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ELECTRONICALLY FILED

December 18, 2014

Dr. Burl Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
Saint Paul, MN 55101

Re: In the Matter of the Complaint By The Minnesota Department of Commerce (DOC) Against the Charter Affiliates Regarding Transfer of Customers; MPUC Docket No. P5615/C-14-383

Dear Dr. Haar:

Enclosed for filing is the Answer of Charter Fiberlink CCO, LLC, Charter Fiberlink CC VIII, LLC, Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC to the Complaint filed by the Department of Commerce on September 26, 2014.

Please contact me if you have any questions about this filing.

Very truly yours,

MENDOZA LAW OFFICE, LLC



Anthony S. Mendoza

Enc.

cc: Service List

STATE OF MINNESOTA
PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint By The)
Minnesota Department of Commerce (DOC)) Docket No. P5615/C-14-383
Against the Charter Affiliates Regarding)
Transfer of Customers)

CHARTER'S ANSWER TO COMPLAINT

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Charter Fiberlink CCO, LLC, Charter Fiberlink CC VIII, LLC (collectively, “Charter Fiberlink”), Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC (collectively, “Charter Advanced Services”¹ and with Charter Fiberlink, collectively referred to hereinafter as “Charter”) hereby submit this Answer to the Complaint filed by the Minnesota Department of Commerce (“DOC”) on September 26, 2014.

INTRODUCTION

Today the act of making a phone call that originates and terminates in Minnesota can invoke up to a combination of four different regulatory schemes depending on which telephone handset you pick up to make the call. For wireless service, states are prohibited from regulating rates and entry. Wireless providers that desire to transfer customers from one corporate affiliate to another, as Charter did, would not require the approval of this Commission in order to do so.² If you pick up a Vonage handset, the call will be subject to a limited set of federal “interconnected VoIP” regulations, but not to state public utility regulations, as those are expressly preempted by the FCC. There are no state market entry requirements, and Vonage would not be required to obtain approval of this Commission to transfer customers to an affiliated or unaffiliated company. If you pick up a Skype handset, the call would be an “information service” under the FCC’s *Pulver* decision³ and subject to even less federal

¹ The two Charter Advanced Services entities (Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC) submit this answer subject to express reservation of their objection that the Commission lacks jurisdiction to impose common carrier regulations on them or their retail VoIP service.

² Indeed, this Commission would have no authority to approve the transfer of wireless customers between unaffiliated companies.

³ *In re Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004). The only federal regulation to which non-interconnected VoIP service is

regulation and no state regulation. If you pick up a landline telephone with a circuit-switched connection, the call would be subject to both federal and state regulation. Companies desiring to offer those services face state entry and rate regulation, and transfers of assets from one company to another require the permission of this Commission.

It is against this fragmented regulatory backdrop that the DOC's Complaint against Charter should be evaluated. In its *Vonage* Order, the FCC cited to the importance of a national, uniform policy with respect to regulation of nomadic VoIP services as the basis for the preemption of this Commission's Order asserting its jurisdiction over Vonage's nomadic VoIP services:

[the FCC], not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [Vonage's nomadic voice service] and other IP-enabled services having the same capabilities. For such services, comparable regulations of other states must likewise yield to important federal objectives.⁴

Since the FCC's *Vonage* Order, this Commission has been presented with three explicit opportunities to assert jurisdiction over fixed VoIP services, and it has abstained from doing so.⁵

subject is 47 U.S.C. § 616, which requires providers of non-interconnected VoIP services to “participate in and contribute to the Telecommunications Relay Services Fund.”

⁴ *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, 22,405 ¶ 14 (2004).

⁵ See Comments of the Minnesota Department of Commerce at 10, *In re Comcast Phone of Minnesota, LLC's Notice of Discontinuance of Comcast Digital Phone Service*, MPUC Docket No. P3123/M-07-1417 (Minn. Pub. Utils. Comm'n Dec. 14, 2007); Notice Soliciting Comments, *In re a Commission Investigation of the Applicability of 911, TAP, and TAM Surcharges to VoIP Services*, MPUC Docket No. P999/CI-09-157 (Minn. Pub. Utils. Comm'n May 14, 2009) (after soliciting comments on the question of whether the Commission had jurisdiction to impose TAP, TAM, and 911 fees on VoIP providers, the Commission took no action); Minnesota Public Utilities Commission Staff Briefing Papers at 8, *In re the Telephone Assistance Plan (TAP) Annual Review*, MPUC Docket No. P999/CI-14-470 (Minn. Pub. Utils. Comm'n Aug. 5, 2014).

The Commission has not been alone in taking this approach.⁶ Meanwhile, many competitive service providers have continued to migrate to VoIP technology, with many VoIP providers, nomadic and fixed, providing VoIP services to consumers without regulatory oversight from this Commission. During this time, there have been virtually no significant consumer complaints or issues that warrant state regulation. Importantly, the DOC Complaint is devoid of a single consumer complaint about Charter's VoIP service, or any VoIP service provider for that matter. If anything, the absence of consumer complaints, combined with the growing array of competitive alternatives for voice services, ought to lead this Commission to conclude that there is no compelling public interest reason now to alter course and attempt to assert regulatory jurisdiction over fixed VoIP services. And, as explained below, the Commission lacks legal authority to do so.

