Proposed Brief of the Center for Democracy & Technology as Amicus Curiae in support of the People of the State of New York

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Statement of Interest of Amicus Curiae

The Center for Democracy & Technology ("CDT") is a nonprofit public interest organization working to ensure that the human rights we enjoy in the physical world are realized online, and that technology serves as an empowering force for people worldwide. Integral to this work is CDT's representation of the public interest in the creation of an open and innovative Internet that promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

For more than twenty years, CDT has participated as amicus curiae and as party litigants in matters related to the open internet and the Federal Communications Commission such as *The Matter of Verizon v. FCC*, as well as most recently *Center for Democracy & Technology v. Federal Communications Commission and the United States of America*. CDT also frequently submits comments in response to FCC regulatory proposals.[1]

[1] See e.g., CDT, Comment, *In the Matter of Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, CG Docket No. 17-131 (June 16, 2017) *available at* https://cdt.org/files/2017/06/Final-FCC-Comment-on-Transparency-Rule-1.pdf; CDT, Comment, *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191 (January 14, 2010) *available at* https://cdt.org/files/pdfs/2010_CDT_openness_comments.pdf; CDT, Comment, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (July 19, 2017) *available at* https://cdt.org/files/2017/07/CDT-2017-FCC-NPRM-Amended-Comment.pdf.

Introduction

In February 2017, the New York State Attorney General ("NY OAG") initiated a lawsuit in Supreme Court of the State of New York alleging that Charter Communications and Spectrum Management Holding Company (together "Charter") violated New York laws prohibiting fraud, deceptive business practices, and false advertising. Specifically NY OAG alleged that Charter "promised Internet speeds that it knew it could not deliver to subscribers" and "promised reliable access to online content that it knew it could not deliver to subscribers." Complaint, New York v. Charter Commc'ns, No. 450318/2017 (N.Y. Sup. Ct. Feb. 1, 2017) at 1. NY OAG alleges that this was accomplished because Charter "failed to deliver on this promise by leasing to a large number of its subscribers older-generation modems and wireless routers that it knew were incapable of achieving the promised Internet speeds." Charter also "failed to make adjustments to its network, such as reducing the size of service groups and increasing the number of channels, for each service group, that would enable a subscriber to achieve the promised speeds." *Id*. at 1-2. Charter sought a motion to dismiss, arguing that the state consumer protection laws were preempted by federal law and that the NY OAG had failed to state a claim for fraud. Supreme Court denied Charter's motion to dismiss, and Charter filed this appeal to challenge part of Supreme Court's holding.

This appeal raises two important questions:

1) What is the state's role in regulating broadband service?; and

2) What should consumers reasonably expect from their broadband service given the representations made by Internet Service Providers ("ISP")?

The Federal Communications Act of 1934 establishes a system of "dual state and federal regulation" over communications. *Louisiana Pub. Serv. Commn. V. FCC*, 476 U.S. 355, 360 (1986). There is no express clause in the Communications Act preempting the state's role in regulating broadband providers. The Communications Act expressly maintained state authority to "protect the public safety and welfare" and to "safeguard the rights of consumers," see 47 U.S.C. § 253(b).

The Communications Act created the Federal Communications Commission (FCC), an agency tasked with regulating "interstate and foreign communication by wire or radio," 47 U.S.C. § 152(a). Part of the FCC's efforts to expand broadband access has included providing consumers more information about the broadband services they pay for. To this end, in December 2010 the FCC issued its first Open Internet Order. *In the Matter of Preserving the Open Internet (2010 Order)*, 25 F.C.C. Rcd. 17,905 (2010). Among the provisions of the order was a requirement that ISPs publicly disclose information regarding "actual access speed," among other metrics (Transparency Rule). *Id.* at ¶ 56. Charter claims that its compliance with these Transparency Rules renders it impossible to abide by the disclosure requirements demanded by the NY OAG. Charter is incorrect. This type of conflict preemption would only exist if the consumer protection law prohibited any disclosure, which is not the case here. Also rather than frustrating the FCC's objectives, compliance with both state and federal regulation furthers the FCC's objectives of expanding access to broadband services, while protecting consumers and encouraging market competition.

