No. 17-2290

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Charter Advanced Services (MN), LLC;
Charter Advanced Services, VIII (MN), LLC,

Plaintiffs-Appellees,

vs.

Nancy Lange, in her official capacity as Chair of the Minnesota Public Utilities Commission; Dan M. Lipschultz, in his official capacity as Commissioner of the Minnesota Public Utilities Commission; John Tuma, in his official capacity as Commissioner of the Minnesota Public Utilities Commission; Matthew Schuerger, in his official capacity as Commissioner of the Minnesota Public Utilities Commission; Katie J. Sieben, in her official capacity as Commissioner of the Minnesota Public Utilities Commission,

Defendants-Appellants.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
No. 15-cv-3935 (SRN/KMM)

PETITION FOR REHEARING *EN BANC*

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I. STATEMENT OF REASONS FOR PANEL REHEARING OR REHEARING *EN BANC*.

This case presents an issue of exceptional national importance: how should an important technological innovation in the telecommunications area, Voice over Internet Protocol ("VoIP"), be regulated under the Telecommunications Act of 1996 ("1996 Act") when the service is provided as a fixed (i.e., non-mobile), interconnected service?

Charter Phone's VoIP service provides telephone services to customers at a fixed location that requires only a standard phone, plugged into a wall jack. Given that Charter can and does determine whether customer calls are intrastate or interstate, should this service be treated the same as a traditional wire-based telecommunications service under the plain language the 1996 Act, and therefore subject to state regulation?

Under the plain language of §§ 152-153, as well as longstanding precedent, including the *Universal Serv. Contribution Methodology*, 21 FCC Rcd. 7518 (2006) ("*USF Order*") and this Court's decision in *MPUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) ("*Vonage III*") Charter's VoIP services should be subject to state regulation. In addition, the functionality approach adopted by the United States Supreme Court in its decision in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"), further

supports state regulation of a telephone service that, in all meaningful respects, functions for the consumer the same as a traditional land-line telephone.

Charter instead urged the Court to ignore the above authority, and contrary to the presumption against preemption, to reach a question of whether VoIP services should be classified as an "information service" under the 1996 Act, preempting all state regulation of the services. Resolving this classification question involves difficult questions of law, policy, and technology that have remained unresolved by the FCC since opening the issue for comments fourteen years ago.

Acting in the absence of formal FCC guidance, a panel of the Eighth Circuit Court of Appeals held 2-1 that Charter Phone's fixed VoIP services are an information service and, therefore, that state regulation is preempted. Opinion (September 7, 2018). As recognized in the dissenting opinion, the decision reached by the panel majority is inconsistent with the 1996 Act. It is also in conflict with this Court's prior opinion in the FCC's *USF Order*, this Court's decision in *Vontage III*, as well as the United States Supreme Court decision in *Brand X*. As such, consideration by the full Court is necessary to ensure uniformity of this Court's decisions. Fed. R. App. P. 35(a)(1), (2).

Furthermore, this issue is both important and novel. As other circuits attempt to grapple with these important and difficult questions, they will look to

this Court's decisions for guidance. As such, the issue in this case is a difficult and novel issue of exceptional importance that would benefit from the careful consideration and well-reasoned analysis that would result from *en banc* consideration by this Court. Fed. R. App. P. 35(a)(2).

II. PROCEDURAL BACKGROUND.

On March 1, 2013, Charter unilaterally deregulated its Minnesota operations by transferring its state residential telephone consumers to an allegedly unregulated subsidiary, Charter Advanced. *See* MPUC Order[1] at 1-15. The Minnesota Department of Commerce ("Department") filed a complaint with the Minnesota Public Utilities Commission ("MPUC" or "Commission") on September 26, 2014, alleging that Charter Fiberlink failed to provide effective notification or seek consent from its Minnesota customers of the service change, nor did it seek the MPUC's regulatory approval before transferring customers. *Id.* at 1-2, 7-11. The Department also alleged that Charter had not paid state fees, including those

[1] *See* Transmittal Affidavit of Andrew Tweeten in Support of Defendant's Motion for Summary Judgment filed November 1, 2016 with the district court, Case No. 15-cv-3935 (SRN/KMM), Exhibit 2. This is the Minnesota Public Utilities Commission's ("MPUC") July 28, 2015 Order Finding Jurisdiction and Requiring Compliance Filing in *In the Matter of the Complaint of the Minnesota Department of Commerce Against the Charter Affiliates Regarding Transfer of Customers*, Docket No. 14-383, and is a public record of the MPUC, available online at: *https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showeDocketsSearch&showEdocket=true&userType=public (referred to herein as* "MPUC Order").

used to fund monthly assistance to eligible low-income Minnesotans ("TAP") and relay services for individuals with hearing impairments ("TAM"). *Id.* (citing Minn. Stat. §§ 237.69–71 and 237.50–56).