The core of the DOC's Complaint is a request that the Commission treat Charter's interconnected VoIP service, which was previously provided to its retail customers by Charter Fiberlink and is now provided by Charter Advanced Services, like traditional telephone service subject to the full panoply of common carrier regulations under Minnesota State law. However, the Commission lacks jurisdiction to impose such regulation because it is preempted by federal law. Federal law distinguishes between "telecommunications services" such as traditional telephone service, which may be regulated by state agencies provided that such regulation does

⁶ See, e.g., *In re the Application of Time Warner Cable Information Services (Hawaii), LLC for Approval of Changes to Its Tariff*, Docket No. 05-0290, Decision and Order No. 22257, at 9-12 (Haw. Pub. Utils. Comm'n 2006) (waiving tariff requirement for Time Warner Cable's VoIP service until further clarification is provided from FCC); *In re Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corp. Pursuant to Section 252(b) of the Telecommunications Act*, 2007 Ore. PUC LEXIS 88, at *56 (Or. Pub. Util. Comm'n Mar. 14, 2007) ("The FCC's orders leave no room for doubt that it intends to take the lead in resolving important regulatory issues relating to IP-Enabled Services, including interconnected VoIP services.").

not conflict with federal law, and “information services,” which cannot be subject to state common-carrier regulations, as federal law preempts it. Although the FCC has not yet formally spoken as to the statutory classification of interconnected VoIP, the federal Communications Act requires a finding that interconnected VoIP service as offered by Charter Advanced Services (and formerly offered by Charter Fiberlink) is an “information service” and that common carrier regulation thereof by state governments (including the state regulations with which the Complaint alleges that Charter has failed to comply) is preempted.

In addition, the Commission lacks jurisdiction even under state law to regulate VoIP in the manner called for by the Complaint. The Commission’s statutory jurisdiction extends to traditional telephone and telecommunications services, but does not extend to information services such as interconnected VoIP.

Finally, the DOC also alleges that Charter’s transfer of customers from its Charter Fiberlink entities to its Charter Advanced Services entities is inconsistent with a settlement agreement adopted by the Commission, and with representations that Charter Fiberlink made to the Commission in an interconnection arbitration several years ago. These allegations are factually incorrect. First, to the extent that Charter entered any ‘settlement’ with the Commission (an allegation the DOC predicates on the DOC’s own characterization of a phone call not reduced to a written agreement), Charter has complied with its terms by continuing to offer TAP credits to qualifying customers. Second, Charter Fiberlink (which continues to provide wholesale telecommunications service despite no longer providing retail interconnected VoIP service) has federal interconnection rights irrespective of the regulatory classification of

Charter's retail VoIP service.⁷ To the extent that Charter Fiberlink referred to its retail customers in an arbitration more than five years ago, it was doing no more than accurately representing the structure of its business at the time—which in any event cannot change the meaning of defined terms in federal law. Accordingly, the DOC has shown no basis for the Commission to impose any sanctions on Charter.

BACKGROUND

I. Charter's Interconnected VoIP Service

Charter's voice service is provided via VoIP, which requires voice signals to be converted into Internet Protocol ("IP") data packets that can be transmitted over broadband networks. To accomplish this conversion, Charter subscribers' handsets are attached to specialized customer premises equipment ("CPE") installed inside the subscribers' premises. After the user speaks into the handset, the CPE formats the analog electric signals from the handset into IP data packets. The IP data packets are then routed through wiring inside the subscriber's premises to Charter's IP network outside the subscriber's home. When a Charter user receives a call, the same process happens in reverse.

Traditional telephone networks (collectively known as the "public switched telephone network" or "PSTN") conversely use a different technology called "circuit switching," in which a dedicated pathway is established for the duration of a phone call. In order to route multiple circuit-switched voice calls over the same network, traditional carriers use a technique called

⁷ See, e.g., *In re Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

Time Division Multiplexing, or “TDM.” When traditional carriers interconnect their networks to exchange telephone traffic, they do so in TDM.

Charter offers an “interconnected” VoIP service, which means that Charter’s VoIP service allows users to engage in two-way voice calling not only with other VoIP users, but also with users of traditional telephone service. *See* 47 U.S.C. § 153(25); 47 C.F.R. § 9.3. To accomplish this, the networks of interconnected VoIP providers must be connected to those of traditional carriers. Because VoIP providers use IP, however, whereas traditional carriers use TDM, calls must be converted from IP to TDM, and vice versa, in order for VoIP providers to exchange traffic with traditional networks. This process of transforming information between different data transmission formats is known as “protocol conversion.” *See generally Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005) (“*Brand X*”) (explaining that “protocol conversion” is a service that enables “communicat[ion] between networks that employ[] different data-transmission formats”). The service that Charter offers to its VoIP customers, therefore, comprises not only the transmission of voice calls but also the conversion of voice calls between IP and TDM to enable its broadband-based customers to interconnect with users of the PSTN and vice versa.

Because VoIP calls are formatted as IP packets, they are also routed on broadband networks based on IP addresses, rather than based on traditional ten-digit phone numbers. However, in order to offer its VoIP customers traditional ten-digit phone numbers, Charter must (every time a customer places or receives a call) convert those phone numbers to IP addresses so that the IP packets carrying the calls can be routed on Charter’s broadband network, which it does by querying an internal Charter database. This process is virtually identical to the manner in which Internet Service Providers route online communications over the Internet by converting

the alphanumeric names assigned to locations on the World Wide Web (*i.e.*, the names of websites) into the IP addresses needed to route communications between subscribers and the relevant servers on which the web pages are located. Charter's utilization of internal databases to match IP addresses to telephone numbers is by necessity invoked every time a user places or receives a call, including both calls to and from PSTN users as well as internal calls on Charter's network, and calls between Charter subscribers and VoIP subscribers on other networks.

