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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK BY ERIC T. SCHNEIDERMAN,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Plaintiff-Respondent,

—against—

CHARTER COMMUNICATIONS, INC. AND SPECTRUM MANAGEMENT
HOLDING COMPANY, LLC (F/K/A TIME WARNER CABLE INC.),
Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* CONSUMERS UNION

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PRELIMINARY STATEMENT

In establishing national policy, the Federal Communications Commission ("FCC" or "Commission") has made transparency an essential component of protecting and promoting consumer welfare. Transparency empowers consumers by providing them the information they need to make informed choices in purchasing communications services.

Federal law recognizes that telecommunications services have intrastate and interstate elements, and that state and federal bodies have different capabilities. States, which are empowered to use any regulatory or enforcement authority not otherwise prohibited by federal law, use those powers to advance national policy, including transparency.

The FCC's Transparency Rule addresses consumer confusion about the cause of broadband service falling short of advertised speeds. To do so, the Rule establishes a *flexible* disclosure requirement and *voluntary* safe harbors for broadband providers to provide consumers with comprehensive information that, considered together, give consumers a realistic understanding of the online performance they can expect. This scheme is not exclusive; the FCC also encourages consumers to use free third-party tools to assess providers' service.

The Commission has made clear that the disclosures and safe harbors established in the Rule could not be used as a defense by providers that make

misleading statements in other contexts, such as advertisements. Thus, providers will not be protected when they mislead consumers by advertising speeds that do not meaningfully reflect the actual experience that consumers can expect.

The states have always used their authority to play a fundamental role in furthering the Commission's consumer protection objectives. When the Commission created the Rule, it recognized the states' role, and made clear that the Rule could not be used to undermine traditional state consumer protection authority, including laws prohibiting fraudulent or misleading advertisements.

Interpreting the Transparency Rule to preempt state consumer protection authority imperils consumer empowerment, denying consumers accurate information to make informed choices. Yet, defendant Charter seeks to use the Transparency Rule—a tool to protect consumers—as a shield to protect itself. This undermines the very purpose of the Rule. If the Rule were interpreted to allow misleading and inaccurate information, it would be meaningless.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Consumers Union ("CU") is the advocacy division of Consumer Reports ("CR"), which was chartered under New York law in 1936, currently headquartered in Yonkers. CU/CR is an expert, independent, non-profit organization working for a fair, just, and safe marketplace for all consumers, and to empower consumers to protect themselves. This includes promoting increased

competition, pro-consumer policies, and consumer education on communications and media issues involving telecommunications, cable, Internet, and wireless services and equipment.

CU/CR has a strong interest in promoting the interests of its members and all other consumers in New York. CU/CR has a particular interest in this case because receiving reliable and truthful information enables consumers to make intelligent and well-informed choices in the purchase of the Internet options and services they depend on and enjoy.

BACKGROUND

The following discussion is designed to assist the Court in assessing the factual and legal framework of this case.

A. Foundations of the Transparency Rule

Transparency is a fundamental element of the national communications policy to protect and promote consumer welfare. Established by the Communications Act of 1934 ("1934 Act"), the FCC is charged with regulating interstate and international communications "so as to make available...to all the people of the United States a rapid, efficient, nation-wide, and world-wide...communication service with adequate facilities at reasonable charges."[1] Consistent with this mission, the Commission has long identified consumer welfare

[1] 47 U.S.C. §151.

as a central goal. Indeed, FCC officials have affirmed that safeguarding and protecting American consumers' interests is the Commission's most important role.[2]

During the telephone/telegraph era, the Commission achieved its consumer protection goals through tariff-based comprehensive regulation of monopoly communications providers. These regulations prescribed providers' conduct, including the nature of the consumer information that they were required to disclose.[3] In this way, the Commission could fulfill its statutory obligation to ensure that consumers were not being subjected to unjust, unreasonable, or discriminatory practices.

As technological advances made it possible for the Commission to replace highly-prescriptive regulation of monopoly providers with competition, the Commission recognized that competition alone might not always ensure just and reasonable results. For example, when the Commission opened digital data

[2] *See, e.g.*, Statement of FCC Commissioner Mignon Clyburn, Senate Committee on Commerce, Science, and Transportation, Oversight of the FCC (March 8, 2017)("Not only do I believe the FCC has the legal responsibility under the Communications Act to put consumers first, it has a moral responsibility.").

