NYC PLANNING

Statement from Marisa Lago, Chairperson of the NYC Planning Commission and Director of the Department of City Planning, before the Land Use Committee of the City Council, on the Mayor's Fiscal Year 2018 Preliminary Budget and Four Year Financial Plan

March 14, 2018

DCP Expense Budget *(Dollars in Thousands)*						
	FY16	**FY17**	**FY18**	**Preliminary Plan**		***Difference**
	Actual	**Actual**	**Adopted**	**FY18**	**FY19**	**FY18-FY19**
PS	$22,574	$24,475	$28,435	$29,143	$28,919	$484
OTPS	$8,657	$11,837	$21,072	$18,715	$16,609	($4,463)
TOTAL	**$31,231**	**$36,312**	**$49,507**	**$47,858**	**$45,529**	**($3,979)**

**The difference of Fiscal 2018 Adopted Budget compared to Fiscal 2019 Preliminary Budget.*

Good morning Chair Salamanca, Subcommittee Chairs Moya, Adams, and Kallos, and distinguished members of the Land Use Committee. Thank you for the opportunity to be here today to discuss the Department of City Planning's (DCP's) preliminary Fiscal Year 2019 budget. Although the focus of this hearing is our FY19 budget, I will begin with comments on the agency's work program, and the exciting services and tools that our budget allocation allows us to provide for the public.

Since the start of this Administration, DCP has remained dedicated to the Mayor's goals of addressing inequality and making New York City the fairest big city in America. By fostering economic opportunity, planning for the creation of permanently affordable housing and investing in neighborhoods, we are already helping New Yorkers to continue to afford to live in their city. But, to state the obvious, there is plenty more to do.

2020 CENSUS

One measure of fairness is the equitable allocation of federal funding. The federal Census count directly affects federal funding for many programs that are critical to the well-being of New Yorkers. These include the supplemental nutrition assistance program, Section 8 housing programs, bridge construction and repairs, and grants to local educational agencies to serve disadvantaged youth. Since this federal funding is

based on population, we must have an accurate 2020 Census. This is a top priority for DCP, as it is for the Council.

The members of DCP's Population Division are national experts in counting urban areas. While 2020 may seem far off, they are already in the field, finding housing units throughout all five boroughs. It is work that has a concrete payoff: in 2010, we added nearly 200,000 units—over 5% of the housing units in the City—to the federal address list. We estimate that this captured as many as 250,000 people who otherwise would not have been counted.

ECONOMIC DEVELOPMENT

New York Works- East Midtown

Turning to economic development, I want to highlight last August's Council vote on the rezoning of East Midtown. Fewer than seven months after this rezoning, which had its skeptics, we are delighted that one of the city's most iconic and largest employers, JP Morgan Chase, has announced the redevelopment of its headquarters at 270 Park Avenue. With 2.5 million square feet of office space planned, the total square footage is larger than Cornell Tech. More importantly, the new headquarters building is expected to house 15,000 employees. And, it was recently revealed that St. Patrick's Cathedral is preparing to sell its air rights to enlarge another East Midtown office building. These initial moves give confidence regarding a bright future for East Midtown. In addition, the sale of air rights for both projects will result in tens of millions of dollars going to public realm and transit improvements.

New York Works- Boroughs Outside Manhattan

The East Midtown rezoning is facilitating the growth of Class A office space. But to combat economic inequality, grow the middle class and adapt to ever-changing technologies, the City is also investing in a range of industries with high wages and job potential that do not need-or wish- to be located in Manhattan. In Downtown Brooklyn, Long Island City, and Broadway Junction, DCP is looking at targeted, localized solutions, as highlighted in the *New York Works* report released by the Mayor last year.

As just one example, *New York Works* finds that Downtown Brooklyn, a fast growing neighborhood sitting on top of 13 subway lines and a regional LIRR station, is well

positioned to increase its supply of office space. Ensuring that there is both the volume and variety of work spaces to accommodate the full range of today's employers is essential to capitalize on Downtown Brooklyn's attractiveness as a residential neighborhood. Further, intercepting Brooklyn commuters before they cross the East River has the potential to ease congestion on Manhattan's subway lines and lower commute times for many Brooklyn residents.

New York Works- Eliminating Zoning Barriers

In addition to looking at particular neighborhoods, DCP is also looking at our citywide regulations to identify barriers to job growth.

Our zoning regulations for office and other work spaces were largely written over 50 years ago and many are now outdated. The way we work has not only changed dramatically since then, but continues to evolve rapidly. Our zoning should not stand in the way of creating the types of spaces needed for the jobs of today and tomorrow--especially at highly accessible locations.

Here are a few examples of obsolete rules that are getting in the way of real-world private sector growth.

- Businesses are gravitating toward rehabilitated loft buildings, because of their beauty and cool-factor, and also because their layouts reflect the needs of today's business culture. But, our zoning makes it nearly impossible to build a new loft-style office building today.

- Craft breweries are making a serious comeback, but the zoning that regulates them was adopted in 1961. At that time, there were only 183 breweries in the entire country; today there are 269 craft breweries in New York State alone, many of which combine production with a related retail store or restaurant. Our half-century-old zoning laws make it almost impossible to find sites for breweries outside of the heaviest industrial districts.

- While our transit habits are changing for the better, in many business areas with good mass transit the mandatory parking requirements are so high that as much space can be required for parking as for the buildings

themselves. This can deter not only the construction of new buildings, but the enlargement of existing businesses.

We have begun to introduce zoning provisions to address these issues and will continue to develop approaches that encourage the creation of offices and other work space that bring jobs closer to where New Yorkers live.

NEIGHBORHOOD PLANNING

In addition to supporting job growth, DCP is focused on increasing the number of new homes in the city, with a special focus on affordable housing. We also seek to support housing growth with appropriate neighborhood investment. Last week, the Council Zoning and Franchises Subcommittee and Land Use Committee voted to support the Jerome Avenue Community Plan. We estimate that the Plan would bring approximately 4,600 new homes to the area, about a quarter of which would be required to be permanently affordable under the city's Mandatory Inclusionary Housing (MIH) requirements.

As part of the Plan, the City has committed to make major investments in protecting and building affordable housing including HPD's commitment to preserve and protect 2,500 existing affordable housing units over the next two years, fixing streets, building new schools and improving parks. The City will also invest in ensuring that neighborhood residents have access to jobs by offering training for both workers and small businesses, including those in the auto industry. Council Members Gibson and Cabrera deserve special congratulations for their dedicated work in shaping this important Plan and fighting for their communities.

Last year, the Council approved both the Downtown Far Rockaway Plan and the East Harlem Plan, resulting in new housing growth opportunities and significant neighborhoods investments. In Downtown Far Rockaway, DCP worked closely with EDC and HPD on land use actions that will bring a vibrant mix of residential, commercial and community facility uses, as well as open space, on vacant and underutilized sites near mass transit and along the neighborhood's primary corridors. The East Harlem Plan became a comprehensive plan to preserve East Harlem's affordable housing in areas with a strong existing character, while requiring new, permanently affordable housing through the MIH requirements.

There is ongoing comprehensive planning underway in other parts of the City, including in Inwood, where a neighborhood plan prepared by EDC is currently in public review as part of ULURP.

With strong leadership by Council Member Lander, the Gowanus Neighborhood Planning Study is well underway. Already, there has been an intensive stakeholder engagement effort that includes the participation of thousands of residents, workers, small business owners, community organizations and elected officials. This outreach was augmented by DCP's online community engagement portal, which received 2,000 pieces of feedback. This is the first time that we have used this online tool, so we are especially pleased by the robust response. Based on this community input, DCP is now developing a planning and land use framework that can act as a road map for Gowanus to become a model green, inclusive, equitable and sustainable neighborhood for all, centered on a wholly unique resource – the Canal itself.

At an earlier phase is DCP's Southern Boulevard neighborhood planning study. Together with our sister agencies, DCP aims to engage community residents and the full range of stakeholders in a ground-up, comprehensive neighborhood study that will create a unified vision through a collaborative process. This study will help implement the 2013 Sheridan Transportation Study, which identified broad land use recommendations for the area. We look forward to working closely with Land Use Chair Salamanca on opportunities to protect and increase affordable housing, strengthen retail and local businesses, increase pedestrian safety and walkability, revitalize the waterfront and improve community resources.

HOUSING

To address the crying need for housing in an already dense, built-up city, DCP is focusing on identifying underutilized sites. For example, in our Jerome Avenue, East NY and East Harlem neighborhood plans, we proposed zoning that encouraged the construction of buildings adjacent to elevated rail lines, leveraging land that had once been thought too difficult to develop.

But our most important tool to spur housing construction is MIH, which requires a percentage of permanently affordable housing whenever the City Planning Commission (CPC) and Council significantly increase residential capacity. MIH is the most comprehensive affordable housing program in the nation, and creates a floor—

not a ceiling—for affordability. By working alongside other City programs and our neighborhood plans, MIH is increasing our stock of affordable housing for decades to come.

The statistics bear this out. In 2017 alone, the CPC approved 11,000 total units through public and private applications utilizing MIH, 2,800 of which must be permanently affordable. From the adoption of the MIH program through March 2nd of this year, we have approved about 18,000 total units through public and private applications utilizing MIH, 4,800 of which must be permanently affordable. And, there's a robust pipeline.

RESILIENCY

Another topic that is critical for a city with 520 miles of coastline and a city that still bears the scars of super-storm Sandy is resilience. In 2017, the CPC- and ultimately the Council- established Special Coastal Risk Districts that place limits on future development in the Staten Island State Buyout Areas, and in Hamilton Beach and Broad Channel in Queens. All of these rezonings have the goal of planning for sea level rise in these especially high risk neighborhoods and were greeted with strong community support.

DCP is currently working on an update to the Flood Resilience Text Amendment, which was adopted by the City Council in October 2013 as an emergency measure to eliminate zoning constraints to rebuilding in the flood zone after super-storm Sandy. We expect to advance a citywide Flood Resilience Text Amendment II later this year, which would make the temporary regulations permanent, implement lessons learned during the recovery and rebuilding process, address issues raised by local communities and encourage long-term resiliency investments in the flood zone. We have already conducted extensive outreach with local communities and look forward to continuing to engage with Council Members on this important resiliency initiative.

I would like to highlight a recently released DCP report, the Resilient Industry Study, which identifies cost-effective strategies that industrial businesses in the floodplain can choose to use to reduce flood risk and restore operations quickly in the event of future flooding. This Study provides descriptions and cost estimates for a wide range of resiliency retrofits to help protect and strengthen the city's industrial sector. This

study is purposely not regulatory; it is intended to serve as a toolkit to help interested industry stakeholders.

PLANNING DATA

To more effectively plan in concert with communities, DCP strives to be at the forefront of sharing relevant planning information to help the public be as informed as possible. This Administration has prioritized making neighborhood data more accessible by giving communities access to cutting edge web tools.

DCP's recently released Community Portal website provides a far better overview of each of the city's 59 community districts. The new portal includes interactive graphics and maps that illustrate each district's socio-economic and demographic characteristics. With a wealth of data and resources easily downloadable in different formats, Community Board members and the general public can quickly access a holistic, data-driven view of neighborhood conditions without having to visit different agency websites. As of February 2018, we have had more than 24,000 users, and have received overwhelmingly positive feedback.

DCP's Zoning and Land Use application (ZoLa) is a heavily-used interactive map that indicates the zoning of every single city block and lot. Neighborhood residents, community boards, elected officials, and property owners use ZoLa to research what is possible to build on a given lot. Department of Buildings inspectors use ZoLa to help ensure compliance in the permitting process. And City planners and other city officials use ZoLa to get a snapshot of what the current zoning will allow in terms of land use. In the last six months, based on input from all of these stakeholders, DCP overhauled ZoLa to provide even more information, and in a far more user-friendly design.

The charter-mandated Statements of Community District Needs and Community Board Budget Requests are annual submissions made by community boards. Until recently, these were separate processes conducted manually. DCP, in conjunction with OMB, now steers a single, integrated process. Using an online form, every Community Board can easily submit its needs and requests, and city agencies can more promptly evaluate their requests. Moreover, each Community Board's Needs and Budget Request Summary is now in a standard format, making it much easier for the public to digest.

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LAND USE APPLICATION REVIEWS

A core part of DCP's work program is reviewing land use applications from the public and from our sister agencies. In FY17 we certified 270 applications and are on track for even more in FY18. While some applicants have expressed a desire for faster approvals, communities have often requested that the review process be lengthened. DCP works to balance the concerns of communities and applicants in the review of land use and environmental applications. Our target timelines for the pre-certification period range from six months for simple actions like subdivisions and renewal of special permits, to 15 months for projects with more complex environmental reviews. A large portion of the review process is beyond the control of DCP, especially when applicants submit incomplete materials and are not responsive to DCP requests for required information. Despite an increased amount of complex applications, DCP's overall MMR performance figure in FY17 was at 75%, above the pre-established target of 70%. Year-to-date in FY18 we are tracking at 78%.

FINANCIAL OVERVIEW

DCP began Fiscal Year 2018 with an Adopted Budget of $49.5M and an authorized headcount of 351 full-time staff lines, of which $32.8M and 159 positions are funded with City Tax-Levy dollars. DCP's remaining $16.7M budget allocation and 192 positions are funded primarily by the federal government. This $49.5M budget allocates $28.4M to agency-wide personnel services, including members of the CPC, and $21.1M to non-personnel services. DCP maximizes its budget by efficiently deploying its resources to meet the priorities of the Administration, DCP's strategic objectives, and, above all, the needs of our communities.

In comparison to DCP's FY18 Adopted Budget, the FY19 Preliminary Budget demonstrates a $3.9M and 11 position reduction. This $3.9M is the combination of a $2.4M net increase from new needs and reallocations, coupled with a $6.3M net decrease from the expiration of several one-time, temporary projects and grant funding.

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The $2.4M increase to DCP's budget consists of $1.2M in new funding and seven positions to support a variety of exciting new initiatives, and $1.2M in contract reallocations. DCP's new needs include:

- An addition of two positions and $162K to advance the Mayor's Job Plan;
- An addition of two temporary positions and $181K to implement new publication and reporting requirements related to urban renewals plans, pursuant to local law: Intro. 1533;
- An addition of three temporary positions and $606K to leverage DCP's paperless filing system to develop a new City Environmental Quality Review (CEQR) Platform on behalf of the Mayor's Office of Environmental Coordination;
- $230K in non-personnel funding to support translation services and telecommunications costs, and a summer internship program aimed at promoting diversity and aiding recruitment efforts.

In addition to new needs, another $1.2M was added to the budget to realign DCP's multi-year contract allocations and to account for funding adjustments such as collective bargaining increases.

The $6.3M decrease to DCP's budget chiefly consists of $4.95M in one-time and temporary project funds that are scheduled to expire at the end of FY 18, including funding for our Paperless Filing System integration, moving costs for our Bronx Office, and funding to update and reprint the Zoning Resolution.

Also, DCP's Community Development Disaster Recovery Grant is slated to expire between FYs 2018 and 2019, resulting in an additional $1.3M and 18 positions reduction to DCP's budget. DCP is actively working with OMB and the federal government on a plan to extend these funds, which would allow us to continue our resiliency work program.

In total, these budgetary actions will result in a net reduction of $3.9M and 11 positions, decreasing DCP's FY19 Preliminary Budget to $45.5M and 340 authorized full-time positions. Despite a decline in funding, the Mayor's FY19 Preliminary Budget adequately supports DCP's robust work program and allows us to meet the needs of New Yorkers.

Thank you for the opportunity to testify, and I welcome your questions.

Landmarks Preservation Commission

TESTIMONY OF MEENAKSHI SRINIVASAN,
LANDMARKS PRESERVATION COMMISSION CHAIR,
BEFORE THE LAND USE COMMITTEE OF THE NEW YORK CITY COUNCIL
March 15, 2018

Good morning Chair Salamanca and Members of the Land Use Committee. I am Meenakshi Srinivasan, Chair of the Landmarks Preservation Commission. Today I am joined by Sarah Carroll, our Executive Director, Gardea Caphart, our Budget Director and Ali Rasoulinejad, our Director of Community and Intergovernmental Affairs. The Landmarks Commission, which is the mayoral agency responsible for protecting and preserving New York City's architecturally, historically and culturally significant buildings and sites, has been at the forefront of preservation policy and a model for many municipalities all over the country. The preservation of historic resources provides enormous public benefits and contributes to the vitality of the city and is part of what makes New York a dynamic global destination.