The use of IP also allows Charter to offer numerous features to its subscribers. These features include the ability to use an online web portal that integrates subscribers' voice calling features with their email account(s) and other features associated with Charter's high-speed Internet and cable video offerings, as well as voicemail-to-email functionality that converts voicemails to text and provides them to users as both electronic audio files and as text.

Prior to March of 2013, Charter Fiberlink provided interconnected VoIP service as a retail service to subscribers in Minnesota. However, in March of 2013, it assigned its retail voice customers to Charter Advanced Services, which now serves those customers, in part to simplify its customer service operations by consolidating the provision of its video, high-speed Internet and voice services. Charter provided its subscribers with written notification at least a month before the transfer, notifying them that their services would be provided by Charter Advanced Services in the future, notifying them that the terms of service would change as a result, and offering them the opportunity to accept the revised terms of service by continuing their subscriptions (as well as providing them with a contact number to call with any questions about the transfer). Charter Advanced Services has continued to offer credits to qualifying customers in amounts equivalent to those called for by the TAP program. Although Charter Fiberlink no longer serves retail voice customers in Minnesota, it continues to provide wholesale

interconnection and transit services, data WAN and private line services to business customers, and local origination and termination services to other carriers.

II. Procedural History

On September 26, 2014, the DOC filed a complaint alleging that the transfer of customers from Charter Fiberlink CCO, LLC and Charter Fiberlink CC VIII, which are CLECs certified by the Commission, to Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC, which are not certified by the Commission, violated Minnesota's "anti-slamming" statutes, Minn. Stats. §§ 237.661 and 237.663. The complaint also requested that Charter's interconnected VoIP service be subjected to all provisions of Minnesota Statutes Chapter 237, applicable to telecommunications carriers. The complaint further accused Charter of violating a prior Commission order related to TAP fees and of taking a position inconsistent with prior representations to the Commission.

On October 22, 2014, Charter filed a Response requesting that the Commission dismiss the Complaint, arguing primarily that the Commission lacks jurisdiction because state regulation of interconnected VoIP is preempted by federal law. On November 18, 2014, the Commission directed Charter to file an answer to the complaint. The Commission stated that "the jurisdictional issue in this case has not yet been thoroughly briefed" and found that it had "sufficient jurisdiction to require an answer to this complaint." Order Requiring Answer to Complaint and Setting Time Lines at 5. It therefore directed Charter to file an answer and stated it would proceed with the investigation "until such time as it has been demonstrated that jurisdiction over the matter is lacking." *Id.*

ARGUMENT

I. State Common Carrier Regulation of Interconnected VoIP is Preempted.

The Commission lacks jurisdiction over Charter’s interconnected VoIP services—whether as provided by Charter Advanced Services as they are today, or as provided by Charter Fiberlink in the past—because state common carrier regulation of Charter’s service is preempted by federal law. As both the Eighth Circuit and the District of Minnesota have stated, state agencies may not impose regulations on services defined as “information services” under federal law. Every court to decide the question has held that interconnected VoIP is an information service, a conclusion following directly from the plain text of the Communications Act.⁸ The Commission should follow that authority and hold that it lacks jurisdiction to impose on Charter’s interconnected VoIP services the regulations at issue.

A. Regulation of Information Services is Preempted.

The Communications Act of 1996 defines and distinguishes between two sets of services that use telecommunications: “telecommunications services,” such as traditional telephone service, and “information services,” 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) and (53).

Whether a state has jurisdiction to regulate a particular service turns on the regulatory classification of that service as a “telecommunications service” or an “information service.” States may regulate telecommunications services in some respects, provided that such regulation does not conflict with federal law. By contrast, the FCC has enforced a “long-standing national policy of nonregulation of information services,” which “allow[s] providers of information

⁸ See discussion *infra* pp. 12-13.

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.” *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (“*Minnesota PUC*”) (internal quotation marks omitted). Thus, “any state regulation of an information service conflicts with the federal policy of nonregulation.” *Id.*; accord *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 1001 (D. Minn. 2003) (“Having determined that Vonage’s services constitute information services, the Court next examines Congress’s intent with regard to state regulation of information services, to determine whether the MPUC’s order is pre-empted. By clearly separating information services from telecommunications services, the Court finds ample support for the proposition that Congress intended to keep the Internet and information services unregulated.”). Thus, if interconnected VoIP is an information service, it is not subject to regulation by the Commission.

B. Interconnected VoIP is an Information Service.

The Commission should hold that Charter’s interconnected VoIP service is an information service for three reasons.

First, interconnected VoIP is an information service under 47 U.S.C. § 153(24) because the service offers the capability to perform a protocol conversion between IP and TDM. Therefore, interconnected VoIP is capable of “processing” and “transforming” information within the meaning of 47 U.S.C. § 153(24).

Second, even if the voice transmission aspects of interconnected VoIP’s voice calling feature would be a telecommunications service if considered in isolation (which they are not), Charter also offers information services associated with those voice calling features which are “sufficiently integrated with the [telecommunications] service to make it reasonable to describe the two as a single, integrated [information service].” *Brand X*, 545 U.S. at 990.

