No. 18-1386

In The Supreme Court of the United States

DAN M. LIPSCHULTZ, JOHN TUMA, MATTHEW SCHUERGER, KATIE J. SIEBEN, and VALERIE MEANS, in their official capacities as Commissioners of the Minnesota Public Utilities Commission,

Petitioners,

v.

CHARTER ADVANCED SERVICES (MN), LLC; CHARTER ADVANCED SERVICES VIII (MN), LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This Petition presents important questions on whether FCC policy preempts state regulation of Voice over Internet Protocol (VoIP) service, and whether VoIP service is a telecommunications or an information service under the appropriate functional test for classification determinations from *Brand X*.

Charter's response significantly understates the national importance of the questions presented. This case concerns whether states will have any role to play in regulating the technology that is rapidly replacing traditional telephone service across the country. Charter does not offer any data to contradict the proliferation of VoIP service.

Furthermore, Charter does not dispute that the Eighth Circuit failed to apply the FCC's well-established functional test for classification determinations. Charter cannot explain away that the Eighth Circuit, in assessing the FCC's implied preemptive intent as to VoIP service, chose not to use the test the FCC would have used. The Eighth Circuit's failure to apply the appropriate test is inconsistent with this Court's precedent.

Finally, Charter mistakenly argues that the Minnesota Public Utilities Commission (MPUC) did not raise the conflict preemption issue below. Before the Eighth Circuit, the MPUC raised and briefed both issues presented in the Petition.

ARGUMENT

I. Charter Significantly Understates the National Importance of the Issues Presented.

Since the early twentieth century, states have regulated intrastate telephone services. *See* Communications Act of 1934, ch. 652, § 2, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 152) (granting the FCC jurisdiction over interstate telephone services but leaving intrastate telephone services to the states). VoIP service is rapidly replacing traditional telephone services in this country and could soon render them extinct. *See In re IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6039 ¶ 2, 6046 ¶ 12 (2009); Pet. 6–7, 12. If states cannot regulate VoIP services, soon states will not be able to regulate any telephone services, and consumers will not be able to choose a telephone service for which they receive the benefits and protections of state regulation. *See id*.

Charter suggests the stakes of this lawsuit are low because federal regulations already subject VoIP service providers to "rules often similar or analogous to those faced by traditional carriers." Charter Br. at 22. If this is true, why did Charter go through great pains to avoid traditional regulation in Minnesota? Before March 2013, Charter offered VoIP services in Minnesota through its affiliates, and these affiliates were regulated by the MPUC. App. 24. In March 2013, Charter restructured and assigned its retail VoIP service customers to a newly-established Charter entity. *Id.* As the district court explained: "The frank purpose behind

the assignment was to limit the reach of state regulation, thereby enhancing Charter's market competitiveness." *Id.* Unquestionably, Charter restructured to avoid regulation in Minnesota that is more robust than federal regulation. But for Charter's blatant attempt to avoid regulations protecting consumers in Minnesota, this lawsuit would never have arisen.

Charter's attempt to portray Minnesota as an outlier, out of step with other states on VoIP, is misguided. To support this portrayal, Charter cites to a set of slides from Sherry Licthenberg of the National Regulatory Research Institute (NRRI). Charter Br. at 20 n.7. However, the author's full NRRI report is supportive of the MPUC's order on Charter and suggests other states may follow suit. The report states that the MPUC's action "shows the ways in which expert state agencies are continuing to ensure that customers receive adequate communications services and that all carriers adhere to state regulatory requirements, as permitted under state law." Sherry Lichtenberg, NRRI Report No. 15–07, *Examining the Role of State Regulators as Telecommunications Oversight Is Reduced* 25 (Aug. 2015).[1] The report observes that "more states and state commissions [may] move in this direction" toward regulating VoIP service, and cites recent legislative proposals in Texas and Maine. *Id.* at 25 n.74.

The MPUC may have been early to recognize the importance of state regulation of VoIP service, but it is not alone in this regard. Indeed, the National Association

[1] The full report is available at http://nrri.org/research-papers/.

of Regulatory Utility Commissioners, which represents the interests of all fifty state commissions that regulate communications services, has filed an amicus brief supporting the Petition. Also, the Vermont Public Utility Commission, like the MPUC, has found it has jurisdiction to regulate VoIP service as a telecommunications service. *See Investigation into Regulation of Voice over Internet Protocol (VoIP) Services*, 2018 WL 835315, at *1–2, *52 (Vt. P.S.B. Feb. 7, 2018).