I am excited to be here before a new Land Use Committee and thank you for inviting me to testify about the Commission and its FY 2019 preliminary budget. I would like to start by outlining our preliminary budget, and then give you an overview of our achievements over the last term, and highlight some of our new initiatives.

Budget Overview
The LPC's adopted budget for FY 2018 was $6.26m and for FY 2019 the preliminary budget is $6.74m, which comprises $6.15m in City funds and $596k in federal Community Development Block Grant (CDBG) funds.

Of the overall preliminary budget, 87% ($5.89m) is allocated to personnel services (PS) and 13% ($857k) is allocated to other than personnel services (OTPS). Our budget supports the agency's departments, including the Research Department, responsible for evaluating and advancing properties for designation; the Preservation Department that reviews permit applications for work on designated properties; the Enforcement Department that investigates complaints of potential violations, and helps owners correct non-compliances; and the Archaeology and Environmental Review Departments, that assist city, state and federal agencies in their Environmental Review process.

The agency's total head count in the preliminary FY 2019 budget is 85, including 77 full-time positions and 8 part-time positions. This is an increase of 4 full-time positions above the current headcount of 81, which includes 73 full-time positions and 8 part-time positions. There are currently, a total of 77 staff members including 71 full-time and 6 part time positions. We are in process of filling the remaining positions.

The increase in our budget of $456k includes funding for the 4 new full-time positions as well as provides us $240k in one-time funding for the agency's relocation from the Municipal Building at One Centre Street to 253 Broadway.

Of the CDBG funding, about 80% is allocated to personnel supporting critical community development-related functions such as surveys, environmental review, archaeology, community outreach and education; while about 20% or approximately $115,000 is allocated for our Historic Preservation Grant Program for low-income homeowners and not-for-profit organizations.

Strategic Plan Overview

The LPC designated and regulates more than 36,000 buildings in all five boroughs, including 1,408 individual landmarks, 120 interior landmarks, 10 scenic landmarks and 141 historic districts and extensions. We also receive close to 14,000 applications annually for work on these designated properties.

Under my tenure, the Commission has taken a multi-pronged approach to ensure good government practices and to promote equity, diversity, efficiency and transparency in all aspects of our work.

Research and Designations

I am proud that from 2014 to 2018, with the help of Research Department, the Commission extended landmark status to 3,862 buildings and sites across the five boroughs, including 63 individual landmarks, 3 interior landmarks, and 10 historic districts. This is the second highest total for an administration in its first term since 1974.

The majority of these properties are within historic districts, extending protections to 3,771 buildings and sites that reflect New York's diverse neighborhoods. These include the Central Ridgewood, Crown Heights and Bedford historic districts and the Mount Morris Park Historic District extension.

We are also pleased that the agency has no backlog of calendared items for designation. We commenced a highly public 18-month process in 2015 to address items that had been on the commission's calendar for decades, some since 1966. This initiative led to the designation of 27 stellar buildings and structures by the end of 2016. These designations represent all five boroughs and celebrate a diverse array of architectural styles, time periods, building typologies and historical significance.

Throughout the last four years we have also worked closely with the Department of City Planning to evaluate historic preservation opportunities in neighborhoods undergoing a rezoning or neighborhood plan. As a result we designated 12 buildings in East Midtown, and the Empire Dairy Complex in East New York. The Commission is also considering designations for four East Harlem properties, and this past week calendared two properties in Far Rockaway, both neighborhoods that have been recently rezoned. We are also currently working with City Planning to evaluate historic resources in Gowanus, Bushwick and Inwood.

In FY 2017, we designated 26 individual landmarks; 2 interiors and 2 historic districts for a total of 319 buildings and sites. Thus far in FY 2018, we have designated 11 individual landmarks and one interior landmark, including Old St James Church in Elmhurst, IRT Power House on the West Side of Manhattan

and the interiors of New York Public Library. We have also calendared 9 additional buildings, one interior and two historic districts – Boerum Hill Historic District Extension and Central Harlem/ 130th to 132nd Street in Upper Manhattan.

I am excited to let you know that on March 20th, we will bring before the Commission our recommendation to calendar the Coney Island Boardwalk as a scenic landmark.

Preservation

I will now turn to our Preservation Department which is the largest department within the agency, and which helps owners of designated buildings to navigate the permit process to restore, alter or rehabilitate their buildings. The staff issues approximately 94-97% of the permits administratively pursuant to the Commission's rules, and they present approximately 3-6% of the applications to the full Commission each year.

In FY 2017, the Commission received 13,874 permit applications and took action on 13,536 applications during that same period. Through February of this fiscal year, we have received 8,786 applications and have taken action on 7,929 applications. The number of applications received last fiscal year reflects a 16.6% increase over the number of applications the LPC received four years earlier in FY13. Our permit reviewer headcount has increased by 33% in that same period. This has allowed us to continue to issue permits efficiently and provide support for those seeking to make changes, whether they are large property owners, a small business, or a homeowner. In 2017, we also launched an internal tracking system that is time-sensitive to make the review of applications much more accountable.

In order to improve our regulatory functions even further, we have commenced the CAPA process (Citywide Administration Process Act) for proposed amendments to our agency Rules that will update standards and codify well-established commission policies and staff practices for ministerial staff level approvals. Over the past year, we have conducted significant outreach to preservation advocates, property owners and industry groups, and a public hearing has been scheduled for March 27th. We believe that that these amendments will: create a more streamlined process for permits; will make our regulatory procedures more efficient and cost-effective; and will provide more transparency for property owners, community residents and others in your districts.

Community Development Block Grant Funding

The Commission also implements a modest Historic Preservation Grant Program targeted for low and moderate-income homeowners and not-for-profit organizations to help restore or repair the facades of their landmarked buildings.

In FY 2018, the Program has awarded three grants: one residential grant in the Prospect Park South Historic District in Brooklyn; and two not-for-profit grants, including the Renee and Chaim Gross Foundation in the South Village Historic District, and the Henry Street Settlement, an individual landmark on the Lower East Side. We are also currently speaking with OMB and HUD to clarify what types of projects at religious properties may also qualify for our grant program.

Technology

Over the past four years, we have made great strides in harnessing technology and our website to achieve our goal to provide more transparency and accessibility to the Commission's work.

Regarding our research and designation work, since 2014 all designation reports have been made available online. In 2016, we launched an interactive landmarks web-map "Discover NYC Landmarks" that provides an intuitive and interactive tool to access information regarding our designations. Last year we launched the "Historic Building Data Project", in which we transferred information from 50 years of designation reports into a geographic information system database. In December 2017, we enhanced our Landmarks web-map, with building-by-building data all buildings within historic districts, and searchable information on the approximately 36,000 buildings and sites under the Commission's purview. We believe that this readily available information is invaluable to property owners, community groups, residents, and members of the public.

On our regulatory side, since 2015 we have made all commission-level application presentations and commission decisions available online. Since 2016 a searchable online permit application database has also been made available, allowing interested parties to view the status of LPC applications and issued permits including staff level approvals.

In 2016, the Commission also launched a digital archive dedicated to our robust archaeological collections, making New York City the first municipality to host such a digital archive. And within the past year we unveiled an interactive story map to celebrate the centennial of women's suffrage in New York. We previously launched an interactive map on LGBT historic designations.

I will end by just saying how honored I am to lead this agency. It is a tremendous privilege to be trusted with the Commissions mandate to preserve New York's heritage for us and future generations. Thank you again for allowing me to testify and I am happy to answer any questions you may have.

Testimony
New York City Council Budget Hearing
Committees on Land Use and Technology, March 15, 2018
By Ralph Palladino, 2nd Vice President Clerical-Administrative Employees Local 1549

Local 1549 represents over 250 members at the 311 Call Center in the following titles: Call Center Representatives (CCR); Customer Information Representatives (CIR), Clerical Associates; Clerical Aides; Office Machine Aides; Secretaries at the 311 Call Center. Our members play a key role in disseminating vital information to the public.

Our members are responsible for giving out important information to the public. This is especially true during disasters and potential disasters. In 2009 we had 350 members serving the public. 311 has lost over 100 of the staff since that time. Most of them handle phone calls. Now they have additional duties relating to social media which is growing rapidly. There has been a steady increase annual in the number of calls received. (See attached "About NYC311".)

The last two years set records for contacting the call center. Last year there was an 11% increase in contacts from the previous. In additional new programs and more complex types of calls have been added on to the employees' responsibilities (See attached).

Last February an agreement was signed by our union and the NYC Office of Labor Relations. Part of it related to staffing. The agreement states "311 shall maintain a budgeted headcount of 265 Call Center Representatives (CCR)". In addition, "If 311 absorbs call taking operations from any other City agency, those new call takers shall not count toward the 265 CCR commitment provided...". This agreement is attached.

The current number of CCR's 220 as of March 1, 2018. This is 45 slots under what the agreement calls for. Some of this is due to turnover given the complexities of the job function. Some is due to the stress of the job and what we consider to be low pay. We believe the hiring rate should be at a higher level while keeping the step annual increases, so as to alleviate this retention problem. We also think that a new civil service test should be given as soon as possible.

In addition there are many "new programs" that have been added to the 311 responsibilities last year by the city (see attached). But NYC OMB has not agreed with the agency to hire 30 more CCRs to handle the additional workload. That and the fact that volume was up an additional 11% last year leads us to conclude that we need an additional 30 more CCR hires over and above the 45 that are understaffed given the older responsibilities. **This should bring the number of CCR's to 295.**

Our members are required to work overtime and are burned out from the quantity of calls and messaging received by the center. Management has consistently denied our members requests for Annual Leave which tells us there is a shortage of staff. This leads to morale problems and also leads to a higher use of sick time than otherwise would occur. This has contributed to the turnover in personnel which is at annual rate of 20-22%. There is so much turnover that the agency must assign their trainers to the new hires and forego the training needed for new programs and other enhancement training.

DC 37 and the city made this agreement in good faith discussions. It was done so that the city could be able to continue to utilize the King Contract that DOITT says they need. We are interested in enhancing this service for the public and need the increased personnel to accomplish this.

We ask that the New York City Council seek funding or require that the city fund a total number of 75 Call Center Representatives in order to meet the demands of proper servicing.

About NYC311

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News

311 Sets New Record with Nearly 40 Million Customer Interactions in 2017

For Immediate Release, January 25, 2018

Four consecutive years of record growth, 11 percent increase over 2016
Half of all interactions were digital; 311 mobile app continues rapid growth
NYC311 Social Media and Chat channels officially go 24/7 in 2018

NEW YORK—NYC311, New York City's primary source of government information and non-emergency services, set its 4th consecutive record for the most annual contacts with 39,935,837 customer requests for services or information in 2017 – surpassing the previous record in 2016 by 11 percent. A customer contact is defined as any interaction with 311 that results in the customer receiving information or submitting a request – including a phone call, mobile app submission, social media interaction, or website visit.

While the phone channel had a 3.9 percent increase with 20.1 million customers dialing 311, customer interactions happening on digital channels – either through the website, mobile app, or social media – increased 19.2 percent from 2016, making up 50 percent of total contacts to bring parity with the phone channel for the first time in 311's 14-year history. Digital interactions have steadily increased as customers chose using the City's digital platforms to access government information, programs and file service requests. The 311 mobile app saw a 14 percent increase in downloads (155K), a 39 percent jump in use with over a million and half contacts, and 353,684 service request filed. 311 Online had 17.8 million visits in 2017, giving it a 16.9 percent increase over 2016 visits. Customers filed nearly 750k service requests online.

311's social media and chat channels saw a large increase in contacts as these channels piloted a 24x7 customer service model (formally Mon. – Fri., 9a-5p) to gauge customer demand. And with a 159 percent increase in chats and 76 percent increase in social media contacts, the message is clear – New York customers appreciate 24/7 service. Therefore, we are happy to announce chat and social media will officially operate 24/7 service to keep in touch with customers on NYC311 Twitter and chat channels. In additional to contact growth, NYC311 social media followers spiked 54 percent in 2017, with 488K total followers on the four managed accounts (NYC311 & NYCASP Twitter, Facebook and Instagram).

"With half of 311's customers now reaching us on the web, we're expanding our twitter and online chat to full 24/7 coverage so we can stay plugged in to New Yorkers' needs in the online world as well as on the phone. 311 is still your trusted City phone number, taking 20 million calls last year – but with more and more New Yorkers using twitter to talk to us, we're strengthening our digital presence and increasing service to make sure your questions get answers," said **NYC311 Executive Director Joseph Morrisroe.**

The City saw a 3.4 percent increase in service request filed with 2,924,919 for the year. The top categories were noise, apartment issues, illegal parking and blocked driveways. The call center logged 1.8 million service requests, or 62 percent of the total for the year. The top inquiries to the call center and 311 Online remain unchanged from 2016, with customers calling for parking tickets status, property tax information, finding a towed car or booking an appointment for an IDNYC card. Highly requested topics for 311 Online focused on City programs such as affordable housing, working for the City and the SNAP program.

By The Numbers

Total Customer Contacts	
Calls to 311	20,140,764
311 Online Visits	17,831,756
311 Mobile App	1,582,001
311-692 Text	152,992
311 Chat	215,136
311 Twitter	13,188
Total	**39,935,837**
Total NYC Population	8,537,673
Average Contacts Per Resident	4.7

Top 5 Service Requests	
Noise	450,916
Apartment Maintenance	352,147
No Heat/Hot Water	213,521
Illegal Parking	146,122
Blocked Driveway	136,097
Total Service Requests Filed	**2,924,919**
As % of Total Contacts	7.3%

Top 5 Service Requests

Top 5 Inquiries by Channel	
Call Center	**311 Online**
Parking Ticket Status	Pay a Parking Ticket
Property Tax Account Assistance and Bill Information	Affordable Housing
Find a Towed Vehicle	New York City Housing Lottery
Bulk Item Disposal Information	NYC Jobs/ Civil Service Exams
IDNYC - Make an Appointment	Supplemental Nutrition Assistance Program (SNAP)

NYC311 aims to provide the public with quick, easy access to all New York City government services and information. New Yorkers can connect with 311 online, by text, phone, or social media. The agency works continuously to make government services more accessible to non-English speakers, with 311 Online available in more than 50 languages.

New Yorkers can connect with 311 by:

- Visiting **311 Online.**
- Texting 311-692.
- Calling 311 or (212) NEW-YORK, (212) 639-9675, from outside New York City.
- Contact 311 using a Video Relay Service (VRS) at (212) NEW-YORK, (212) 639-9675.
- Contacting 311 using TTY or Text Telephone at (212) 504-4115.
- Following 311 on **Twitter**, **Facebook**, and **Instagram.**
- Downloading 311's **iPhone** or **Android** app

Contact: Bill Reda, NYC311 Communications Director, wreda@311.nyc.gov

Tel. 212-504-4292

[redacted]

Top Ten Drivers for Complex Call Volume Increase At 311			
Service	**Driver**	**Annual Volume Increase**	**% Increase**
IDNYC Appointment & Support	New Program	129,395	129395%
Property Tax Assistance	Increased Volume	70,033	17%
Service Request Status	Increased Volume	37,270	23%
Bulk Item Appointment	New Program	35,012	43%
Tenant Legal Assistance	New Program	18,798	16%
NYC Well Mental Health Support	New Program	15,499	201%
Immigrant Services	New Program	13,031	81%
DHS Shelter Complaints	Increased Volume	11,733	142%
City Worker Complaints	Increased Volume	10,277	12%
Organics Waste Collection	New Program	10,223	946%

OFFICE OF LABOR RELATIONS

40 Rector Street, New York, N.Y. 10006-1705
nyc.gov/olr

February 14
~~January~~ , 2017

Henry Garrido
Executive Director
District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007

Re: 311 Services and Staffing

Dear Mr. Garrido:

This letter memorializes our agreement regarding Call Center Representative ("CCR") staffing levels and assignments in 311 and the agency's utilization of an overflow vendor to manage calls. The City and DC37 have a shared interest in reducing 311's reliance on an overflow vendor. The parties also recognize the value of the overflow vendor's services for special programs and initiatives, during emergencies, and during periods when calls to 311 predictably peak.

