

LATHAM & WATKINS LLP

November 27, 2017

VIA NYSCEF

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. et al., Index No. 450318/2017*

Dear Justice Sherwood:

On behalf of Charter Communications, Inc., I am writing to submit for the Court's review the attached draft Order, which was released by the Federal Communications Commission (FCC) on November 22, 2017 in its *Restoring Internet Freedom* proceeding, WC Docket No. 17-108 ("Draft Order"). The Draft Order, which the FCC has announced its intention to adopt in final form on December 14, 2017, would retain the FCC's transparency rule (which, among other things, mandates disclosure of actual broadband speeds in the manner defined by the Commission) while rescinding other "open Internet" or "net neutrality" rules.

Of particular relevance here, the Draft Order includes an extensive discussion of the interplay between federal and state law, including with respect to the transparency rule on which Charter has relied in arguing that federal law preempts the Attorney General's allegations that Time Warner Cable made deceptive claims about its broadband speeds. Consistent with the FCC's statements in prior orders and enforcement advisories, the Draft Order "conclude[s] that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork of separate state and local requirements." Draft Order ¶ 190. It notes that "[a]llowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here," especially "by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates." *Id.*

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To ensure that state law does not undermine federal objectives, the Draft Order both occupies the field with respect to “economic” or “public utility-type” regulations, *id.* ¶ 191, and further holds that generally applicable state and local laws, while preserved to the extent *consistent* with the FCC’s rules, are preempted to the extent “the administration of such general state laws ... interfere[s] with federal regulatory objectives.” *Id.* ¶ 192. In recognizing this basic tenet of the conflict preemption doctrine, the FCC noted that “general savings clause like section 414 ‘do[es] not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes.’” *Id.* ¶ 192 n.703.

Importantly, the Draft Order does not constitute final agency action, and it may be revised before the FCC’s scheduled vote on December 14. But Charter submits that the FCC’s proposed holdings regarding federal preemption nevertheless are instructive, and counsel for Charter accordingly intends to address the Draft Order during the November 28, 2017 argument on Charter’s Motion to Dismiss.

Respectfully submitted,

/s/ Christopher J. Clark

Christopher J. Clark
of LATHAM & WATKINS LLP

cc: All Counsel of Record (via NYSCEF)

Attachment