The other issue before the court is the question of what consumers should reasonably expect about their broadband service based on the advertisements of their ISP. When consumers read about speed tiers in broadband subscription advertisements, they reasonably expect their actual delivered speeds to be similar to the marketed speed. This expectation is reasonable, in part, because of the difference in price between lower and higher speed internet access packages. If the only difference between two tiers is the maximum speed, but the actual average speeds are similar, then the price difference would be unjustified because the mere potential to transmit at higher speeds is of little value if actual speeds rarely reach the maximum. Consumers need to be able to rely on ISPs to truthfully advertise their broadband speeds, in part because it is difficult for the average consumer to meaningfully gauge broadband speeds and determine why their internet speeds may not be matching their expectations. Transparent, truthful advertising, readily understood by a reasonable consumer, is fundamentally necessary for consumers to make informed choices about their service provider, and for there to be market competition among service providers.

Argument

1. **The FCC Transparency Rule Does Not Preempt State Consumer Protection Law.**

Supreme Court correctly held that the claims asserted by the NY OAG are not preempted by federal law. Neither the Federal Communications Act nor the Transparency Rule contain an explicit preemption clause. Moreover, there is no conflict preemption as the disclosure requirements in state law do not make it impossible for ISPs to comply with FCC disclosure requirements. Finally, the enforcement of state consumer protection law would facilitate the purpose of the FCC, not frustrate it, by ensuring market competition and protecting consumers.

A. The Transparency Rule does not explicitly preempt or conflict with state consumer protection laws.

There are three situations in which, pursuant to the Supremacy Clause of the Constitution, US Const. Art. VI, cl 2, state law is preempted by federal law: (1) express preemption, which occurs when a statute has an express provision for preemption, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), (2) field preemption, which occurs when Congress intends federal law to occupy the field; and (3) conflict preemption, which occurs when "compliance with both state and federal law is impossible," *California v. ARC America Corp.,* 490 U.S. 93, 100-101 (1989), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). There is no explicit provision in federal law that precludes the enforcement of state consumer protection laws in this context, and Charter does not make any claim to the existence of a such a provision in the Federal Communications Act of 1934 or within the Transparency Rule itself. Instead, Charter's preemption case rests entirely on the argument that there is a conflict between the requirements of the Transparency Rule disclosure and those mandated by the state.

Neither the intent nor the text of the Transparency Rule supports the argument that it is impossible to comply with both the Rule and a state consumer protection regime. "Impossibility preemption is a demanding defense, and [courts] will not easily find a conflict that overcomes the presumption against preemption." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 97 (2d Cir. 2013) (quoting Wyeth, 555 U.S. at 573)(quotation marks and alterations omitted)). "Conflict preemption requires complete impossibility—not mere inconvenience or hardship." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1050 (7th Cir. 2013). "If there [i]s any available alternative for complying with both federal and state law—even if that alternative [i]s not the most practical and cost-effective—there is no impossibility preemption." *In re MTBE*, 725 F.3d at 99;

see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

The Transparency Rule requires ISPs to disclose "accurate information regarding the network management practices, performance, and commercial terms" to assist consumers in making informed decisions regarding internet use. 47 CFR § 8.3. In order to meet the criteria for impossibility preemption, the state consumer protection law would have to include measures that prevent the disclosure of network performance and commercial terms to consumers. This kind of provision would directly contravene the purpose of a consumer protection framework. Instead, state consumer protection laws and the Transparency Rule share a common purpose: to ensure that consumers have access to accurate information and can make informed decisions. *2010 Open Internet Order*, 25 FCC Rcd at 17936, ¶ 53. The Transparency Rule requires ISPs to make accurate disclosures to the public regarding network performance and commercial terms, 47 CFR § 8.3, while state consumer protection laws provide a shield against deceptive business practices and advertising. In this context, there is no conflict between the aims of the federal and state regimes--the laws complement each other.

Moreover, there are no grounds for the claim that state consumer protection laws serve as an obstacle to the implementation of federal law in this context. The FCC has previously and explicitly recognized the vital role that states serve in "protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints." *2010 Open Internet Order* at 17970 n.374. Based on this understanding, the FCC has stated that it has "no intention of impairing states' or local governments' ability to carry out these duties unless (it) find(s) that specific measures conflict with federal law or policy." *Id.* The Communications Act expressly maintained state authority to "protect the public safety and welfare" and to "safeguard the rights of consumers." 47 U.S.C. § 253(b). Additionally, the Communications Act contains a savings clause which states that nothing in the Act "shall in any way abridge or alter the remedies now existing in common law or by statute, but the provisions of this Act are in addition to such remedies." 47 U.S.C. § 414.