In response, Charter contended that the MPUC lacks jurisdiction over its VoIP telephone service, arguing that VoIP service is not a "telecommunication service" under the 1996 Act. *Id.* at 2, 4-6, 10-11. As a result, since March 2013, in Charter's view, its customers are no longer protected by numerous state law consumer protections, including, *inter alia*,: (1) protection from "slamming" practices, *see* Minn. Stat. § 237.661; (2) protection from discriminatory price gouging, *see id.* § 237.60; (3) protection from unauthorized billing charges, *see id.* § 237.665; and (4) customer privacy regulations, *see* Minn. R. 7812.0100, subp. 8, 7812.1000. *Id.*

Charter Phone also contends that because it is not subject to the MPUC's jurisdiction, Charter is not required to: (1) collect or remit TAP and TAM fees or inform customers of the availability of low-income assistance programs;[2] (2) submit a plan to MPUC detailing how it will provide 911 service to its customers, *see* Minn. R. 7812.0550; (3) comply with Minnesota's service quality

[2] To fund TAP and TAM, all Local Exchange Carriers must collect monthly bill surcharges from their customers and remit the proceeds to the Minnesota Department of Public Safety. *See* Minn. Stat. §§ 237.701, subd. 1 & 237.52, subd. 3.

standards, *see* Minn. Stat. §§ 237.121 & 237.765, *see also* Minn. R. 7812.0700; (4) report significant service disruptions to MPUC, *see* Minn. R. 7810.0600; (5) comply with notice requirements, such as notices for price increases and significant changes in the terms and conditions of service, *see* Minn. R. 7812.2210, subp. 3; (6) follow Commission approved procedures for resolving bill disputes, *see* Minn. R. 7810.2400; (7) abide by certain customer protections both before and during disconnection of customer service, *see* Minn. Stat. 7810.2000–2300; or (8) comply with restrictions on customer deposits, *see* Minn. R. 7810.1600. *Id.* Charter also asserts that it is no longer required to inform customers of their ability to seek recourse with the MPUC because, according to Charter, the MPUC can no longer legally provide recourse to Charter's customers. *Id.*; *see also* Minn. R. 7810.1100–7810.1200 (requiring a telephone utility to establish complaint procedures for its customers and keep records of all customer complaints forwarded from the MPUC to the utility).

In orders dated November 18, 2014 and July 28, 2015, the MPUC found that Charter's service is subject to the framework of dual state and federal regulation under the 1996 Act. *Id.* at 1-2, 12-15. On October 26, 2015, Charter Advanced filed suit in the United States District Court for the District of Minnesota, asserting that the MPUC's actions are preempted by the 1996 Act. In its May 8, 2017 Order

on the parties' cross motions, the district court granted Charter Advanced's motion for summary judgment and denied the MPUC's motion for summary judgment.

On June 7, 2017, the MPUC filed a notice of appeal of the district court's decision. On September 7, 2018, in a 2-1 decision, a panel of this Court affirmed and held that fixed VoIP is an information service and, as such, that MPUC is preempted from regulating Charter Phone's service.

III. ARGUMENT.

A. The Majority Opinion In This Case Conflicts With Prior Holdings In *Vonage III* And The FCC's *USF Order*.

Rehearing is required to resolve the conflict between the panel's majority opinion in this case and this Court's prior holding in *Vonage III*, the *FCC's USF Order*, and the U.S. Supreme Court's holding in *Brand X*.

The FCC and this Court in *Vonage III* held that "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for . . . preemption . . . and would be subject to state regulation." *MPUC v FCC* ("*Vonage III*"), 483 F.3d 570, 580 (8th Cir. 2007) (quoting the FCC's *USF Order*, 21 FCC Rcd. 7518, 7546 ¶ 56 (2006)). Charter Phone is a fixed, interconnected VoIP service with the ability to determine whether calls are interstate or intrastate. Thus, under the plain terms of this Court's *Vonage III* decision and Paragraph 56 of the FCC's *USF Order* quoted therein, the MPUC has jurisdiction over Charter Phone.

In 2017, this Court also affirmed a district court decision relying on Paragraph 56 of the *USF Order*, as applied by this Court in *Vonage III*. *See Sprint Commcn's Co. v. Bernsten*, 152 F. Supp. 3d 1144, 1152 (S.D. Iowa 2015) (observing that the FCC explicitly said that the *Vonage* preemption order does not apply to providers with the ability to track the jurisdiction of customer calls and such providers are subject to state regulation), *aff'd sub nom. Sprint Commcn's Co., L.P. v. Lozier*, 860 F.3d 1052 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 669 (2018). The Fifth Circuit Court of Appeals has likewise done the same. *See Centurytel of Chatham, LLC v. Sprint Commcn's Co.*, 185 F. Supp. 3d 932, 943-45 (W.D. La. 2016) (holding that Paragraph 56 "expressly reversed" application of *Vonage* preemption order when companies can track the jurisdiction of VoIP calls and observing that the Eighth Circuit specifically credited this interpretation in *Vonage III*), *aff'd* 861 F.3d 566 (5th Cir. 2017), *cert. denied*, 138 S.Crt. 669 (2018).

