument that the form of the communication has changed **from the user's perspective**. Rather Charter argues that protocol conversion constitutes a technical change in the signal. As argued above, this argument sidesteps the relevant point, that Charter's interconnected VoIP customers are not purchasing protocol conversion services. Additionally, Charter's reasoning

[10] Order on Reconsideration, ¶ 2, emphasis added.
[11] 47 U.S.C. § 153(50), emphasis added.

would dictate that all electronic communications, even those carried by the PSTN, would be classified as information services.

Further, the FCC undermined Charter's argument when it directly addressed the question as to whether interconnected VoIP is telecommunications. In its 2006 *Universal Service Contribution Order* the FCC stated:

> [U]sing the Act's definitions, we find that interconnected VoIP providers "provide" "**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 and received**."[12]

Note that the bold-faced term is the precise wording, no more, no less, than Congress' definition of telecommunications.

The "offering" of telecommunications establishes a service as a telecommunications service. The FCC has established that interconnected VoIP service is telecommunications. And, based on the record before it the Minnesota Commission has established that Charter is clearly offering telecommunications.

Two points should be made regarding the context of the *Universal Service Contribution Order*, neither one restricting the broad application of the FCC's finding. First, the *Order* focused on interstate telecommunications. However, that focus does not diminish the scope of the FCC's finding because (a) neither the FCC nor Congress draw a definitional distinction between inter- and intrastate "interconnected VoIP providers," and (b) neither the FCC nor Congress define "telecommunications" in terms of jurisdiction. Regulatory jurisdiction is irrelevant to both definitions. Second, the FCC did not find that interconnected VoIP service is a telecommunications service, only that it is telecommunications, and that interconnected VoIP providers "provide" telecommunications. The FCC was silent on the question as to whether interconnected VoIP providers "offer" telecommunications. That silence can be attributed to the nature of the question addressed by the *Order*, that is, whether interconnected VoIP providers "provide" telecommunications pursuant to § 254(d) of the Act, and are thus required to contribute to universal service. By the nature of the question the FCC did not need to make a finding with respect to the "offering" of a service. The FCC draws a significant distinction between "offer" and "provide."[13]

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[12] Report and Order and Notice of Proposed Rulemaking. *In the Matter of Universal Service Contribution Methodology*. WC Docket No. 06-122, FCC 06-94, ¶ 39, emphasis added.

[13] *Universal Service Contribution Order*, ¶¶ 40-41.

Proportion of Calls Converted

At the hearing Charter acknowledged that not all voice conversations placed using its interconnected VoIP service require IP-TDM conversion. Some conversations, such as some of the calls between two Charter customers, are not converted to TDM. Following Charter's arguments such calls would be characterized as telecommunications services, not information services. Although the record did not indicate the proportion of such calls that are placed in Minnesota, Charters characterization begs the question as to how many calls placed within a region, and using IP-TDM conversion, are sufficient to convert a telecommunications service into an information service (one IP-TDM conversion; 50 percent of traffic converted; 99 percent of traffic converted?). This question exposes the distinction that Charter seeks to mask: that a service is distinct from a technical function. Charter has asked the Commission to find that its entire service is an information service because some calls require IP-TDM conversion.

Summary

Charter's argument seeks to blur the distinction between protocol conversion as a technical input to a simple voice conversation, and protocol conversion as a service sought and purchased explicitly as a service in its own right. Blurring this distinction, Charter reads the *Non-Accounting Safeguards Order* as support for its argument that the technical function of protocol conversion, as used in its interconnected VoIP service, determines that (i) Charter's service is an information service, and (ii) its service is immune to Congress' telecommunications management exception.

However, the FCC's *Order* only goes so far as to say that protocol conversion **services** are information services (but for three exceptions). The *Order* provides no support for the argument that employment of the technical function of protocol conversion immunizes Charter's service from the telecommunications management exception. Arguments regarding the three exceptions referred to in the *Order* are off-point, referring only to protocol conversion **services** and, further all three exceptions do not preclude Commission action even if those exceptions were relevant.

Federal Preemption: Inextricably Linked Features

Charter does not raise new issues, does not point to new and relevant evidence, and does not expose errors or ambiguities in the *Order*.

Commission Options

Issue 1: Should the Commission Reconsider or Reopen its July 28th *Order*?

1.a Grant Charter's petition for rehearing.

1.b Deny Charter's petition for rehearing.

Staff recommends option 1.b.

Note: if the Commission denies Charter's petition it need not address Issue 2.

Issue 2: Should the July 28th *Order* be Modified?

2.a Find that Charter's interconnected VoIP service is an information service and, as such, outside the Commission's jurisdiction.

2.b Find that Charter does not raise new issues, does not point to new and relevant evidence, and does not expose errors or ambiguities in the July 28th *Order*.

2.c Take other action.

Staff recommends option 2.b.