The Second Circuit has ruled directly on this point in the consumer protection context, holding in *Marcus v. AT&T* that the Communications Act does not "manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud" and that the savings clause "evidences Congress' intent to allow such claims to proceed under state law." 138 F.3d 46, 54 (2d Cir. 1998). Given the lack of express conflict, the Court must rule that the pertinent facts and law do not support a case for federal preemption.

B. The FCC's Core Objectives Are Not Frustrated.

Charter is wrong to assert that the Attorney General's lawsuit "impermissibly frustrate[s] the FCC's objective of promoting a uniform standard for describing actual broadband speeds." Defendant-Appellant Memorandum of Law in Support of Motion to Dismiss or Stay at 31–46. The alleged inconsistency refers to Charter's responsibility to comply with both the FCC's Transparency Rule and the state of New York's consumer protection laws, which prohibit deceptive business practices and false advertising. The relevant provisions in both federal and state law prevent false and misleading statements or omissions that deceive consumers and undermine their ability to make informed choices. Nothing in the relevant New York consumer protection laws conflicts with the FCC's Transparency Rule.

To the contrary, the FCC's regulatory regime and New York's consumer protection statutes work in concert to prohibit providers from engaging in false and deceptive marketing practices, including making false or misleading statements in marketing materials. Section 201 of the Communications Act of 1934 prohibits "unjust and unreasonable practices,"47 U.S.C. § 201(b) and the FCC has held that "unfair and deceptive marketing practices by interstate common carriers constitute unjust and unreasonable practices under Section 201(b)." *In the Matter of Nobeltel, LLC*, 27 FCC Rcd. 11760, 11762 (2012). "In promulgating the Transparency Rule, the FCC stated that the Rule was intended to ensure consumers had the "right to accurate information, so [they] can choose, monitor and receive the broadband Internet services they have been promised." Decision and Order, New York v. Charter Commc'ns, No. 450318/2017 (N.Y. Sup. Ct. Feb. 16, 2018) at 13. The FCC's Transparency Rule prohibits providers from making misleading or inaccurate statements about the performance of their service offerings. *In Re Preserving and Promoting the Open Internet,* Report, Order, and Declaratory Ruling, 30 FCC Rcd. at 5670-77 ¶¶ 157–70.

This language is mirrored in Sections 349 and 350 of New York's General Business Law, Article 22-A. N.Y. GBL Art. 22-A §§ 349 and 350. Section 349 prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service . . . ." N.Y. GBL Art. 22-A § 349. Section 350 prohibits "false advertising," which is defined as advertising that is "misleading in a material respect," including the failure to reveal facts that are material in light of the representations made. N.Y. GBL Art. 22-A § 350. The FCC has stated that a provider may violate the Transparency Rule by advertising inaccurate or misleading performance information, even if the provider makes safe harbor-compliant disclosures on its website. *2015 Open Internet Order* FCC Rcd. At 5670, ¶ 157. False or misleading statements about network performance—or omissions of information material to a customer's decision to purchase or use a service—are thus actionable under the FCC's rules and New York's consumer protection law. For this reason Supreme Court correctly observed that "state laws that subject providers to liability if they make deceptive or misleading claims about their services complement and co-exist with, rather than thwart, the goals of increasing user information, choice, and control." Decision and Order, New York v. Charter Commc'ns, No. 450318/2017 (N.Y. Sup. Ct. Feb. 16, 2018) at 13.