Like this case, both *Centurytel of Chatham* and *Bernsten* considered claims by providers of fixed-interconnected VoIP services arguing that their VoIP service was an information service and therefore state regulation of their call traffic was preempted. In both cases, the courts declined the provider's invitation to resolve whether their service met the definition of "information service" and instead found

Paragraph 56 dispositive.[3] *Centurytel of Chatham*, 185 F. Supp. 3d at 943-44; *Bernsten*, 152 F. Supp. 3d at 1152.

The majority opinion in this case, however, reached the opposite conclusion. It is indisputable that Charter is "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls." Yet the majority decision failed to follow Paragraph 56, decided to address the classification question, and ultimately concluded fixed VoIP services *do* "qualify for . . . preemption" and are *not* "subject to state regulation." Indeed, this Court's conclusion gives so little consideration to the *Vonage III* precedent that it is difficult to understand how the panel's decision could be applied in future cases without, in effect, overruling it.

As stated in this Court's decision affirming *Bernsten*, resolving the broader question of whether the 1996 Act preempts MPUC's authority does not require statutory classification of the VoIP calls as a telecommunications service or an information service. *See Lozier*, 860 F.3d at 1056. Just as in that case, FCC

[3] Indeed, the history of the *Vonage* cases supports a court decision that does not reach the classification decision. In *Vonage Holding Corp. v. MPUC ("Vonage I")*, 290 F. Supp. 2d 993 (D. Minn. 2003), the district court decided that a nomadic VoIP telephone service offered by *Vonage* (offering an internet-based service similar to Skype or Facetime) was an information service. The FCC declined to affirm the district court's classification determination and instead resolved the issue based on *Vonage Holdings Corps*, 19 FCC Rcd. 22,404, 22,413-14 ¶¶ 17-18 (2004) ("*Vonage II*"). This Court affirmed the FCC's preemption decision based on the fact that *Vonage's* service was nomadic and unable to be tracked jurisdictionally, and declined to consider the issue decided by the district court. *Vonage III*, 483 F.3d at 578.

precedent directs that state jurisdiction is proper. Under the plain terms of Paragraph 56 of the FCC's *USF Order*, and this Court's subsequent restatement of that disclaimer of preemption in *Vonage III*, the MPUC has authority to regulate Charter Phone because Charter is capable of determining the jurisdiction of its customers' calls.

The panel may have been influenced by an amicus brief filed by the FCC. But any such reliance is misplaced. Paragraph 56 of the *USF Order* was a formal action taken by FCC Commissioners, whereas the amicus brief is instead a litigation position that is not entitled to deference. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (litigating position unsupported by administrative practice not due deference); *cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action . . ."). This Court must hew to its precedent in *Vonage III*, as well as the determination and judgment expressed by Commissioners at the FCC in Paragraph 56 of the agency's *USF Order*. Reframing or discarding this authority, as urged by the FCC, would improperly

"propel the court into the domain which Congress has set aside exclusively for the administrative agency." *See SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947).

On the merits of the classification issue, the panel's decision is also inconsistent with the United States Supreme Court's decision in *Brand X*. There, the Court held that a functionality test does not allow companies to evade regulation. *See Brand X*, 545 U.S. at 997-98. Because Charter Phone operates for the end user in all significant respects like a traditional landline telephone, the functional approach requires a conclusion that Charter Phone would be subject to the same regulatory statutes regardless of its internal technology. The panel decision in this case failed to follow this analysis, and is therefore also inconsistent with *Brand X*.

Rehearing *en banc* is necessary to ensure uniformity in this Court's decisions.

B. This Case Presents An Issue Of Exceptional National Importance.

As currently decided by the majority panel, the decision in this case addresses the issue of whether VoIP should be classified as a "telecommunications service," under the 1996 Act, and thus subject to state regulation, or as an "information service," for which state regulation is preempted.

