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January 30, 2015

Mr. Daniel P. Wolf
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

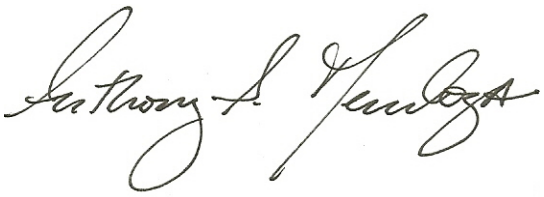
Dear Mr. Wolf:

Enclosed for filing are Reply Comments from 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

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PUBLIC UTILITIES COMMISSION

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

CHARTER'S REPLY COMMENTS AND MOTION TO BIFURCATE

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January 30, 2015

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Charter Fiberlink CCO, LLC and Charter Fiberlink CC VIII, LLC ("Charter Fiberlink"), and Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC ("Charter Advanced Services") (collectively, "Charter") hereby submit the following Reply Comments and Motion to Bifurcate in response to the Comments filed by the Department of Commerce ("Department" or "Dep't") and Office of the Attorney General ("OAG") in this docket.

As demonstrated in Charter's December 18, 2014 Answer, the Department's position in this docket represents a serious regulatory overreach. The federal Communications Act preempts state regulatory agencies from imposing their own state-specific public utility regulations on "information services." And extensive legal authority supports the proposition that fixed Interconnected VoIP services such as Charter's competitive retail voice offering are information services to which such preemption applies. Indeed, state regulatory agencies around the country—whether by court order or legislative intervention—are routinely precluded from imposing precisely the sorts of state-specific regulations that the Department seeks to apply to Charter here.

Thus, there are serious questions about whether the rules of which the Department complains are applicable to Charter Advanced Services in the first place, and about whether the Department's allegations are properly before the Commission. However, neither the Department nor the OAG meaningfully grapples with any of those questions, and the limited legal authorities the Department cites in support of the Commission's jurisdiction are inapposite.

Because Charter Advanced Services is an information service provider not subject to state public utility regulations, the Department cannot claim that Charter did not comply with the state public utility regulations identified in the Complaint. However, even here, the specific

allegations in the Complaint are misplaced, and Charter properly denied in its Answer the Department's unsupported allegations. Moreover, although the Department's Comments repeatedly accuse Charter of "misleading" the Commission, displaying a lack of "candor," or engaging in "antics," these accusations are unwarranted as well. Charter's actions and legal positions represent a good-faith disagreement about the governing legal standards. In each instance Charter's denial of the Department's Complaint allegations was entirely appropriate and supported by both the law and the record.

Charter addresses the Department's various legal and factual assertions (as well as those of the OAG) in more detail below. However, the Department's filing, as well as its premature attempts to assert its authority to demand discovery from Charter Advanced Services (when that authority is the very issue in dispute in this docket), make clear that it would be prudent and efficient for the Commission to resolve the jurisdictional and preemption issues in this docket before deciding the Department's numerous factual allegations. The alleged regulatory compliance issues focused upon by the Department may very well be mooted entirely by resolution of the threshold legal questions regarding preemption and jurisdiction. Accordingly, Charter respectfully requests that the Commission either dismiss this proceeding, or bifurcate it into separate jurisdictional and regulatory compliance phases and address the jurisdictional and preemption issues first.

BACKGROUND

This matter arises out of a change in Charter's competitive voice business structure. Prior to March 1, 2013, Charter Fiberlink—a CLEC certificated by this Commission—provided wholesale telecommunications services and Interconnected VoIP services to subscribers in Minnesota. On March 1, 2013, however, Charter reorganized its voice business structure to transfer its Interconnected VoIP customers from Charter Fiberlink to Charter Advanced Services.

Subscribers affected by the transfer were provided with notice (via their monthly bills) at least 30 days in advance, and given the option to discontinue their service in the event they did not wish to have their Interconnected VoIP service provided by Charter Advanced Services.[1] Charter has no record of any subscriber in Minnesota raising any complaint or objection to the transfer. Although Charter Advanced Services now provides service to retail VoIP subscribers, Charter Fiberlink continues to operate as a CLEC and continues to provide wholesale local interconnection and exchange access service, as well as private line and data WAN service.

There is nothing unique about Charter's revised business structure (with a CLEC providing wholesale services and an affiliated entity serving retail VoIP customers). To the contrary, this structure is common, if not pervasive, throughout the industry. The FCC has expressly endorsed it. For instance, in its recent *Connect America Fund* order, the FCC observed that Interconnected VoIP services are often provided by "retail VoIP service providers" and that "[b]ecause the Commission has not broadly addressed the classification of VoIP services," such retail entities "take the position that they are offering unregulated services." *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 17,663, 18,025-26, ¶¶ 968, 970 (2012). The FCC expressly approved, for purposes of intercarrier compensation, the partnership between such unregulated retail entities and certificated "wholesale carriers" who provide them with interconnection and wholesale telecommunications inputs. *Id*. ¶ 970.[2]

[1] *See* Charter's Response to Information Request No. 1, Exhibits A-C (Dep't Comments Attachment 5).

[2] The FCC's approach on this issue, moreover, was fully litigated before the Tenth Circuit, which affirmed its decision in full. *See In re FCC 11-161*, 753 F.3d 1015, 1147-49 (10th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3450 (U.S. Nov. 25, 2014) (No. 14-610).

PROCEDURAL HISTORY

On September 26, 2014, the Department filed a Complaint alleging a number of regulatory violations by Charter Fiberlink and Charter Advanced Services. Among other things, the Complaint claimed that the transfer of customers from Charter Fiberlink to Charter Advanced Services violated Minnesota's "anti-slamming" and "anti-cramming" statutes, Minn. Stats. §§ 237.661 and 237.663. The Complaint also requested that Charter Advanced Services' Interconnected VoIP service be subjected to all provisions of Minnesota Statutes Chapter 237, applicable to telephone companies and 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 services 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, preliminarily and solely on that basis, that it had "sufficient jurisdiction to require an answer to this complaint." Order Requiring Answer to Complaint and Setting Time Lines at 5.

On December 18, 2014, Charter filed an Answer pursuant to the Commission's instructions. In its Answer, Charter primarily argued that the Commission lacks jurisdiction over Charter's VoIP service under both federal and state law. Charter explained that under federal law, Interconnected VoIP is an "information service" pursuant to 47 U.S.C. § 153(24), and that state regulation of Interconnected VoIP is therefore preempted. *See* Answer 9-17. It cited abundant case law support for its position, including a case from the federal District Court in Minnesota reaching the identical conclusion. *Vonage Holdings Corp. v. Minn. Pub. Utils.*

Comm'n, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003). Charter further explained that a company providing Interconnected VoIP services is not a "telephone company" or "telecommunications carrier" under Minnesota law, and the Commission therefore lacks jurisdiction to regulate Interconnected VoIP. Answer 17-19. Finally, Charter specifically responded to each of the Department's allegations. *See* Answer 20-21 (addressing Department's arguments that Charter's actions are inconsistent with a 2009 phone call with Charter representative and with previous representations to the Commission); Answer 21-27 (making point-by-point responses to each numbered Department allegation).