In light of the above, this letter confirms that the parties agree to the following:

1. 311 shall maintain a budgeted headcount of 265 Call Center Representatives ("CCR").

2. If 311 absorbs call-taking operations from any other City agency, those new call-takers shall not count toward the 265 CCR commitment provided for in Paragraph 1 of the instant agreement.

3. Incoming call-takers from any other City agency to 311 would carry the CCR title, with the exception of mandatory circumstances outside of 311's control, e.g., DCAS-ordered transfers, etc.

4. In the event the budgeted headcount of 265 CCRs is reduced, the City shall notify DC37 and the parties shall meet to discuss the impact to this agreement.

5. In the event that 311 operations move to a larger facility, allowing for an increase in the budgeted headcount of 265 CCRs, the City shall notify DC37 and the parties shall meet to discuss the impact to this agreement.

6. DC37 agrees that 311 is not obligated to provide two consecutive days off as part of a regularly scheduled workweek to CCRs hired on or after July 1, 2015. However, employees on that schedule will be given the right to request a schedule with two consecutive days off after 12 months of employment. After 12 months working a schedule without consecutive days off, new employees may request a change in schedule to a schedule with two consecutive days off by completing a schedule change request form provided by the agency. An available schedule with two consecutive days off will be offered to the CCR within three months of such request.

7. DC37 further agrees to support:
   a) 311's existing practice of utilizing students from the City University of New York to provide call coverage.
   b) 311's existing practice to select, among volunteers knowledgeable in social media and new technology, CCRs to handle customer service contacts in social media and new technology channels.
   c) 311's contract in fiscal year 2017 for an overflow vendor with a guaranteed monthly minimum of logged hours of 15,000, resulting in a reduction of minimum logged hours from 16,500 to 15,000.

8. The parties will continue to explore new ways to increase the productivity of CCRs, reduce costs, and maintain 311's service quality.

9. This agreement shall commence on February 1, 2017, and shall run through the length of 311's contract with its overflow vendor. If 311 chooses to renew the contract between the agency and its overflow vendor, this agreement shall be renewed at the Union's option for the same length of time as the overflow contract renewal period.

10. A party may cite this agreement and introduce this agreement into evidence only to enforce its terms, and only while the agreement remains in effect. In no other respect shall this agreement create a precedent.

11. As of February 1, 2017, this agreement shall supersede and void all prior agreements and understandings, oral or written, between the parties with respect to the matters in this agreement.

If this letter accurately reflects the terms of our agreement, please sign a copy and return it to me.

Very truly yours,

Robert W. Linn

Agreed on behalf of District Council 37,
AFSCME, AFL-CIO:

By: _____
Henry Garrido, Executive Director

Date: Feb. 14, 2017

Local 1549
Headcount Comparison
by Agency & Title

January 11, 2010 / November 13, 2013 / November 13, 2014/February 1, 2017/March 2, 2017/April 20, 2017/March 1, 2018

AGENCY	TITLE	01/11/2010	11/13/2013	11/13/2014	2/1/17	3/2/17	4/20/17	3/1/18
Dept of Info Telecommunications Tech	Clerical Associate	11	20	16	26	26	26	20
	Clerical Aide				1	1	1	1
	Secretary	2	1	1	1	1	1	1
	Call Center Rep	320	159	187	209	223	207	220
	Office Machine Aide	2	1	1	1	1	1	1
	Customer Info Rep	0	2	2	3	4	3	4
President Boro of Brooklyn	Clerical Associate	2	3	2	2	2	2	2

GOOD CALL
EMERGENCY ARREST HOTLINE

www.goodcall.nyc
1-833-3-GOODCALL

Good Call is a nonprofit that runs a completely **free 24/7 arrest hotline** allowing anyone to connect with a public defender right away if they or a loved one are arrested.

THE PROBLEM

300,000+ arrests occur in NYC every year, most of which are in **low income** communities and for **low level misdemeanors**

47,000 people sent to jail awaiting their trial, **before being convicted**

The lack of adequate support during an arrest can lead to **wrongful jail and devastating consequences**

- Lost child custody
- School expulsion
- Compromised immigration status
- Lost jobs
- Undeserved criminal record
- Mental and physical trauma

OUR SOLUTION

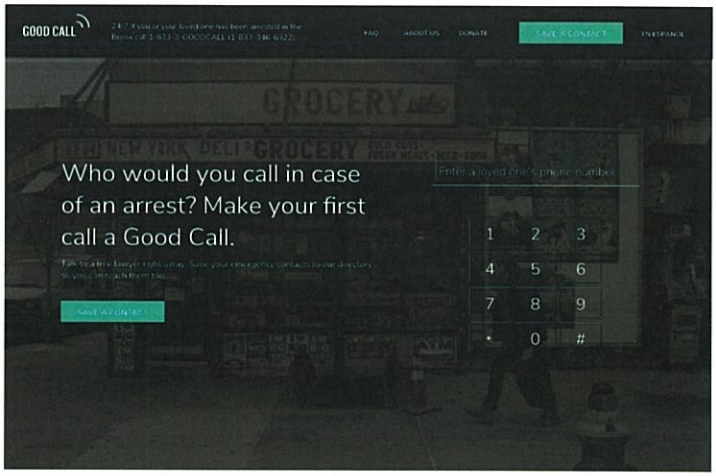
Good Call Free 24/7 Hotline

Anyone can call **1-833-3-GOODCALL** if they or a loved one are arrested, and our software will automatically **connect them with a free lawyer** at one of our partnering legal organizations

Emergency Contact Directory

Anyone can add themselves and their loved ones to our emergency contact directory on **www.goodcall.nyc**

This ensures that loved ones can be alerted and supported in case of an arrest



GOOD CALL MAKES THE DIFFERENCE

The Arrest		At the precinct	In court	Result
When arrested, a person is taken to a police station and their cell phone is taken away The only way to reach out for help is by making phone calls to numbers they have memorized	**Without Good Call**	Can't reach a lawyer Interrogated without a lawyer Unable to reach loved ones	No time for lawyer to prepare defense No proof of "community ties"	**Wrongful jail time**
	With Good Call	Get a lawyer right away Prevent interrogation Alert loved ones	Lawyer and loved ones have time to prepare Proof of "community ties"	**Return home**

OUR PROGRESS

Good Call Bronx Launch

We launched in the Bronx in October 2016, with hotline staffing and legal support provided by our legal partners

THE LEGAL AID SOCIETY

The Bronx Defenders
Redefining public defense.

Results

- 450+ people helped
- > 90% caller satisfaction
- < 1min average hold time
- 350+ emergency contacts saved
- Impactful success stories

Our goal is to make Good Call **available in all five boroughs, decrease pretrial jail, and support policy** which enables legal support throughout the arrest process.

JOIN THE MOVEMENT

Reach out to us today

We are looking for community organizations, public defenders, funders, and advocates who are interested in bringing Good Call to their communities.

CONTACT US

Email **hello@goodcall.nyc**

Follow **@goodcallnyc**

Visit **www.goodcall.nyc**

DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS TESTIMONY BEFORE THE CITY COUNCIL COMMITTEES ON LAND USE AND TECHNOLOGY

FISCAL YEAR 2019 PRELIMINARY BUDGET

THURSDAY, MARCH 15, 2018

Good afternoon Chairs Salamanca and Koo, and members of the City Council Committees on Land Use and Technology. My name is Samir Saini and I am the new Commissioner of the Department of Information Technology and Telecommunications, also known as DoITT, and New York City's Chief Information Officer. Thank you for the opportunity to testify today about DoITT's Fiscal 2019 Preliminary Budget. With me are Evan Hines, First Deputy Commissioner; Annette Heintz, Deputy Commissioner for Financial Management and Administration; John Winker, Associate Commissioner for Financial Services; and Michael Pastor, our General Counsel.

It is my pleasure to testify before you in my first hearing as DoITT Commissioner. I'd like to congratulate Chair Salamanca and Chair Koo on their appointments to the Land Use and Technology Committees, and I'm looking forward to a productive working relationship as we work to strengthen our city and improve quality of life for all New Yorkers.

Today it is my pleasure to update the Committees on the work that DoITT has been doing, and the many exciting things to come in the next year. During this hearing, I'll begin with a summary of **DoITT's Fiscal 2019 Preliminary Budget.** Following that, I'd like to provide an initial overview of a revised strategic plan we are currently developing and plan to publish before the end of the Fiscal Year.

FY19 Preliminary Budget and Savings

DoITT's Fiscal 2019 Preliminary Budget provides for operating expenses of approximately **$602.5 million;** allocating **$148 million in Personal Services** to support **1,748 full-time positions**; and **$454 million for Other than Personal Services,** or OTPS. Intra-City funds transferred from other agencies account for **$136.5 million or about 23%** of our total budget allocation. For Fiscal 2018, telecommunications costs represent the largest portion of the Intra-City expense, projected at $110.7 million.

For Fiscal Year 2018, the budget appropriation increased by $32 million from the Fiscal Year 2019 November Financial Plan. The increases to the Fiscal 2018 Preliminary Budget are largely attributed to funding received from NYPD for their ITB Mobility project, which will provide

smartphones and tablets for every police patrol unit, and other funding associated with ongoing required maintenance for recently approved, capitally-funded initiatives.

For Fiscal Year 2019, the budget appropriation decreased by $3 million. This net decrease is the result of the savings and efficiencies programs DoITT is implementing, including insourcing Verizon support staff with existing in-house positions, replacing existing software products with less expensive alternatives, and reducing maintenance costs through aggressive negotiations with vendors.

As I mentioned earlier, I'll now provide a quick overview of our department and the 3 core pillars to our strategic plan.

Our name notwithstanding, DoITT is a lot more than just the City's IT department. We partner with over 100 governmental entities and deliver over 50 IT services that range from service desk support, email hosting, project management, solution architecture design, application development and support, citywide IT service contracts, cyber security vulnerability management, backup storage services…the list goes on. In other words, we provide an array of services that NYC employees rely upon every single day to keep the City running and we're proud of our reputation of excellence on this front.

Looking ahead, I see three core areas where DoITT can build on past success and do even more.

1. **DoITT as a Service** - *Transforming DoITT into Running like a Service Business* - Building on the efforts of my predecessor, Anne Roest, to further embrace service management practices and adopt best practice operating frameworks that, from an agency perspective, will improve the reliability, quality, and security of the core shared services we deliver across all our city agencies. These services include data center hosting services, collaboration services, telecommunication services, and our service desk (requests and tickets).

2. **DoITT to further Empower our Agencies to Achieve More** – Optimizing our service portfolio to offer our agencies a balanced array of 'high-touch, medium-touch, and 'light-touch' IT services that help agencies improve the quality of the services they deliver to all New Yorkers.

    a. **"High-Touch"** – These are areas in which agencies need DoITT's technological expertise to lead end-to-end project management (such as the Emergency Communication Transformation Program, (a.ka. ECTP), or solution architecture design, build, deployment, and support, like our re-architecture of 311. New services on the horizon are based around human centered design. This will help

agencies increase adoption of public-facing tools designed around the person using it.

b. **"Medium-Touch"** – An example of this is how we provide cloud services to agencies. In this case, we provide both a contract vehicle and a technical gateway for agencies to use cloud services, which is widely known to be efficient and secure technology in many cases. This allows agencies to transfer baseline funding to DoITT at the start of each fiscal year for the cloud services they need without processing any additional orders. It also allows agencies to directly access the cloud providers they need on a case by case basis, while DoITT manages security policies, governance and access.

c. **"Light-Touch"** - This includes developing citywide offerings that any agency can easily leverage for their own needs. DoITT does all the heavy lifting negotiating the contracts, and all agencies need to do is purchase the services they need off of them. Our Master Service Agreements (MSAs) for citywide telecom services, including voice, data, and wireless, are tried-and-true contract vehicles that provide agencies with competitive pricing, improved service levels, and favorable terms and conditions exclusive to NYC. Currently, we are in the process of finalizing 11 MSAs to increase competition further and drive costs down even lower.

3. **Advancing Digital Equity and Democracy to Empower New Yorkers** – This pillar is around building on the work we already do with LinkNYC and oversight of franchise agreements that drive broadband adoption on the street and in the home to close the digital divide. This lays a clear path to meeting the Mayor's mission to achieving affordable, reliable high-speed broadband by 2025 in partnership with the office of the Chief Technology Officer. This also includes experimenting with innovative technology solutions to improve civic engagement and voter participation.

Finally, I want to provide an update on the status of the Charter Communications franchise agreement. As many of you are aware, we recently released results from two separate audits of the company. Our financial audit found Charter in default for improperly reporting its gross revenue. As of this week, the company has provided us with additional financial information we requested, and we are currently analyzing it. Our probe into Charter's compliance with labor-related provisions did not find the company in default, but this does not mean the company is in good standing. We found that Charter has been operating on an overly broad definition of what it means for a vendor to be located in NYC. DoITT will audit Charter again within the next 12 months to ensure that they adhere to stricter standards for choosing local vendors. We are also prepared to take punitive action pending the outcome of an NLRB complaint if Charter is found in violation.

Obviously, these audits are happening against the backdrop of the terrible labor dispute between Charter and Local 3 of the International Brotherhood of Electrical Workers. We echo Mayor de Blasio's strong and consistent call for Charter to finally deliver a fair contract to the 1,800 hardworking men and women who have been on strike for nearly a year now. DoITT will continue whatever tools are at our disposal to hold Charter accountable to the provisions of our franchise agreement, and we look forward to working with the Council to achieve this shared goal.

I appreciate the opportunity to highlight some of DoITT's top priorities for the year to come. This concludes my prepared testimony, and I will now be pleased to address any questions. Thank you.

MAY 15, 2018 TESTIMONY OF LANCE VAN ARSDALE OF LOCAL UNION NO. 3 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE NEW YORK CITY COUNCIL ON THE PRELIMINARY BUDGET FOR THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

LOCAL UNION NO. 3
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
158-11 Harry Van Arsdale Jr. Avenue
Flushing, NY 11365
(718) 591-4000

MAY 15, 2018 TESTIMONY BY LANCE VAN ARSDALE OF LOCAL 3 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE NEW YORK CITY COUNCIL ON THE PRELIMINARY BUDGET FOR THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS ("DOITT")

I am the assistant business manager for Local 3 of the International Brotherhood of Electrical Workers. Reference is made to my prior testimony before this Council on May 30, 2017, the transcript of that hearing, which the present Committees possess, and the video of the May 30, 2017 hearing, which can be found at the Council's web site. As the Committees are aware, Local 3 is presently in a protracted strike (the "Present Strike") against Charter Communications/Spectrum, which, for clarity, I will call "Spectrum."

There are presently 1,700 members of Local 3 on strike against Spectrum. If you include family members, then, somewhere between 7,000 to 10,000 City residents are affected. And, if you include retired members and their families, then the range of individuals directly affected by Spectrum's unfair labor practices, could perhaps be as high as 20,000 souls.

But, now, based on evidence in the public domain, through a lawsuit by the NYS Attorney General, public proceedings of the NYS Public Service Commission, and recent audit results by DOITT, it is evident that Spectrum is not just engaged in a war against its Local 3 employees, but also, a war on the Peoples of the City of New York and State of New York, and their respective governments and regulatory frameworks for telecommunications. In this regard, there is evidence that suggests that Spectrum is, apparently, through willful misrepresentations and deceptive practices, adversely injuring and damaging hundreds of thousands of Spectrum customers in New York City and State, and also breach its obligations under its franchise agreements to the City, as well as its separate, distinct commitments to the State of New York.

