

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CHARTER ADVANCED SERVICES)	
(MN), LLC, et. al.,)	
)	Case No. 15-cv-3935-SRN-HB
Plaintiffs,)	
)	
v.)	AMICUS BRIEF OF VOICE ON
)	THE NET COALITION IN
BEVERLY JONES HEYDINGER,)	SUPPORT OF PLAINTIFFS'
et. al.,)	COMPLAINT
)	
Defendants.)	

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GLOSSARY

FCC	Federal Communications Commission
IP	Internet Protocol
MPUC	Minnesota Public Utilities Commission
July 28 Order	July 28, 2015 MPUC “Order Finding Jurisdiction and Requiring Compliance Filing” <i>In the Matter of the Complaint of the Minnesota Department of Commerce Against the Charter Affiliates Regarding Transfer of Customers</i> , Dkt No. P-6716,5615/C-14-383.
MPUC Order	September 24, 2015 MPUC “Order Denying Reconsideration,” <i>In the Matter of the Complaint of the Minnesota Department of Commerce Against the Charter Affiliates Regarding Transfer of Customers</i> , Dkt No. P-6716,5615/C-14-383.
VoIP	Voice over Internet Protocol
VON Coalition	Voice on the Net Coalition

IDENTITY AND INTEREST OF AMICI

The Internet has transformed every aspect of American life. Internet-based applications, including Voice over Internet Protocol (“VoIP”), are used by tens of millions of people every day, at home and at work, to deliver voice, data and video communications. Once limited to hobbyists and their computers, these IP communications are now used seamlessly across multiple devices, including broadband-enabled handsets, cell phones, laptop computers, desktop computers and tablets.

The VON Coalition is a non-profit, 501(c) (6) trade association incorporated in May 1998 to represent providers of IP communications. The coalition is comprised of service providers, software providers and equipment manufacturers including AT&T, Google, Microsoft, Nextiva, Switch and Vonage. The VON Coalition’s singular mission is to advocate for public policies that support the availability and adoption of Internet communications.

To facilitate its mission, the VON Coalition focuses on several key objectives, including:

- Educating regulators, legislators and media about Internet communications technologies, products, benefits, and practices;
- Recommending action on state and federal regulation and legislation that affects the interests of the Internet communications industry; and
- Providing a forum for discussion by VON Coalition of important legal and regulatory policy issues.

Members of VON Coalition believe that regulators should refrain from applying decades-old, traditional telephone regulations that could stall consumer benefits from IP

communications, while industry and government find new solutions to address important consumer or public safety interests. In short, the VON Coalition works to advance regulatory policies that will enable all Americans to enjoy cutting-edge IP innovations and technologies free of unnecessary governmental regulation. The VON Coalition website may be found at: <http://www.von.org/>.

The VON Coalition has an interest in this proceeding because Plaintiffs, Charter Advanced Services (MN) LLC and Charter Advanced Services VIII (MN), LLC, are providers of interconnected VoIP service, like many providers represented by the VON Coalition. Plaintiffs are challenging the September 24, 2015 MPUC Order denying rehearing of a July 28, 2015 MPUC Order that Plaintiffs' VoIP services are "telecommunications services" subject to state regulation. The MPUC Order, while narrowly focused on Plaintiffs, could be interpreted to apply to all similarly situated VoIP providers. Therefore, any decision by this Court concerning the MPUC Order could affect the MPUC's ability to regulate services provided by VON Coalition members.

INTRODUCTION

The MPUC Order imposes state regulation of Plaintiffs' network-based, interconnected VoIP service by requiring Plaintiffs to comply with all applicable Minnesota state telecommunications rules and requirements. Plaintiffs argue that the MPUC Order "singles out Charter Advanced's interconnected VoIP service as the only VoIP service in Minnesota subject to such regulation, arbitrarily leaving indistinguishable services offered by other providers unregulated by the State." Complaint at ¶5. Although

at this point in time the MPUC is only regulating Charter; at some point in the future the MPUC may seek to regulate other VoIP providers; hence our concern.