Following the filing of Charter's Answer, the Department began serving information requests. These requests did not pertain to Charter's jurisdictional contentions, but rather (and concerning, in light of the Department's erroneous assertion that there are no material facts in dispute, Dep't Comments 5 n.6, 27) pertained to the Department's factual allegations that Charter has not complied with several Minnesota state regulations. In addition, the requests sought evidence regarding customer complaints more generally without tying the request for customer complaints to any particular claimed regulatory violation. *See* First Information Request (seeking information pertaining to Charter Fiberlink's notice to customers of transfer to Charter Advanced Services) (Dep't Comments Attachment 5); Second Information Request (seeking information pertaining to Charter's implementation of TAP credits) (Dep't Comments Attachment 3); Third Information Request (generically seeking information pertaining to any complaints by Charter subscribers, on any topic) (Dep't Comments Attachment 3). Charter Fiberlink, a certificated CLEC, provided responsive information to the Department's First Request, although, as it no longer serves retail voice customers, informed the Department that it

was not the proper entity to provide information pertaining to the Second and Third Requests.[3] Charter Advanced Services, on the other hand, properly raised the objection that it is not subject to the Department's freestanding authority to demand discovery.[4]

The OAG filed its comments on January 16, 2015, and the Department did so on January 20, 2015. Charter discusses both sets of comments—and replies thereto—below.

I. NEITHER THE DEPARTMENT NOR THE OAG HAVE DEMONSTRATED THAT STATE COMMON CARRIER REGULATION OF INTERCONNECTED VOIP SERVICE IS PERMISSIBLE UNDER FEDERAL LAW.

Neither the Department nor the OAG give any persuasive response to Charter's detailed analysis that Interconnected VoIP is an information service and hence not subject to state public utility regulation under the Communications Act. The federal preemption issue in this docket is dispositive, and overrides all of the Department's other allegations.

The Department's lead argument on the preemption issue (Dep't Comments 5)—and the Attorney General's *only* argument on the subject (OAG Comments 5-6)—is that the FCC has not yet *expressly* preempted state regulation of Interconnected VoIP. To be sure, as the Eighth Circuit has noted, the FCC has predicted that it *would* preempt state regulation of Interconnected VoIP if a case presenting that issue arose. *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 582 (8th Cir. 2007) (noting that FCC order "suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services"). Nevertheless, the OAG and the Department contend that there is no preemption here because the FCC never actually has issued an order preempting state regulation of Interconnected VoIP.

[3] *See* Charter's Response to Information Request No. 1.

[4] *See* Charter's Responses and Objections to Information Request No. 2; Charter's Responses and Objections to Information Request No. 3.

However, Charter has never contended that *an FCC Order* preempts regulation of Interconnected VoIP. Rather, Charter contends that *the Communications Act*, by its own force and effect, preempts regulation of Interconnected VoIP. The Communications Act creates a *statutory* category of information services that is not subject to public utility regulation, 47 U.S.C. § 153(24); Charter's position here is simply that Interconnected VoIP falls within that category by operation of the statute without need for any affirmative action by the FCC. Of course, if and when the FCC decides the regulatory classification of Interconnected VoIP, its decision will guide application of 47 U.S.C. § 153(24) insofar as principles of administrative law warrant. But the statute itself applies whether or not the FCC has issued such an interpretation. Absent an FCC decision, it is incumbent upon this Commission to decide the regulatory classification of Interconnected VoIP in the first instance. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (if "Congress has not directly addressed the precise question at issue," it is "necessary in the absence of an administrative interpretation" for the tribunal to reach "its own construction on the statute"); *In re Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, Memorandum Opinion and Order, 24 FCC Rcd 12573, 12578 ¶ 10 (2009) (where regulatory classification of VoIP traffic was at issue in arbitration proceeding, FCC directing state commission to decide issues "relying on existing law"). The Commission should, based on the authority Charter has placed before it (including the decision of the U.S. District Court for the District of Minnesota), hold that Interconnected VoIP is an information service.

Indeed, in the absence of an FCC interpretation, courts have frequently been called upon to decide the regulatory classification of VoIP in order to resolve cases before them—and they have uniformly held that Interconnected VoIP is an information service by applying the plain text of the Communications Act. *See Paetec Commc'ns, Inc., v. CommPartners, LLC*, No. 08-Civ.-0397(JR), 2010 WL 1767193, at *2-3 (D.D.C. Feb. 18, 2010) (holding that Interconnected VoIP is an information service where necessary to resolve intercarrier compensation dispute); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1082 (E.D. Mo. Sept. 14, 2006) ("*Southwestern Bell v. Missouri PSC*"), *aff'd*, 530 F.3d 676 (8th Cir. 2008) (same); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) (holding that Interconnected VoIP is an information service in order to resolve federal preemption claim). That statutory text is binding on the Commission, under the Supremacy Clause of the United States Constitution, whether there is an administrative decision interpreting and applying it or not. The law does not "require[] a specific formal agency statement identifying conflict in order to conclude that such a conflict in fact exists." *Geier v. Amer. Honda Motor Co.*, 529 U.S. 861, 884 (2000).

In support of its position, the Department cites a "Procedural Order on Remand" by the Vermont Public Service Board in a regulatory proceeding addressing Interconnected VoIP (Dep't Comments 5 n.9), but that proceeding in fact confirms that the Department's argument is incorrect. The Procedural Order cited was on remand from the *state Supreme Court*, which rejected the very argument that the Department advances here. In Vermont's regulatory proceedings concerning Comcast's Interconnected VoIP service, Comcast asserted—as Charter does here—that state regulation of Interconnected VoIP was preempted by federal law. *See In re Investigation into Regulation of Voice Over Internet Protocol Services*, 70 A.3d 997, 1002-03

(Vt. 2013). The Vermont Public Service Board rejected Comcast's argument based on the theory the Department now asserts: the FCC had not yet preempted state regulation of Interconnected VoIP, and thus it was free to regulate Comcast. *Id.* at 1007. The Vermont Supreme Court reversed, holding that if Interconnected VoIP service is an information service under the Communications Act, then "any Title II-type regulation," *i.e.*, public utility regulation, would be preempted. *Id*. at 1007. It explained that the Board should defer to the FCC "if and when the FCC decides the issue," of whether Interconnected VoIP is an information service, but "[a]t this time . . . there is no decision to which the Board can defer. In the interim, the Board is fully capable of deciding the scope of federal law and determining whether that law preempts state regulation, and there is no reason not to do so." *Id.* at 1007-08. For the same reason, the absence of an FCC decision on preemption does not *prevent* this Commission from addressing the statutory classification issue (and consequent federal preemption issue) here; in fact it *requires* the Commission to address the issue. Charter requests that the Commission, based on the authorities cited in Charter's Answer (which include the decision of the U.S. District Court of the District of Minnesota), decide the issue in favor of preemption.[5]

The Department next suggests that Charter failed to disclose that the FCC will hold a meeting "on this precise issue." Dep't Comments 6. However, the Department then cites to the FCC's ongoing *Open Internet* (also known as "Net Neutrality") docket, a proceeding concerning

[5]The Michigan decision cited by the Department (Dep't Comments 5 n.9) similarly provides it no support. That case addressed interconnection under 47 U.S.C. § 251 (an issue over which states indisputably have regulatory authority), not regulation of retail services. Further, the Department cites that decision as holding that the "FCC did not request that state commissions refrain from deciding the issue [of applicability of 47 U.S.C. § 251 to VoIP traffic]." Dep't Comments 5 n.9 (bracket in original). That holding is entirely consistent with Charter's position: Charter agrees that the FCC "did not request that state commissions refrain from deciding" the regulatory classification of Interconnected VoIP, which is precisely why Charter is currently making arguments on that very issue.