Add to this mix, the Jan. 4, 2018 FCC's Declaratory Ruling, Report, and Order in its so-called, Restoring Internet Freedom Proceeding (the "RIF Order"), WC Docket No. 17-108, FCC 17-166, in which, through erroneous, illogical, engineering and legal fictions, the FCC has sought to limit the ability of the governments of cities, such as New York City, and states, such as New York State, to protect and enhance their citizens' access to broadband telecommunications and broadband internet access services. Significantly, for this hearing, the FCC's analysis in the RIF Order could justify a radically reduced revenue stream for the City received through its telecommunications franchise framework, as well as its control of the inalienable property of the City.[1]

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[1] You will find accompanying my testimony today a separate appendix of copies of pertinent documents. These copies of documents are as follows: Exhibit ("Exh.) A - the Mar. 12, 2018 Van Arsdale letter to the Chairs of the Council Committees on Land Use and on Technology (without attachments); Exh. B - May 30, 2017 Van Arsdale Written Testimony to Council Committee on

(Continued...)

Spectrum is, by way of a merger, and subsequent State and City approvals, a holder of a New York City Cable Franchise that originally was granted to the renown entity, Time Warner Cable. Spectrum also provides non-cable telecommunications services by broadband infrastructure in the City built up by way of the Time Warner cable footprint. Spectrum's broadband revenue in the City arises by providing City residents VOIP telephone service and access to the internet. Spectrum, and its predecessors, have only been able to operate City-wide through the use of what the City Charter calls, the "inalienable property of the City," which should be understood by all as the public rights of way - - - the streets and sidewalks of the City, including what lies beneath.

Because of such usage, the City Charter requires of Spectrum and others that in order to operate City-wide they must be holders of telecommunications franchises issued through authorizing resolutions requested by DOITT of the Council, and, then, voted on and approved by the Council. Thereafter, the Charter mandates a public process by which entities can apply for a franchise, and, if passing certain stated criteria, including a vendex review, may, publicly, be approved as holders of a franchise, under an express, written agreement, publicly available for review by the Council and the public at large. These franchises and agreements are, allegedly, regulated by and supervised by DOITT. The City's Law Department historically plays a role as do officials of the Office of the Mayor. Finally, because millions of dollars in revenue fees and commissions are involved, as well as critical services to the public, the Office of Management and Budget, the Comptroller, the Public Advocate, and the Council, also have a hand in regulating such telecommunications franchisees and their holders.

The Charter is a wonderful, and pragmatic governing document. Since 1989, it has provided for purposes of governance of the inalienable property a definition of telecommunications, which

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[1](...continued)
Technology and the Council Subcommittee on Zoning and Franchises (without attachments); Exh. C - Complaint, *People of the State of New York by Eric T. Schneiderman, Attorney General of the State of New York v. Charter Communications, Inc., et al.*, Sup. Ct., N.Y.Co., Index No. 450318/2017 (the "AG's Suit"); Exh. D - Feb. 13, 2018 Decision and Order denying Spectrum's motion to dismiss the Complaint in the AG's Suit; Exh. E. - the Feb. 23, 2018 DOITT's so-called "Draft Letter Report Regarding Charter's Compliance with Article 17 of Franchise Agreements" (the "DOITT Audit Report"); Exh. F - the NYS PSC Order Initiating a Management and Operations Audit, issued and effective Dec. 8, 2017 (the "PSC Audit Order"), Case 17-C-0757; Exh. G - PSC Chair Rhodes letter regarding the PSC Audit Order; Exh. H - Excerpts, RIF Order, "Table of Contents;" Exh. I - Excerpts, RIF Order, Initial Sections (¶¶ 1-64); Exh. J - Excerpts, RIF Order, ¶¶ 185-191 (summary of "effects" on regulatory structures created by the Obama era FCC's "Net Neutrality Order" on wireline and wireless infrastructure); and Exh. K - Excerpts, RIF Order, ¶¶ 194-204 ("Preemption of Inconsistent State and Local Regulations").

is noted below.[2] Suffice it to say, such a definition is rooted in common sense, and encompasses, broadly, how we all communicate today. In doing so, we all use a variety of means. If technology and tastes change, the Charter's definition covers them all, including wireline and wireless broadband services.

Now, the 29 year old definition of telecommunications and the City's telecommunications regulatory framework in the Charter, based on this Council's franchise authorizing resolutions, are under attack by the Trump era RIF Order.[3] The consequence of this may be, if allowed to stand, drastically less revenue to the City under its telecommunications franchises and a very limited ability to regulate its inalienable property related to telecommunications. And, it goes without saying, that such regulation protects City residents, among other things, against deceptive practices, and protects the City's electrical and telecommunications workers against unfair treatment and unjust wages and working conditions. In this regard, it bears reminding that this Council has fought and continues to fight for all workers in the City to have decent and fair wages, benefits, and working conditions.

There are steps that this Council, and all other City officials, could take to address the present shape of things described above.

First, the City should not retreat one inch from its view of what constitutes the appropriate definition of telecommunications. In essence, the City Charter is correct, and the RIF Order is wrong. In this regard, the Obama era FCC in its Net Neutrality Order,[4] got it right. The Council and DOITT should continue its telecommunications franchise regulatory regime with respect to wireline and wireless broadband services, whether for VOIP, internet access, or intranet services, over and under the inalienable property, as defined by the 1989 City Charter. If this sets up a confrontation in Federal Court, so be it. But, in setting up this confrontation, the City should proceed notwithstanding the RIF Order; let the franchisees risk the consequences of a default by ignoring the City Charter and Council's authorizing resolutions.

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[2] Chapt. 48, § 1074 of the Charter of the City, defines Telecommunications as follows: "'Telecommunications' shall mean the transmission of writings, signals, pictures, numbers and sounds or intelligence of all kinds by aid of wire, cable, optical fiber, radio, satellite, electromagnetic wave, microwave or other like connection between points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services incidental to such transmission."

[3] And, it shouldn't surprise this Council that two of the leading proponents of the rationales of the RIF Order were Spectrum and Verizon, supported by their trade associations. Also, ironically, but notable in the ethically challenged Trump Era, the leading voice on the FCC in support of the RIF Order was and is its present Chair, Ajit Pai, the former deputy general counsel of Verizon.

[4] FCC Report and Order, *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, Adopted Feb. 26, 2015, and Released Mar. 12, 2015.

Second, the City, in the appropriate litigation, with other Cities and States, including New York State, should challenge under the US Constitution the RIF Order's limitation of States and Cities regulation of their inalienable property for purposes of the provisioning of telecommunications services, such as defined by the City Charter, including wireline and wireless broadband services.

Third, the Council should, based on evidence disclosed by the State Attorney General, investigate, determine, and, by way of a Council Resolution, publicly condemn Spectrum for intentionally and knowingly blaming its Local 3 employees for its own willful and intentional failures to provide broadband services (speeds and capacities) as represented to its customers.

Fourth, the Council should investigate and determine if the types of misrepresentations and breaches catalogued in the AG's Suit, in the PSC Audit Order, and the DOITT Audit Report, also indicate that Spectrum has not provided the City with the correct amounts of commission revenue, as well as the correct information on the basis for gross revenue, as required under Spectrum's franchise agreement. The scope of this investigation should include not reporting at all, or not reporting completely or accurately, gross revenue of Spectrum earned from all telecommunications sources as defined under the City Charter.

Fifth, the Council should pass such legislation as is necessary to create a public benefit corporation, similar to the NYC Economic Development Corporation, which should be a holder of the pertinent telecommunications franchises, so as to offer New York City residents all types of telecommunications services, whether as a provider of last resort or just a provider by way of consumer preference, in direct competition with all other NYC telecommunications franchisees.

Sixth, the Council should pass such legislation as is necessary to require that telecommunications services implemented, repaired, and serviced on "real property of the City," as such property is described by the City Charter, be only done by employees protected by collective bargaining agreements, achieved through certified bargaining representatives as defined by the National Labor Relations Act.

Seventh, the Council should consider and report on ways to ensure that Authorizing Resolutions for cable and other telecommunications services have terms that mandate stricter reporting obligations to the Council by DOITT, and have tougher penalties and default provisions, for franchisees that engage in conduct, such as alleged in the AG's Suit, the PSC Audit Order, and the DOITT Audit Report.

Eighth, the Council should hold hearings investigating the entire course of DOITT's regulation of telecommunications franchises since 1989 to determine if the Administrative Code and the Charter needs to have additional mandates and other strictures to improve DOITT's regulation of telecommunications franchises.

Ninth, the Council needs to analyze the RIF Order, among other Trump era FCC initiatives, in order to prepare such counter-measures to ensure the protection and enhancement of the interests

of the people of the City.

In conclusion, the AG's Suit, the PSC Audit Order, the DOITT Audit Report, the FCC's RIF Order, and Spectrum's treatment of its Local 3 employees, all evidence that an attack is underway against the telecommunications regulatory framework that has protected the City and its residents since 1989. It is time for comprehensive action. Whether DOITT can rise to the occasion remains to be seen. Nonetheless, this Council under its new leadership, has the opportunity to act and make a difference. As the expression from cable television's "Game of Thrones" goes, a telecommunications winter for the City is coming, and the City must ready its dragons.

I thank the Council for the opportunity to testify, and look forward to supplementing this testimony in the days to come.

MAY 15, 2018 TESTIMONY OF LANCE VAN ARSDALE OF LOCAL UNION NO. 3 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE NEW YORK CITY COUNCIL ON THE PRELIMINARY BUDGET FOR THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

APPENDIX OF EXHIBITS

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EXHIBIT A

Local Union No. 3

International Brotherhood of Electrical Workers
OF GREATER NEW YORK AND VICINITY

OFFICE AND HEADQUARTERS
158-11 Harry Van Arsdale Jr. Avenue, Flushing, N.Y. 11365
Phone: 718-591-4000 · Fax: 718-380-8998

200 Bloomingdale Road, White Plains, NY 10605
Phone: 914-948-3800 · Fax 914-948-1843

AFFILIATED WITH
AFL-CIO

NEW YORK CITY
CENTRAL LABOR COUNCIL
AFL-CIO

BUILDING & CONSTRUCTION
TRADES COUNCIL
OF GREATER NEW YORK

AND ALL STATE AND
CENTRAL BODIES

March 12, 2018

Hon. Francisco Moya
Chairman
Subcommittee on Zoning and Franchises
250 Broadway, Suite 1768
New York, NY 10007

Hon. Peter Koo
Chairman
Committee on Technology
250 Broadway, Suite 1749
New York, NY 10007

Dear Chairmen Moya and Koo,

On February 23, 2018, the New York City Department of Information Technology and Telecommunications published a "Draft Letter Report Regarding Charter's Compliance with Article 17 of Franchise Agreements" (hereinafter, "Report"), a copy of which is attached hereto as Exhibit A. As you may be aware, the Report follows a months' long audit of Charter Communications, Inc. (hereinafter, "Charter") that was initiated in August of 2017 in direct response to information elicited at the May 30, 2017 Joint Hearing of the Subcommittee on Zoning and Franchises and Committee on Technology held by your predecessors, then Chairmen Richards and Vacca.

The findings of the Report demonstrate that the allegations that have been made by Local 3 throughout the nearly year-long strike against Charter regarding the company's use of non-New York City vendors and its commission of unfair labor practices are in fact true. Specifically, the Report indicated that:

1. "DoITT's audit revealed that, because of Charter's overly broad interpretation of the term 'located in the City', Charter failed to engage in practices with respect to its vendor selection that demonstrate compliance with the requirement set forth in Section 17.4 of the Franchise Agreements..." (Report, Page 3); and
2. "DoITT also found that an Administrative Law Judge ("ALJ") at the NLRB found labor law violations on the part of Charter that constitute a default of its obligations under Section 17.1 of the Franchise Agreements." (Report, Page 3)

The findings of the Report call into question the veracity of the testimony provided to the Subcommittee and Committee on May 30, 2017 by Charter representatives Adam Falk and Camille Joseph-Goldman. After being sworn by the Committee Clerk, Mr. Falk and Ms. Josephs-Goldman testified that Charter had been in compliance with all terms of its Franchise Agreement, including, specifically, the requirement to utilize subcontractors located within the City. However, as evidenced by the findings of the Report, this testimony is now proven to be deceptive at best and potentially perjurious at worst. Throughout their testimony before the Subcommittee and Committee, the Charter representatives asserted that Charter's "contractors

overwhelmingly come from within the city,"[1] and "over 80 percent of our contractors being based right here in New York City. The vast majority of contractors who engage on business for Spectrum are from New York City."[2] In order to sustain these contentions, however, Charter considered a vendor to be a "City Vendor under Section 17.4 [of the Franchise Agreement] if it had a 'location in New York City from which it conducts business,' **even if such a location is merely a temporary storage facility**." (Report, Page 6, emphasis added)

Such an overly broad interpretation of the Franchise Agreement's terms to encourage the utilization of local, New York City-based vendors completely undermines the intent of the provision and evidences bad faith on the part of Charter. Indeed, although Charter claimed that 20 of the 26 vendors it utilized during the audit were located in the City,[3] DoITT determined that 6 were not even registered to do business as either a foreign or domestic business entity with the New York State Secretary of State.[4] Additionally, the physical locations identified by Charter for 7 vendors appear to be either addresses of self-storage facilities or of companies unrelated to the vendors.[5] Ultimately, DoITT could confirm that only 7 of the 26 vendors (approximately 27%) utilized by Charter during the audit period were in fact located in City as required by the Franchise Agreement.[6] Certainly, such brazen deception and misrepresentation in forsworn testimony before the Subcommittee on Zoning and Franchises and Committee on Technology demands further investigation by the City Council and should be treated as a breach of the Franchise Agreement.

The findings of the Report also demonstrate that an Administrative Law Judge of the National Labor Relations Board has determined that Charter has violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act by suspending and coercively interrogating Local 3 represented employees. In the Report, DoITT characterized Charter's unlawful actions as "punishing employees for participation in protected union activities and coercively interrogating such employees about union activities."[7] Although Charter is appealing the decision, DoITT has recognized in its Report that these violations "constitute a default of Charter's obligations under Section 17.1 to recognize employees [sic] bargaining rights."[8] A copy of the ALJ's decision is annexed as Exhibit B.

While the findings of the Report and the deceptive testimony provided by Charter's representatives to the Council should be enough to trigger the default provisions of Charter's Franchise Agreement with the City, it is not the only development involving Charter's deceptive practices that has been brought to the attention of the City Council, Comptroller, Public Advocate, Mayor, New York State Attorney General, Public Service Commission, and Governor.

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[1] "Transcript of the Minutes of the Subcommittee on Zoning and Franchises Jointly with the Committee on Technology," May 30, 2017, Page 82, Lines 16-7.
[2] *Id.* at Page 92, Lines 15-18.
[3] *See*, Report at Page 6.
[4] *See, id.* at Page 8.
[5] *Id.* at Pages 9-12.
[6] *See, id.* at Page 6.
[7] *Id.* at Page 15.
[8] *Id.*

The NYS Attorney General has commenced an action in State Court alleging that Charter engaged in continuous and widespread deceptive practices against NYS residents, including NYC residents, by willfully and knowingly misrepresenting internet access speeds and capacities continuously and systematically. A copy of the NYS Attorney General's complaint is annexed as Exhibit C. Recently, Justice Peter Sherwood denied Charter's motion to dismiss the Attorney General's complaint holding that the Attorney General's pleading properly states a claim upon which relief may be granted. A copy of Justice Sherwood's decision is annexed as Exhibit D. Local 3 brought the Attorney General's action to the attention of the Council in Spring, 2017. Possibly hundreds of thousands of NYS and NYC residents may be affected by the acts claimed by the NYS Attorney General. If proven, such conduct would, independently, support the default provisions of Charter's Franchise Agreement with the City.

Additionally, based on complaints and information that Governor Cuomo's office found credible, the NYS Public Service Commission ordered an audit to determine/confirm if Charter has breached the PSC's merger order, which permitted Charter to merge with TWC and acquire, among other assets, TWC's NYC Cable Franchise. One aspect of the Commission's audit order is to determine if Charter has breached its obligation with respect to maintaining in New York State customer-facing jobs. This may also entail determining if Charter has made misrepresentations regarding the existence of such jobs to the PSC and other government agencies and officials. (While this is similar to the DoITT audit results, it is State-wide in scope, but also a distinct example of Charter's breach of its commitments and possible misrepresentations.) A copy of a letter from PSC Chairman John Rhodes to Charter CEO Thomas Rutledge indicating the initiation of a management and operations audit is annexed as Exhibit E.