The answer to this question has significant policy ramifications. The FCC first solicited comments on this question in 2004. *See In re IP-Enabled Services*,

19 F.C.C.R. 4863, 4880-81 ¶¶ 26-27, 4886 ¶ 35 (2004). Through multiple administrations, the FCC has been unable to resolve the issue. As Judge Grasz explained in his dissent, this lack of clarity from the FCC "is at least in part because the entire telephone network is in the process of changing from time-division multiple ('TDM') to internet protocol ('IP')." Op. at 10 (Grasz, J., dissenting). As a result, deciding what is and is not an information service has become increasingly complicated, with the significant possibility that substantially similar services will be subject to different regulatory regimes throughout this technological transition. *Id.*

For example, as the dissent points out: "The only practical difference between Charter's network and AT&T's network is whether the first converter box is inside or outside the customers' homes." *Id*. at 11. And yet, under the panel's holding, the AT&T network is subject to state regulation but the Charter network is not. *Id*. This arbitrariness "may explain why the FCC has yet to make categorical pronouncements on protocol conversions," such as the technology at issue here. *Id.*

Whatever its motivations, the FCC has been reluctant to resolve the issue with a final rule that must be supported by policy reasons capable of surviving arbitrary and capricious review under the Administrative Procedure Act. In effect, the majority purported to resolve an issue that has vexed the FCC for decades,

without an analysis of the policy ramifications and without a robust analysis of the statutory text.

In addition to raising important regulatory policy questions, the issue of preemption in this case raises significant and difficult statutory interpretation questions. Judge Grasz's dissent offers a well-reasoned analysis for why the technology at issue cannot be an information service, as the term is defined in the 1996 Act, concluding: "In my view, the net protocol conversion in Charter's service makes it either a telecommunications service or something outside the primary categories of services in the Communications Act. The one thing it cannot be is an information service." *Id*. at 11–13. By contrast, the majority offers a one-paragraph explanation for why the technology is an information service under the 1996 Act, without addressing any of the textual problems with that interpretation highlighted by Judge Grasz. *Id*. at 6–7.

Moreover, this opinion is likely to have significant precedential value. While this issue has been pending before the FCC, other courts have declined to address the classification issue for purposes of resolving whether state regulation of VoIP is preempted under the 1996 Act. *See, e.g.*, *Vonage III*, 489 F.3d at 1241 (declining to reach the issue because it was not preserved for review). The panel's opinion in this case is the first. As other circuits grapple with this important and

difficult question in the future, they will look to the Eighth Circuit opinion for guidance.

It is important that this circuit provide a thorough and well-reasoned analysis on this compelling question. Accordingly, this Court should grant rehearing *en banc.*

C. The District Court's Decision Is Contrary To Presumptions Against Preemption Of State Law, Congressional Intent, And Public Policy.

This Court should grant rehearing *en banc* because the panel's decision is inconsistent with Congress' established framework of shared federal and state regulation of telecommunications services. Contrary to congressional intent, it invites carriers to artificially alter technical aspects of their service to evade regulation and it undermines competitive neutrality. Furthermore, a classification rule simply based on the particular technology a carrier uses is nonsensical in an industry that is undergoing a significant and arguably, in Charter's view, permanent transition.

First, Congress did not preempt the field of telecommunications from state regulation when it passed the 1996 Act. It preserved the authority of state commissions to enact "regulations for or in connection with intrastate communication service . . . ." 47 U.S.C. § 152. Congress indicated that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or

local law unless expressly so provided . . . ." Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 143. This Court's decision upends the dual regulatory system that this Court has recognized Congress enacted. *See Sw. Bell Tel. Co. v. Connect Commc'ns Corp*., 225 F.3d 942, 948 (8th Cir. 2000) (the Telecommunications Act is a "scheme of cooperative federalism").

Second, contrary to the plain language of the 1996 Act, *see, e.g*., 47 U.S.C. § 153(53), this Court's decision allows telecommunications carriers to evade state authority under the 1996 Act—and any attendant support obligations for funds for low income and deaf and hard of hearing individuals—simply by changing technology.

Third, federal and state telecommunications laws share the premise of technological and competitive neutrality. *See, e.g., USF Order*, 21 FCC Rcd. At 7541 ¶ 44; Minn. Stat. § 237.011(4). Yet Charter seeks to gain a competitive advantage simply by changing technology to avoid regulations applicable to its competitors.

These important concerns further support the appropriateness of rehearing *en banc.*

CONCLUSION

This case involves novel issues of exceptional importance, and the majority opinion departs from statutory text, precedents of this Court, other federal courts, and the FCC. For the reasons stated herein, this Court should grant a rehearing *en banc*.

Dated: September 21, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,229 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Times New Roman font.

3. The undersigned, on behalf of the party filing and serving this petition, certifies that the petition has been scanned for viruses and that it is virus-free.

Dated: September 21, 2018.

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Charter Advanced Services, et al v. Nancy Lange, et al
Eighth Circuit Appellate Court File No. 17-2290

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I electronically submitted the foregoing Document (Petition for Panel Rehearing or Rehearing *En Banc*) with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I will serve the foregoing document by First-Class Mail, postage prepaid, on the following non-CM/ECF participants listed below within five days of the notice that the brief has been accepted for filing by the Court:

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