[3] *Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC2d 1, 3 (1980).

services to competition in 1979, it identified its "fundamental concern" as being the availability of services and equipment to consumers at reasonable costs.[4]

Recognizing that "communications networks are most vibrant, and best able to serve the public interest, when consumers are empowered to make their own decisions about how networks are to be accessed and utilized"[5] the Commission evolved to adopt a new consumer protection approach, relying heavily on competition, but placing greater attention on ensuring consumers receive information to safeguard their ability to make informed choices. This emphasis accelerated with the 1984 breakup of AT&T, and was codified in the 1996 Telecommunications Act ("1996 Act"), the preamble of which stated the purpose "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers."[6]

As the 1996 Act was implemented, the Commission and state regulators pressed to ensure consumers would have accurate information about rates and practices to differentiate among the service choices they have, so consumers can reap the benefits of a competitive market. In the 1999 *First Truth-in-Billing*

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[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 72 FCC2d, 358, 424 (1979).
[5] *Protecting and Promoting the Open Internet*, 30 FCCRcd 5601, 5618 (2015)("*2015 Internet Order*").
[6] Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56.

Order, led by strong evidence of growing consumer confusion related to billing for interstate telecommunications services, the Commission concluded that competitive pressures alone did not ensure consumers would receive clear, informative bills.[7] It adopted a flexible approach to promote billing transparency, requiring complete, non-misleading disclosure of charges and disclaimers for interstate services.[8]

Building on its transparency policy, the Commission, in 2005, adopted the *Second Truth-in-Billing Order*, expanding disclosure rules and extending them to wireless providers.[9] Stating that "as competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace,"[10] the Commission required carriers to disclose, at the point of sale, estimates of taxes, regulatory fees, and other charges that had traditionally been added to the price of the calling plan after signing-up.[11]

B. Role of the States

States play an essential role in furthering the Commission's consumer welfare goals, including consumer protection. Critical to this is the balancing of

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[7] *Truth-in-Billing and Billing Format*, 14 FCCRcd 7492, 7494 (1999)("*First Truth-in-Billing Order*").
[8] *Id.* at 7498-7502.
[9] *Truth-in-Billing and Billing Format*, 20 FCCRcd 6448, 6456-58 (2005)("*Second Truth-in Billing Order*").
[10] *Id.* at 6457.
[11] *Id.* at 6450.

state and federal responsibilities. The 1934 Act established a system of dual state/federal regulation under which the FCC regulated interstate services and the states regulated intrastate services.[12] Congress preserved this dual regulatory system in its 1996 update of the 1934 Act with what has been called

> an unusual regime of "cooperative federalism," with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states." *Global Naps, Inc. v. Massachusetts Dept. of Telecommunications and Energy*, 427 F.3d 34, 46 (1st Cir. 2005)(internal citation omitted). While "under cooperative federalism, federal and state agencies should endeavor to harmonize their efforts with one another" and "state commissions are directed by provisions of the Act and FCC regulations in making decisions," the [1996 Act] "gives the state commissions latitude to exercise their expertise in telecommunications and needs of the local market." *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 352 (6th Cir. 2003)(quoting Philip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U.L. Rev. 1692, 1724 (2001).[13]

The 1996 Act explicitly permits states to take any necessary steps that are not otherwise prohibited and further the Commission's goals and objectives. Although the 1996 Act somewhat broadened federal authority over some aspects of intrastate communications,

[12] 47 U.S.C. §§151, 152(b).
[13] *S. New England Tel. Co. v. Comcast Phone of Connecticut, Inc.*, 718 F.3d 53, 58 (2d Cir. 2013).

> [a]t the same time, [it] preserved broad state authority. States can regulate 'to further competition' as long as their regulations are consistent with the Act and with the F.C.C.'s regulations. The F.C.C. cannot abrogate state regulations that are consistent with the Act and with the F.C.C.'s implementation.[14]

The goal of harmonizing state and federal actions extends to advanced communications services, *i.e.*, broadband. Section 706 of the 1996 Act states that

> [t]he Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment…of advanced telecommunications capability…by utilizing…measures that promote competition in the telecommunications markets, or other regulating methods that remove barriers to infrastructure investment.[15]

A primary policy imperative underlying this regulatory dichotomy is that federal and state governments have different capabilities. The federal government is well-equipped to deal with broad policies that may require a high degree of technological expertise, while state bodies are better able to address practices that have a direct impact on consumers within their states. As [California PUC] Commissioner Kennedy put it, "federal regulators would never be equipped to accept millions of calls from individual customers involved in billing disputes,"

[14] *Sprint Commc'ns Co. v. Bernsten*, 152 F. Supp. 3d 1144, 1149 (S.D. Iowa 2015), *aff'd sub nom. Sprint Commc'ns Co., L.P. v. Lozier*, 860 F.3d 1052 (8th Cir. 2017)(citations omitted).
[15] Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56.

and it makes no sense for "the FCC to assume the responsibility for addressing these and other consumer complaints at the retail level."[16]

The responsibilities of the FCC and state bodies necessarily overlap, but states have established clear authority over a consumer protection issues concerning communications providers, including billing practices,[17] privacy,[18] robocalls,[19] spam,[20] disclosure requirements,[21] and significantly, fraud and misrepresentation in advertising practices.[22]

It is in this context that the FCC's broadband Transparency Rule was born.