the regulatory classification of "broadband internet access service"—*i.e.*, a service that provides access to the public Internet over a broadband connection. That regulatory classification question is not the same issue before the Commission here as the Department asserts; indeed they are distinct.[6] Charter's Answer explained three distinct reasons that its Interconnected VoIP service is an "information service": (1) Interconnected VoIP offers the capability to perform a protocol conversion between IP and TDM, Answer 11-13; (2) Charter's Interconnected VoIP service is closely integrated with information services such as a voice management portal, *id.* at 14-16; and (3) Charter's Interconnected VoIP service converts IP addresses into telephone numbers. *Id.* at 16-17. None of these arguments are the issues presently before the FCC in the *Open Internet* docket, and only the third touches even minimally on the FCC's past decisions related to broadband Internet access services. Unfortunately, the Department does not link the actual legal questions in this docket to the legal questions in the FCC's *Open Internet* proceeding—it simply asserts that the issues are identical. They are not.[7]

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[6] In contrast to the *Open Internet* docket, the FCC does have a proceeding open addressing the precise question at issue here—whether VoIP services are "telecommunications services" or "information services" under federal law. However, the FCC initially posed those questions in 2004, and has not yet decided them. *See In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867, ¶5, 4872-93, ¶¶ 42-43 (2004). There is no basis to believe that a decision is imminent.

[7]The Department's claim that the "the FCC has been signaling the probability that it will rely on its Title II authority to classify broadband internet access service, such as Charter's, as telecommunications services," Dep't Comments at 6, is a red herring. As discussed, the classification of "broadband internet access service" is a separate issue from the classification of interconnected VoIP service. The Department's argument is ironic given that the FCC has *expressly* signaled that it *would* preempt state regulation of fixed interconnected VoIP services, which *is* precisely the issue presented in this case. *Minn. Pub. Utils. Comm'n*, 483 F.3d at 582 ("to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order") (quoting *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 ¶32 (2004)).

Turning to the merits of the preemption issue, the Department's argument is incomplete and not supported by the authority it cites. The Department quotes a portion of 47 U.S.C. § 253 purportedly giving state agencies the plenary power to issue regulations "on a competitively neutral basis." Dep't Comments 7. But § 253 actually says something different:

> (a) In general
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 253(a) preempts barriers to entry to "telecommunications services," while Section 253(b) says that nothing "in this section"—*i.e.*, Section 253—affects a State's ability to impose competitively neutral regulations. Thus, Section 253(b) preserves a state's power to regulate *telecommunications services*. That provision is irrelevant to Charter's argument that Interconnected VoIP is an *information service*.

The Department's sole response to that argument is contained in footnote 31 of its Comments, underscoring the weakness of the Department's position. In response to Charter's first argument that its Interconnected VoIP engages in "protocol conversion," the Department cites the FCC's decision in *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, Order, 19 FCC Rcd 7457 (2004). But as the Department notes, that case—known as the "IP-in-the-middle" decision—involved a service in which calls originated in TDM (traditional telephonic protocol), then were converted

to IP, and then were converted back into TDM. *See* Dep't Comments 14 n.31. The FCC concluded this was a "telecommunication service" because it involved "no net protocol conversion." 19 FCC Rcd at 7465 ¶ 12. But Charter's service is *not* a TDM-to-IP-to-TDM service that involves "no net protocol conversion." Rather, Charter's service offers a *net* protocol conversion—it converts from IP to TDM and vice versa. *See* Answer 11-12. Indeed, this net protocol conversion is the very feature of Charter's service that allows Charter users to speak to traditional telephone users. Accordingly, Charter's voice service is an information service under *AT&T*. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 968 (2005) (characterizing "protocol conversion" as "ability to communicate between networks that employ different data-transmission formats").

In response to Charter's second argument that its voice service is inextricably intertwined with other, undisputed information services in the form of advanced communications features (such as an online portal and voice-mail-to-text functionality), the Department asserts that "[a]ccount access and voice mail are not regulated services, however, and Charter offers no authority to suggest that these attributes constitute attributes used to distinguish information services from telecommunications services." Dep't Comments 14 n.31. However, as Charter's Answer explained, both the Supreme Court's decision in *Brand X*, and the FCC's decision in *Vonage*, hold that a communications service inextricably intertwined with its information service capabilities should be treated as a single, integrated information service. Answer 14-16. Indeed, in *Vonage*, the FCC even cited Interconnected VoIP services that are integrated with online portals and advanced communications features as examples of integrated services whose regulatory classification should be decided based on the complete suite of functionalities offered,

rather than isolating the voice-calling features of the service and classifying them as though they were a standalone service. *See id*. at 15.[8]

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In its *Order Requiring Answer to Complaint and Setting Time Lines*, this Commission observed that "the jurisdictional issue in this case has not yet been thoroughly briefed." *Id*. at 5.[9] Now that the Department has had the opportunity to brief the issue, it has not adequately rebutted Charter's contention that Interconnected VoIP is an information service not subject to state regulation. Accordingly, Charter reiterates its request that the Commission dismiss this proceeding. In the alternative, to the extent the Commission believes there are jurisdictional or preemption issues yet to be determined, Charter requests that the Commission promptly bifurcate the proceeding and address those issues first. *See* Part VI *infra*.

II. THE COMMISSION LACKS JURISDICTION UNDER STATE LAW TO REGULATE INTERCONNECTED VOIP SERVICE.

Beyond federal preemption, the Department (and the Commission) lack authority under state law as well. As Charter's Answer explains, regardless of whether state regulation of Interconnected VoIP is preempted, the Commission lacks authority to regulate Interconnected VoIP under state law. Answer 17-19.

The Department's responses also fail to rebut this conclusion. The Department first asserts that "Minnesota statutes makes no distinction among technologies used to make ordinary

[8]The Department conspicuously offers no response to Charter's alternative, third argument that its service also relies on internal querying of databases with every call in order to convert IP addresses into telephone numbers. Answer 16-17. This is the basis the FCC and the Supreme Court used to find the service at issue to be an "information service" in *Brand X*.

[9]In a puzzling footnote, the Department argues that this Commission has not "abstained" from classifying Interconnected VoIP, but rather has simply not taken its "opportunities … to assert jurisdiction." Dep't Comments 8 n.16. The purpose of this distinction is unclear, as the point remains that the Commission has not decided the issue.

local phone calls." Dep't Comments 9. This begs the question in this case: whether Interconnected VoIP, a service based on a technology unimaginable to the Legislature when it enacted the phrase "telephone service" in 1915, constitutes an "ordinary local phone service." Beyond its bare assertion, the Department provides no argument that it does.