As the representative for numerous VoIP service providers, the VON Coalition has a significant interest in any order permitting the state to impose legacy telephone regulations on providers of distinct VoIP services that are already sufficiently governed by federal law. If the state were permitted to regulate a substantial class of VoIP providers, such regulation could have devastating effects for providers and their ability to offer and implement consistent, competitive services across state lines. Accordingly, this brief aims to assist the Court in understanding the features and functionality of VoIP technologies, the significant and on-going regulation of VoIP providers under federal law, and how state regulation could significantly affect the national growth and use of IP communications, including VoIP.

ARGUMENT

I. The MPUC's September 24, 2015 Order Could Be Interpreted As Applicable to Similarly Situated VoIP Service Providers

In 2004, the FCC preempted state regulation of VoIP.¹ The *Vonage Order* firmly established that a national regulatory framework was more appropriate for providers of VoIP and other integrated communications capabilities. *Id.* at 22424. The FCC made clear that the *Vonage Order* applied to services with similar, basic characteristics, including those provided by cable companies. *Id.* at 22432.

¹ See *In the Matter of Vonage Holdings Corp.*, 19 F.C.C. Rcd. 22404 (2004) (“*Vonage Order*”).

The MPUC's Order is limited to what the MPUC refers to as "fixed, interconnected VoIP," provided by Charter and its subsidiaries, which the MPUC claims it can regulate, because it claims the FCC has not preempted state regulation of fixed, interconnected VoIP. The MPUC contrasts "fixed, interconnected VoIP", with "nomadic, interconnected VoIP", which the MPUC claims it cannot regulate. When it issued its preemption order, the FCC focused on Vonage's nomadic VoIP service but its principles apply equally to fixed VoIP services.²

As of December 31, 2013, there were 116 VoIP providers in Minnesota, according to a report issued by the FCC in October 2014.³ These 116 VoIP providers served 852,000 subscriber lines (465,000 residential lines and 387,000 business lines).⁴ That number has steadily increased year over year as the FCC has issued these reports.

Whether or not the reasoning of the MPUC decision equally applies to any of those 116 providers, besides Charter, is ambiguous at best. All of them are providers of interconnected VoIP, and some provide service over their own networks in Minnesota. However, what is less clear is whether those services are fixed or nomadic (and even whether that should matter since the facts presented to the MPUC only concern the VoIP service provided by Charter).

² The FCC did not use the terms "fixed, interconnected VoIP" and "nomadic, interconnected VoIP" in the *Vonage Order*.

³ See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Local Telephone Competition: Status as of December 31, 2013, (Oct. 16, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf

⁴ Nationally, there were 48 million VoIP subscriber lines, representing about 35 percent of all subscriber lines. *Id.* at 3, Figure 2.

This ambiguity leaves interconnected VoIP providers whose services are not identical to Charter's under a regulatory cloud. Moreover, it leaves customers at the risk of losing VoIP services if the MPUC attempts to enforce the Order against other interconnected VoIP providers. For example, the MPUC could require VoIP providers that do not apply for certificates of public convenience and necessity to cease and desist from providing services in Minnesota. Or VoIP providers that do not want to subject themselves to PUC jurisdiction may voluntarily cease providing services in Minnesota.

II. The State Should Be Precluded From Regulating VoIP Service Providers

A. VoIP Services are Distinguishable from Traditional Phone Services and Thus Qualify as Information Services

The *Vonage Order* detailed the types of features and functionalities available in 2004 that demonstrated that VoIP was more than simply a telephone service but was fully integrated with other online services. In particular, these features included voicemail, three-way calling and geographically independent telephone numbers. *Vonage Order* at 22407. In addition, Vonage offered a Real-Time Online Account Management feature allowing customers to access their accounts 24 hours a day through an Internet web page to manage their communications by configuring service features, handling voicemail, and editing user information. Vonage customers could, among other options, play voicemails back through a computer or receive them in e-mails with the actual message attached as a sound file. In addition, computer programming could be used to cause calls to Vonage customers simultaneously to ring on multiple devices, including ones with different phone numbers.

Today, all of these features and more are available from interconnected VoIP providers for both residential and enterprise customers.