In 2012, the FCC recognized "the important role that . . . federal and state regulatory partners play in protecting consumers." *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436 at ¶ 111 (2012). State attorneys general are often better able to investigate and respond to unfair and deceptive business practices that occur in their states.[2] To this end, states can build upon the disclosures mandated in the Transparency Rule to cater to the type of information that would be valuable to their constituents and their investigations. Working in tandem with states, the FCC sets the floor of information that must be disclosed to consumers, not the ceiling. Unlike what has been alleged by Charter, compliance with both regulations was not impossible in

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[2] Indeed, both the FCC and the Federal Trade Commission (FTC) have long acknowledged the necessity of federal-state cooperation in consumer protection. In the 1960s, President John F. Kennedy's Consumer Advisory Council found that "if consumers were to be given adequate protection, it was necessary to provide remedies at state and local levels." See Federal Trade Commission, *Remarks of Hon. Paul Rand Dixon, FTC Commissioner*, before the Fla. Dep't of Agriculture & Consumer Services at 3 (March 8, 1974).

this case, and compliance with the two does not frustrate the FCC's purpose. The FCC does promote a uniform floor of standards and the long standing relationship between the states and the FCC furthers the FCC's purpose of promoting access to broadband capability, while ensuring consumer protection and market competition.

2. Consumers expect their actual internet speeds to be similar to the marketed speed.

Charter seeks an appeal of Supreme Court's denial of Charter's motion to dismiss the complaint's allegations regarding TWC's "up to" speed representations for failure to state a claim, in part because they argue such representations could not mislead a reasonable consumer. Supreme Court correctly denied the motion to dismiss this claim. A reasonable consumer would be deceived by advertisements claiming "up to" speeds that are functionally unattainable.

When consumers read about speed tiers in broadband subscription advertisements, they reasonably expect their actual delivered speeds to be similar to the marketed speed. Plaintiff-Respondent's Memorandum of Law in Opposition to Defendant's Motion to Dismiss or Stay at 19 (citing favorably *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 108 (N.Y. App. Div. 3d Dep't 2005). This expectation is reasonable, in part, because of the difference in price between lower and higher speed internet access packages. If the only difference between two tiers is the maximum speed, but the actual average speeds are similar, then the price difference would be unjustified because the mere potential to transmit at higher speeds is of little value if actual speeds rarely reach the maximum. By the same token, if actual speeds are not regularly reaching the maximum advertised speed, then using maximum speed as an indicator of the relative value of speed tiers becomes meaningless. Customers should not be expected to assume that their actual speeds will be some arbitrary bit rate significantly below the maximum. Rather, they should be able to rely on advertised speeds as reflective of actual speeds. Accurate disclosure of performance metrics enables consumers to make informed choices and promotes a more competitive market for internet access services.[3]

Even where speed tiers are marketed as "up to" a maximum speed, consumers are right to expect their average actual speeds to be at or near that maximum speed. Such marketing claims imply that the ISP's network is capable of delivering end-to-end traffic at or above those speeds and that there are meaningful differences among the tiers, in terms of both performance and value. If actual internet speeds are not at or near marketed tier speeds, then the performance of a subscriber's internet connection will not reflect the perceived differences in value based on the speeds and prices of tiered offerings, potentially making a $100/month high-speed subscription practically indistinguishable, in terms of the

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[3] *In the matter of Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905, 17936, ¶ 53 (2010).

number of devices and kinds of applications it supports, from a $30/month standard-speed subscription.

Similarly, if the ISP's network is incapable of delivering packets at least at the rate indicated by the speed tier advertising, then the "up to" marketing scheme is misleading. Although it is reasonable to assume that, during peak network usage, internet speeds may drop below the maximum advertised speed, it is unreasonable to advertise speeds above which the network is capable of supporting on average. For instance, it would be unreasonable to advertise a tier's maximum speed if achieving that speed is only possible when there is no other traffic on the network or if that speed is only possible in short, infrequent "bursts" representing only a small fraction of a customer's overall usage. Therefore, even accounting for slower delivery rates due to congestion during peak network usage times, it is reasonable for customers to expect their daily average internet speed to be near the maximum rate advertised. A 2012 FTC report found that when it comes to "up to" advertisements, many consumers do believe they will achieve the maximum advertised. Manoj Hastak & Dennis Murphy, *Effects of a Bristol Windows Advertisement with an "Up To" Savings Claim on Consumer Take-Away and Beliefs*, Report submitted to Federal Trade Commission (May 2012).