Nor does the Department meaningfully explain why the Legislature would have expressly regulated VoIP in the context of 911 fees in 2005 and sales tax in 2008, if VoIP were simply one type of "telephone service" under state law. Answer 18-19. The Department ignores entirely the statutes addressing 911 fees, 2005 Minn. Laws ch. 136, art. 10, § 15. And regarding sales tax, the Department asserts that the post-2008 definition of "telecommunication services," which specifically identified VoIP, "was not substantively different" from the pre-2008 definition of "telecommunication services." Dep't Comments 9-10 n.21. This argument cannot be squared with the statutory history. Before 2008, the relevant statute explicitly stated that "[t]elecommunications services do not include … information services." Minn. Stat. § 297A.61 subd. 24 (2008). In 2008, the Legislature deleted that phrase, and further broadened the definition of "telecommunications services" so that it now applies "without regard to whether the service is referred to as Voice over Internet Protocol services or is classified by the Federal Communications Commission as enhanced or value added." Minn. Stat. § 297A.61 subd. 24 (2014). Services classified by the FCC as "enhanced" are essentially synonymous with the statutory category of "information services." *Brand X*, 545 U.S. at 977. Thus, in 2008, the Legislature repealed a provision stating that it was *not* taxing "information services," and enacted a provision stating that it *was* taxing at least some types of "information services." The Department's assertion that the post-2008 statute is not "not substantively different" (Dep't

Comments 9-10 n.21) from the pre-2008 statute is not supported by a plain reading of the statute or a review of the legislative history.

III. THE DEPARTMENT'S AND OAG'S APPEALS TO THE PUBLIC INTEREST ARE NOT TIED TO THE LEGAL QUESTIONS PRESENTED IN THIS CASE.

Given that there is no legal basis to subject Interconnected VoIP providers such as Charter to state public utility regulation, arguments about whether the public interest would be served—or not served—by such regulation are not the legal inquiry before the Commission. However, Interconnected VoIP services are generally not regulated as public utilities in other states. To the contrary, courts and state legislatures across the country have generally resisted efforts by state regulators to do so. This absence of regulation at the state level has not triggered the adverse consequences predicted by the Department and OAG. This all strongly suggests that the federal regulatory oversight of Interconnected VoIP providers has adequately protected consumer interests. The Department's efforts to sway the Commission's decision on the legal issues at stake in this proceeding by appealing to the public interest do not show otherwise.

For instance, although the Department cites statistics showing that a few dozen people have complained about service from Comcast and Charter over the course of the past year, 17 to the Department (which it does not disaggregate as between Charter and Comcast) and 22 to the Consumer Affairs Office (only 12 of which pertained to Charter) (Dep't Comments 10-11), the modest number of those complaints cuts against its position. Moreover, the Department provides no indication of how many of these complaints were about Interconnected VoIP or how many were meritorious. Moreover, many of those complaints appear to pertain to topics (such as burying cable) on which the Commission's jurisdiction does not depend on the outcome in this docket in any event. Even further afield is the Department's citation to complaints made to the Better Business Bureau, a nationwide organization with no connection to state

telecommunications regulation, about "Charter"—again, with no indication as to whether those complaints had anything to do with Interconnected VoIP services, as opposed to services such as broadband Internet access or cable video, for which Charter's nationwide subscribers substantially outnumber its Interconnected VoIP customers. Given that Interconnected VoIP services are provided across the country, by many providers in many states, without regulation by state regulators (but subject to a number of federal rules and requirements protecting consumers), the Department's citations do not present a compelling public interest argument for imposing an additional layer of Minnesota-specific state regulation onto Charter Advanced Services' voice offering.[10]

The Department also argues that Charter is a bad actor because it has failed to comply with the Commission's regulations, thus creating a public interest in imposing the Commission's regulations. *E.g.*, Dep't Comments at 13 (citing Charter's failure to "comply[] with regulatory requirements … even though the regulatory requirements existed" and "Charter's lack of cooperation in responding to simple regulatory concerns"); *see also* OAG Comments 8-9. Obviously, if Charter is correct that Interconnected VoIP is an information service not subject to state public utility regulations, Charter's decision not to conform the operation of its competitive voice business to state-by-state regulations in over two dozen jurisdictions that do not apply to its services is entirely reasonable and justifiable. *See In re Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 22,427 ¶ 37 (2004) (observing that "imposition of 50 or more additional sets of different economic regulations" on Interconnected VoIP providers would

[10]The Department's Comments also add a new allegation that Charter does not provide the Commission's Consumer Affairs Office's contact information to its customers. *See* Dep't Comments at 26. Because the Commission does not have jurisdiction to adjudicate consumer complaints with respect to Charter Advanced Services' interconnected VoIP service, no such notification is required.

unreasonably impede their development); *cf. State v. Jacobson*, 697 N.W.2d 610, 615-16 (Minn. 2005) (person who "believed in good faith" that his acts were legal could not have had a "conscious and intentional purpose to break the law" (internal quotation marks omitted)).[11]

Finally, the Department argues that the Commission should regulate Interconnected VoIP to create a level playing field with incumbent telephone providers who are subject to regulation. Dep't Comments 12-15. To the extent that the Department's argument is based on payment of the TAP or TAM contributions, the Commission is free to remedy this issue by adopting a TAP and TAM contribution mechanism properly limited to intrastate traffic (*see* n.14 *infra*)—and the Department's critique proves too much, as it is equally true of any number of voice service providers who compete in Minnesota but who are not subject to TAP or TAM, such as non-facilities-based ("over-the-top") Interconnected VoIP providers or wireless carriers. To the extent that the Department believes that Minnesota state regulations are truly imposing a competitive disadvantage on wireline providers relative to the many services regulated on a federal level with which they compete, such as wireless and over-the-top VoIP providers, the solution to such concerns would be to better tailor the state's wireline telephone regulations, rather than try to extend them to a subset of the federally-regulated competitors. Indeed, if the Department's contention were correct, extending state public utility regulation to Interconnected VoIP providers would simply put them at a corresponding competitive disadvantage relative to wireless and nomadic VoIP providers. There is hardly a compelling competitive case for subjecting fixed Interconnected VoIP services to additional regulations simply for the sake of doing so.

[11] This fact also underscores the unreasonableness of the DOC's and OAG's excessive request to refer to an administrative law judge questions of whether Charter knowingly or intentionally violated Minnesota law and Commission rules. *See* Part V *infra*.

IV. CHARTER'S DENIALS OF THE DEPARTMENT'S ALLEGATIONS WERE WARRANTED, AND THE DEPARTMENT DOES NOT DEMONSTRATE OTHERWISE.

For reasons articulated above, the Department's complaints about Charter's alleged noncompliance with various state regulatory requirements are mooted by the inapplicability of those requirements to Interconnected VoIP services in the first instance, both as a matter of federal preemption and under state law. However, even with respect to the specific violations alleged by the Department, many of the Department's allegations are inaccurate, and Charter properly denied them in its Answer. *See* Answer at 21-27 (responding to numbered allegations).[12]

The Department's Comments criticize Charter's denials with numerous allegations regarding Charter's conduct in this proceeding. *See, e.g.*, Dep't Comments at 15 (asserting that Charter "repeatedly, falsely" claims continued offering of TAP credit); *id*. at 17 (claiming that Charter is "disingenuous" and shows "lack of trustworthiness"), *id*. at 19 (accusing Charter of "antics" due to opt-out nature of change in terms of service); *id*. at 20 (accusing Charter of "false