C. History of the Transparency Rule

The Commission's "principles of open access, competition, and consumer choice...have continued to guide Commission policy in the Internet era."[23] It described the *2015 Open Internet Order* as "the latest in a long line of actions by the Commission to ensure that American communications networks develop in

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[16] Dixon and Weiser, *A Digital Age Communications Act Paradigm for Federal-State Relations*, 4 J. on Telecomm. & High Tech. L. 321, 342 (2006).
[17] *First Truth-In-Billing Order*, 14 FCCRcd at 7507.
[18] *See, e.g.*, Aronson v. Sprint Spectrum, L.P., 90 F. Supp. 2d 662, 668-69 (W.D. Pa. 2000).
[19] *See, e.g., Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 (7th Cir. 2013).
[20] *See, e.g.*, *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 538 (D. Md. 2006).
[21] *See, e.g., New Cingular Wireless PCS LLC v. Picker*, 216 F. Supp. 3d 1060, 1067-70 (N.D. Cal. 2016).
[22] *See, e.g., Kaplan v. ITT-U.S. Transmission Sys., MCI Tele. Corp.* 831 F.2d 627, 633 (6th Cir. 1987).
[23] *2015 Internet Order*, 30 FCCRcd at 5619.

ways that foster economic competition, technological innovation, and free expression."[24] The Transparency Rule is essential to this endeavor.

The Transparency Rule is based on the same concerns about information asymmetry between providers and consumers that motivated the truth-in-billing orders. The Commission found that broadband providers have incentives to conceal relevant information from consumers.[25] The Transparency Rule's objective was to afford access to accurate and useful information so consumers could make informed choices between broadband services and monitor services thereafter. For two decades, in a variety of proceedings and contexts, the Commission has reiterated this rationale and made regulatory choices that reinforce this objective.

1. FCC Internet Policy Statement and Early Transparency Policies

As the Internet was becoming an indispensable part of modern-day life in the early 2000s, a bipartisan consensus emerged that it would be unfair to consumers and unhealthy for the market if users of the world's most powerful information source were left unprotected. Recognizing that, in 2005 the Commission issued a consumer-focused *Internet Policy Statement* designed to

[24] *Id.* at 5618.
[25] *See Preserving the Open Internet*, 25 FCCRcd 17905, 17915-25 (2010)("*2010 Internet Order*"); *Id.* at 5628-34.

"preserve and promote the open and interconnected nature of the Internet" and "ensure consumers benefit from the innovation that comes from competition."[26]

Guided by the objective to empower consumers and a Congressional directive to develop a National Broadband Plan with goals of promoting, among other things, "consumer welfare,"[27] the Commission, over the course of the next few years, took steps to ensure that consumers would have access to sufficient information about broadband providers' network practices. Generally, the FCC focused on answering two questions: (1) what network performance information was required by consumers, and (2) how should that performance be measured.

To address the first question, in 2007 the Commission sought comment on whether to extend truth-in-billing and other consumer protection requirements to wireless broadband service.[28] This was followed up on in August 2009, when the Commission issued a *Consumer Information and Disclosure Notice of Inquiry* to explore how to extend truth-in-billing requirements to wireline broadband providers, and further stating its belief that consumers need information on the availability and quality of network services and equipment, rates and fees,

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[26] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCCRcd 14986, 14988 (2005)("*Internet Policy Statement*").
[27] American Recovery and Reinvestment Act of 2009, PL 111-5, 123 Stat 115 (2009).
[28] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCCRcd 14853, 14929-31 (2005).

contractual commitments, and accurate and transparent billing statements.[29] The Commission stated that its goal was in furtherance of its "core responsibility" to "protect[] and empower[] American consumers."[30] Thereafter, it examined what information providers should disclose in reports to regulatory bodies versus what they should disclose in advertisements to consumers.[31]

In October 2008, the Commission brought an enforcement action against Comcast, finding that it had secretly used discriminatory network management practices in blocking consumer access to certain content online.[32] Thereafter, Comcast was required to disclose its practices, so that the Commission and the public could ensure the discriminatory practices were discontinued.[33]

With respect to measuring broadband performance, the Commission's Public Notice in the *Consumer Information and Disclosure* proceeding also sought information on how such measuring should be done.[34] Based on this information, its National Broadband Plan concluded that the FCC should measure and publish

[29] *Consumer Information and Disclosure*, 24 FCCRcd 11380,11387 (2009).
[30] *Id.* at 11381.
[31] *See Broadband Measurement and Consumer Transparency*, 24 FCCRcd 14120, 14121 (2009).
[32] *See Comcast Corporation*, 23 FCCRcd 13028 (2008), *rev'd on other grounds*, *Comcast Corp. v FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[33] *Id.* at 13060.
[34] *Broadband Measurement and Consumer Transparency*, 24 FCCRcd at 14121-22.