Third, interconnected VoIP is an information service because every time a user places a voice call or uses many of Charter's enhanced features,⁹ Charter must utilize internal databases to match IP addresses to telephone numbers. In *Brand X*, the Supreme Court upheld the FCC's determination that "part of the information service cable companies provide is access to DNS service." *Id.* at 998-99. Charter's IP address lookup service is substantively identical to an Internet Service Provider's DNS service and is inextricably tied to its voice calling features, and interconnected VoIP should therefore be classified as an information service for this reason as well.

i. Interconnected VoIP is an Information Service Because It Offers the Capability to Perform Net Protocol Conversions.

Under the Telecommunications Act, "[t]he 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." 47 U.S.C. § 153(24). Interconnected VoIP qualifies as an "information service" under this definition. When a Charter subscriber calls a person on the PSTN, Charter converts the voice data from IP to TDM; likewise, when a Charter subscriber receives a call from a caller who uses the PSTN, Charter converts the voice data from TDM to IP. This process constitutes the "transforming" and "processing" of information. Indeed, the "transformation" and "processing" of calls from IP to TDM and back is the feature that makes interconnected VoIP attractive to the public; without that feature, interconnected VoIP users could not speak to PSTN users. Because

⁹ Enhanced features requiring use of Charter's internal IP address database include Caller ID, Call Waiting, Call Waiting with Caller ID, Anonymous Call Rejection, Selective Call Acceptance, Call Screening, Custom Ring, Call Forward – Selective, Call Forward – Variable, Speed Dial 8, 3-Way Calling, Call Return, Auto Busy Redial, Unlimited Directory Assistance, Voicemail, Distinctive Ring, Private Number, Call Forward – Busy, and Call Forward – No Answer.

interconnected VoIP quite literally “transform[s]” and “process[es]” information, it is an information service under 47 U.S.C. § 153(24).

The FCC’s interpretation of the term “information service” supports this reasoning. In *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 (1996) (“*Non-Accounting Safeguards Order*”), modified in part, 12 FCC Rcd 2297 (1997), the FCC concluded that subject to certain exceptions not implicated here, “protocol processing services constitute information services under the 1996 Act.” *Id.* at 21,956 ¶ 104. It concluded that “an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly ‘transforms’ user information,” and that “other types of protocol processing services that interpret and react to protocol information associated with the transmission of end-user content clearly ‘process’ such information.” *Id.* Based on that analysis, the FCC held that “both protocol conversion and protocol processing services are information services under the 1996 Act.” *Id.* Applying that analysis to this case, there is no doubt that the IP-to-TDM conversion is a “protocol conversion”; indeed, the Supreme Court 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. *Brand X*, 545 U.S. at 968. Thus, because interconnected VoIP performs “protocol conversion,” it is an “information service.”

Four federal courts have held that interconnected VoIP is an “information service” because of the IP-to-TDM protocol conversion, and none, to Charter’s knowledge, has ruled that interconnected VoIP is a telecommunications service. In *Vonage Holdings Corp. v. Minnesota*

Public Utilities Commission, most relevant here, the court held that interconnected VoIP carriers “act on the format and protocol of the information,” thus making the service an information service. 290 F. Supp. 2d 993, 999 (D. Minn. 2003).¹⁰ In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, the court explained that under longstanding FCC precedent, “[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service.” 461 F. Supp. 2d 1055, 1081-82 (E.D. Mo. 2006), *aff’d on other grounds*, 530 F.3d 676 (8th Cir. 2008). Accordingly, it found that when voice traffic that enters a network using the IP protocol and terminates on the PSTN using TDM, the provider offers an information service. *Id.* at 1082-83. Likewise, the Southern District of New York later relied on this reasoning in preliminarily enjoining the New York State Public Service Commission from regulating an interconnected VoIP service provider. *See 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), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005). And in *Paetec Communications, Inc. v. CommPartners, LLC*, the court adopted the holding of *Southwestern Bell*, finding that the protocol conversion effectuated by VoIP services renders them information services. *See* No. 08-Civ.-0397 (JR), 2010 WL 1767193, at *2-*3 (D.D.C. Feb. 18, 2010). The Commission should follow that authority and hold that interconnected VoIP is an information service.

¹⁰ Critically, although the Complaint seeks to distinguish the *Vonage* case from the present case based on the fact that Vonage offered “nomadic” VoIP whereas Charter offers “fixed” VoIP, *see* Complaint at 7-8, nothing in the *Vonage* court’s decision turned on ownership of the transmission facilities. Rather, the decision turned on the protocol-conversion feature common to both services.

- ii. Charter's Interconnected VoIP Service is an Information Service Because Its Calling Features Are Inextricably Intertwined With Other Data-Processing Capabilities.

Even if interconnected VoIP were not an information service solely by virtue of the IP-to-TDM protocol conversion, it would still be an information service for the independent reason that it offers a single, integrated service that is not severable into distinct information service and telecommunications service components.

In *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), *aff'd in part, vacated in part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom. National Cable & Telecommunication Ass'n v. Brand X Internet Services*, 545 U.S. 966 (2005), the FCC held that a service will be treated as a single, integrated information service, rather than as an information service with a separate telecommunications service component, when the telecommunications features are not "separable from the data-processing capabilities of the service" but are instead "part and parcel of" the information service and "integral to its other capabilities." *Id.* at 4823 ¶ 39. For example, the FCC held that cable modem services would be treated as information services because although certain Internet access capabilities enabled consumers to transmit information, other capabilities such as electronic mail and web browsing constituted information services. *Id.* at 4821-23 ¶¶ 36-38. The FCC concluded that Internet access providers offer "a single, integrated service" that "combines computer processing, information provision, and computer interactivity with data transport" and that accordingly "constitute[s] an information service, as defined in the [1996] Act." *Id.* The Supreme Court affirmed the FCC's determination, holding that "the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." *Brand X*, 545 U.S. at 990.