- **Mobility.** Many VoIP providers offer unified communications products that are integrated with customers' mobile service.⁵ An example includes mobile apps, allowing the service to be used over a Wi-Fi connection on a smart phone. Many providers also offer softphones, allowing access to VoIP service through a personal computer or laptop.⁶
- **Enhanced voice mail and video.** Voice mail can now be automatically transcribed and sent as an email, along with the actual voice mail file.⁷ A VoIP user can automatically call back the person leaving the voice mail by simply tapping the phone number. Video is now available on VoIP phones.⁸
- **Other integrated features.** Call recording is readily available.⁹ Click-to-call features are integrated with a customer's Outlook or similar phone directory, allowing for instant conference calls. A feature known as "Presence" allows

⁵ See Vonage, *Mobile App: Wherever You Are, Your Business Phone Is With You*, VONAGE BUSINESS, <https://business.vonage.com/features/mobile> (last visited Dec. 23, 2015).

⁶ See Nadeem Unuth, *What is Softphone?*, ABOUT TECH, <http://voip.about.com/od/glossary/g/SoftphoneDef.htm> (last visited Dec. 23, 2015).

⁷ See VoicePulse, *Features*, [WWW.VOICEPULSE.COM](http://www.VOICEPULSE.COM), <http://five.voicepulse.com/business#features> (last visited Dec. 23, 2015).

⁸ See VoIPDistri, *Yealink Announces VC400 and VC120 Video Conferencing System*, [WWW.VOIPDISTRI.COM](http://www.VOIPDISTRI.COM), <http://www.yealink-phones.com/yealink-announces-vc400-video-conferencing-system/> (last visited Dec. 23, 2015).

⁹ Jive, *Taking Cloud to the Enterprise*, [WWW.JIVE.COM](http://www.JIVE.COM), <http://jive.com/enterprise> (last visited Dec. 23, 2015).

users to know whether co-workers are available for a phone call or an instant messaging chat.¹⁰

These features are technologically feasible because they use the Internet, broadband and Internet Protocol. While these features are not part of intrastate telephone services, they are integrated with VoIP offerings. Indeed, it is this distinction that led the FCC to determine in the *Vonage Order* that VoIP service should be regulated at the federal level. Eleven years later, there has been increased integration between VoIP features with the Internet and mobile services, providing further support for that FCC decision.¹¹

Significantly, a year before the *Vonage Order*, this Court addressed the very question of whether VoIP services should be regulated by the MPUC. The Court found VoIP to be an “information service” rather than a “telecommunication service” under Telecommunications Act, precluding the MPUC’s effort to regulate the service:

Examining the statutory language of the Communications Act, the Court concludes that the VoIP service provided by Vonage constitutes an information service because it offers the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). ... The Court concludes that Vonage's activities fit within the definition of information services. Vonage's services are closely tied to the provision of

¹⁰ See Deb Shinder, *The Top Five Advanced VoIP Features Your Business Needs*, TECHREPUBLIC (Mar. 2, 2007, 10:36 AM), <http://www.techrepublic.com/article/the-top-five-advanced-voip-features-your-business-needs>.

¹¹ The FCC did not indicate which of these features and functionalities were decisive in reaching its preemption conclusion and some of these features and functionalities are present in fixed interconnected VoIP. Therefore, it cannot be determined that the FCC intended to restrict the scope of its preemption order only to nomadic interconnected VoIP services.

telecommunications services as defined by Congress, the courts and the FCC, but this Court finds that Vonage *uses* telecommunications services, rather than provides them.

...

Because Congress has expressed an intent that services like Vonage's must remain unregulated by the Communications Act, and because the MPUC has exercised state authority to regulate Vonage's service, the Court concludes that that state and federal laws conflict, and pre-emption is necessary.

Vonage Holdings Corp. v. Minnesota Pub. Utilities Comm'n, 290 F. Supp. 2d 993, 999; 1001-02 (D. Minn. 2003).

It bears noting that the question of whether states are preempted from regulating VoIP is not exclusively based on whether VoIP should be classified as an information service or telecommunications service. As discussed above, the operational and customer-facing characteristics of VoIP, including the myriad of features available today that integrate with mobile devices and other Internet-based applications and functionality resist separation into interstate and intrastate communications. Therefore, under federal law, states are preempted from regulating VoIP regardless of its classification.