[12] The Department asserts that Charter has failed to meet its "burden" of proof, citing Minn. Stat. § 237.74 subd. 4(d). Dept. Comments 5 n.6. Leaving aside the circular assumption that Charter Advanced Services is a "telecommunications carrier" to which the burden-shifting function of 237.74 subd. 4(d) applies in the first instance, any such burden would pertain to the entire proceeding, including evidence introduced at a contested case hearing under Section 237.74 subd. 4(c). The Department cites nothing to support its apparent (and mistaken) belief that a party answering a complaint is required to carry its burden of proof at the pleading stage, prior to any hearing or further process. Moreover, even assuming the provision has any application to this proceeding, the burden-shifting provision in section 237.74, subd. 4(d) provides only that "[i]n any complaint proceeding authorized under this section, telecommunications carriers shall bear the burden of proof consistent with the allocation of the burden of proof to telephone companies in sections 237.01 to 237.73." However, the only reference to shifting the burden of proof in those sections pertain to subject matters not germane to this proceeding. *See* Minn. Stat. § 237.075 (shifting burden of proof for rate-of-return regulated telephone company seeking a rate increase); § 237.12 (shifting burden to party resisting interconnection with other carriers); § 237.28 (shifting burden in Commission-initiated motions involving the reasonableness of rates); § 237.762 (burden of proof on ILEC to show price regulated and flexibly price regulated services are priced above TELRIC).

statements"); *id*. at 23 (accusing Charter of "lack of candor"). Despite repeatedly levying such serious accusations, the Department's Comments then fail to support any of them, and in several places misrepresent Charter's position to this Commission.

A. The Provision of Different Services by Different Charter Entities is Unremarkable and Perfectly Lawful.

The Department's difficulties appear to be based in large part on a misunderstanding of the fact that Charter Fiberlink and Charter Advanced Services are different companies offering different services (and, per Charter's position in this docket, subject to different legal obligations). The Department states that "[i]t is unclear which customers and services remain with Charter Fiberlink and which were transferred to Charter Advanced Services," and that it is confusing because "[c]ustomers know that they were and are continued to be served by 'Charter.'" Dep't Comments at 23.

Charter's competitive voice business structure is neither confusing nor unusual. It is entirely unremarkable that one Charter affiliate (Charter Fiberlink), a CLEC, offers one suite of services (wholesale local interconnection, exchange access, private line and data WAN) to business and wholesale customers, whereas a different Charter Affiliate (Charter Advanced Services) offers a different set of services (retail Interconnected VoIP) to another set of customers. It is commonplace (if not universal) for companies in the communications industry to provide different lines of service through different affiliates. In fact, the FCC explicitly endorsed this exact approach to providing retail VoIP services through a separate entity that in turn partners with a CLEC that provides wholesale inputs. *See 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, 3519 ¶ 13 (2007). Moreover, as already described *supra*, the specific business structure adopted by Charter, in which a regulated CLEC provides (*inter alia*) wholesale services and an unregulated VoIP provider offers retail voice services, is well-known to the FCC and was explicitly endorsed by the FCC mere months before Charter implemented the structural changes leading to this proceeding. *See In re Connect America Fund*, 26 FCC Rcd at 18,025-26 ¶¶ 968-970. Given that Charter's structure is pervasive in the industry, it is difficult to understand how the Department can now claim confusion, particularly when—as demonstrated below—retail customers transferred from Charter Fiberlink to Charter Advanced Services were fully informed in advance of the transfer.

B. The Department Misrepresents its Inappropriate and Premature Attempts to Take Discovery From Charter Advanced Services.

The fact that Charter Fiberlink and Charter Advanced Services are not the same entity also answers the Department's repeated complaints regarding Charter's discovery responses.

As described above, the Department has sought to use the comment period to take discovery from Charter. The Department's First Information Request was directed to Charter Fiberlink only, and inquired regarding the customer transfer. Charter Fiberlink cooperated fully with the request and provided the Department, as requested, with copies of the transfer notice and an explanation of how subscribers were notified. *See* Charter's Response to First Information Request.

However, the Department went beyond its jurisdiction in its Second and Third Information requests, in which it requested information not only from Charter Fiberlink (a certificated CLEC that does not dispute the Commission's jurisdiction or authority), but also from Charter Advanced Services, and in which the Department sought information regarding matters (such as administration of TAP credits and incidents of complaints from retail

customers) solely within Charter Advanced Services' purview, and not relevant to Charter Fiberlink's operations. *See* Second Information Request & Third Information Request (Dep't Comments Att. 3). These information requests were improper. Although Minn. Stat. § 237.11, on which the Department relies, states that a "telephone company subject to the provision of this chapter" must make its books and records available to the Department upon request, *the very issue at dispute in this proceeding* is whether Charter Advanced Services is such a "telephone company subject to the provisions" of Chapter 237, or an information service provider subject only to federal regulation. Charter Advanced Services accordingly raised an objection to the Department's attempt to exercise its asserted authority to inspect its books and records when that authority is the very thing that Charter Advanced Services is disputing.[13]

The Department glosses over this history by claiming generically that "Charter" chose not to cooperate and that "Charter" has "refused to share … information" in response to its requests. Dep't Comments at 12. However, in so doing, the Department fails to inform the Commission that Charter Fiberlink cooperated with its requests in full, and that Charter Advanced Services interposed a valid objection to the Department's requests, as it was entitled to do. Given that Charter's discovery responses have been clear with respect to the fact that Charter Fiberlink and Charter Advanced Services take different positions regarding the appropriateness of the Department's information requests, the Department unfairly paints Charter in a negative light merely for asserting its rights in this proceeding.

[13]*See* Charter's Objections and Responses to Second Information Request at pp. 2, 3, 4, 5; Charter's Objections and Responses to Third Information Request at pp. 2, 3, 4 (Dep't Comments Att. 3).

C. Charter Continues to Offer TAP Discounts, Despite Not Being Obligated to, and the Department's Minimal "Investigation" Does Not Show Otherwise.

For the reasons explained in Parts I and II *supra*, Charter Advanced Services is not legally obligated to participate in the TAP program; at a bare minimum there is a serious legal dispute as to that question.[14] Notwithstanding the federal preemption of any obligation of Charter Advanced Services to do so, however, it has continued to offer TAP credits to qualifying customers on a voluntary basis. *See* Declaration of Betty Sanders at ¶¶ 2-3, attached as Exhibit 1 ("Sanders Decl.").

From the Department's Comments, it appears that its investigation into Charter Advanced Services' provision of the TAP credit prior to filing its Complaint was limited to placing a single phone call to a Charter customer service line. *See* Dep't Comments at 15. Contrary to the erroneous conclusion reached by the Department, Charter Advanced Services has continued to credit the monthly bills of qualifying customers, as described in the attached Sanders Declaration. *See* Ex. 1 at ¶¶ 2-3.[15] The Department's Comments do not prove otherwise.

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[14]Although states are not *per se* precluded from seeking universal service contributions from interconnected VoIP providers, the FCC has held that such "state contribution requirements" may not be "inconsistent with the federal contribution rules" to the federal Universal Service Fund. *See In re Universal Service Contribution Methodology*, Declaratory Ruling, 25 FCC Rcd. 15,651, 15,658 ¶¶16-17 (2010). More to the point, the contributions must be limited to "intrastate traffic." *Id.* ¶ 17; *see also Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009) (affirming preemption of Nebraska state USF contribution requirement for interconnected VoIP providers as inconsistent with federal law). The TAP and TAM funding mechanisms are arguably inconsistent with that direction because they are funded by per-line charges bearing no relationship to the extent of inter- or intra-state traffic.