In the *Vonage* preemption order, the FCC strongly implied, albeit without formally deciding, that IP-based communications services that integrate VoIP calling with other advanced communications features are information services if those features are sufficiently intertwined. The FCC noted that Vonage’s IP-based service offered several unique capabilities, such as the ability to “forward[] a voicemail via e-mail to a colleague using an Internet-based e-mail service” and to “invoke[e] forwarding features.” 19 FCC Rcd at 22,420 ¶ 25. The FCC stated that “[t]hese functionalities in all their combinations form an integrated communications service.” *Id.* Of course, the *Vonage* preemption order involved nomadic rather than fixed VoIP. However, the FCC stated that even fixed VoIP services would be considered integrated services as well: “[T]hese integrated capabilities and features are ... inherent features of most, if not all, IP-based services having basic characteristics found in [Vonage’s service], *including those offered or planned by facilities-based providers.*” *Id.* at 22,420 ¶ 25 n.93 (emphasis added).¹¹

The Commission should follow the FCC’s lead in *Vonage* and hold that Charter’s interconnected VoIP service is a single, integrated information service. As explained above, Charter offers numerous additional services that are undoubtedly information services, such as its online voice management portal, a website through which customers can access their accounts, view and forward voicemails as email attachments, as well as voicemail-to-email functionalities that transcribe voicemails to text. *See* discussion *supra*, at 6-7. Indeed, these are the exact types of advanced communications features the FCC called out in the *Vonage* order as

¹¹ In *Minnesota PUC*, the Eighth Circuit noted that in the Universal Service Contribution proceeding, the FCC “indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the *Vonage* order.” *Minnesota PUC*, 483 F.3d at 583. To begin with, that FCC statement is purely dicta and has no decisional significance. But in any case, Charter does not contend that it qualifies for preemption solely on the basis of the *Vonage* order. Rather, Charter argues that state regulation is preempted because Interconnected VoIP is an information service. As the Eighth Circuit acknowledged, this is a separate preemption theory that the FCC has not yet addressed. *Id.* at 578.

significant in transforming the service from a mere voice communications service to an “integrated communications service.” 19 FCC Rcd at 22,420 ¶ 25. Just as in *Vonage*, “[t]hese functionalities in all their combinations form an integrated communications service” which are “inherent features of ... IP-based services.” *Id.* ¶ 25 & n.93.

iii. Interconnected VoIP is an Integrated Information Service Because it Involves Access to and Processing of Stored Information.

Finally, interconnected VoIP is an information service based on its use of stored databases and lookup capabilities to access its users’ IP addresses, which constitute the literal “retrieving” and “utilizing ... information via telecommunications” under the statute. 47 U.S.C. § 153(24).

In *Brand X*, the Supreme Court upheld the FCC’s determination that the process of identifying and encoding IP address information constitutes an information service:

When an end user accesses a third-party’s Web site, the Commission concluded, he is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company’s own Web site, its e-mail service, or his personal Web page. For example, as the Commission found below, part of the information service cable companies provide is access to DNS service. *See supra*, at 2703. A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or “clicks” on with his mouse) with the IP address of the Web page’s host server. *See P. Albitz & C. Liu, DNS and BIND 10* (4th ed. 2001) (For an Internet user, “DNS is a must. ... [N]early all of the Internet’s network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer”). It is at least reasonable to think of DNS as a “capability for ... acquiring ... retrieving, utilizing, or making available” Web site addresses and therefore part of the information service cable companies provide.

545 U.S. at 998-99 (alterations in original).

The service offering for interconnected VoIP includes a feature virtually identical to the Domain Name Service (“DNS”) on which the FCC and Supreme Court relied in *Brand X* in

determining that cable modem service is an information service. Because traffic on private IP networks such as Charter's network is routed based on IP addresses in the exact same manner as traffic on the public Internet, Charter maintains databases that associate IP addresses with 10-digit "telephone numbers." When a person places a call, Charter's service "translates" the telephone number into an IP address using lookup capabilities essentially identical to DNS. *See id.* Accordingly, *Brand X's* reasoning applies directly to Charter's IP number storage and lookup capabilities.

C. Conclusion.

Because Charter's interconnected VoIP service is an information service for each of the reasons listed, none of the Minnesota state regulations that the Complaint alleges Charter to have violated is applicable to the service. Among other things, Charter Fiberlink was not required to secure Commission approval before transferring its interconnected VoIP customers to Charter Advanced Services,¹² and Charter Advanced Services is not required to obtain Commission certification to provide interconnected VoIP service in the state, or to participate in the TAP or TAM programs.¹³ Each of these regulations is a state common carrier regulation preempted under federal law.

II. The Commission Also Lacks Authority Under State Law To Impose Regulations On Interconnected VoIP.

The Commission has jurisdiction only over "telephone companies" and "telecommunications carriers" doing business in this state." Minn. Stat. §§ 237.01, 237.16, and 237.74. If the Commission did have jurisdiction over interconnected VoIP service, Charter

¹² Notwithstanding the lack of a legal obligation to do so, Charter notified affected subscribers by way of notifications accompanying their bills at least a month before the transfer.

