Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	
Regarding Broadband Speed	)	CG Docket No. 17-131
Disclosure Requirements	)	
	)	

COMMENTS OF PUBLIC KNOWLEDGE

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SUMMARY

The Commission should reject Petitioner's' request to find that broadband consumer protection is exclusively subject to federal regulation. A recent complaint filed by the New York Attorney General against Charter Communications and Spectrum Management Holding Company (formerly Time Warner Cable) appears to be the motivation for the Petitioners' request. The New York complaint alleges fraudulent and deceptive business practices that, if proved, violate the state's consumer protection laws. A court has already ruled that this effort is not preempted by federal regulation.[1] States are and should continue to be free to enforce their generally-applicable consumer protection laws against companies of all kind, including broadband, cable, and telecommunications companies. The Commission's broadband speed measurement and transparency framework should not preclude state efforts for a number of reasons. First, the Commission lacks the necessary grant of statutory authorization from Congress to preempt state consumer protection laws. Second, even if the Commission did have authority to preempt in this matter, it should decline to do so, as states are better equipped with the expertise and personnel to police fraudulent and deceptive business practices carried out within the state. As the Commission has recognized, "states play a vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints."[2]

ARGUMENT

I. Petitioner's request should be rejected because the Commission lacks legal authority to preempt state consumer protection efforts.

The Petitioner's request should be rejected because the Commission lacks the legal authority to find that its broadband transparency and speed measurement framework preempts state consumer protection efforts. As the Supreme Court has explained, preemption can occur in a number of circumstances:

[1] *People v. Charter Communs. Inc.*, No. 17 Civ. 1428 (CM), 2017 Lexis 68415 (S.D.N.Y. Apr. 27, 2017).
[2] *Preserving the Open Internet, Broadband Industry Practices*, 25 FCC Rcd 17905, 17970 ¶121 (2010) ("*2010 Open Internet Order*").

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.[3]

None of these circumstances are present with respect to preemption of state consumer protection efforts.

Federal preemption of state law requires both statutory authorization and justification. Petitioners have failed to demonstrate either.[4] Petitioners request a declaratory ruling to prevent broadband internet access service (BIAS) providers from being subject to "inconsistent" standards.[5] Petitioners also argue that BIAS providers are afforded "Safe Harbor" through compliance with a federally sanctioned measurement and reporting program, such as Measuring Broadband America, and should not subject to additional liability under state law.[6] These claims are unjustified. There is no clear statement in the Communications Act to authorize preemption of state consumer protection efforts, and in any case Petitioners have not demonstrated an adequate justification for preemption.

A. The Commission may not preempt state consumer protection efforts because, although broadband traffic is interstate, other aspects of a broadband provider's business activities, such as consumer communications, are intrastate.

The Commission only has authority to regulate interstate communications services.[7] Applying an "end-to-end" analysis, the Commission has consistently found that broadband is an interstate service. For example, in the Cable Modem Declaratory ruling, it wrote that

> traffic bound for information service providers (including Internet access traffic) often has an interstate component." The Commission concluded that although such traffic is both interstate

[3] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 US 355, 368-69 (1986) (citations omitted).
[4] *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982).
[5] *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, CG Docket No. 17-131 (filed May 15, 2017) ("*Petition"*).
[6] *Id*. at 4.
[7] 47 U.S.C. § 152. The DC Circuit recently issued an opinion that hinges in large part on the Commission's lack of authority over interstate elements of communication. *See Global Tel*Link v. FCC.*, 2017 U.S. App. Lexis 10428 (D.C. Cir. June 13, 2017).

> and intrastate in nature, it "is properly classified as interstate and it falls under the Commission's . . . jurisdiction." The jurisdictional analysis rests on an end-to-end analysis, in this case on an examination of the location of the points among which cable modem service communications travel. These points are often in different states and countries.[8]

This analysis, notably, focuses on broadband *traffic*. Other aspects of broadband, such as marketing, billing, the consumer relationship, and equipment,[9] may be intrastate and generally immune from Commission preemption.