[15] In addition to the monthly TAP discount, Charter provided a one-time TAP credit to qualifying subscribers in December 2014. Charter Advanced Services had inadvertently continued to provide subscribers with the $2.50 monthly TAP discount after the Commission raised the discount to $3.50 effective October 1, 2013; the one-time credit in December 2014 ensured that subscribers were given the full $3.50 discount retroactive to October 1, 2013. *See* Sanders Decl. ¶ 4.

The Department also claims that (after it had *already* made the allegations in the Complaint) one of its representatives was not offered the TAP credit when he inquired about it via an online customer service chat. *See* Dep't Comments at 15.[16] Charter is investigating the Department's assertion that the credit was not offered; however, as the attached Declaration of Betty Sanders demonstrates, Charter Advanced Services is clearly continuing to provide such credits today and has done so through the relevant time period. At most, the Department's inability to verify Charter's policy raises a fact issue (and contradicts the Department's assertion that there are no material issues of fact).

The Department also constructs an argument based on an inaccurate description of Charter's discovery responses. As discussed above, Charter Advanced Services, which provides retail Interconnected VoIP services in Minnesota and administers TAP credits to qualifying customers, objected to the Department's Second Information Request, which inquired regarding the TAP program. Charter Fiberlink, which no longer has any retail customers and accordingly has no customers eligible for TAP discounts, responded to the Department's inquiry, but truthfully responded that it lacked information responsive to the Department's request. *See* Charter's Response to Second Information Request (Dep't Comments Attachment 3).

Again disregarding the fact that Charter Advanced Services and Charter Fiberlink are different entities, the Department argues that Charter must not be providing TAP credits at all because "Charter" claimed to lack information about the TAP program in its discovery responses. Dep't Comments at 17. However, "Charter" made no such claim. To the contrary, Charter Advanced Services (which provides the TAP discount) objected to being subject to the

[16]The screenshot the Department attaches shows the Charter customer service representative encouraging the Department's representative to inquire about the credit at his "local Charter office." Dep't Comments Attachment 4.

Department's discovery. The Department's conflation of Charter Fiberlink's response with Charter Advanced Services' response—and its failure to inform the Commission that the reason that Charter Advanced Services did not provide the information requested was due to a valid discovery objection, not because Charter Advanced Services claimed to lack information about administering the TAP discount—appears to be another attempt to portray Charter in an unwarranted negative light merely for asserting its rights in this proceeding.

D. Charter's Conduct is Consistent with the "Agreement" Referenced by the Department.

The Department further accuses Charter of misconduct in discussing a prior proceeding in which the Department had submitted to the Commission a letter purporting to memorialize a verbal agreement by Charter to continue offering TAP credits to qualifying subscribers. *See* Answer at 20. Here, the Department, without citation, alleges that Charter has engaged in "disparagement of its own prior commitment" to offer TAP credits, and has admitted that it "cannot be relied on." *See* Dep't Comments at 17-18. This accusation does not fairly represent Charter's position.

For context, Charter's Answer actually says the following:

> 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.[17]

[17] *See also* Answer at 25-26:

> 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.

Answer at 20. Nothing in Charter's Answer even remotely approaches "disparagement" of its position in the docket at issue. In fact, Charter's Answer states exactly the opposite: that it has "continued to honor both the letter and the spirit of the agreement…" *Id*. It is difficult to see how the Department moves from that statement to accusing Charter of "disparagement" or "lack of trustworthiness." At most, Charter's Answer questions the Department's use of the term "settlement," *i.e.*, a legal term of art, to describe an agreement not reduced to writing, memorialized only by the Department's own, minimally detailed characterization of a phone call. Given that Charter continues to provide TAP discounts, *see* Sanders Decl. ¶¶ 2-3, the Department's accusatory tone on this subject is unwarranted.

E. Charter's Customer Notification Regarding the Transfer Was Reasonable and the Department Cites Nothing to the Contrary.

Charter Fiberlink truthfully and reasonably gave all of its retail customers advance notice that it was transferring its retail Interconnected VoIP business to Charter Advanced Services. It did so by notifying them through their monthly bills—the most logical way to communicate with its customer base and the means by which subscribers would most likely expect communication from their voice service provider. Indeed, Minnesota law specifically calls out "bill inserts" as an appropriate means of providing notice to telecommunications subscribers. Minn. Stat. § 237.74 subd. 6(b). Despite again accusing Charter of "misleading" both the Commission and its customers, nothing in the Department's Comments demonstrates either that Charter Fiberlink's notification was unreasonable, or that its description of the notification in Charter's Answer was inaccurate.[18]

[18] *See* Answer at 22:

> 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

The Department is silent altogether on the notifications Charter Fiberlink sent via U.S. mail to its customers, and does not claim that this was an inadequate notification method. The Department's sole complaint appears to be that some customers who receive their bill electronically might choose not to look at it. *See* Dep't Comments at 18-19. For instance, the Department claims that one of the Department's representatives, at the time a Charter Fiberlink customer, chose not to look at his monthly bill and was therefore unaware of the notification Charter had sent him. *Id*. at 19. Given that "bill inserts" are specifically named as reasonable means of providing notice in the statute, the Department's complaint seems better addressed to the Legislature rather than in a complaint against a carrier that used bill inserts to send a notification to its subscribers. *See* Minn. Stat. § 237.74 subd. 6(b). Tellingly, although the Department asserts that Charter's notice was not provided by "reasonable means," Dep't Comments at 19, it cites no authority for the proposition that notifying customers via their monthly bills, whether paper or electronic, is not reasonable.

Similarly, with respect to the content of the notice, Charter truthfully informed customers that the "underlying service … for your Charter Phone will remain unchanged" but would be provided by a different provider. *See* Charter Response to Information Request 1, Exs. A, C. Again, the Department accuses Charter of "misleading" its customers, but points to nothing to support the accusation that there is anything "misleading" about this truthful statement.

Finally, the Department complains that Charter's transfer was conducted on an opt-out basis, with subscribers not wishing to have their service transferred given the opportunity to discontinue service. *See* Dep't Comments at 19. Minn. Stat 237.74 subd. 6(a)(2) & (b) requires

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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.

meaningful "notice" to subscribers in the event of change in the terms of service; it does not require that changes to terms of service be conducted on an opt-in basis. Moreover, Section 237.661 by its own terms applies only to transfers to "another telecommunications carrier," and Charter Advanced Services is an information service provider, not a "telecommunications carrier." Despite denigrating a standard opt-out transfer as "antics," Dep't Comments at 19, the Department cites no authority whatsoever to suggest that it was improper in this instance, much less unlawful.