A. Meaningful measurement of broadband speeds can be difficult for consumers.

The complaint alleges that Charter promised New York customers that they would receive "up to" specific Internet speeds ranging from 3 to 300 Mbps, with substantially higher rates for higher speed tiers. As Supreme Court held, the net impression of Charter's marketing materials conveyed to New Yorkers that they would receive "up to" such speeds consistently, anywhere in their homes, and on any number of personal wireless devices. Decision and Order, New York v. Charter Commc'ns, No. 450318/2017 (N.Y. Sup. Ct. Feb. 16, 2018) at 19. Charter alleges that this advertising is not deceptive. However, advertising phrases like this one benefit from the practical difficulty for consumers to meaningfully gauge the broadband speeds they pay for.[4]

In 2015, the Government Accountability Office ("GAO") reviewed "issues related to broadband performance information" by examining "broadband performance information available to consumers and its limitations" as well as the

[4] The FCC conducts a performance study of broadband service through the Measuring Broadband America (MBA) program. The MBA program compares ISPs' average delivered download and upload speeds against their advertised speeds. While this service provides consumers some assurances about what ISPs are advertising, these measurements fail to provide a complete picture of what consumers are experiencing. The 2016 MBA report states that congestion beyond an ISP's network, is not measured in their study. Moreover, the test does not reveal if a computer's home network is the bottleneck, rather than the ISP's network. Further, the FCC has noted that "the fixed MBA survey is designed to provide statistics at a national level," and "is not designed to assess the quality of broadband services provided at a local level." Inquiry, *Deployment of Advanced Telecommunications Capability*, 31 F.C.C. Rcd. 9,140, 9,165 (2016). Because the FCC's measurements are meant to assess national statistics, states have a vital role to play in helping consumers assess the services they are are actually receiving, and preventing fraudulent advertising.

"FCC's actions to evaluate its efforts to provide consumers with broadband performance information." Government Accountability Office, *Broadband Performance: Additional Actions Could Help FCC Evaluate Its Efforts to Inform Consumers,* GAO-15-363 (April 2015) at 2. The GAO observed that while "[c]onsumers can access information on broadband performance from a number of sources" "the information available to consumers is not standardized" which "makes it difficult for consumers to compare broadband services" and "the information available through speed tests may not accurately reflect the end-user's actual experience." *Id*. at 12. A survey conducted by the FCC in 2015 revealed that eighty percent of broadband users do not know the speed of their broadband connection, or know what "they are getting compared to what the broadband provider is claiming to offer."[5] It is difficult for consumers to meaningfully understand the broadband service they have, and why they may not be meeting expectations. In part for this reason, it is vital that ISPs be as forthcoming as possible in their representations to consumers about the service they provide. Further, states play a vital role in ensuring that ISPs disclose their actual speeds by enforcing state consumer protection laws.

[5] FCC, *Broadband Speed* (Dec. 7, 2015) *available at* https://www.fcc.gov/general/broadband-speed.

B. Where ISPs supply customer premises equipment, speed tiers should reflect actual internet speeds at consumers' devices.

When a customer purchases an internet access package marketed as providing certain speeds and including customer premises equipment (CPE) such as a modem or a router, it is reasonable for the customer to expect those devices to be capable of transmitting data at the rate advertised. In the instant case, TWC supplied and installed hardware inside customers' homes that was incapable of delivering data at the advertised rates. Plaintiff-Respondent's Memorandum of Law in Opposition to Defendant's Motion to Dismiss or Stay at 10-12. Therefore, even if TWC's network was capable of delivering data at the speeds claimed for some tiers, the customer could never experience that speed because of the limited capacity of the modem or router installed by TWC as part of the service. In this scenario, advertising speeds above the capability of the hardware supplied and installed by the ISP is either incorrect, misleading, or both. To be accurate and not misleading, advertised tier speeds should reflect the speeds actually experienced at the edge of the ISP-supplied network equipment, including any in-home CPE and any equipment the ISP owns or maintains to interconnect the ISP's network and other networks. Although ISPs should not be held responsible for limitations in home networking equipment provided by the customer or a third party, nor should an ISP's speed claims depend on the performance of interconnected networks, it is reasonable for customers to expect that equipment supplied and installed by the

ISP at the edges of its network to support their selected speed tier. Therefore, any claims made by ISPs should account for limitations in any equipment supplied by the ISP as part of the internet access service.

CONCLUSION

This Court should dismiss Charter's appeal, or, in the alternative, affirm Supreme Court's decision denying Charter's motion to dismiss.

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Respectfully submitted,

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