¹³ Notwithstanding the lack of a legal obligation to do so, Charter Advanced Services continues to provide credits in the amounts called for by the TAP program to qualifying subscribers.

would be considered a “telecommunications carrier” under Minnesota Statutes section 237.01, Subd. 6, and it would be subject to regulation as a “telecommunications carrier” under section 237.74. But the Commission does not have jurisdiction over interconnected VoIP because it is not “telephone service.”

The term “telephone service” is not defined anywhere in the Minnesota Statutes. However, other legislation demonstrates that the Legislature did not intend it to encompass interconnected VoIP services. The Commission, being a creature of statute, has only those powers granted to it by the Legislature or those that can be “fairly drawn and fairly evident from the agency objectives and powers expressly given by the [L]egislature.” *Qwest Corp. v. Minn. Pub. Utils. Comm’n*, 427 F.3d 1061, 1065 (8th Cir. 2005) (quotation marks omitted). In *Qwest*, the Eighth Circuit examined whether this Commission had implied authority to order refunds. The court found that it did not have such implied authority. In reaching this decision, the Court found it significant that the Minnesota Legislature had not “seen fit expressly to grant refund powers to the Commission, although it could have done so and in one instance has at least recognized its use.” *Id.* at 1065. The same circumstances are present in this case. There can be no question the Minnesota Legislature has not expressly granted the Commission jurisdiction over interconnected VoIP service. No such express grant of authority appears anywhere in Minnesota Statutes Chapter 237. Moreover, given all of the controversy surrounding the regulation of VoIP services, of which this Commission arguably has been the epicenter, the Minnesota Legislature has never seen fit to expressly grant regulatory authority over VoIP services to this Commission despite many years and numerous opportunities to do so.

In 2005, the legislative session directly following the FCC’s *Vonage* Order, the Minnesota Legislature saw fit to amend Minnesota Statutes section 403.025 and 403.11 to

require VoIP (*i.e.*, “packet-based telecommunications service provider”) customers to pay 911 fees. 2005 Minn. Laws ch. 136, art. 10, § 15. And in 2008, the Minnesota Legislature likewise saw fit to apply sales tax to sales of VoIP services to Minnesota customers. *See* 2008 Minnesota Laws, ch. 154, art. 12, § 9. If the meaning of “telephone service” under state law *already* encompassed interconnected VoIP services, there would have been no need for either measure to call out interconnected VoIP services specifically. Rather, these provisions demonstrate that the Legislature is perfectly capable of extending regulatory requirements to interconnected VoIP services when it intends to do so, and has declined to do so with respect to the rules and regulations that DOC seeks to have the Commission apply to Charter in its Complaint.

Further, as noted by the Minnesota Supreme Court in *Minnesota Microwave, Inc. v. Public Service Commission*, the Commission must consider “the substantive evils which the legislature sought to alleviate by the legislation” in deciding whether to classify a service as a “telephone service.” 190 N.W.2d 661, 667 (Minn. 1971). Those evils were “the usual monopolistic evils—discriminatory and excessive rates, under-capitalization, and indifferent service.” *Id.* No such evils are even alleged by the DOC in its Complaint. None exist. The DOC Complaint does not document a single customer complaint against Charter’s interconnected VoIP service. Charter is clearly not a monopolist—it competes with traditional wireline telephone service, mobile phones, nomadic VoIP, and many other Internet-based services. There is no basis in the statutory history to impose regulations on Charter. There is no government interest even cited by the DOC explaining why Charter’s interconnected VoIP service should be treated as a “telephone service.” It is not at all clear from the DOC Complaint what problem it is attempting to cure, other than to force Charter to comply with state government regulations merely for the sake of doing so.

III. The DOC's Remaining Allegations Lack Merit.

Finally, the DOC makes two other allegations against Charter: that Charter's recent actions are inconsistent with a 2009 settlement agreement, and that its current position is inconsistent with previous representations to the Commission in an interconnection arbitration. Each allegation lacks merit.

First, the Complaint alleges that Charter has discontinued offering the TAP program to qualifying subscribers in violation of a prior order of the Commission adopting a complaint settlement, in which Charter Fiberlink agreed that it would seek Commission approval prior to discontinuing the offering of TAP credits to qualifying customers. To the extent that DOC's own characterization of a phone call with Charter representatives (not reduced to a formal writing) can be termed a "settlement," Charter has continued to honor both the letter and the spirit of the agreement even as characterized by DOC. Charter Advanced Services continues to provide TAP credits to both new and previously-qualified Charter voice subscribers. Despite this, over the past 19 months, Charter has received no reimbursement from the TAP fund for such discounts.

Second, the DOC alleges that Charter's current position conflicts with a representation that Charter Fiberlink made in an April 16, 2009 filing of Exceptions to a recommended decision, in which Charter Fiberlink stated that it was a facilities-based provider entitled to interconnection rights. *See* Complaint at 4; Exceptions of Charter Fiberlink, Inc. to Arbitrator's Report at 16, *In re Petition of Charter Fiberlink, LLC for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, MPUC Docket No. P-5535,421/M-08-952 (Minn. Pub. Utils. Comm'n Apr. 16, 2009). However, there is nothing inconsistent between Charter Fiberlink's invocation of its federal interconnection rights as a facilities-based carrier under 47 U.S.C. § 252(b) and its current position that the Commission is

preempted by federal law from imposing state common carrier regulations on its (former) provision of retail VoIP service. Charter Fiberlink continues to operate as a carrier providing wholesale telecommunications services over its facilities, which entitles it as a matter of federal law to interconnection rights. In addition, Charter Fiberlink also continues to provide data WAN and private line services to business customers, and local origination and termination services to other carriers. Because Charter Fiberlink's status as a carrier under federal law does not depend upon the federal classification of its retail (as opposed to wholesale) service, its 2009 invocation of its federal interconnection rights has nothing to do with the Commission's authority to regulate the retail service that Charter provides through a different affiliate (the Charter Advanced Services entities) today. *See, e.g., In re Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (affirming interconnection rights for wholesale carriers where retail interconnected VoIP services are provided by different entities).