data on actual performance of landline broadband services.[35] This evolved into an ongoing nationwide performance study of broadband service, the Measuring Broadband America ("MBA") program. Under the MBA program, the Commission annually releases reports on national broadband performance. To measure performance, the Commission allows broadband providers to rely on a particular methodology provided by SamKnows, a third-party company.[36]

2. 2010 Open Internet Order and the Transparency Rule

In October 2009 the Commission launched a rulemaking proceeding to codify its Internet principles.[37] In the *2009 Open Internet NPRM*, the Commission acknowledged the importance of "protecting users' interests," including "consumer protection in commercial contexts."[38] In proposing a Transparency Rule, the FCC reiterated the need for accurate information and focused on consumers' special informational needs.[39] The Commission also sought comment on the kind of reports broadband providers should submit to allow the Commission to "make informed policy decisions."[40]

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[35] *See Connecting America: The National Broadband Plan*, 44 (2010)("[p]utting more information in the hands of consumers is a proven method to promote meaningful competition and spur innovation, both of which will generate more and better consumer choices").
[36] *Comment Sought on Residential Fixed Broadband Services Testing and Management Solution*, 25 FCCRcd 3836 (2010).
[37] *2009 Internet NPRM*, 24 FCCRcd at 13066.
[38] *Id.* at 13087-88.
[39] *Id.* at 13112-14.
[40] *Id.* at 13113.

In 2010, the Commission issued its first open Internet regulations.[41] It built on its *Internet Policy Statement*, "first and foremost by requiring broadband providers to be transparent in their network management practices, so that end users can make informed choices" "regarding the purchase and use of broadband service."[42] Rather than dictating specific compliance instructions, the Commission decided that flexibility was the best approach.[43] While it provided guidance on what information providers might need to disclose, such as expected and actual access speed and latency, it emphasized that its list was not exhaustive, nor a safe harbor.[44] The Commission instead clarified that different circumstances may require disclosures of different information to satisfy the Rule.[45]

To address continued compliance concerns,[46] the FCC issued *Advisory Guidance* in June 2011, offering "suggestions" on how broadband providers can satisfy their disclosure obligations.[47] As part of the guidance, the Commission created a *voluntary* "safe harbor" whereby wireline broadband providers who

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[41] *2010 Internet Order*, 25 FCCRcd 17905, *rev'd on other grounds*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2010).
[42] *Id.* at 17908, 17936.
[43] *Id.* at 17938.
[44] *Id.* at 17939.
[45] *Id.*
[46] *See, e.g.*, Letter from Ross Lieberman, GN Docket No. 09-191, WC Docket No. 07-52 at 2 (June 8, 2011).
[47] *Advisory Guidance for Compliance with Open Internet Transparency Rule*, 26 FCCRcd 9411 (2011)("*2011 Advisory Guidance*").

chose to participate in the MBA program could disclose performance metrics from the program to comply with the Rule. The Commission believed that these metrics, considered together, would be a sufficient representation of the actual performance their customers could expect to experience.[48] The Commission did not specify what metrics were required, but suggested that broadband providers could disclose the average upload and download speeds during the busiest period on weeknights, and average roundtrip latency, for a particular tier of service.[49] Determined to maintain the flexibility of the Rule, the Commission reiterated that the safe harbor guidance was only "suggestions" that were neither required nor exclusive.[50]

In July 2014, the Commission issued an *Enforcement Advisory* that further clarified the Transparency Rule.[51] The *Advisory* explained that "[a]ccuracy is the bedrock" of the Rule, and that its core purpose "is to allow consumers to understand what they are purchasing."[52] Thus, it prohibits a provider "from making assertions about its service that contain errors, are inconsistent with the provider's disclosure statement, or are misleading or deceptive."[53]

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[48] *Id.* at 9414.
[49] *Id.* at 9414-15.
[50] *Id.* at 9413.
[51] *FCC Enforcement Advisory, Open Internet Transparency Rule*, 29 FCCRcd 8606, 8607 (2014)("*2014 Enforcement Advisory*").
[52] *Id.*
[53] *Id.*

3. 2015 Open Internet Order and the Enhanced Transparency Rule

After other aspects of its 2010 open Internet regulations were invalidated, the Commission, in 2014, released a new open Internet proposal. Among other things, the Commission proposed to enhance the Transparency Rule, to better ensure that consumers and the Internet community have the "information they need to understand the services they are receiving and to monitor practices that could undermine the open Internet."[54] The Commission reiterated its belief that "access to accurate information about broadband provider practices encourages the competition, innovation, and high-quality services that drive consumer demand and broadband investment and deployment."[55]