Charter's commission of unfair labor practices has also not been limited to the incident identified in the Report. Local 3 has filed unfair labor practice ("ULP") charges against Charter in twelve different Regional Offices of the National Labor Relations Board for interfering with statutorily protected consumer hand-billing in twelve different states, including New York. Although the charges in six of the twelve Regional Offices have been withdrawn by Local 3 because in most cases because the hand-billers could not prove that the individuals in Charter uniforms who ordered them off the property and threatened to call the police were managers, supervisors, or agents of the company, three Regional Offices have found merit to these ULP charges. Accordingly, those offices have found that there is sufficient evidence that ULPs to issue a complaint against Charter unless it enters into a settlement agreement with the Regional Offices. Additionally, Local 3 and Charter have just recently settled other ULP charges concerning allegations that Charter was illegally surveilling Local 3 members as they lawfully exercised their Section 7 rights to engage in protected union activities, as well as conditioning strikers' reinstatement on their resignation from Local 3. The settlement agreement requires Charter to post a notice to employees indicating that Charter will not attempt to interfere with their Section 7 rights nor condition their reinstatement on resigning their union membership to ensure that Charter's previous actions will not chill Local 3 members' exercise of their union rights.

CONCLUSION

Local 3's present labor struggle with Charter over providing to its New York City resident members and their families for a decent wage, including health and retirement benefits, as well as working conditions, including not being in any way part, or made scape-goats, of the Company's deceptive practices, is part and parcel of 1) the overall deceptive practices alleged by the New York State Attorney General in its lawsuit against Charter, 2) the breach of Charter of its Franchise Agreement with the City, as found by DoITT in the Report, 3) the alleged possible default by Charter of its obligations to New York State, as ordered to be investigated by the PSC, and 4) the persistent and multijurisdictional unfair labor practices committed by Charter. The totality of the evidence is that Charter has engaged in deceptive practices against the citizens of New York City and State, and the governments of New York City and State. The prerogative for this Council is to investigate and make its own finding that Charter is in default of its Franchise Agreement and to implement the appropriate sanctions. The approximately 1,800 Local 3 members who have been on strike for nearly a year—and their families—are depending on your prompt and thorough investigation of these matters.

Sincerely,

X.T.

Lance Van Arsdale
Assistant Business Manager

LVA: xt
OPEIU: 153
Enclosures
Cc: Hon. Corey Johnson, Speaker
Hon. Ritchie Torres, Chair, Committee on Oversight and Investigations

EXHIBIT B

Testimony of Lance Van Arsdale:

Honorable Council Members, thank you for setting your time aside to address the future of the broadband infrastructure for the City of New York's franchise agreements and violations of its current franchise agreements.

For eight (8) weeks the 1,700 employees of Charter Communications/Spectrum f/k/a/ Time Warner Cable represented by the International Brotherhood of Electrical Workers, Local Union # 3 have been on an unfair labor practice strike against Spectrum. Spectrum has not only engaged in regressive bargaining with the Union during a recent federal mediation session with the Federal Mediation and Conciliation Service on May 23rd at which time Charter proposed eliminating employee pensions and reducing their health benefits by greater than 50%, but they have also increased the cost of providing cable to its customers by anywhere between 22% to 250% (http://www.abcactionnews.com/money/consumer/taking-action-for-you/spectrum-raising-rates-on-almost-everyone-in-some-cases-customers-say-they-are-shocked). NYS Attorney General Eric Schneiderman after filing a lawsuit against Charter Communications/Spectrum f/k/a/ Time Warner Cable said, "The allegations in today's lawsuit confirm what millions of New Yorkers have long suspected -- Spectrum-Time Warner Cable has been ripping you off." (https://ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-against-spectrum-time-warner-cable-and-charter).

Meanwhile Charter Communications Inc., Chief Executive Officer, Thomas Rutledge was awarded a $98.5 million pay package in 2016 after signing a new employment agreement that keeps him on the job until April 2021 (https://www.bloomberg.com/news/articles/2017-03-16/charter-ceo-awarded-98-5-million-pay-to-stay-on-job-until-2021). Charter/Spectrum sees no problem with providing a $98.5 million package to its CEO and paying for it by driving down and eliminating benefits for its employees and raising rates on its customers. This kind of corporate greed is not what makes America great - it hurts working men and women struggling to provide health coverage for their families and security for their future.

On February 1, 2017 NYS Attorney General Eric Schneiderman filed a lawsuit on behalf of the citizens of New York State, accusing Charter/Spectrum of repeated and persistent fraudulent conduct, deceptive business practices, false advertising and various violations of the general business law in New York State. The NYS

Attorney General's lawsuit highlights the various violations of Charter/Spectrum's current franchise agreement with the City of New York.

In the NYS Attorney General's lawsuit, the AG factually alleges Charter/Spectrum misled subscribers by falsely promising speeds it could not deliver. Charter/Spectrum leased older generation single-channel modems to subscribers, in its effort to cut cost and boost profits for Charter/Spectrum and did not replace defective modems. Charter/Spectrum leased defective wireless routers to subscribers. Charter/Spectrum did not allocate sufficient resources for its network to reliably deliver the proper speeds. Charter/Spectrum manipulated the FCC speed tests. Charter/Spectrum misled subscribers by falsely promising reliable access to online content broadly. These factual allegations of fraud by Charter/Spectrum has two effects, the first effect is the citizens o New York City are paying premium prices for substandard service. The second effect is that Charter/Spectrum's employees are being disciplined for Charter's deceptive practices and they are also being held back from training and promotional opportunities. The effect of Charter/Spectrum's fraud on its customers leave a no win situation for Charter/Spectrum's frontline employees who interact daily with the customers. Charter/Spectrum's technicians are disciplined for repeat service calls, this discipline can inhibit future training and promotions. When a customer receives a poor TV signal and cannot stream or download internet content because of refurbished defective modems or antiquated backbone plant infrastructure the customer places a service call. The technician, sent to the service call will inspect and repair, if needed, the existing equipment. However, because the repairs are only as good as the antiquated equipment they were ser to service, the customer is generally not happy with the service call. Too often, the customer makes a second service call because of the same problems, the first technician is disciplined on a "repeat service call", and this leads to discipline through Charter/Spectrum's failed human resources metric system which further suppress the technicians' future training and promotion. Charter/Spectrum's fraud is being used to rip-off its customer and short change the employees. The council committee will hear from employees of Charter/Spectrum who will give testimony on how bad the franchise infrastructure is.

In or about September 2013 Time Warner Cable eliminated all General Foremen job duties, all of whom are ir their 50's and 60's. Following the September 2013 Adverse Employment Action taken against all the General

Foremen, Time Warner Cable assigned the General Foremen job duties to newly hired younger employees who lack the General Foremen's experience and aptitude. At the same time as the Adverse Employment Action was taken against the General Foremen in September 2013 - TWC management representatives made comments to various General Foreman, such as "you don't have much more time left" before retiring, comments about the general foreman's "gray hair" and that the general foreman are now "in the 21st century". On March 24th, 2014 the General Foremen filed an age discrimination lawsuit in the supreme court of the State of New York, New York County for age based employment discrimination in violation of the NYS Human Rights law and the NYC Human Rights law. On November 25th, 2014 TWC's motion to dismiss this lawsuit was denied by the Supreme Court of New York.

Loss of jobs: Since the merger of TWC and Charter Communications on May 18th, 2016, Charter Communications has closed the Executive offices of TWC at Time Warner Center 10 Columbus Circle with the loss of 200+ jobs and moved their executive offices to Stamford, Connecticut. In March of 2017 Charter laid off an additional 12 employees in its New York 1 News division. On May 12th, 2017 Local 3 was notified of the By Charter Communications that it is closing its Drafting & Design Dept. and moving its work to Denver, Colorado at a loss of another 80-100 jobs. Starting approximately 3 years ago TWC began using out of state contractors in various departments in its system at a loss of 200+ high paying jobs.

Violations of Current Franchise Agreement:

1. Section 16 of Charter's Franchise agreement –

16.2 Customer protection standards

2. Section 17 of Charter's Franchise agreement – Employment and Purchasing

17.2 No Discrimination

17.3 Local Employment Plan

17.4 City Vendors

17.5 Local Law Requirements

The language in the current franchise agreement began with negotiations starting approximately in 2008 which led to its approval on September 16, 2011. This language from 2008 does not address the current broadband technology and bundled services (internet, telephony, TV signal and wireless). In the current franchise agreement section 13 Transfer of Franchise, 13.1 this whole clause in the franchise agreement was bypassed and rubber stamped by a mysterious side letter created by a previous Mayor to merge and transfer ownership of the franchise without city council review. Future franchise agreements must include specific timelines for infrastructure maintenance and rebuilds, the last major rebuild of the cable system under this franchise was done in 1994. The industry standard should be every 10 years. New franchises should include equipment specifications and review for equipment and wiring from the customers' premises to the nodes and headend of the franchise provider on a yearly basis. Local employment and Labor standards must be specified to protect the jobs of New York City citizens. Since the current administration in Washington, DC through th FCC is giving complete control and merger opportunities to the largest telecommunications companies in this country, the City of New York must control and retain jurisdiction of all bundled services (internet, telephony TV signal and wireless), to stop the current violations of this franchise agreement and to prevent future violations by even larger corporations.

As I have just highlighted, corporate greed has resulted in sub-standard service and equipment, labor unrest and the loss of 100s of high paying jobs that also has a devastating effect on the city's tax base. All this is so another CEO can make $98.5 MILLION. This destroys the very fabric that makes NYC the greatest in the world – the workingmen and women that build and maintain it.

Submitted as evidence:

- Exhibit A – N.Y.S. Attorney General Schneiderman' s lawsuit against Charter Communications, Inc.
- Exhibit B – Age Discrimination lawsuit against Time Warner Cable, Inc.
- Exhibit C – Partial list of out of state contractors used by Charter/Spectrum in New York City
- Exhibit D – Charter Communications, Inc. letter regarding moving New York City jobs out of state

MAY 15, 2018 TESTIMONY OF LANCE VAN ARSDALE OF LOCAL UNION NO. 3 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE NEW YORK CITY COUNCIL ON THE PRELIMINARY BUDGET FOR THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

LOCAL UNION NO. 3
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
158-11 Harry Van Arsdale Jr. Avenue
Flushing, NY 11365
(718) 591-4000

MAY 15, 2018 TESTIMONY BY LANCE VAN ARSDALE OF LOCAL 3 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE NEW YORK CITY COUNCIL ON THE PRELIMINARY BUDGET FOR THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS ("DOITT")

I am the assistant business manager for Local 3 of the International Brotherhood of Electrical Workers. Reference is made to my prior testimony before this Council on May 30, 2017, the transcript of that hearing, which the present Committees possess, and the video of the May 30, 2017 hearing, which can be found at the Council's web site. As the Committees are aware, Local 3 is presently in a protracted strike (the "Present Strike") against Charter Communications/Spectrum, which, for clarity, I will call "Spectrum."

There are presently 1,700 members of Local 3 on strike against Spectrum. If you include family members, then, somewhere between 7,000 to 10,000 City residents are affected. And, if you include retired members and their families, then the range of individuals directly affected by Spectrum's unfair labor practices, could perhaps be as high as 20,000 souls.

But, now, based on evidence in the public domain, through a lawsuit by the NYS Attorney General, public proceedings of the NYS Public Service Commission, and recent audit results by DOITT, it is evident that Spectrum is not just engaged in a war against its Local 3 employees, but also, a war on the Peoples of the City of New York and State of New York, and their respective governments and regulatory frameworks for telecommunications. In this regard, there is evidence that suggests that Spectrum is, apparently, through willful misrepresentations and deceptive practices, adversely injuring and damaging hundreds of thousands of Spectrum customers in New York City and State, and also breach its obligations under its franchise agreements to the City, as well as its separate, distinct commitments to the State of New York.

Add to this mix, the Jan. 4, 2018 FCC's Declaratory Ruling, Report, and Order in its so-called, Restoring Internet Freedom Proceeding (the "RIF Order"), WC Docket No. 17-108, FCC 17-166, in which, through erroneous, illogical, engineering and legal fictions, the FCC has sought to limit the ability of the governments of cities, such as New York City, and states, such as New York State, to protect and enhance their citizens' access to broadband telecommunications and broadband internet access services. Significantly, for this hearing, the FCC's analysis in the RIF Order could justify a radically reduced revenue stream for the City received through its telecommunications franchise framework, as well as its control of the inalienable property of the City.[1]

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[1] You will find accompanying my testimony today a separate appendix of copies of pertinent documents. These copies of documents are as follows: Exhibit ("Exh.) A - the Mar. 12, 2018 Van Arsdale letter to the Chairs of the Council Committees on Land Use and on Technology (without attachments); Exh. B - May 30, 2017 Van Arsdale Written Testimony to Council Committee on

(Continued...)

Spectrum is, by way of a merger, and subsequent State and City approvals, a holder of a New York City Cable Franchise that originally was granted to the renown entity, Time Warner Cable. Spectrum also provides non-cable telecommunications services by broadband infrastructure in the City built up by way of the Time Warner cable footprint. Spectrum's broadband revenue in the City arises by providing City residents VOIP telephone service and access to the internet. Spectrum, and its predecessors, have only been able to operate City-wide through the use of what the City Charter calls, the "inalienable property of the City," which should be understood by all as the public rights of way - - - the streets and sidewalks of the City, including what lies beneath.

Because of such usage, the City Charter requires of Spectrum and others that in order to operate City-wide they must be holders of telecommunications franchises issued through authorizing resolutions requested by DOITT of the Council, and, then, voted on and approved by the Council. Thereafter, the Charter mandates a public process by which entities can apply for a franchise, and, if passing certain stated criteria, including a vendex review, may, publicly, be approved as holders of a franchise, under an express, written agreement, publicly available for review by the Council and the public at large. These franchises and agreements are, allegedly, regulated by and supervised by DOITT. The City's Law Department historically plays a role as do officials of the Office of the Mayor. Finally, because millions of dollars in revenue fees and commissions are involved, as well as critical services to the public, the Office of Management and Budget, the Comptroller, the Public Advocate, and the Council, also have a hand in regulating such telecommunications franchisees and their holders.

The Charter is a wonderful, and pragmatic governing document. Since 1989, it has provided for purposes of governance of the inalienable property a definition of telecommunications, which

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[1](...continued)
Technology and the Council Subcommittee on Zoning and Franchises (without attachments); Exh. C - Complaint, *People of the State of New York by Eric T. Schneiderman, Attorney General of the State of New York v. Charter Communications, Inc., et al.*, Sup. Ct., N.Y.Co., Index No. 450318/2017 (the "AG's Suit"); Exh. D - Feb. 13, 2018 Decision and Order denying Spectrum's motion to dismiss the Complaint in the AG's Suit; Exh. E. - the Feb. 23, 2018 DOITT's so-called "Draft Letter Report Regarding Charter's Compliance with Article 17 of Franchise Agreements" (the "DOITT Audit Report"); Exh. F - the NYS PSC Order Initiating a Management and Operations Audit, issued and effective Dec. 8, 2017 (the "PSC Audit Order"), Case 17-C-0757; Exh. G - PSC Chair Rhodes letter regarding the PSC Audit Order; Exh. H - Excerpts, RIF Order, "Table of Contents;" Exh. I - Excerpts, RIF Order, Initial Sections (¶¶ 1-64); Exh. J - Excerpts, RIF Order, ¶¶ 185-191 (summary of "effects" on regulatory structures created by the Obama era FCC's "Net Neutrality Order" on wireline and wireless infrastructure); and Exh. K - Excerpts, RIF Order, ¶¶ 194-204 ("Preemption of Inconsistent State and Local Regulations").

is noted below.[2] Suffice it to say, such a definition is rooted in common sense, and encompasses, broadly, how we all communicate today. In doing so, we all use a variety of means. If technology and tastes change, the Charter's definition covers them all, including wireline and wireless broadband services.