The Commission may preempt intrastate activities that are related to interstate communication only if it is not possible to separate the interstate and intrastate components.[10] For example, in *Public Utility Commission of Texas v. FCC*, the Commission preempted state authority to designate franchise service areas where the state order conflicted with a federal right to access an interstate connection point. Preemption was permissible in this instance because intrastate and interstate calls routed through the same connection points, making it impossible to separate the conflicting interstate and intrastate components at issue.[11] And in *Computer & Commc'ns Indus. Ass'n v. FCC*, the Commission preempted the regulation of equipment, even though the equipment was located wholly within a state, because the equipment was "used interchangeably for both interstate and intrastate communication,"[12] and state regulation "would interfere with achievement of a federal regulatory goal."[13] But such inseparability is not present with respect to state efforts to protect broadband consumers—in the New York case, for instance, the state is only asserting authority over allegedly misleading statements made in New York to New York consumers. Additionally, state efforts to police against fraud and misrepresentation can coexist with

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[8] *In the Matter of Internet Over Cable Declaratory Ruling,* Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 ¶ 59 (2002).

[9] *Computer & Commc'ns Indus. Ass'n*, 693 F.2d 198, 214 (D.C. Cir. 1982) (Courts have held that the Commission may only preempt the state regulation of intrastate equipment when this "would interfere with achievement of a federal regulatory goal.").

[10] *PUC of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989).

[11] *Id.*

[12] *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982).

[13] *Id.*

federal transparency policies—states should be free to pursue policies that go further than federal policies, for instance, or that concern other aspects of the business/consumer relationship.[14]

B. The Commission cannot preempt because Congress has not clearly authorized it to do so.

The Commission lacks authority to preempt because the Communications Act does not clearly authorize it to do so. Petitioners have failed to cite any statutory authority directing the Commission to preempt state fraud or misrepresentation claims—merely vaguely averring to the uncontroversial point that the Commission, at times, preempts state communications regulations that are inconsistent with its own.[15]

Not only is there no specific statutory authorization for the preemption petitioners seek, there is a presumption against it. First, the Communications Act contains a savings clause that enacts a presumption against preemption. It clearly states that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[16] More generally, in preemption cases involving a field traditionally subject to state regulation, courts "start with the assumption that historic police powers of states are not to be surpassed by a federal act unless that was the clear and manifest purpose of Congress."[17] The police power of states is among the most important functions of government:

> Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. "It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; ... and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the

[14] Glenn Kaplan & Chris Barry Smith, *Patching the Holes in the Consumer Product Safety Net: Using State Unfair Practices Laws to Make Handguns and Other Consumer Goods Safer*, 17 Yale J. on Reg. 253, 260 (2000) (asserting federal regulation serves as a floor that is complemented by state tort laws, which may have a deterrent effect and promote higher product safety standards over time).

[15] *Petition* at 15.

[16] 47 U.S.C. § 414.

[17] *Wyeth v. Levine,* 555 U.S. 555 (2009).

legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made...[18]

Protecting consumers from fraud and misrepresentation in the sales of goods or services is one of the historic, core police powers of the states. It has long been recognized that "[t]he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against ... deception and fraud."[19]

Not only have petitioners failed to identify such a clear statement authorizing preemption, the very authority the Commission first relied on in enacting its transparency requirements, Section 706 of the Telecommunications Act of 1996, expressly reiterates the complementary roles of the federal government and the states. "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one."[20] Indeed, at times when Congress has given the FCC authority to preempt states, it has expressly withheld from the Commission the ability to preempt state requirements that "safeguard the rights of consumers,"[21] demonstrating not merely a lack of positive authority to preempt state consumer protection laws but a policy against it.

Additionally, Title II of the Communications Act, which became a source of authority for the transparency rules in the 2015 Open Internet Order, likewise fails to justify preemption. As the United States District Court for the Southern District of New York recently found,[22] there is nothing in Section 207 of the Communications Act, which states that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter" *may* seek a remedy under its provisions *must* exclusively do so.[23]

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[18] *Slaughter-House Cases*, 83 US 36, 62 (1873) (citing *Commonwealth v. Alger*, 61 Mass. (7 Cush) 53 (1851)).
[19] *Dent v. West Virginia*, 129 US 114, 122 (1889).
[20] *New York State Dept. of Social Servs. v. Dublino*, 413 US 405, 421 (1973).
[21] 47 U.S.C. § 253
[22] *People v. Charter Communs. Inc.*, No. 17 Civ. 1428 (CM) at 17, 2017 Lexis 68415 (S.D.N.Y. Apr. 27, 2017)
[23] Further, although a particular state law claim may allege harms that *also* violate the Communications Act or the Commission's rules, this does not imply that a particular state law cause of action somehow "arises under" federal law. As the Second Circuit held, the "mere fact that the Communications Act governs certain aspects of defendant's

C. **The Commission likely lacks justification to preempt because the federal measurement scheme can coexist with state consumer protection laws.**

Preemption may be justified where the state law conflicts with or negates the federal law, or where compliance with both state law and federal law is impossible. Here, the Commission cannot preempt state consumer protection efforts because any federal measurement and transparency scheme can coexist with state consumer protection efforts.