Charter also emphasizes the lack of a circuit split. However, Charter offers no reason to believe a better vehicle will present these nationally-important issues to the Court. Unlike other appellate cases involving VoIP, this case has no jurisdictional problems or concerns about record development. *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 851 F.3d 1324, 1328–29 (D.C. Cir. 2017) (per curiam) (holding an association lacked standing to seek an order compelling the FCC to classify VoIP service as a telecommunication service); *In re FCC 11–161*, 753 F.3d 1015, 1048–49 (10th Cir. 2014) (finding the question of whether a VoIP service provider may obtain universal service funds was not ripe); *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd. of P.R.*, 634 F.3d 17, 38 (1st Cir. 2011) ("We are hesitant to insert ourselves into the classification and regulation of VoIP traffic on such a muddled record."). With a clean record, no disputed facts, and no jurisdictional concerns, this case presents an excellent vehicle to review the important issues presented.

II. Charter Does Not Dispute the Eighth Circuit Failed to Use the Well-Established Functional Test for Classification Determinations.

Charter does not dispute that the FCC uses a well-established functional test for classifying communications services, which was approved by this Court in *Brand X*. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991–93 (2005); *see also* Pet. 19–21. Charter also does not dispute that the Eighth Circuit did not use, or even mention, the functional test when it classified VoIP service.

This begs the question: When assessing whether state regulation conflicts with policy set by the FCC, shouldn't a court use the test developed and used by the FCC? The answer is obviously yes.

Charter's argument that the Eighth Circuit was entitled to use a textual approach, rather than the FCC's functional approach, ignores the context of this case. The Eighth Circuit made the classification determination to decide whether there was a conflict between state regulation and FCC policy. Administrative conflict preemption is fundamentally a question of the agency's implied preemptive intent. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884–85 (2000) (stating that preemption "fundamentally is a question of . . . intent," and conflict preemption is an instance of "implied" or "implicit" intent). To assess the agency's implied intent, a court should use the same test the agency would use if it were deciding the question. When the court opts to use a different test, as the

Eighth Circuit did here, the danger is that the result will reflect the court's intent rather than the agency's intent. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A] court is not to substitute its judgment for that of the agency."). The Eighth Circuit's failure to apply the FCC's well-established functional test, on this issue of national importance, is inconsistent with this Court's precedents.

The fact that the FCC supported Charter at the Eighth Circuit is irrelevant to this issue because the FCC did not take a position on VoIP classification and did not dispute that its well-established functional test is the appropriate test for classifying VoIP service. *See* Brief of the Federal Communications Commission as Amicus Curiae in Support of Plaintiffs-Appellees at 28, *Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290, 2017 WL 4876900 (8th Cir. Oct. 26, 2017). Furthermore, the FCC's litigating position does not reflect the agency's official position and is not due deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

III. The MPUC Did Not Waive the First Question Presented.

Charter argues that the MPUC cannot present the first question in the Petition because it was not raised below. Charter Br. at 29–30. This is balderdash! Before the Eighth Circuit, the MPUC raised two related but distinct issues: whether the MPUC is preempted from

regulating Charter's VoIP service under FCC policy and precedent, and whether VoIP service is a telecommunications or an information service. Both issues are presented in this Petition.

In its principal brief to the Eighth Circuit, the MPUC raised these two issues and summarized its arguments as follows:

> Based on binding decisions of this Court, FCC precedents, and recent decisions from other federal courts, the MPUC is not preempted from regulating Charter Phone. The MPUC is entitled to judgment as a matter of law on this basis alone. If the Court reaches the definitional classification issue raised by Charter Advanced, Charter Phone is properly regarded as a telecommunications service subject to the MPUC's jurisdiction. This conclusion follows from the plain text of the Telecommunications Act and the FCC's functional approach to classification.

Brief of the Defendant-Appellant Commissioners of the MPUC at 17, *Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290, 2017 WL 3821821 (8th Cir. Aug. 24, 2017). In its reply brief to the Eighth Circuit, the MPUC again emphasized that, in addition to the classification issue, it was arguing a distinct conflict preemption issue: "[The preemption issue] is not whether Charter Phone should be classified as a 'telecommunications service' or an 'information service' under the 1996 Act, but rather whether the MPUC is preempted, pursuant to the FCC's and this Court's

precedents, from regulating fixed, interconnected VoIP telephone services." Reply Brief of the Defendant-Appellant Commissioners of the MPUC at 2, *Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290, 2017 WL 5653490 (8th Cir. Nov. 15, 2017).

Both issues presented to the Eighth Circuit are presented in this Petition. The MPUC has not waived or abandoned either one.

CONCLUSION

For all of the reasons stated above, as well as those contained in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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