Now, the 29 year old definition of telecommunications and the City's telecommunications regulatory framework in the Charter, based on this Council's franchise authorizing resolutions, are under attack by the Trump era RIF Order.[3] The consequence of this may be, if allowed to stand, drastically less revenue to the City under its telecommunications franchises and a very limited ability to regulate its inalienable property related to telecommunications. And, it goes without saying, that such regulation protects City residents, among other things, against deceptive practices, and protects the City's electrical and telecommunications workers against unfair treatment and unjust wages and working conditions. In this regard, it bears reminding that this Council has fought and continues to fight for all workers in the City to have decent and fair wages, benefits, and working conditions.

There are steps that this Council, and all other City officials, could take to address the present shape of things described above.

First, the City should not retreat one inch from its view of what constitutes the appropriate definition of telecommunications. In essence, the City Charter is correct, and the RIF Order is wrong. In this regard, the Obama era FCC in its Net Neutrality Order,[4] got it right. The Council and DOITT should continue its telecommunications franchise regulatory regime with respect to wireline and wireless broadband services, whether for VOIP, internet access, or intranet services, over and under the inalienable property, as defined by the 1989 City Charter. If this sets up a confrontation in Federal Court, so be it. But, in setting up this confrontation, the City should proceed notwithstanding the RIF Order; let the franchisees risk the consequences of a default by ignoring the City Charter and Council's authorizing resolutions.

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[2] Chapt. 48, § 1074 of the Charter of the City, defines Telecommunications as follows: "'Telecommunications' shall mean the transmission of writings, signals, pictures, numbers and sounds or intelligence of all kinds by aid of wire, cable, optical fiber, radio, satellite, electromagnetic wave, microwave or other like connection between points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services incidental to such transmission."

[3] And, it shouldn't surprise this Council that two of the leading proponents of the rationales of the RIF Order were Spectrum and Verizon, supported by their trade associations. Also, ironically, but notable in the ethically challenged Trump Era, the leading voice on the FCC in support of the RIF Order was and is its present Chair, Ajit Pai, the former deputy general counsel of Verizon.

[4] FCC Report and Order, *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24, Adopted Feb. 26, 2015, and Released Mar. 12, 2015.

Second, the City, in the appropriate litigation, with other Cities and States, including New York State, should challenge under the US Constitution the RIF Order's limitation of States and Cities regulation of their inalienable property for purposes of the provisioning of telecommunications services, such as defined by the City Charter, including wireline and wireless broadband services.

Third, the Council should, based on evidence disclosed by the State Attorney General, investigate, determine, and, by way of a Council Resolution, publicly condemn Spectrum for intentionally and knowingly blaming its Local 3 employees for its own willful and intentional failures to provide broadband services (speeds and capacities) as represented to its customers.

Fourth, the Council should investigate and determine if the types of misrepresentations and breaches catalogued in the AG's Suit, in the PSC Audit Order, and the DOITT Audit Report, also indicate that Spectrum has not provided the City with the correct amounts of commission revenue, as well as the correct information on the basis for gross revenue, as required under Spectrum's franchise agreement. The scope of this investigation should include not reporting at all, or not reporting completely or accurately, gross revenue of Spectrum earned from all telecommunications sources as defined under the City Charter.

Fifth, the Council should pass such legislation as is necessary to create a public benefit corporation, similar to the NYC Economic Development Corporation, which should be a holder of the pertinent telecommunications franchises, so as to offer New York City residents all types of telecommunications services, whether as a provider of last resort or just a provider by way of consumer preference, in direct competition with all other NYC telecommunications franchisees.

Sixth, the Council should pass such legislation as is necessary to require that telecommunications services implemented, repaired, and serviced on "real property of the City," as such property is described by the City Charter, be only done by employees protected by collective bargaining agreements, achieved through certified bargaining representatives as defined by the National Labor Relations Act.

Seventh, the Council should consider and report on ways to ensure that Authorizing Resolutions for cable and other telecommunications services have terms that mandate stricter reporting obligations to the Council by DOITT, and have tougher penalties and default provisions, for franchisees that engage in conduct, such as alleged in the AG's Suit, the PSC Audit Order, and the DOITT Audit Report.

Eighth, the Council should hold hearings investigating the entire course of DOITT's regulation of telecommunications franchises since 1989 to determine if the Administrative Code and the Charter needs to have additional mandates and other strictures to improve DOITT's regulation of telecommunications franchises.

Ninth, the Council needs to analyze the RIF Order, among other Trump era FCC initiatives, in order to prepare such counter-measures to ensure the protection and enhancement of the interests

of the people of the City.

In conclusion, the AG's Suit, the PSC Audit Order, the DOITT Audit Report, the FCC's RIF Order, and Spectrum's treatment of its Local 3 employees, all evidence that an attack is underway against the telecommunications regulatory framework that has protected the City and its residents since 1989. It is time for comprehensive action. Whether DOITT can rise to the occasion remains to be seen. Nonetheless, this Council under its new leadership, has the opportunity to act and make a difference. As the expression from cable television's "Game of Thrones" goes, a telecommunications winter for the City is coming, and the City must ready its dragons.

I thank the Council for the opportunity to testify, and look forward to supplementing this testimony in the days to come.

MAY 15, 2018 TESTIMONY OF LANCE VAN ARSDALE OF LOCAL UNION NO. 3 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS TO THE NEW YORK CITY COUNCIL ON THE PRELIMINARY BUDGET FOR THE DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS

APPENDIX OF EXHIBITS

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EXHIBIT A

Local Union No. 3

International Brotherhood of Electrical Workers
OF GREATER NEW YORK AND VICINITY

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AFFILIATED WITH
AFL-CIO

NEW YORK CITY
CENTRAL LABOR COUNCIL
AFL-CIO

BUILDING & CONSTRUCTION
TRADES COUNCIL
OF GREATER NEW YORK

AND ALL STATE AND
CENTRAL BODIES

March 12, 2018

Hon. Francisco Moya
Chairman
Subcommittee on Zoning and Franchises
250 Broadway, Suite 1768
New York, NY 10007

Hon. Peter Koo
Chairman
Committee on Technology
250 Broadway, Suite 1749
New York, NY 10007

Dear Chairmen Moya and Koo,

On February 23, 2018, the New York City Department of Information Technology and Telecommunications published a "Draft Letter Report Regarding Charter's Compliance with Article 17 of Franchise Agreements" (hereinafter, "Report"), a copy of which is attached hereto as Exhibit A. As you may be aware, the Report follows a months' long audit of Charter Communications, Inc. (hereinafter, "Charter") that was initiated in August of 2017 in direct response to information elicited at the May 30, 2017 Joint Hearing of the Subcommittee on Zoning and Franchises and Committee on Technology held by your predecessors, then Chairmen Richards and Vacca.

The findings of the Report demonstrate that the allegations that have been made by Local 3 throughout the nearly year-long strike against Charter regarding the company's use of non-New York City vendors and its commission of unfair labor practices are in fact true. Specifically, the Report indicated that:

1. "DoITT's audit revealed that, because of Charter's overly broad interpretation of the term 'located in the City', Charter failed to engage in practices with respect to its vendor selection that demonstrate compliance with the requirement set forth in Section 17.4 of the Franchise Agreements..." (Report, Page 3); and
2. "DoITT also found that an Administrative Law Judge ("ALJ") at the NLRB found labor law violations on the part of Charter that constitute a default of its obligations under Section 17.1 of the Franchise Agreements." (Report, Page 3)

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Such an overly broad interpretation of the Franchise Agreement's terms to encourage the utilization of local, New York City-based vendors completely undermines the intent of the provision and evidences bad faith on the part of Charter. Indeed, although Charter claimed that 20 of the 26 vendors it utilized during the audit were located in the City,[3] DoITT determined that 6 were not even registered to do business as either a foreign or domestic business entity with the New York State Secretary of State.[4] Additionally, the physical locations identified by Charter for 7 vendors appear to be either addresses of self-storage facilities or of companies unrelated to the vendors.[5] Ultimately, DoITT could confirm that only 7 of the 26 vendors (approximately 27%) utilized by Charter during the audit period were in fact located in City as required by the Franchise Agreement.[6] Certainly, such brazen deception and misrepresentation in forsworn testimony before the Subcommittee on Zoning and Franchises and Committee on Technology demands further investigation by the City Council and should be treated as a breach of the Franchise Agreement.

The findings of the Report also demonstrate that an Administrative Law Judge of the National Labor Relations Board has determined that Charter has violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act by suspending and coercively interrogating Local 3 represented employees. In the Report, DoITT characterized Charter's unlawful actions as "punishing employees for participation in protected union activities and coercively interrogating such employees about union activities."[7] Although Charter is appealing the decision, DoITT has recognized in its Report that these violations "constitute a default of Charter's obligations under Section 17.1 to recognize employees [sic] bargaining rights."[8] A copy of the ALJ's decision is annexed as Exhibit B.

While the findings of the Report and the deceptive testimony provided by Charter's representatives to the Council should be enough to trigger the default provisions of Charter's Franchise Agreement with the City, it is not the only development involving Charter's deceptive practices that has been brought to the attention of the City Council, Comptroller, Public Advocate, Mayor, New York State Attorney General, Public Service Commission, and Governor.

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[1] "Transcript of the Minutes of the Subcommittee on Zoning and Franchises Jointly with the Committee on Technology," May 30, 2017, Page 82, Lines 16-7.
[2] *Id.* at Page 92, Lines 15-18.
[3] *See*, Report at Page 6.
[4] *See, id.* at Page 8.
[5] *Id.* at Pages 9-12.
[6] *See, id.* at Page 6.
[7] *Id.* at Page 15.
[8] *Id.*

The NYS Attorney General has commenced an action in State Court alleging that Charter engaged in continuous and widespread deceptive practices against NYS residents, including NYC residents, by willfully and knowingly misrepresenting internet access speeds and capacities continuously and systematically. A copy of the NYS Attorney General's complaint is annexed as Exhibit C. Recently, Justice Peter Sherwood denied Charter's motion to dismiss the Attorney General's complaint holding that the Attorney General's pleading properly states a claim upon which relief may be granted. A copy of Justice Sherwood's decision is annexed as Exhibit D. Local 3 brought the Attorney General's action to the attention of the Council in Spring, 2017. Possibly hundreds of thousands of NYS and NYC residents may be affected by the acts claimed by the NYS Attorney General. If proven, such conduct would, independently, support the default provisions of Charter's Franchise Agreement with the City.

Additionally, based on complaints and information that Governor Cuomo's office found credible, the NYS Public Service Commission ordered an audit to determine/confirm if Charter has breached the PSC's merger order, which permitted Charter to merge with TWC and acquire, among other assets, TWC's NYC Cable Franchise. One aspect of the Commission's audit order is to determine if Charter has breached its obligation with respect to maintaining in New York State customer-facing jobs. This may also entail determining if Charter has made misrepresentations regarding the existence of such jobs to the PSC and other government agencies and officials. (While this is similar to the DoITT audit results, it is State-wide in scope, but also a distinct example of Charter's breach of its commitments and possible misrepresentations.) A copy of a letter from PSC Chairman John Rhodes to Charter CEO Thomas Rutledge indicating the initiation of a management and operations audit is annexed as Exhibit E.

Charter's commission of unfair labor practices has also not been limited to the incident identified in the Report. Local 3 has filed unfair labor practice ("ULP") charges against Charter in twelve different Regional Offices of the National Labor Relations Board for interfering with statutorily protected consumer hand-billing in twelve different states, including New York. Although the charges in six of the twelve Regional Offices have been withdrawn by Local 3 because in most cases because the hand-billers could not prove that the individuals in Charter uniforms who ordered them off the property and threatened to call the police were managers, supervisors, or agents of the company, three Regional Offices have found merit to these ULP charges. Accordingly, those offices have found that there is sufficient evidence that ULPs to issue a complaint against Charter unless it enters into a settlement agreement with the Regional Offices. Additionally, Local 3 and Charter have just recently settled other ULP charges concerning allegations that Charter was illegally surveilling Local 3 members as they lawfully exercised their Section 7 rights to engage in protected union activities, as well as conditioning strikers' reinstatement on their resignation from Local 3. The settlement agreement requires Charter to post a notice to employees indicating that Charter will not attempt to interfere with their Section 7 rights nor condition their reinstatement on resigning their union membership to ensure that Charter's previous actions will not chill Local 3 members' exercise of their union rights.

CONCLUSION

Local 3's present labor struggle with Charter over providing to its New York City resident members and their families for a decent wage, including health and retirement benefits, as well as working conditions, including not being in any way part, or made scape-goats, of the Company's deceptive practices, is part and parcel of 1) the overall deceptive practices alleged by the New York State Attorney General in its lawsuit against Charter, 2) the breach of Charter of its Franchise Agreement with the City, as found by DoITT in the Report, 3) the alleged possible default by Charter of its obligations to New York State, as ordered to be investigated by the PSC, and 4) the persistent and multijurisdictional unfair labor practices committed by Charter. The totality of the evidence is that Charter has engaged in deceptive practices against the citizens of New York City and State, and the governments of New York City and State. The prerogative for this Council is to investigate and make its own finding that Charter is in default of its Franchise Agreement and to implement the appropriate sanctions. The approximately 1,800 Local 3 members who have been on strike for nearly a year—and their families—are depending on your prompt and thorough investigation of these matters.

Sincerely,

X.T.

Lance Van Arsdale
Assistant Business Manager

LVA: xt
OPEIU: 153
Enclosures
Cc: Hon. Corey Johnson, Speaker
Hon. Ritchie Torres, Chair, Committee on Oversight and Investigations

EXHIBIT B

Testimony of Lance Van Arsdale:

Honorable Council Members, thank you for setting your time aside to address the future of the broadband infrastructure for the City of New York's franchise agreements and violations of its current franchise agreements.

For eight (8) weeks the 1,700 employees of Charter Communications/Spectrum f/k/a/ Time Warner Cable represented by the International Brotherhood of Electrical Workers, Local Union # 3 have been on an unfair labor practice strike against Spectrum. Spectrum has not only engaged in regressive bargaining with the Union during a recent federal mediation session with the Federal Mediation and Conciliation Service on May 23rd at which time Charter proposed eliminating employee pensions and reducing their health benefits by greater than 50%, but they have also increased the cost of providing cable to its customers by anywhere between 22% to 250% (http://www.abcactionnews.com/money/consumer/taking-action-for-you/spectrum-raising-rates-on-almost-everyone-in-some-cases-customers-say-they-are-shocked). NYS Attorney General Eric Schneiderman after filing a lawsuit against Charter Communications/Spectrum f/k/a/ Time Warner Cable said, "The allegations in today's lawsuit confirm what millions of New Yorkers have long suspected -- Spectrum-Time Warner Cable has been ripping you off." (https://ag.ny.gov/press-release/ag-schneiderman-announces-lawsuit-against-spectrum-time-warner-cable-and-charter).

Meanwhile Charter Communications Inc., Chief Executive Officer, Thomas Rutledge was awarded a $98.5 million pay package in 2016 after signing a new employment agreement that keeps him on the job until April 2021 (https://www.bloomberg.com/news/articles/2017-03-16/charter-ceo-awarded-98-5-million-pay-to-stay-on-job-until-2021). Charter/Spectrum sees no problem with providing a $98.5 million package to its CEO and paying for it by driving down and eliminating benefits for its employees and raising rates on its customers. This kind of corporate greed is not what makes America great - it hurts working men and women struggling to provide health coverage for their families and security for their future.

On February 1, 2017 NYS Attorney General Eric Schneiderman filed a lawsuit on behalf of the citizens of New York State, accusing Charter/Spectrum of repeated and persistent fraudulent conduct, deceptive business practices, false advertising and various violations of the general business law in New York State. The NYS

Attorney General's lawsuit highlights the various violations of Charter/Spectrum's current franchise agreement with the City of New York.