First, many state consumer protection efforts do not seek to proactively regulate the behavior of companies, or to regulate the underlying service. They rather seek to hold companies liable for fraud or misrepresentation. Even in situations (unlike this one) where the federal government has expressly preempted states from regulating the content of communications to consumers, "[t]hat Congress requires a particular warning label does not automatically pre-empt a regulatory field," and "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions."[24] The court explained,

> State-law prohibitions on false statements of material fact do not create "diverse, nonuniform, and confusing" standards.... state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity.[25]

Second, even if a state were to require disclosures that were different, more detailed, more numerous, or more prominent than what the FCC requires, it is not impossible for a broadband provider to comply with both federal and state requirements simultaneously, provided that the state did not in some way attempt to prevent a provider from complying with its federal requirements. For example, in *Tennessee v. FCC*, the court rejected federal preemption of a state rules restricting municipal broadband because the state rules "did not require municipalities to violate any FCC requirements."[26] The fact that

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billing relationships with its customers does not mean that ... claims arise under the Act." *Nordlicht v. New York Telephone Co.*, 799 F. 2d 859, 861-62 (2d. Cir. 1986).

[24] *Cipollone v. Liggett Group*, 505 US 504, 518 (1992) (federal tobacco warning label requirements do not preempt state torts).

[25] *Id.* at 529

[26] *Tennessee v. FCC*, 832 F.3d 597, 599 (6th Cir. 2016).

state requirements may simply be different than federal requirements is not evidence that they are incompatible with them.

Finally, state consumer protection efforts do not thwart any legitimate Commission objectives. In enacting the transparency rules, the Commission stated that they were 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."[27] These are exactly the reasons why states seek to protect their residents. It does not somehow thwart the goals of increasing user choice and control if states ensure that users have an even better understanding of their broadband or WiFi performance than what federal rules require. Because in this case state law can coexist with the Commission's legitimate objectives,[28] the Commission may not preempt.

More broadly, every business that operates across state lines is subject to the laws of different jurisdictions. Grocery stores and banks might wish to relieve themselves of the burden of state oversight no less than cable and telecommunications companies. But our federal system of governance ensures that each state can protect its consumers using its own resources and using the standards that it sees as best, provided that such actions do not contradict federal law. While companies are apt to complain of a "confusing" or "contradictory" patchwork of rules the fact that consumer protection issues are often handled by states rather the federal government has not proved a barrier to commerce thus far, and having a diversity of jurisdictions that each may approach an issue differently is in fact a strength, not a weakness of our system of law. In this case, states are not seeking to regulate the operation of broadband service or impose rules or standards that are incompatible with federal policy, but merely to protect consumers in their own states. Even under a "worst case scenario" from the perspective of a broadband or cable company, it would have to merely use different language to describe and market its service to consumers in one state rather than another—a burden that, given different levels of taxation and fees from one place to another, largely already exists.

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[27] Federal Communications Commission, *Open Internet Transparency Rule* (Jan. 17, 2017), *available at* https://www.fcc.gov/consumers/guides/open-internet-transparency-rule.
[28] *National Asso. of Regulatory Utility Comm'rs v. FCC,* 737 F.2d 1095 (D.C. Cir., 1984).

II. The Commission should decline to preempt state law because states are equipped with the expertise and personnel to police fraudulent and deceptive business practices carried out within the state.