The *2015 Open Internet Order* "reaffirms the importance of ensuring transparency" by adopting the enhanced Transparency Rule, which ensures "consumers are fully informed about their Internet access."[56] Under the enhanced Rule, in addition to disclosure of speed and latency, the Commission requires disclosure of other performance characteristics that could likely affect a consumer's online experience, namely packet loss. Specifically, the *Order* requires providers to disclose actual performance that is "reasonably related to the

[54] *Protecting and Promoting the Open Internet*, 29 FCCRcd 5561, 5564-65 (2014)("*2014 Internet NPRM*").
[55] *Id.* at 5585.
[56] *2015 Internet Order*, 30 FCCRcd at 5609.

performance the consumer would likely experience in the geographic area in which the consumer is purchasing service."[57] Providers can satisfy this requirement by disclosing median download and upload speeds,[58] median latency,[59] and average packet loss.[60]

The *2015 Open Internet Order* did not adopt a specific disclosure format for consumer information, but it recognized that a single disclosure might not be adequate.[61] Thus, it established a safe harbor for providers who used a consumer-focused disclosure. In a later proceeding, the Commission established the "broadband label" for this safe harbor, which described how providers might effectively present the required information.[62] The current broadband label safe harbor requires the disclosure of price and various charges, data allowance, and performance metrics, including "typical speed downstream/upstream," "typical latency," "typical packet loss" and any network management practice that may affect performance.[63] Providers could continue to use and disclose the information

[57] *See Id.* at 5672-79.
[58] *See 2015 Measuring Broadband America Fixed Broadband Report*, 30-36 (2015)("*2015 MBA Report*").
[59] *Guidance on Open Internet Transparency Rule Requirements*, 31 FCCRcd 5530, n.28 (2016)("*2016 Transparency Rule Guidance*").
[60] *2015 MBA Report* at 18.
[61] *2015 Internet Order*, 30 FCCRcd at 5680.
[62] *2016 Transparency Rule Guidance* at 5539.
[63] *Broadband Labeling*, https://www.fcc.gov/consumer-governmental-affairs/broadband-labeling (last visited Apr. 30, 2018).

obtained from the MBA program as a safe harbor, but only for "meeting the requirement" to disclose under the Rule.[64]

The *2015 Open Internet Order* was challenged in court, but it was upheld in its entirety.[65]

4. 2018 Restoring Internet Freedom Order

In 2017, a new Commission majority initiated a rulemaking proceeding that proposed a different approach to Internet policy.[66] In 2018, the Commission released the *Restoring Internet Freedom Order*, repealing many of the consumer welfare rules that had driven Commission policy since the *2005 Internet Policy Statement*.[67] Importantly, however, the Commission not only retained the Transparency Rule, it made it the key provision on which consumers and the broader Internet community could assess the fairness and accuracy of broadband provider practices.

ARGUMENT

Transparency is essential to achieving the national communications policies of protecting and promoting consumer welfare. Thus, in creating its broadband Transparency Rule, the Commission was careful not to limit states and localities

[64] *2016 Transparency Rule Guidance* at 5533.
[65] *USTelecom v. FCC*, 825 F.3d 674 (D.C. Cir. 2017), *certiorari pending.*
[66] *Restoring Internet Freedom,* 32 FCCRcd 4434 (2017).
[67] *Restoring Internet Freedom,* 33 FCCRcd 311 (2018). The *2018 Order* has not yet gone into effect and has been appealed to the D.C. Circuit. *Mozilla Corp. v. FCC* (No. 18-1051, D.C. Cir.).

from using their own authority to further these national policy objectives. It declined to preempt state consumer protection authority and it never implied that the Rule or voluntary safe harbor provisions would preempt other consumer protection laws. Moreover, the Commission has never indicated that FCC enforcement of transparency requirements would be the only consumer protection to which consumers are entitled. To the contrary, it made clear that the Rule should not undermine traditional state consumer protection enforcement.

Weaponizing the Transparency Rule to preempt state consumer protection requirements counterproductively imperils consumer empowerment, denying consumers accurate information they can use to help protect themselves from broadband providers' unfair practices. The Rule does not shield broadband providers from liability for misleading advertising.

A. The FCC did not intend to supplant the states' important consumer protection role

The FCC recognized the states' important role when it declined to preempt state consumer protection laws in the *2010* and *2015 Open Internet Orders*. In the *2010 Order*, the Commission recognized that "states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints," and stated that it had "no intention of impairing states' or local governments' ability to carry out these duties," unless it finds from evaluation on a case-by-case basis that a specific measure conflicts with

federal law or policy.[68] The Commission echoed this case-by-case conflict preemption approach in its *2015 Open Internet Order*.[69] This is contrasted with the Commission's express preemption of state authority over certain other areas of broadband provider activities.[70] To date, the Commission has not used this case-by-case approach to preempt any state consumer protection actions.