In the NYS Attorney General's lawsuit, the AG factually alleges Charter/Spectrum misled subscribers by falsely promising speeds it could not deliver. Charter/Spectrum leased older generation single-channel modems to subscribers, in its effort to cut cost and boost profits for Charter/Spectrum and did not replace defective modems. Charter/Spectrum leased defective wireless routers to subscribers. Charter/Spectrum did not allocate sufficient resources for its network to reliably deliver the proper speeds. Charter/Spectrum manipulated the FCC speed tests. Charter/Spectrum misled subscribers by falsely promising reliable access to online content broadly. These factual allegations of fraud by Charter/Spectrum has two effects, the first effect is the citizens of New York City are paying premium prices for substandard service. The second effect is that Charter/Spectrum's employees are being disciplined for Charter's deceptive practices and they are also being held back from training and promotional opportunities. The effect of Charter/Spectrum's fraud on its customers leave a no win situation for Charter/Spectrum's frontline employees who interact daily with the customers. Charter/Spectrum's technicians are disciplined for repeat service calls, this discipline can inhibit future training and promotions. When a customer receives a poor TV signal and cannot stream or download internet content because of refurbished defective modems or antiquated backbone plant infrastructure the customer places a service call. The technician, sent to the service call will inspect and repair, if needed, the existing equipment. However, because the repairs are only as good as the antiquated equipment they were sent to service, the customer is generally not happy with the service call. Too often, the customer makes a second service call because of the same problems, the first technician is disciplined on a "repeat service call", and this leads to discipline through Charter/Spectrum's failed human resources metric system which further suppresses the technicians' future training and promotion. Charter/Spectrum's fraud is being used to rip-off its customers and short change the employees. The council committee will hear from employees of Charter/Spectrum who will give testimony on how bad the franchise infrastructure is.

In or about September 2013 Time Warner Cable eliminated all General Foremen job duties, all of whom are in their 50's and 60's. Following the September 2013 Adverse Employment Action taken against all the General

Foremen, Time Warner Cable assigned the General Foremen job duties to newly hired younger employees who lack the General Foremen's experience and aptitude. At the same time as the Adverse Employment Action was taken against the General Foremen in September 2013 - TWC management representatives made comments to various General Foreman, such as "you don't have much more time left" before retiring, comments about the general foreman's "gray hair" and that the general foreman are now "in the 21st century". On March 24th, 2014 the General Foremen filed an age discrimination lawsuit in the supreme court of the State of New York, New York County for age based employment discrimination in violation of the NYS Human Rights law and the NYC Human Rights law. On November 25th, 2014 TWC's motion to dismiss this lawsuit was denied by the Supreme Court of New York.

Loss of jobs: Since the merger of TWC and Charter Communications on May 18th, 2016, Charter Communications has closed the Executive offices of TWC at Time Warner Center 10 Columbus Circle with the loss of 200+ jobs and moved their executive offices to Stamford, Connecticut. In March of 2017 Charter laid off an additional 12 employees in its New York 1 News division. On May 12th, 2017 Local 3 was notified of the By Charter Communications that it is closing its Drafting & Design Dept. and moving its work to Denver, Colorado at a loss of another 80-100 jobs. Starting approximately 3 years ago TWC began using out of state contractors in various departments in its system at a loss of 200+ high paying jobs.

Violations of Current Franchise Agreement:

1. Section 16 of Charter's Franchise agreement –

16.2 Customer protection standards

2. Section 17 of Charter's Franchise agreement – Employment and Purchasing

17.2 No Discrimination

17.3 Local Employment Plan

17.4 City Vendors

17.5 Local Law Requirements

The language in the current franchise agreement began with negotiations starting approximately in 2008 which led to its approval on September 16, 2011. This language from 2008 does not address the current broadband technology and bundled services (internet, telephony, TV signal and wireless). In the current franchise agreement section 13 Transfer of Franchise, 13.1 this whole clause in the franchise agreement was bypassed and rubber stamped by a mysterious side letter created by a previous Mayor to merge and transfer ownership of the franchise without city council review. Future franchise agreements must include specific timelines for infrastructure maintenance and rebuilds, the last major rebuild of the cable system under this franchise was done in 1994. The industry standard should be every 10 years. New franchises should include equipment specifications and review for equipment and wiring from the customers' premises to the nodes and headend of the franchise provider on a yearly basis. Local employment and Labor standards must be specified to protect the jobs of New York City citizens. Since the current administration in Washington, DC through the FCC is giving complete control and merger opportunities to the largest telecommunications companies in this country, the City of New York must control and retain jurisdiction of all bundled services (internet, telephony, TV signal and wireless), to stop the current violations of this franchise agreement and to prevent future violations by even larger corporations.

As I have just highlighted, corporate greed has resulted in sub-standard service and equipment, labor unrest and the loss of 100s of high paying jobs that also has a devastating effect on the city's tax base. All this is so another CEO can make $98.5 MILLION. This destroys the very fabric that makes NYC the greatest in the world – the workingmen and women that build and maintain it.

Submitted as evidence:

- Exhibit A – N.Y.S. Attorney General Schneiderman' s lawsuit against Charter Communications, Inc.
- Exhibit B – Age Discrimination lawsuit against Time Warner Cable, Inc.
- Exhibit C – Partial list of out of state contractors used by Charter/Spectrum in New York City
- Exhibit D – Charter Communications, Inc. letter regarding moving New York City jobs out of state

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, INC. and SPECTRUM MANAGEMENT HOLDING COMPANY, LLC (f/k/a TIME WARNER CABLE, INC.),

Defendants.

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SUMMONS

Index No.: 450318/2017

Plaintiff designates New York County as the Place of Trial

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONDED to answer in this action and serve a copy of your answer on the Plaintiff's attorney within twenty (20) days after service of this summons, exclusive of the day of service. If this summons is not personally served upon you, or if the summons is served upon you outside of the State of New York then your notice of appearance must be served within thirty (30) days. In the case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Date Filed: January 31, 2017

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, INC. and SPECTRUM MANAGEMENT HOLDING COMPANY, LLC (f/k/a TIME WARNER CABLE, INC.),

Defendants.

----------X

COMPLAINT

Index No.
IAS Part

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TABLE OF CONTENTS

NATURE OF THE ACTION

1. Plaintiff, the People of the State of New York, by Attorney General Eric T. Schneiderman (the "OAG"), brings this action pursuant to Executive Law § 63(12) and General Business Law ("GBL") Article 22-A, §§ 349 and 350 to remedy past and ongoing fraudulent and deceptive practices by Charter Communications, Inc. ("Charter") and Spectrum Management Holding Company LLC (together "Spectrum-TWC" or "Defendants"), formerly known as "Time Warner Cable" and rebranding as "Spectrum."

2. Spectrum-TWC is the largest provider of residential Internet services in New York State. It provides Internet service to approximately 2.5 million New York households and earns well over a billion dollars in revenue annually from selling Internet services in New York.

3. From at least January 1, 2012 to the present (the "Relevant Period"), Spectrum-TWC conducted a systematic scheme to defraud and mislead subscribers to its Internet service by promising to deliver Internet service that it knew it could not and would not deliver. As described below, this scheme had two separate components: first, Spectrum-TWC promised Internet speeds that it knew it could not deliver to subscribers; second, Spectrum-TWC promised reliable access to online content[1] that it knew it could not deliver to subscribers.

4. The first component of Spectrum-TWC's scheme consisted of promising consumers, including its subscribers, that they would obtain throughout their homes the Internet speeds advertised in various subscription plans. Spectrum-TWC failed to deliver on this promise by leasing to a large number of its subscribers older-generation modems

[1] Examples of online content include television and movies on Netflix; shopping websites such as Amazon; entertainment websites such as YouTube; social media platforms such as Facebook; and gaming platforms such as League of Legends.

and wireless (or "WiFi") routers that it knew were incapable of achieving the promised Internet speeds. In addition, Spectrum-TWC failed to make adjustments to its network, such as reducing the size of service groups[2] and increasing the number of channels[3] for each service group, that would enable a subscriber to achieve the promised speeds. Not only did Spectrum-TWC fail to deliver the promised Internet speeds, it repeatedly assured subscribers that they could achieve the same results with wireless as with a wired connection, even when it knew that the wireless connection suffered from unavoidable, real-world limitations.

5. Spectrum-TWC offered Internet service plans that were differentiated by the particular Internet speeds they offered. The plans offered speeds ranging from 2 Megabits per second ("Mbps")[4] to 300 Mbps. In Spectrum-TWC's advertising, it touted the higher-speed plans as offering "fast, reliable Internet speeds."

6. Because the plans with the faster speeds were more expensive for subscribers, Spectrum-TWC tried to convince as many subscribers as possible to sign up for these high-speed plans as part of its plan to grow revenue. Spectrum-TWC provided incentives to its customer service representatives to persuade subscribers to sign up for high-speed plans by tying the compensation of the customer service representatives to the monthly revenue generated from subscriptions to these high-speed plans.

7. But rather than provide subscribers with Internet service that achieved the promised Internet speeds, Spectrum-TWC provided subscribers with deficient equipment and a network that it knew were incapable of reliably delivering the promised speeds.

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[2] A service group is a group of subscribers who share the total data transfer capacity ("bandwidth") of a cable line that connects the homes in any given neighborhood to Spectrum-TWC's central facilities.
[3] Internet data in a cable system travels over the same channels and cable wires that provide cable television service to the home but uses specially-reserved channels.
[4] Megabits per second or Mbps is a measure of how quickly data can travel.

8. During the Relevant Period, Spectrum-TWC leased older-generation modems to over 900,000 subscribers in New York State at a fixed fee that is currently $10 per month. The company promised its subscribers that these modems would allow them to achieve the Internet speeds they had paid for, and that Spectrum-TWC would upgrade the modems at no additional charge as Internet speeds increased. However, Spectrum-TWC knew that, in practice, these older-generation modems were incapable of achieving the Internet speeds its subscribers were led to believe they were paying for.

9. In early 2013, in connection with the Internet speed tests administered by the Federal Communications Commission ("FCC"), Spectrum-TWC determined that its older-generation modems were incapable of reliably achieving speeds of even 20 Mbps. To avoid costs, Spectrum-TWC failed to replace these older-generation modems with the new-generation modems for subscribers who paid for plans that promised speeds of 20 Mbps and above. Instead, Spectrum-TWC continued to charge those subscribers for higher-speed plans that the company knew their modems could not deliver.

10. To conceal this failure, Spectrum-TWC assured the FCC in or about July 2013, that it would replace its older-generation modems for *all* of its subscribers, but in fact it did not. The FCC relied on that commitment to exclude the poor results of the speed tests on those modems in the FCC's subsequent public reports. Had these modems' results been included in the FCC's testing program, they would have revealed Spectrum-TWC's deceptive practices.

11. In addition, during the Relevant Period, Spectrum-TWC leased older-generation wireless routers to over 250,000 subscribers in New York State who had subscribed to plans promising speeds of 200 Mbps and 300 Mbps. As with the modems,

Spectrum-TWC promised its subscribers that such wireless routers would allow them to achieve the Internet speeds they had paid for, and that Spectrum-TWC would upgrade the routers at no additional charge as wireless technology improved. However, Spectrum-TWC knew that, in practice, these older-generation routers were incapable of delivering Internet speeds greater than 100 Mbps.

12. Despite fielding countless calls from subscribers about slow wireless speeds, Spectrum-TWC took no steps to replace these older-generation routers with the appropriate routers, and, instead, continued to charge subscribers to whom it provided older-generation routers for plans that promised Internet speeds of 100 Mbps and higher.

13. Moreover, Spectrum-TWC failed to provide the promised Internet speeds to even those subscribers who leased current-generation modems and wireless routers from Spectrum-TWC. This was because Spectrum-TWC managed its cable network in a way that did not deliver the promised Internet speeds over any type of connection. It cut corners by packing too many subscribers in the same service group, which resulted in slower speeds for subscribers, especially during peak hours. It also failed to add more channels for each service group, which similarly resulted in slower speeds for subscribers.

14. Spectrum-TWC fraudulently induced at least 640,000 subscribers in New York State to sign up for high-speed plans that it knew it could not provide. Spectrum-TWC knowingly failed to allocate sufficient bandwidth to subscribers, which it could have done either by reducing the size of its service groups or adding more channels to each service group. Based on several Internet speed tests, including those run by the FCC, subscribers on the 300 Mbps plan generally received only 10% to 70% of the

promised speed; subscribers on the 200 Mbps plan received only 14% to 60% of the promised speed; and subscribers on the 100 Mbps plan received only 24% to 87% of the promised speed.

15. Spectrum-TWC further deceived the FCC by manipulating the average Internet speed results in the FCC's speed tests. The company inflated the average speed results by providing increased Internet speeds when service groups were less utilized to offset (and conceal) test results showing slower speeds when the service groups had heavier usage. By gaming the FCC speed tests in this manner, Spectrum-TWC concealed the fact that it failed to consistently deliver the promised speeds to its subscribers under actual network conditions.

16. During the Relevant Period, most of Spectrum-TWC's subscribers accessed the Internet through a wireless connection. Spectrum-TWC assured its subscribers that they would achieve Internet speeds wirelessly that were as fast as their wired speeds. In reality, however, wireless speeds were consistently much slower than wired speeds due to multiple factors, including distance from the wireless router, interference from other electronics and appliances, and the number of devices accessing the wireless router at the same time.

17. Based on consumer speed test data, Spectrum-TWC subscribers experienced much slower speeds when connecting to the Internet using wireless routers. When connecting wirelessly, subscribers on the 300 Mbps plan typically received 15% of the promised speed; subscribers on the 200 Mbps plan received 20% of the promised speed; subscribers on the 100 Mbps plan received 39% of the promised speed; and subscribers on the 50 Mbps plan received 58% of the promised speed.

18. Despite knowing the limitations of wireless technology, Spectrum-TWC, in its advertising, continued to promise consumers that they could get the same "blazing fast speeds" through their wireless connection as with their wired connection. Spectrum-TWC also trained its customer service representatives to propagate these same falsehoods in their calls with subscribers.

19. The second component of Spectrum-TWC's scheme consisted of promising its subscribers that they would obtain reliable access to online content. Spectrum-TWC refused to invest in additional ports[5] where its network connected with online content providers when those ports became heavily congested. The company's failure to add more port capacity to its network connections with online content providers meant that Spectrum-TWC would not make whole on its promises to its subscribers.

20. During the Relevant Period, Spectrum-TWC promised consumers, including its subscribers, that they would receive reliable access to content on the Internet with "no buffering," "no slowdowns," "no lag," "without interruptions," "without downtime," and "without the wait." As a direct result of Spectrum-TWC's failure to add more ports, its subscribers encountered all of these things – buffering, slowdowns, lags, interruptions, and down times.

21. In fact, Spectrum-TWC deliberately took advantage of its control over port capacity where its network connected to online content providers to extract more revenue for the company. To do so, Spectrum-TWC used its leverage over access to subscribers to extract fees from online content providers in exchange for granting such access. Spectrum-TWC lined its pockets by intentionally creating bottlenecks in its

[5] Ports are physical hardware sockets where one network can plug into another network through a fiber optic wire. These ports are located at points where Spectrum-TWC's network connects with online content providers.

connections with online content providers, despite knowing that these negotiating tactics would create problems for its subscribers in accessing online content.

22. While Spectrum-TWC engaged in disputes with online content providers, its subscribers experienced a number of adverse effects, including interrupted Internet service, buffering, slowdowns, lags, and issues with streaming video content that Spectrum-TWC's advertisements specifically promised them they would avoid.

23. Throughout the Relevant Period, Spectrum-TWC consistently failed to make the investments necessary to provide its subscribers with the Internet speeds and reliable online content that it had promised. Capitalizing on the fact that its subscribers had few, if any, other choices for an ISP, Spectrum-TWC placed profits ahead of the interests of its subscribers, and collected billions of dollars in fees from New York subscribers for providing Internet service.

24. Since 2015, the OAG has fielded over 2,800 reports from Spectrum-TWC subscribers who complained that they did not receive the Internet service promised to them in Spectrum-TWC advertisements.

25. Complaints received by Spectrum-TWC tell the same story. A few examples, reproduced below, illustrate the enormous frustration and lost productivity New Yorkers have experienced as the result of Spectrum-TWC's false and misleading advertising practices:

- "I have been a customer of TWC for over 5 years . . . I have paid every month for a package that includes your turbo internet. I had constant problems with internet speed . . . . Bottom line is I am continuing to pay for a product that you are not delivering to me, I am pretty sure that is illegal, I expect the goods I pay for."

- "For the past two years I have become increasingly frustrated with the fact they advertise speeds that they don't come close to providing, while still charging a premium."