F. Nothing About Charter's Advertising Was Improper.

The Department also repeats its assertion that Charter sought an improper competitive advantage by advertising that it does not impose additional fees on top of the monthly advertised price for its services. But the Department's complaint against this practice disregards the fact that Charter currently provides voice services in 27 states, and that the language on Charter's website to which the Department points is aimed at customers nationwide. There is no reason to think that marketing language aimed at a national audience is a reference to two Minnesota-specific programs (TAP and TAM), or would be perceived as such by Charter's potential customers.[19] As Charter has previously explained, this simply advertises, fairly, that Charter does not bill customers a price higher than advertised, because any fees are built into the

[19]The Department stretches credibility by arguing that the competitive value of Charter's advertising is proved by the fact that Charter used the lack of fees as part of its "pitch" regarding the customer transfer. *See* Dep't Comments at 21-22. However, leaving aside that there would be little reason for Charter to "pitch" anything to customers who have already decided to subscribe to Charter's services, the language the Department cites was not in the notification communicated to transferred subscribers. It was only part of a customer service representative script that Charter was prepared to use in the event it were to receive any inquiries regarding the same—which Charter has no record of receiving. If Charter truly viewed this language as a marketing "pitch" for obtaining a competitive advantage as the Department claims, it hardly makes sense for Charter to have communicated it to so limited an audience, and possibly to no audience at all.

advertised price rather than charged in addition to it. Moreover (although this is not the purpose of Charter's advertising) if Charter is correct that Charter Advanced Services is not required to pay Minnesota's TAP and TAM fees on its Interconnected VoIP Service for the reasons stated, *see* n.14 *supra*, then there would be nothing unlawful about communicating the absence of such fees to potential customers.

G. Charter's Statements in Docket No. 08-952 Are Fully Consistent With Its Present Position.

Charter's Answer also explained that one of Charter Fiberlink's 2009 filings in an interconnection arbitration, to which the Department has repeatedly pointed in this proceeding, is a red herring. Unlike today, where Charter's telecommunications offerings are provided by Charter Fiberlink and its retail VoIP offerings are provided by Charter Advanced Services, in 2009 Charter Fiberlink provided *both* retail VoIP service *and* other telecommunications services. Charter Fiberlink, accordingly, was fully entitled to interconnection rights in 2009, and remains so entitled today as (among other things) a wholesale carrier. The FCC has expressly held that wholesale carriers (and in particular wholesale carriers providing wholesale inputs used by different entities to offer retail VoIP service) are entitled to interconnection under Sections 251 and 252 of the Communications Act. *See In re Time Warner Cable Request for Declaratory Ruling*, 22 FCC Rcd at 3519, ¶¶ 12-13. In 2009, Charter Fiberlink referred to its retail customers because, at that time, Charter Fiberlink served retail voice customers: today it does not. The entity that does (Charter Advanced Services) is neither a CLEC nor required to register as one in order to offer information services to retail customers.

Although the transition from a single entity serving both retail and wholesale customers to two entities offering different services to different customers (as is common practice in the industry) was fully explained in Charter's Answer, the Department again conflates Charter

Fiberlink and Charter Advanced Services, arguing that "Charter has shown no facts to suggest that its local service has changed in any manner affecting its status as a local service provider in the intervening years since 2008." *See* Dep't Comments at 9, n.19. Again, this argument chooses to ignore both the difference between the entities involved, and the fact that the statutory classification of those services is a question of law that depends on application of the statutory terms in the Communications Act.[20] Charter Fiberlink's position in the 08-952 Docket has no relevance to this proceeding and is no more than a distraction.

H. Charter's Revised Annual Report Moots the Department's Complaint.

The Department's Complaint also contains multiple accusations regarding Charter's Annual Report, Charter's supposed violation of Minnesota law, Charter's customer transfer, and the policy implications thereof, all rolled into the same allegation:

> 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.

Because this compound allegation called for a legal conclusion, Charter correctly stated that a response was not required. *See* Answer at 27. With respect to one of the several concepts intermingled in Paragraph 15—Charter's inclusion of Interconnected VoIP revenues in its annual report—Charter explained in its Answer that such revenues pertain to services not subject to state regulation and therefore not subject to regulatory assessments. *See* Answer at 27. However, as

[20]Although the Department's Comments refer to "2008," the filing to which they point was submitted to the Commission on April 16, 2009. *See* 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).

the result of discussions with the Department postdating the Department's Complaint, Charter agreed to include those revenues in a voluntary supplement to its annual report in the interest of furthering the resolution of this dispute. Due to that voluntary supplement, when Charter ultimately filed its Answer on December 18, 2014, it was no longer true that Charter had "not fil[ed] an annual report reflecting intrastate revenues for service to customers" as alleged, and Charter accordingly denied the allegation. *See* Answer at 27.

Charter's voluntary inclusion of its Interconnected VoIP revenues in its annual report ought to moot the Department's complaint, as Charter has now provided the information requested. Apparently determined to accuse Charter of wrongdoing, however, the Department accuses Charter of a "lack of candor" for denying Paragraph 15. Dep't Comments at 23. However, it was the Department that chose to draft its Complaint allegation in the manner that necessitated a denial (as Charter could hardly admit to the compound allegation as written), and Charter's voluntary agreement to report the requested revenues ought to resolve the Department's complaint.[21]

V. THE SERIOUS DOUBTS REGARDING FEDERAL PREEMPTION AND JURISDICTION RENDER ANY ALLEGED NONCOMPLIANCE BY CHARTER PER SE NOT KNOWING OR INTENTIONAL.

The Department's and OAG's requests that this matter should be referred to a contested case proceeding to determine the "knowing and intentional" nature of Charter's supposed "violations," Dep't Comments 28; *see also* OAG Comments 5, should be rejected out of hand. Again, the regulations that the Department accuses Charter of violating are federally preempted

[21]The Department's claim that Charter "has forced … public resources to be expended on it" by requiring this proceeding to be brought before the Commission is somewhat ironic. Dep't Comments at 23. It was the Department, not Charter, that chose to engage in overreach by seeking to exercise authority over an interconnected VoIP provider, in the face of extensive legal authority indicating that such regulatory action is not permissible.

and do not apply to Charter's Interconnected VoIP services in the first place. *See* Parts I & II *supra*. There is at the very least a substantial legal question about whether such preemption applies. Indeed, by asserting its jurisdiction only for the limited purpose of requiring an Answer to the Complaint, and by entertaining briefing on the jurisdictional issue, this Commission has signaled its concurrence that the legal questions raised in this docket are substantial. The existence of a good-faith legal basis for Charter's position here renders any failure to comply with state public utility rules and regulations *per se* non-knowing and nonintentional. *See Walker v. Fingerhut Corp*., No. C6-00-2078, 2001 WL 506952, at *1 (Minn. App. May 15, 2001) (upholding trial court's determination that "respondent's good-faith belief that Minnesota law was not controlling … established that respondent had no intention to evade Minnesota … law"); *Jacobson*, 697 N.W.2d at 615-16 (person who "believed in good faith" that his acts were legal could not have had a "conscious and intentional purpose to break the law" (internal quotation marks omitted)). Accordingly, the Department's and OAG's calls to have the supposedly "knowing and intentional" nature of Charter's actions investigated should be denied.

VI. THE COMMISSION SHOULD BIFURCATE THE PROCEEDING INTO DISTINCT PREEMPTION AND REGULATORY COMPLIANCE PHASES.

The Department's Comments regarding its various factual allegations, as well as its efforts to engage in discovery regarding those allegations during the comment period, make clear that litigating the jurisdictional and regulatory compliance issues at the same time will be wasteful and inefficient. Charter accordingly requests that this proceeding be bifurcated into two phases. The first phase would address the question of whether the Commission has jurisdiction to regulate Charter's Interconnected VoIP service. In the first phase, the Commission would address two issues: first, whether Interconnected VoIP is an "information service" under federal law, 47 U.S.C. § 153(24), thus resulting in preemption of state regulation; and second, whether

Interconnected VoIP service providers are "telephone companies" or "telecommunications carriers" under state law, and thus within the Commission's regulatory jurisdiction. Minn. Stat. §§ 237.01, 237.16, and 237.74. The parties would take discovery, and the Commission would render a decision, on only those issues.