The *2018 Restoring Internet Freedom Order* reinforces the Commission's position. It states, "we do not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives."[71] It explained that the "continued applicability of these general state laws is one of the considerations that persuade[d]" the Commission to repeal other open Internet regulations in the order.[72]

The FCC has reiterated its intent that states use their authority to protect consumers against fraudulent or misleading advertisements regarding provider performance.[73] This is underscored by the FCC's instructions for the broadband

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[68] *2010 Internet Order*, 25 FCCRcd at 17970 n.374.
[69] *2015 Internet Order*, 30 FCCRcd at 5804.
[70] *See e.g.*, *Id.* at 5803 ("we preempt any state from imposing any new state USF contributions on broadband").
[71] *Restoring Internet Freedom Order*, 34 FCCRcd at 428.
[72] *Id.* at 428-29.
[73] *See, e.g.*, *2010 Internet Order*, 25 FCCRcd at 17940 (noting that "[b]roadband providers' online disclosures shall be considered *disclosed to the Commission* for purposes of monitoring and enforcement" of the rule); *2011 Advisory Guidance*, 26 FCCRcd at 944 ("This guidance is

label safe harbor, which plainly states that the safe harbor is "not designed to preempt any state law," but is simply a safe harbor "from enforcement by the FCC of the FCC Open Internet provisions."[74]

B. The FCC's overriding interest is ensuring consumers receive accurate information about their broadband services

The objective of the FCC's Transparency Rule is evident in its implementation. In every significant agency document regarding the Rule, the Commission repeats that its goal is to ensure broadband consumers have the information they need to make informed choices,[75] so that they "are not misled or surprised by the quality or cost of the services they actually receive."[76] In accordance with this, the Commission has concluded that the information that most matters to consumers is the performance they would actually experience in their respective geographic locations, not some abstract number that does not

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intended for broadband providers seeking additional clarification about disclosure practices *that will satisfy the rule*."); *2014 Enforcement Advisory*, 29 FCCRcd at 8607 n.5 ("the Open Internet Order thereby provides guidance on the minimum disclosure *necessary to satisfy the rule's requirement that sufficient information be disclosed*.")(emphasis added).

[74] *Broadband Labeling*, https://www.fcc.gov/consumer-governmental-affairs/broadband-labeling.

[75] *See 2009 Internet NPRM*, 24 FCCRcd at 13110 (seeking comments on what consumers need to know to make informed purchase and use of services); *2010 Internet Order*, 25 FCCRcd at 17908 (stating that the FCC is "requiring broadband providers to be transparent in their network management practices, so that end users can make informed choices"). *2014 Internet NPRM*, 29 FCCRcd at 5589-90 ("The accuracy and availability of such network performance information is a common linchpin for end users, edge providers, and all stakeholders in the Internet community.").

[76] *2014 Enforcement Advisory*, 29 FCCRcd at 8607.

meaningfully reflect consumer experience.[77] The Commission's revisions to its disclosure requirements and measurement metrics over time have been in furtherance of that goal.

The enhanced Transparency Rule adopted in 2015 was motivated by findings that broadband speeds often fell short of advertised speeds,[78] and that consumers are often confused about what causes problems or limitations with their services.[79] The Commission cited consumer group comments showing uncertainty about whether slow speeds are caused by broadband providers' practices or by other, external factors.[80]

Even as the Commission continued to develop methods to help better inform consumers, it cautioned that it had not completely solved the problem. For example, while the FCC working group designing the broadband label endorsed the MBA methodology, it expressed concern that consumers might not be able to sufficiently understand that information and reaffirmed its desire for consumers to have realistic information about speeds.[81] The Commission has also consistently reminded broadband providers using the safe harbor that "additional information"

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[77] *2011 Measuring Broadband America*, 10 (2011).
[78] *2015 Internet Order*, 30 FCCRcd at 5587.
[79] *Id.* at 5631.
[80] *Id.*
[81] *Open Internet Label Study*, FCC Open Internet Advisory Committee, Transparency Working Group (2013).

might be required to comply with the Transparency Rule "in light of relevant circumstances."[82] And it encouraged providers to examine their disclosure practices to determine what additional information, if any, should be disclosed to help customers understand what they are purchasing.[83]

In fact, the flexibility afforded in the Transparency Rule was based on the premise that providers may need to disclose different information in different ways to accurately convey the experience a consumer could actually expect. In every order or guidance related to the Rule, the FCC emphasized that its suggested disclosures were neither required nor exclusive.[84] Rather, the Commission consistently stressed that affording providers flexibility in complying with the disclosure requirements was the only way to ensure that consumers receive the information needed to make informed choices.[85]