States are and should continue to be free to enforce their generally-applicable consumer protection laws against companies of all kind, including broadband, cable, and telecommunications companies. There are many advantages to the federal system, which allows state and federal authorities to work in complementary ways to promote the general welfare. As the Supreme Court wrote,

> [O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In Tafflin v. Levitt, 493 U. S. 455, 458 (1990), "[w]e beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."…..
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> As James Madison put it:
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> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).
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> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[29]

Furthermore, not only is it merely possible for federal regulation and state law to coexist, the federal system functions best to protect consumers when state tort law serves as a complement to the federal regulation. As a practical matter, "Expertise, reputational value, and human capital together may make the state regulatory system an asset that both local officials and locally based interest groups will fight to keep."[30] This is because "[t]he federal government desperately needs the technical and personnel

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[29] *Gregory v. Ashcroft*, 501 US 452, 457-58 (1991).
[30] John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 Law & Contemp. Probs. 203, 219 (Summer 1997).

resources of state and local governments."[31] For example, some state offices of attorneys general, such as New York, have divisions dedicated to consumer protection.[32] The New York Bureau of Consumer Frauds and Protection reports that it litigates or mediates thousands of consumer complaints each year.[33] The division also expends resources researching and reporting on "emerging consumer problems and issues." [34] Other states have similar resources, and sound policy would ensure that these resources can be used to protection consumers of communications services.

Finally, having different jurisdictions with the ability to protect consumers and promote the public interest ensures that one jurisdiction can compensate for the shortcomings of the others. Not all states may be active in protecting broadband consumers—but for residents of these states, the federal rules will provide a level of protection. And not every FCC regime may be as interested in proactively policing the behavior of broadband providers as others. As Professor Mary J. Davis put it in another context, "an alternative, complementary mechanism to the typically static administrative regulatory framework,"[35] such as a state tort framework, can serve a valuable purpose in uncovering valuable information and protecting consumers.

III. The Commission should decline to consider Petitioner's request because it is not prudent or timely to issue a ruling at this time.

The Commission should decline to act on this petition for two more reasons. First, Petitioner's request amounts to a change in the Commission's rules and policies and should go through the formal rulemaking process. Second, the Commission's recent Notice of Proposed Rulemaking in the Matter of Restoring Internet Freedom (NPRM) leaves continued statutory authorization for the federal transparency rules in question. Ruling on Petitioner's request now would therefore be imprudent and poorly-timed.

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[31] *Id.* at 220.
[32] *See* New York State Office of the Attorney General, Bureau of Consumer Frauds and Protection, https://ag.ny.gov/bureau/consumer-frauds-bureau (last visited Jun. 15, 2017).
[33] *Id.*
[34] *Id.*
[35] Mary J. Davis, *The Case Against Preemption: Vaccines and Uncertainty*, 8 Ind. Health L. Rev. 291, 294 (2010-2011).

If the Commission intends to preempt state consumer protection efforts, this rule change must go through the Commission's rulemaking process, including publication of the proposed change in the Federal Register and providing public notice and opportunity to comment.[36] Petitioner US Telecom itself has argued this point in other matters.[37] The Communications Act likewise requires that some kinds of preemption specifically must go through a notice-and-comment procedure.[38] It would be unlawful for the Commission to grant a request for preemption without following the proper procedure.

Additionally, the Commission has called into question the statutory basis for the transparency rules themselves. The 2010 Open Internet Order relied on Section 706 as its source of statutory authorization for its rules, and the 2015 Open Internet Order adopted modifications that relied on both Section 706 and Title II.[39] In its recent "Restoring Internet Freedom" NPRM,[40] the Commission proposed to end regulation under Title II and indicated that it intends to interpret Section 706 as a merely "hortatory" provision that would prevent it from being used as an independent source of authority.[41] The Commission has not proposed any basis of authority for enacting transparency rules (or Open Internet rules more generally) aside from these provisions. Without legal authority to support them, the transparency rules would be unenforceable. With this prospect it makes little sense for the Commission to find that these rules somehow preempt state law or, indeed, to clarify or elaborate them at all. Finally, to state the obvious, if the Commission lacks authority to regulate an issue, it also lacks authority to preempt states on that issue, since preemption is simply a form of regulation.

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[36] 5 U.S.C. § 553.

[37] Comment of US Telecom, In Support of Petition for Reconsideration, PS Docket No. 14-174 at 5 (Jan. 10, 2015).

[38] 47 U.S.C. § 253(d).

[39] *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and order, 30 FCC Rcf 5601 ¶267 (2015) ("*2015 Open Internet Order*").

[40] *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 ¶ 4 (2017).

[41] *Id.* at ¶ 100 ("The text of these provisions also appears more naturally read as hortatory, particularly given the lack of any express grant of rulemaking authority, authority to prescribe or proscribe the conduct of any party, or to enforce compliance.")

CONCLUSION

For the foregoing reasons, Public Knowledge requests that the Commission reject Petitioner's request to find that broadband consumer protection is exclusively subject to federal regulation and continue to allow states to protect their residents.

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