Moreover, to the extent Charter Fiberlink in the 2009 arbitration referenced its provision of retail service, that was an accurate reflection of the state of its business at the time. And in any event, the DOC cites no authority suggesting that Charter's characterization of its retail service in an arbitration several years ago could change the meaning or application of defined terms in federal law.

IV. Responses to Numbered Allegations.

Charter hereby responds to each enumerated paragraph in the Complaint. To the extent an allegation is not specifically addressed by Charter's responses, Charter denies that allegation.

Paragraph 1: On or around March 1, 2013, the Charter Fiberlink Companies assigned the rights to serve their residential customers, including customers participating in the TAP program, to the Charter Advanced Services Companies.

Response: Charter admits that Charter Fiberlink transferred its retail customers to Charter Advanced Services on March 1, 2013, but denies that this allegation is relevant to any matter within the Commission's jurisdiction.

Paragraph 2: The customers of the Charter Fiberlink Companies were transferred to the Charter Advanced Services Companies without prior Commission notice or approval.

Response: Charter admits that Charter Fiberlink did not seek Commission notice or approval for the assignment of its retail customers to Charter Advanced Services, but denies that this allegation is relevant to any matter within the Commission's jurisdiction.

Paragraph 3: The customers of the Charter Fiberlink Companies were transferred to the Charter Advanced Services Companies without meaningful notice or prior consent of its customers, in violation of Minn. Stats. §§ 237.661 and 237.663.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. Charter provided "meaningful notice" to its subscribers by sending them notifications of the upcoming assignment at least a month before the customers were transferred from Charter Fiberlink to Charter Advanced Services, offering them a number to call with any questions, and indicating to them that they could accept the revised terms of service by continuing to subscribe to their voice services more than 30 days after receipt of the notice. Charter has no records of any customer complaints regarding the transfer or the notification. Further, the Commission lacks jurisdiction under both state and federal law to regulate interconnected VoIP under Minn. Stats. §§ 237.661 and 237.663.

Paragraph 4: The Charter Advanced Services Companies and the Charter Fiberlink Companies are under common ownership and control.

Response: Admitted. However, Charter denies that this allegation is relevant to any matter within the Commission's jurisdiction.

Paragraph 5: The Charter Advanced Services Companies do not have, and have not sought, a certificate of authority from the Commission to provide telecommunications service in Minnesota.

Response: Charter admits that Charter Advanced Services has not sought a certificate of authority, but denies that this allegation is relevant to any matter within the Commission's jurisdiction.

Paragraph 6: Charter violated Minn. Stats. §§ 237.16, subd. 1, 237.23, 237.74, subd. 12 and Minn. Rules pt. 7812.0200, subd. 1, by transferring assets and changing the operating company serving end-use customers without either notice to the Commission or prior Commission approval. The transfer occurred on March 1, 2013, whereby the Charter Fiberlink Companies assigned the rights to serve their residential service customers to the Charter Advanced Services Companies, resulting in an uncertified company providing services to consumers that were formerly provided by a certified entity.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. The Commission lacks jurisdiction under both state and federal law to regulate Charter's interconnected VoIP service under Minn. Stats. §§ 237.16, subd. 1, 237.23, 237.74, subd. 12 and Minn. Rules pt. 7812.0200, subd. 1. It is irrelevant that the Charter Advanced Services Companies are "uncertified" because no certification is required.

Paragraph 7: Charter violated Minn. Rules pt. 7812.0300 by providing service to customers through an uncertified company, that were formerly provided by a certified company, without fulfilling the filing requirements required of telecommunications service providers.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. The Commission lacks jurisdiction

under both state and federal law to regulate Charter's interconnected VoIP service under Minn. Rules pt. 7812.0300.

Paragraph 8: Charter violated Minn. Rules 7812.0600 by providing service to customers through an uncertified affiliate company, without meeting the basic service requirements for a local service provider to offer its customers within its service area.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. The Commission lacks jurisdiction under both state and federal law to regulate Charter's interconnected VoIP service under Minn. Rules pt. 7812.0600.

Paragraph 9: Charter violated Minn. Stat. § 237.52 subd. 3 by not collecting the TAM fee from customers that were transferred to an uncertified company, and not remitting the TAM fee as provided in Minn. Stat. Section 403.11, subd. 1(d).

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. The Commission lacks jurisdiction under federal law to regulate Charter's interconnected VoIP service under Minn. Stat. § 237.52 subd. 3 and Minn. Stat. Section 403.11, subd. 1(d).

Paragraph 10: Charter violated Minn. Stat. § 237.70 pertaining to the collection and remittance of the TAP fee.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. The Commission lacks jurisdiction under both state and federal law to regulate Charter's interconnected VoIP service under Minn. Stat. § 237.70.

Paragraph 11: Charter violated Minn. Stat. § 237.70 by not providing the TAP assistance program to new qualifying subscribers.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. Charter is continuing to offer credits in accordance with the amounts called for by the TAP assistance program to new qualifying subscribers and past qualifying subscribers alike. Moreover, the Commission lacks jurisdiction under both state and federal law to regulate Charter's interconnected VoIP service under Minn. Stat. § 237.70.