Thus, the FCC's record makes clear that the Transparency Rule is a starting point to inform consumers, not an endpoint. For example, in the *2014 Open Internet NPRM*, the Commission sought comments on what disclosure

[82] *2010 Internet Order*, 25 FCCRcd at 17939.
[83] *Id.* at 17938-39.
[84] *See, Id.* at 17939 (stating that the suggested list of information to disclose is neither exhaustive nor a safe harbor); *2011 Advisory Guidance*, 26 FCCRcd at 9414 ("these particular methods of compliance are not required or exclusive").
[85] *2010 Internet Order*, 25 FCCRcd at 17938.

requirements would meet "basic informational needs."[86] And in the *2015 Open Internet Order*, the Commission characterized the Rule as a "basic" or "minimum" protection for consumers.[87] Even Time Warner Cable, Charter's predecessor, characterized the disclosure requirements as a "foundation" and "baseline protection" for consumers to make informed choices.[88]

C. The safe harbors and SamKnows methodology are not intended to foreclose other methods of measurement

Rather than opposing third-party broadband performance measuring methods, the Commission has embraced them. Noting the existence of third-party software tools that "may help supplement the [T]ransparency [R]ule,"[89] the Commission expressed support for their use by consumers, consumer watchdogs, and broadband providers alike. In its Consumer Guide for the *2014 Open Internet Order*, the Commission encourages consumers to test broadband speeds using any number of free, online tests to evaluate if their service measures up to the provider's advertised speed.[90] And in the *2010 Open Internet Order*, the Commission asserted that a key purpose of the Rule was to enable consumers to monitor network management practices, encouraging them to use free third-party

[86] *See 2014 Internet NPRM*, 29 FCCRcd at 5586 (seeking comments on whether a separate disclosure requirement would meet the end-user's basic informational needs).
[87] *2015 Open Internet and Order*, 30 FCCRcd at 5620.
[88] 2014 TWC Comment at 3, Dkt. 14-28.
[89] *2010 Internet Order*, 25 FCCRcd at 17941.
[90] *Open Internet Transparency Rule Consumer Guide*, FCC (Jul. 23, 2014).

software to evaluate performance.[91] The Commission even suggested that providers participating in the MBA program disclose performance data from tests other than its selected SamKnows methodology to satisfy the Rule.[92]

Notably, in opposing the enhanced Transparency Rule, defendant Charter stated its belief that existing transparency obligations were complemented by free tools that can evaluate broadband service. Charter even encouraged customers to use these tests instead of the Commission's SamKnows methodology to obtain localized data more relevant to their experiences.[93]

D. The disclosure requirements and safe harbors do not allow broadband providers to advertise misleading speed performance

The Transparency Rule prohibits broadband providers from making inaccurate and misleading assertions about network performance even when they use and comply with the safe harbors.[94] The Commission has made it clear that broadband providers cannot use the safe harbors to insulate themselves from liability for making misleading or inaccurate statements either in their official

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[91] *2010 Internet Order*, 25 FCCRcd at 17941.
[92] *2011 Advisory Guidance*, 26 FCCRcd at 9416 ("[A] broadband provider may disclose actual performance based on internal testing; consumer speed test data; or other data regarding network performance, including reliable, relevant data from third-party sources such as the broadband performance measurement project."). The Commission went on to say that "[v]arious software-based broadband performance tests are available as potential tools for companies to estimate actual broadband performance," including the Ookla and Measurement Lab speed tests used by the New York Attorney General. *Id.*
[93] 2014 Charter Comment at 10, 25.
[94] *2014 Enforcement Advisory*, 29 FCCRcd at 8607.

disclosures or in another context, such as advertisements.[95] In other words, broadband providers' marketing claims, for example those advertising maximum "up to" speeds, can be misleading even if the broadband provider participates in the MBA program and makes consumer disclosures in the format of the FCC-approved broadband label.

Moreover, the Commission has never indicated that the "actual speed" in MBA reports, carved out from the report's comprehensive system of measurements, would be an accurate and consistent reflection of broadband performance that a broadband provider could use in consumer-facing materials. "Actual speed," as used in the reports, is term of art coined for the program. It is only one of many performance metrics that measures a provider's overall speed performance. Other metrics include latency, packet loss, geographical limitations, and management practices that might slow down a consumer's Internet experience. In addition, the reports include data such as sustained speed, speed variances among consumers, and regional expected speed. Only with all of this information, taken together, can a broadband provider accurately represent overall speed performance.