If the Commission concludes that it lacks jurisdiction under either federal or state law at Phase I (and/or that application of the regulations at issue are preempted), then this proceeding would conclude. But if the Commission concludes that it has jurisdiction under both federal and state law in Phase I, then the proceeding could – following any appropriate judicial review – move to Phase II. In Phase II, the Commission could consider the Department's issue-specific (and contested) factual allegations.

The Commission's rules state that they "must be construed to secure the just, speedy, and economical determination of issues before the commission." Minn. R. 7829.0200. The Commission has frequently heeded that directive and bifurcated proceedings when circumstances warranted. For instance, in *In re Petition by Excelsior Energy, Inc. for Approval of a Power Purchase Agreement Under Minnesota Stat. § 216B.1694, Determination of Least Cost Technology, and Establishment of a Clean Energy Technology Minimum Under Minn. Stat. § 216B.1693*, MPUC No. E-6472/M-05-1993, the Commission bifurcated the matter into two phases "as suggested by Excelsior Energy." Second Prehearing Order ¶ 2 (Minn. Pub. Utils. Comm'n June 2, 2006). The Commission stated that "A separate ALJ report will be submitted to the Commission at the conclusion of each phase. Evidence and argument received in Phase 1 may be offered for incorporation in Phase 2." *Id.* The Commission decided that discovery on the second phase would not begin until the ALJ Report on the first phase was complete. *Id.* ¶¶ 5-6. The Commission's accompanying memorandum observed that "[b]ifurcating the matter into

phases to address the two units is reasonable. It allows the hearing to start more quickly." *Id.* p. 5.[22]

Bifurcation is similarly appropriate here. The purpose of bifurcation is to ensure that the Commission resolves the potentially dispositive, threshold issues of jurisdiction and federal preemption before the parties and Commission expend significant resources addressing the Department's numerous specific allegations concerning Charter's alleged non-compliance with Commission rules. In particular, the Department's Complaint includes fifteen paragraphs with a wide range of allegations. As described above, Charter vigorously contests each allegation; each claim, as well as others in the Department's Complaint, will require discovery, briefing, and an evidentiary hearing. Indeed, the Department's broad information requests to Charter thus far illustrate that litigating the various factual allegations will be a resource-intensive exercise. These various allegations, and the discovery underlying them, will all be irrelevant if the Commission lacks jurisdiction over Interconnected VoIP and/or its regulations are preempted by federal law. Thus, Charter asks the Commission to settle the issues of jurisdiction and preemption first.

[22]Other examples of bifurcation abound, including two in the past four months. *See, e.g.*, *In re the Further Investigation in to Environmental and Socioeconomic Costs Under Minnesota Statute 216B.2422, Subdivision 3*, First Prehearing Order, PUC E-999/CI-14-643, ¶ 12, 2014 WL 6985150 (Minn. Pub. Utils. Comm'n Dec. 9, 2014) ("The testimony and hearing in this matter shall be bifurcated."); *In re the Application of North Dakota Pipeline Company LLC for a Pipeline Routing Permit for the Sandpiper Pipeline Project in Minnesota, et. al*, Nos. PL-6668/PPL-13-474, PL-6668/CN-13-473, Order Separating Certificate of Need and Route Permit Proceedings and Requiring Environmental Review of System Alternatives at 4-6, 2014 WL 5088224, at *4-5 (Minn. Pub. Utils. Comm'n Oct. 7, 2014) (bifurcating proceeding in light of complexity of issues and confusion caused by joint proceeding); *In re an Investigation and Audit of Northern States Power Company's Service Quality Reporting*, ,Order Continuing Investigation and Requiring Notice to Employees, Payment of Invoice, and Letter of Compliance, Docket No. E,G-002/CI-02-2034 at 1 & n.1, 2003 WL 1957229, at *1 & n.1 (Minn. Pub. Utils. Comm'n April 17, 2003) (noting bifurcation of docket into financial and service quality components).

This procedure would potentially save the parties significant resources—if the Commission holds that it lacks jurisdiction, then the parties will be able to avoid litigating the remaining issues in this case. Further, in light of the many complicated issues raised by both the jurisdictional and the merits questions, it will be easier for the Commission and the parties to deal with the Department's Complaint in this manner.

Bifurcating the proceeding in this manner will create no risk of delay or inefficiency. The fact testimony, expert testimony, and documentary evidence associated with the two phases would barely, if at all, overlap: The first phase would focus on the characteristics of Interconnected VoIP as a whole as they relate to federal and state jurisdictional provisions, whereas the second phase would focus on Charter's specific actions in connection with its Minnesota VoIP service. Thus, there would be no efficiency advantage associated with lumping the two issues in the same proceeding.

Charter notes that Vermont conducted an investigation into regulation of Interconnected VoIP, and concluded that bifurcation was appropriate along the lines suggested by Charter. *See In re Investigation into Regulation of Voice Over Internet Protocol Services*, 70 A.3d at 1002 ("The parties agreed to divide the proceeding into phases. In Phase I, the Board was confined to fact-finding and determining the extent of its jurisdiction, and in Phase II, the Board was supposed to consider to what extent it should exercise its jurisdiction"). The Commission should similarly bifurcate this proceeding.

CONCLUSION

For the reasons stated, Charter respectfully requests that the Commission hold that federal law preempts the Department's allegations, or that the rules at issue in the Department's Complaint do not apply to Charter's Interconnected VoIP service under state law in the first instance. In the alternative, if the Commission believes that further proceedings are required to

resolve those questions, Charter requests that the Commission bifurcate the proceeding and address the federal preemption and extent of state law authority prior to the alleged regulatory noncompliance issues raised in the Complaint.

Dated: January 30, 2014

Respectfully submitted,

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STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
Betsy Wergin	Commissioner

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

DECLARATION OF BETTY SANDERS

1. My name is Betty Sanders. I am employed by Charter Communications as its Senior Director of Regulatory Affairs.

2. I have reviewed sample invoices sent to customers who subscribe to Interconnected VoIP Services offered by Charter Advanced Services from the period beginning March 1, 2013 through the present.

3. Based on my review of the sample invoices, I have verified that Charter has continued to provide credits under the Minnesota Telephone Assistance Program (TAP) to numerous qualifying Minnesota customers.

4. I am aware that Charter Advanced Services had inadvertently continued to provide subscribers with the $2.50 monthly TAP discount after the Commission raised the discount to $3.50 effective October 1, 2013. However, Charter provided its Minnesota customers a one-time TAP credit in December 2014 to provide the full $3.50 discount retroactive to October 1, 2013.

Further your affiant saith not.

Dated this 30th day of January, 2015.

Betty Sanders

Subscribed and Sworn to before me, a Notary Public, this 30 day of January 2015.

(SEAL)

NOTARY PUBLIC NOTARY SEAL STATE OF MISSOURI

JANEEN DOMAGALSKI
My Commission Expires
April 25, 2017
St. Louis County
Commission #13405360

Notary Public

My Commission Expires: 4/25/2017

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:

REPLY COMMENTS TO MINNESOTA DEAPRTMENT OF COMMERCE 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 30th day of January 2015

/s/Valerie Mendoza, Paralegal

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