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DIVISION OF ECONOMIC JUSTICE
BUREAU OF INTERNET & TECHNOLOGY

November 28, 2017

VIA ECF

The Hon. O. Peter Sherwood
New York State Supreme Court
Commercial Division
60 Centre Street
New York, New York 10007

Re: **The People of the State of New York by Eric T. Schneiderman v. Charter Communications, Inc. and Spectrum Management Holding Company, LLC (f/k/a Time Warner Cable, Inc.), 450318/2017**

Dear Justice Sherwood:

On behalf of the Office of the Attorney General ("OAG"), I write to respond to the letter (Doc. No. 109) submitted yesterday afternoon (the "Letter") by Defendants in the above-captioned action. The Letter contends that a draft rule (the "Draft Rule")[1] proposed by the Chairman of the Federal Communications Commission ("FCC") last week is somehow relevant to the Court's consideration of the pending motion to dismiss. Defendants' Letter violates Commercial Division Rule 18[2] because the Draft Rule is not a court decision and Defendants' Letter contains additional argument. To the extent that the Court is inclined to consider the arguments contained in the Letter, OAG requests permission to submit the response below.

Defendants' Letter is misleading in at least four key respects. First, the Draft Rule—which seeks to establish a new deregulatory policy effectively undoing network neutrality—includes no language purporting to create, extend or modify the preemptive reach of the Transparency Rule on which much of Defendants' preemption argument is based. Thus, even if the FCC promulgates the Draft Rule in its current form, the Draft Rule would not add any new legal authority pertinent to Defendants' preemption argument.

[1] Draft Order, WC 17-108.

[2] Rule 18 provides that "[a]bsent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind."

Second, the Draft Rule's discussion of preemption *supports* OAG's position that this state consumer fraud action is not preempted. In purporting to justify a so-called "federal deregulatory policy," the FCC repeatedly and emphatically stresses the continued *availability* of traditional state remedies and consumer protections. Draft Rule ¶ 192 ("Indeed, the continued applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here"); *See id.* ("We appreciate the many important functions served by our state and local partners, and we fully expect that the states will 'continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing…"); ¶ 87 ("[W]e find that pre-existing legal remedies, particularly antitrust and consumer protection laws, sufficiently address such harms."); ¶ 142 ("We also observe that all states have laws proscribing deceptive trade practices."). Defendants' Letter fails to mention, much less substantively address, these plain statements from the FCC.

Third, the Letter likewise neglects to advise the Court that the Draft Rule proposes to abolish outright the broadband nutritional label and its corresponding "safe harbor." Draft Rule ¶ 227. This is the same safe harbor that Defendants claim is the basis for their conflict preemption argument—namely, that the safe harbor allowed by the FCC would be impermissibly undermined if Defendants were also required to comply with State law. *See* Defendants' Opening Brief, at 7-12.

Fourth, the Letter appears to suggest that the FCC endorsed a new policy of field preemption that would apply across the board to consumer fraud actions such as this state action, citing footnote 703 of the Draft Rule. Defendants, however, omitted the language in the very same footnote providing that: "states retain their traditional role in policing and remedying violations of a wide variety of general state laws." Draft Rule ¶ 192 n.703. Moreover, the quoted portion of the footnote addresses only the "general" savings clause of 47 U.S.C. § 414. Neither the Letter nor the Draft Rule addresses the specific bar against implied preemption in 47 U.S.C. § 601(c)(1), in which Congress prohibits construing federal telecommunications law "to modify, impair, or supersede Federal, State, or local law *unless expressly so provided in such Act or amendments*." *Id.* (emphasis added).

In sum, the Draft Rule does not preempt OAG's consumer fraud action, but rather makes clear that the states have a longstanding and traditional role in protecting their citizens against frauds, including those committed by internet service providers.

Respectfully yours,

/s/
Mihir Kshirsagar