Paragraph 12: Charter advertises "No added fees like the phone company charges you" creating a competitive advantage for itself by evading the collection and remittance of the TAP and TAM fees.

Response: Denied. This allegation does not identify any provision of state law that might apply to Charter's advertisement. To the extent such a provision existed, the Commission would lack jurisdiction under both state and federal law to apply it to Charter. Further, there is no evidence that subscribers would view Charter's advertisement as referring to TAP or TAM fees. Moreover, there is no evidence that Charter receives any competitive advantage, especially given that Charter continues to provide TAP credits to new qualifying subscribers and past qualifying subscribers alike, yet receives no reimbursement from the TAP fund. In any event, the statement in Charter's advertisement reflects a legitimate marketing of the fact that Charter's advertised pricing is all-inclusive, and that there are no additional fees not reflected in the advertised price. Charter itemizes all applicable taxes, fees, and charges for customers on their monthly bills.

Paragraph 13: Charter has discontinued offering the TAP program to qualifying customers in violation of the Order of the Commission in the 08-1322 Docket dated January 28, 2009 adopting a complaint settlement in which Charter agreed that prior Commission approval would be received prior to discontinuing TAP.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. First, to the extent that DOC's

characterization of a phone call with Charter representatives in Docket No. 08-1322 (which is not reduced to a formal writing) can be characterized as a ‘settlement,’ Charter is continuing to offer credits in accordance with the amounts called for by the TAP assistance program to new qualifying subscribers and past qualifying subscribers alike through the Charter Advanced entities, and is thus complying with both the letter and spirit of the so-called ‘settlement’ as characterized by DOC. Further, as subject matter jurisdiction is not waivable, the Commission lacks jurisdiction under both state and federal law to enforce its order against Charter’s interconnected VoIP service.

Paragraph 14: Charter’s position concerning the transfer of customers to an unregulated entity conflicts with Charter’s representations in a past interconnection agreement arbitration before the Commission, the 08-952 Docket, where Charter represented to the Commission that it is a facilities-based local service provider that provisions service over its own switch and transmission facilities, and thus, has the right to request that the Commission compel ILECs to interconnect with it at a single physical POI in Qwest territory in each LATA in which Charter, as a CLEC, has local end user customers, and to provide any related services and elements at cost-based rates.

Response: Denied. Charter Fiberlink’s interconnection rights under federal law stem from its status as a carrier providing telecommunications services (*i.e.*, wholesale services and other business services) over its own facilities and depend in no way on its retail interconnected VoIP services being subject to state regulatory jurisdiction. Moreover, Charter Fiberlink served retail customers at the time it made the statement to which Paragraph 14 refers. Finally, a party’s statements in an arbitration cannot in any event change the meaning of federal law, under which Charter’s retail VoIP service is an information service.

Paragraph 15: Charter has violated Minn. Stat. § 237.295, subd. 2 by not filing an annual report reflecting intrastate revenues for service to customers, as Charter transferred customers of a certified company to an uncertified company without obtaining prior Commission approval. In so doing, Charter has evaded the

requirement to pay regulatory assessments to recover Commission and Department expenses associated with telecommunications regulatory activity.

Response: The allegation states a conclusion of law to which no response is required. To the extent a response is required, the allegation is denied. First, Charter has in fact filed an annual report including its revenues from intrastate VoIP. Second, the Commission lacks jurisdiction under both state and federal law to regulate Charter's interconnected VoIP service under Minn. Stat. § 237.295, subd. 2 or to impose regulatory assessments.

V. Affirmative Defenses.

1. The Commission lacks subject matter jurisdiction over the Complaint and the allegations therein because Charter's interconnected VoIP service is an information service under federal law.

2. Each regulation and/or statute the Complaint accuses Charter of violating is preempted by the doctrine of conflict preemption as applied to Charter's interconnected VoIP service because it is an information service not subject to common carrier regulation under federal law.

3. The Commission lacks jurisdiction over Charter's interconnected VoIP service because the FCC has preempted the field with respect to regulation of interconnected VoIP services.

4. The Commission lacks jurisdiction under state law over Charter Advanced Services' interconnected VoIP service because Charter Advanced Services does not provide "telephone services" and is therefore not a "telecommunications carrier" under Minnesota law.

VI. Procedural Recommendation.

Because there are significant factual issues raised by the DOC's complaint pertaining to this Commission's jurisdiction over Charter Advanced Services' interconnected VoIP service,

and relating to the other specific claims alleged therein, Charter requests the Commission refer this case to the Office of Administrative Hearings for a contested case proceeding in accordance with Minnesota Statutes Chapter 14.

Dated: December 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Valerie Mendoza, on behalf of Charter Fiberlink CCO, LLC, Charter Fiberlink CC VII, LLC, Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC hereby certify that I have this day, served copies of the following document on the attached list of persons by electronic filing, certified mail, e-mail, or by depositing a true and correct copy thereof properly enveloped with postage paid in the United States Mail at St. Paul, Minnesota:

ANSWER TO COMPLAINT FROM CHARTER FIBERLINK CCO, LLC, CHARTER FIBERLINK CC VIII, LLC, CHARTER ADVANCED SERVICES (MN), LLC AND CHARTER ADVANCED SERVICES VIII (MN), LLC

MPUC Docket No: P5615/C-14-383

Dated this 18th day of December 2014

/s/Valerie Mendoza, Paralegal

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