B. VoIP Services are Regulated Under Federal Law

Any suggestion that state regulation of VoIP service, whether classified as "fixed" or "nomadic," is necessary to protect consumers is unfounded. Consistent with the *Vonage Order*, since 2005, the FCC has carefully imposed regulatory obligations on interconnected VoIP – most of which are intended to address consumer protection. During that time, and despite numerous opportunities and requests to do so, the FCC has not classified interconnected VoIP as a telecommunications service. Instead, the FCC has relied on its authority under Title I of the federal Communications Act and other very

specific statutory mandates to impose these obligations. A list of those FCC requirements is printed below.

**FCC PROCEEDINGS AFFECTING IP COMMUNICATIONS
(As of December 28, 2015)**

FCC Docket # Release Date	Impact of Decision
WC Docket 05-196 June 3, 2005	Requires interconnected VoIP providers to offer Enhanced 911
ET Docket 04-295 September 23, 2005	Required interconnected VoIP providers to comply with obligations under the Communications Assistance Law Enforcement Act
WC Docket 06-122 June 27, 2006	Requires interconnected VoIP providers to contribute to the federal universal service fund payment and to register with the FCC using Form 499
CC Docket 96-115 April 2, 2007	Requires interconnected VoIP providers to comply with rules protecting customer proprietary network information
EB Docket 06-119 June 8, 2007	Requires interconnected VoIP providers to provide reports on the redundancy, resiliency and dependability of their 911 networks and systems
WT Docket 96-198 June 15, 2007	Requires interconnected VoIP providers to comply with regulations related to disabilities access and to contribute to the telecommunications relay service fund
MD Docket 07-81 August 6, 2007	Requires interconnected VoIP providers to pay FCC regulatory fees.
WC Docket 07-243 November 8, 2007	Required interconnected VoIP providers to comply with local number portability obligations
WC Docket 07-38 June 12, 2008	Requires interconnected VoIP providers to file Form 477 (reporting number of lines served in each state)
WC Docket 04-36 May 13, 2009	Requires interconnected VoIP providers to seek FCC approval before discontinuing service
WC Docket 06-122	Allows states to assess universal service obligations on the

November 5, 2010	intrastate revenues of interconnected VoIP providers in a manner consistent with the federal Universal Service Fund
WC Docket 11-39 June 22, 2011	Requires interconnected VoIP providers to comply with Truth in Caller ID rules
CG Docket No. 11-47 October 7, 2011	Requires providers of non-interconnected VoIP to contribute to the Telecommunications Relay Services Fund.
CG 10-213 October 7, 2011	Requires non-interconnected VoIP providers to comply with disabilities access requirements.
CC Docket 01-92 November 18, 2011	Prohibits VoIP providers from blocking calls to or from the public switched telephone network.
PS Docket 11-82 February 21, 2012	Requires interconnected VoIP providers to report network outages to the FCC.
IB Docket No. 04-112 January 15, 2013	Requires VoIP providers to file international traffic reports.
WC Docket No. 13-39 November 8, 2013	Requires VoIP provider to collect and report data on call completion rates to rural telephone exchanges.
WC Docket No. 13-97 June 22, 2015	FCC gives interconnected VoIP providers direct access to telephone numbering resources ¹²

Between the *Vonage Order* and the FCC's comprehensive regulation of interconnected VoIP, it's not surprising that state regulatory commissions are not actively subjecting VoIP providers to licensing or other regulations intended for telephone

¹² It is instructive for this proceeding that this decision specifically recognized that interconnected VoIP providers were not subject to state entry regulation and did not receive a state certification. Report and Order, WC Docket No. 13-97 (rel. June 22, 2015) at ¶¶ 21-22.

companies.¹³ Moreover, since 2005 at least 30 states have passed legislation codifying the *Vonage Order* prohibiting PUC regulation of VoIP and also going beyond that by including other IP-enabled services (which includes a broader set of services using IP technology).¹⁴ To date, despite the growing popularity of VoIP and other IP communications, none of these statutes has been revoked or amended to provide the state commissions with authority to regulate. Thus, any concern that VoIP providers would cause consumer harm unless regulated by the state PUCs is baseless.

III. State Regulation Threatens the Growth and Use of VoIP

The FCC does not often preempt state regulation. The *Vonage Order* was directed at the important federal objective of relieving VoIP providers of the burden of complying with a patchwork of inconsistent state laws when they provide interstate services.