Understanding the Transparency Rule to require that any representation of speed reflects a consumer's actual experience is the only interpretation that

[95] *2015 Internet Order*, 30 FCCRcd at 5681.

comports with the Commission's paramount goal of ensuring consumers receive accurate information. "[T]he Transparency Rule requires accuracy wherever statements regarding network management practices, performance, and commercial terms appear."[96]

> A provider making an inaccurate assertion about its service performance in an advertisement, where the description is most likely to be seen by consumers, could not defend itself against a Transparency Rule violation by pointing to an "accurate" official disclosure in some other public place. That would be impossible to reconcile with the purpose of the Transparency Rule.[97]

The Commission does not endorse providers using consistency as a shield from liability when they portray speed in a way that does not account for the factors that would affect a consumer's actual experience. Defendant Charter seems to think that, because the Commission stated that a provider's description of its service in other contexts must be consistent with its disclosures,[98] the "actual speed" number in the MBA reports is the only speed it can provide in its advertisements.[99] But this miscomprehends the Commission's guidance and intent. The Commission has not stated, and does not intend, that consistency means that broadband providers can pluck the same numbers from their official disclosures and place those in advertisements if doing so would mislead consumers about the

[96] *2014 Enforcement Advisory*, 29 FCCRcd at 8607.
[97] *Id.*
[98] *Id.*
[99] Charter Brief, p.6

online experience they would actually receive. The speed in a provider's consumer-facing advertising must accurately reflect a consumer's actual expected online experience.

The only reasonable interpretation of the FCC's intent behind the requirement is to ensure that the speed claims a broadband provider makes in its advertisements truthfully represent the *overall* broadband quality as reflected in its accurate official disclosure. If that were not the case, the result would be absurd because broadband providers could advertise the positive information from their disclosures and omit the negative information, as defendant Charter did with its advertised speeds in this case. Indeed, in the two instances where the Commission has taken enforcement action against broadband providers under the Transparency Rule, it has made clear that omissions that amount to misrepresentations are a violation of the Rule.[100]

All this is buttressed by the Commission's concerns about consumer comprehension, noted earlier. As the Commission was considering the enhanced Transparency Rule in the *2014 NPRM*, it was particularly concerned that, to many consumers, the actual speed of their service did not live up to the advertised speed.[101] And the Commission stated that it was fully aware from academic

[100] *AT&T Mobility, LLC.*, 30 FCCRcd 6613, 6615 (2015); *T-Mobile USA, Inc.*, 31 FCCRcd 11410, 11417-18 (2016).
[101] *2014 Internet NPRM*, 29 FCCRcd at 5587.

research and its own experience with consumers that the manner in which broadband providers provide information to consumers can have as much impact on consumer decisions as the information itself.[102] The Commission highlighted recent research suggesting that consumers have difficulty understanding commonly used terms associated with the provision of broadband services.[103] Specifically, the Commission recognized that the meaning of "speed" for consumers is broader than when defined more precisely in a technical context. In an *Public Notice* concerning the speed information that should be disclosed to consumers, the Commission explained that, to consumers, "speed" actually means a full range of performance parameters—including speed, latency, and jitter.[104]

Consumers ability to compare services of different broadband providers is furthered by broadband providers disclosing information in all contexts that accurately reflects a consumer's actual experience. Defendant Charter claims that the Commission's disclosure requirements constitute a comprehensive regulatory scheme designed so that consumers can make apples-to-apples comparisons of broadband providers.[105] On this basis, it asserts that the New York Attorney General's fraud claims are conflict preempted. But that view defies the

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[102] *Id.*
[103] *Id.* at 5586.
[104] *Consumer and Governmental Affairs Bureau Seeks Comment On "Need for Speed" Information for Consumers of Broadband Services*, 24 FCCRcd 5847 (2011).
[105] Charter Brief, p.35-36

Commission's intent. The FCC was only referring to the ability of consumers to compare providers when reviewing their official disclosures, which must include all the information a consumer reasonably needs to understand what might be their actual online experience. Because the Commission expects providers to advertise speeds that accurately reflect a consumer's actual experience, the Commission's desire that consumers be able to effectively compare providers would be furthered, not frustrated, by advertised speeds that reflect actual performance. Even were that the case, had the Commission intended the disclosure requirements to constitute a consistent and comprehensive regulatory scheme for comparisons under which all other disclosure methods would be preempted, it would have required all broadband providers use the exact same disclosure framework. Instead, it chose *flexible* disclosure requirements and a *voluntary* safe harbor.

If the Transparency Rule allowed misleading and inaccurate information, it would be meaningless. State law requirements that press broadband providers to make marketing claims reflecting a consumer's actual experience further the purpose of the Transparency Rule. Allowing providers to selectively disclose only one indicator of performance in an advertisement that causes consumer confusion would undermine the Rule.

CONCLUSION

This court should grant the New York Attorney General's request to dismiss the appeal, or in the alternative, affirm the Supreme Court's decision below.

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