Vonage Order at 22424. As noted earlier, more than 116 VoIP providers offer services in Minnesota. It's unclear how many of those companies reside or have any presence in Minnesota or provide VoIP services in other states. Some of these providers likely have

¹³ Some states have required VoIP providers to register – providing the company name, address and contact information, as permitted by the FCC, in order to assess state universal service fund obligations.

¹⁴ See e.g., Florida (27 Fla. Stat. 364.011); Ohio (Ohio Revised Code, Title 49, section 4905.042); Alabama (Ala.Code 1975 § 37-2A-4); Missouri (Mo. Rev. Stat § 386.020); Michigan (M.C.L.A. 484.2401); Indiana (IC 8-1-2.6-1.1); Georgia (Ga. Code Ann., § 46-5-222); Delaware (26 Del.C. § 202); Statutory information for several other states is available in an August 3, 2011 letter written to FCC by VON Coalition and other trade associations concerning seeking relief from state VoIP regulation. Letter, Filling the Regulatory Void: State VoIP Activity - WC Docket No. 10-90; GN Docket No. 09-51; WC Docket No. 05-337; CC Docket No. 96-45; CC Docket No. 01-92; WC Docket No. 06-122; WC Docket No. 04-36 (Aug. 3, 2011), available at http://www.von.org/filings/year/09_2011/2011_08_03_VoIP_Jurisdiction_Letter.pdf.

customers in another state that have branches or small offices in Minnesota. Given the ease of installation, these Minnesota customers may never interact with or even see a bill from the VoIP provider.

Complying with licensing, tariffing and reporting requirements from 50 state public service commissions would necessarily impose significant cost burdens on VoIP providers – a result that the FCC explicitly sought to prevent in the Vonage Order.¹⁵ These costs will either be borne by the VoIP providers, or more likely passed along in higher charges to all VoIP customers.¹⁶ Or companies may decide not to provide services in states with burdensome regulations; reducing competition and harming consumers.

Moreover, VoIP providers have built businesses in reliance on the federal framework, developing services that are provided seamlessly on a nationwide basis without state-specific operational distinctions. Pricing, service features, term and conditions and product offerings have all been standardized to allow for a better customer experience. If VoIP providers were required to set up separate operations to comply with the telecommunications rules of each state, the results would lead to rampant inefficiency without customer benefit.

¹⁵ *Vonage Order* at 22416 (“The administrative process involved in entry certification and tariff filing requirements, alone, introduces substantial delay in time-to-market and ability to respond to changing consumer demands, not to mention the impact these processes have on how an entity subject to such requirements provides its service.”)

¹⁶ It is worth noting that avoidance of state regulatory requirements does not relieve VoIP providers from paying applicable taxes, fees and surcharge, or from complying with general state consumer protection laws.

CONCLUSION

For the reasons set forth above, VON Coalition respectfully requests that the Court (a) deny Defendants' Motion to Dismiss, (b) enter an order declaring that application of Minnesota state public utilities and common carrier requirements to VoIP services is preempted under federal law and violates the Federal Communications Act and the Supremacy Clause of the United States Constitution.

Dated: December 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 29, 2015, a true and correct copy of the foregoing was served via the Court's electronic filing system on all counsel of record.

/s/ Karla M. Vehrs

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

<p>CHARTER ADVANCED SERVICES (MN), LLC, et. al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>BEVERLY JONES HEYDINGER, et. al,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Case No. 15-cv-3935-SRN-HB</p> <p>LR 7.1(F) WORD COUNT COMPLIANCE CERTIFICATE REGARDING VON (VOICE ON THE NET) COALITION’S AMICUS BRIEF IN SUPPORT OF PLAINTIFFS’ COMPLAINT</p>
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I, Karla M. Vehrs, certify that VON Coalition’s Amicus Brief complies with the word limitation of Local Rule 7.1(f). The Brief contains 3,130 words, including text, headings, footnotes, and quotations, other than the parts of the document exempted by Local Rule 7.1(f)(1)(C). The Brief was prepared using Microsoft Word Version 2010, and the word-count function of this word-processing software was applied specifically to include all text, including headings, footnotes, and quotations.

I further certify the Brief complies with the type size requirements of Local Rule 7.1(h) because the memorandum was prepared using at least font size 13, is double-spaced, and is submitted on 8.5” by 11” paper with margins of at least one inch on all four sides.

Dated: December 29, 2015

Respectfully submitted,

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