- "The company is advertising internet speeds of 100 - 300 Mbps. However, for the past 6 months, I have been receiving speeds of only 3 - 4 Mbps. The company is advertising internet speeds that are far higher than the actual speed being provided."

- "This is ridiculous and am paying for a service I am not receiving. It's actually stealing from the consumer."

- "[Spectrum-TWC] won't acknowledge a problem. I have trouble streaming movies and usually lose connection."

- "We are being throttled on streaming services such as Youtube, Netflix, and Twitch while also having problems with Video games such as League of Legends."

- "We're supposed to get 'up to 50 Mbps' download bandwidth. But when I use more than 1.5 Mbps down, I can't use the Internet for anything else. It comes to a sluggish crawl. Frequently in the evening and night I can't consistently stream Netflix, Hulu, HBO Go, or Showtime go with any reliability. Pay $82.99 a month for Internet that frequently is unusable in the evenings, and always unusable if I try to download a couple things at a decent speed."

26. The OAG seeks restitution for New York subscribers as well as injunctive and equitable relief appropriate to redress Spectrum-TWC's fraudulent conduct. In addition, the OAG seeks the imposition of civil penalties and reasonable costs of investigation and litigation.

PARTIES

27. Plaintiff is the People of the State of New York by their attorney, Eric T. Schneiderman.

28. Before May 18, 2016, Time Warner Cable, Inc. ("TWC") provided and marketed Internet service under the Time Warner Cable brand to New York subscribers. On May 18, 2016, as a part of a series of transactions that resulted in Charter

Communications, Inc. ("Charter") merging with TWC and continuing to operate its business, TWC merged with and into Charter's subsidiary, Spectrum Management Holding Company, LLC ("Spectrum Holding").

29. Defendant Spectrum Holding is a Delaware corporation with its principal place of business at 400 Atlantic Street, Stamford, Connecticut 06901.

30. Defendant Charter is a Delaware corporation with its principal place of business at 400 Atlantic Street, Stamford, Connecticut 06901.

31. Charter is the second-largest residential cable provider in the country. Since its merger with TWC on May 18, 2016, Charter, together with its subsidiary Spectrum Holding, has provided and marketed Internet service to New York subscribers under both the "Time Warner Cable" and "Spectrum" brand names. Charter is in the process of rebranding Time Warner Cable in New York as Spectrum and rolling out new Internet service plans across the State.

32. On January 18, 2017, Plaintiff sent Defendants a pre-litigation notice, pursuant to GBL Article 22-A, by certified mail, return receipt requested. Plaintiff also sent Defendants' counsel a copy of the pre-litigation notice by email on January 18, 2017.

JURISDICTION

33. This Court has jurisdiction pursuant to: (i) Executive Law § 63(12), under which the OAG is empowered to seek injunctive relief, restitution, damages and other equitable relief, including disgorgement, when a person or business entity engages in repeated fraudulent or illegal acts or persistent fraud or illegality in the carrying on, conducting or transaction of business; (ii) General Business Law § 349(b), which authorizes the OAG to seek injunctive relief, restitution, disgorgement and civil penalties

when a person or business entity engages in deceptive acts and practices in the conduct of any business, trade, or commerce; and (iii) GBL § 350, which authorizes the OAG to seek injunctive relief, restitution, disgorgement and civil penalties when a person or business engages in false advertising in the conduct of any business, trade or commerce in the state of New York.

BACKGROUND

I. The Importance Of Internet Service

34. The Internet and its rapid expansion represent the greatest telecommunications revolution of the modern age—connecting people, powering technology, and fueling commerce in ways that were unimaginable even a decade ago.

35. Many Americans rely on the Internet in their daily lives for a broad range of social, recreational and business purposes. They interact with family and friends; stream and download music and movies; exchange news and multimedia content; play online games; work from home; engage in e-commerce; and participate in many other activities.

36. As the FCC explained in a 2015 report, "[a]ccess to robust broadband [Internet] service is a necessity in today's world for jobs, education, civic engagement and economic competitiveness."

37. Internet service ranks along with utilities and housing as one of the most significant recurring expenses for many households. In October 2016, for example, Spectrum-TWC charged New Yorkers a list price of $70 per month or $840 per year for plans that promised Internet download speeds of 20 Mbps. Spectrum-TWC also charged most subscribers an additional $10 monthly equipment lease fee.

38. To connect to the Internet, a residential subscriber signs up with an Internet Service Provider ("ISP") such as Spectrum-TWC. In New York, consumers have a limited choice of providers for residential Internet access. Two or three ISPs dominate the market in most areas of the State.

39. ISPs use one or more of several different technologies to transmit Internet data to and from a residential subscriber. These include (i) digital subscriber line ("DSL"), which runs over traditional phone lines; (ii) fiber-optics, which runs over optical fiber cables; and (iii) cable, which runs over dedicated frequencies on the same coaxial cable as cable television.

40. Spectrum-TWC uses a combination of fiber-optics and cable to transmit data to and from residential subscribers.

41. Spectrum-TWC's subscribers need a device known as a cable modem to connect to Spectrum-TWC's cable network. Today, most subscribers have a modem and a wireless router at home. Sometimes the modem and wireless router are combined in a single integrated "gateway" device.

42. The wireless router creates a wireless home network that allows Internet-ready devices such as smartphones, tablets, and laptop computers to transmit and receive Internet data without being physically tethered to a modem by a cord. As a result of its convenience, over 90% of Spectrum-TWC's current subscribers have access to the Internet through a wireless connection.

43. Spectrum-TWC controls various factors that affect the quality and performance of a subscriber's Internet service at home. These factors include the capabilities of the modems and wireless routers it supplies to its subscribers, its

management of its network to provide each subscriber with sufficient capacity to experience the promised service, and the nature of its relationships with and connections to other networks, such as online content providers.

44. These factors affect the speed at which Internet data travels to and from the subscriber's home. As described on Spectrum-TWC's website, Internet speed measures "how quickly information travels from the Internet to your computer." This speed is typically measured in megabits per second ("Mbps").

45. The majority of residential subscribers use their Internet service at home between 7 p.m. and 11 p.m. These hours are referred to as "peak" hours.

46. Typical users value an Internet service that lets them employ a device of their choice to browse webpages that load swiftly, stream videos that play smoothly, and interact effortlessly with other users online through social media, multiplayer games or other forums.

47. Studies conducted by Spectrum-TWC show that users place a premium on Internet speed and service reliability, and are willing to pay for such attributes because they directly affect the Internet experience.

48. For most users, however, it is difficult to know whether their ISP is actually delivering the level of service promised.

49. As a result, consumers rely heavily on the representations made by an ISP regarding speed and reliability when selecting an ISP or service plan.

II. Spectrum-TWC's Network

50. Spectrum-TWC is the largest provider of Internet service in the State of New York. About 2.5 million households—or more than one out of every three New

Yorkers who pay for high-speed Internet service—depend on Spectrum-TWC for Internet access today. Spectrum-TWC's coverage area encompasses large sections of Albany, Buffalo, New York City and Rochester and extends to municipalities, suburbs, and rural areas statewide, including communities in upstate New York near the Canadian border.

A. The "Last Mile" Of Spectrum-TWC's Network

51. A cable wire typically connects a Spectrum-TWC subscriber's modem to the nearest cable distribution facility in the neighborhood. This portion of the network is often referred to as the "last mile."

52. Spectrum-TWC's network transmits data over the last mile of its network using a portion of the channels and wires that carry cable television to a subscriber's home.

53. On Spectrum-TWC's network, multiple subscribers share the total data transfer capacity, also known as "bandwidth," that can be carried on the last mile of cable. Subscribers who must share the last mile's bandwidth are placed in the same "service group" by Spectrum-TWC.

54. Unlike cable television, where the fact that all the homes on a block are watching the Super Bowl on television at the same time will not reduce the quality of the service, with cable Internet access, if many users who share a service group try streaming the game at the same time, the service quality for all subscribers on that group may suffer.

55. The total bandwidth available to a service group is determined by the number of channels Spectrum-TWC made available to transmit data. Each channel's bandwidth is about 38 Mbps.

56. From about 2012, Spectrum-TWC's network across the State typically provided eight channels or about 304 Mbps (8 x 38 Mbps) of bandwidth to be shared among all the subscribers in a service group. That meant, for example, that each subscriber in a service group of 300 subscribers had about 1 Mbps of bandwidth to use if all the subscribers used the service group's bandwidth at the same time.

57. In 2014, Spectrum-TWC upgraded its network in the New York City area (the "MAXX upgrade")[6] by doubling the number of available channels, thereby increasing the service group's shared bandwidth to about 608 Mbps (16 x 38 Mbps).

58. In February 2016, the average Spectrum-TWC service group in New York had about 340 subscribers. Some service groups had as few as 32 subscribers and others had as many as 621 subscribers.

59. To deliver the Internet speeds that Spectrum-TWC promised to its subscribers, it could either add more channels to the system to increase the shared bandwidth, or split the size of service groups to reduce the number of subscribers sharing a connection.

60. To use a highway analogy, for traffic to flow at the promised speeds between two points, Spectrum-TWC could either add new lanes to the highway (adding channels) or divert some traffic to a less utilized highway to reduce the congestion (splitting service groups). But Spectrum-TWC failed to make the necessary investments to do either.

61. As set forth below in Section I.C.1, during the Relevant Period, Spectrum-TWC included too many subscribers in its service groups and failed to add more channels

[6] Subsequently, Spectrum-TWC upgraded its network in certain parts of the Hudson Valley.

for such service groups, thereby ensuring the company would not deliver the Internet speeds it promised to its subscribers.

B. Modems Leased To Subscribers By Spectrum-TWC

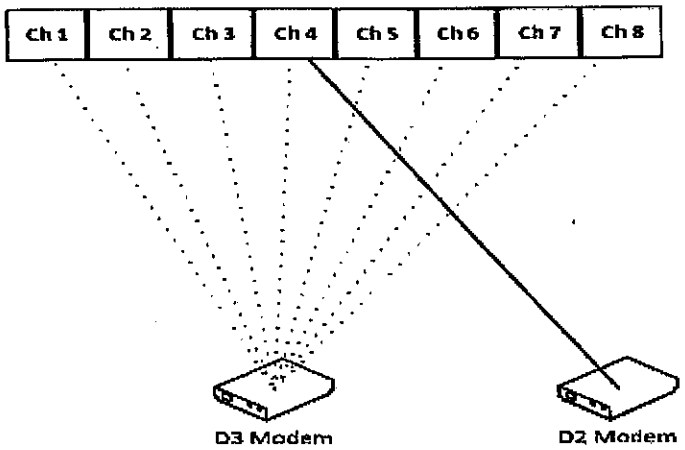
62. Newer generation modems, called DOCSIS[7] 3 ("D3"), can use all of the service group's available bandwidth by sending a subscriber's data across multiple cable channels at once. This allows cable companies to offer significantly higher speeds to subscribers than was previously possible with the older generation DOCSIS 1 ("D1") and DOCSIS 2 ("D2") modems, which could only use one channel at a time.

63. While older-generation D1 and D2 modems still work on a D3 system, they cannot take advantage of the full capacity of the service group; instead, these modems are limited to a single-channel that has about 38 Mbps of bandwidth, which they must share with all the other users on that channel.

64. The ability of D3 modems to bond several channels together is akin to having a multi-lane highway. Data traveling to or from a D3 modem can use any available highway lane, allowing for more traffic to pass through. D2 modems are confined to a single lane of the multi-lane highway, even when that single lane is congested with traffic.

65. A graphic from a Spectrum-TWC presentation from 2013 illustrated the functional difference between a D2 and a D3 modem:

[7] "DOCSIS" refers to the Data Over Cable Service Interface Specification standard used to transmit data over cable wires.



66. As set forth in greater detail below in Section I.B.1, during the Relevant Period, Spectrum-TWC routinely leased older-generation, single-channel modems to subscribers who paid for speeds that required a multichannel D3 modem.

C. Spectrum-TWC's Connection With Other Networks

67. The Internet is sometimes described as a network of networks, with each network serving as few as one to as many as millions of computers. Different networks communicate and exchange data encoded in "packets" with each other using a common language.

68. The FCC classifies three main types of players in the Internet ecosystem in addition to the end-user subscribers:

- Internet service providers: Companies such as Spectrum-TWC that connect subscribers' homes to the Internet;
- "Backbone" providers: Companies, such as Level3 Communications ("Level 3") and Cogent Communications Holdings ("Cogent"), that connect ISPs to each other and to content providers; and
- Content providers: Companies, such as Netflix, Riot Games and Facebook, which provide online content to subscribers by connecting through backbone providers or establishing a direct connection to ISPs.

69. For a subscriber to access content online, data must travel from the content provider to the end user through the ISP's interconnection points. Interconnection points are places where two networks can exchange data directly or connect through intermediaries. If these points are congested, that congestion will hurt the end user's experience because data will travel more slowly and data may be lost.

70. In the highway analogy, the content is like a car traveling from Boston to an apartment building in Manhattan. Interstate 95 is the backbone provider's network and the Manhattan streets are the ISP's network. The bridges and tunnels are the interconnection points that require sufficient access lanes to process swiftly the volume of traffic.

71. As set forth in greater detail in Sections II.B and II.C, during the Relevant Period, Spectrum-TWC routinely let its connections with backbone providers and content providers become overly congested, which caused slowdowns and interruptions for subscribers who were promised reliable and uninterrupted access to the content of their choice.

FACTUAL ALLEGATIONS

72. Spectrum-TWC marketed a service that promised consumers a fast, reliable Internet connection that could stream content without interruption from virtually anywhere in the home.

73. Spectrum-TWC understood why these characteristics were important to subscribers. A 2015 Spectrum-TWC internal presentation titled "Key trends and imperatives for TWC Internet" explained that: (a) new technologies and people increasingly working from home "drive ever-expanding bandwidth needs"; (b) new

subscribers are "increasingly citing reliability, along with speed, as reasons to switch ISPs" and that existing subscribers rate "connectivity and reliability as most important aspects of their Internet service"; and (c) Spectrum-TWC "cannot compete on speed & reliability alone and must distinguish its Internet offering by promising connectivity everywhere with no dead spots."

74. Throughout the Relevant Period, Spectrum-TWC repeatedly represented to consumers, including its subscribers, that they would receive consistently fast Internet speeds, and reliable and uninterrupted access to online content. Both of these representations were false.

I. Spectrum-TWC Misled Subscribers By Falsely Promising Speeds It Knew It Could Not Deliver

75. Spectrum-TWC misled subscribers by repeatedly promising Internet speeds in its advertisements during the Relevant Period that it knew it could not reliably deliver.

76. Spectrum-TWC's representations were false for the following three reasons:

- Deficient Equipment: During the Relevant Period, Spectrum-TWC leased older-generation, single-channel modems despite knowing that such modems were, in its own words, not "capable of supporting the service levels paid for." Over the same period, Spectrum-TWC also leased older-generation wireless routers to subscribers despite knowing that these routers would prevent them from ever experiencing close to the promised speeds over wireless connections.

- Congested Network: During the Relevant Period, Spectrum-TWC failed to allocate sufficient bandwidth to subscribers by reducing the size of its service groups or increasing the number of channels for its service groups. These network improvements would have enabled subscribers to achieve the fast Internet speeds that they paid for. Results from three independent Internet speed measurements confirmed that Spectrum-TWC consistently

failed to deliver the promised speeds to subscribers on its high-speed plans.

- Limitations of Wireless: During the Relevant Period, Spectrum-TWC misled subscribers by assuring them that they could achieve the same Internet speeds through wireless connections as with wired connections despite knowing that accessing the Internet using wireless routers would sharply reduce the Internet speeds a subscriber would experience.

A. Spectrum-TWC Promised Subscribers They Would Receive The Fast Internet Speeds Advertised In Their Service Plans

77. During the Relevant Period, Spectrum-TWC offered service plans at different price points to subscribers. It differentiated the service plans exclusively on the basis of the promised Internet speed a subscriber could achieve for downloading data.

78. In 2012 and 2013, Spectrum-TWC pegged its "standard" plan at 15 Mbps across New York State and offered high-speed plans of 20, 30 and 50 Mbps. In 2014, the company offered higher speed plans for subscribers in and around New York City as part of its MAXX upgrade program, creating new high speed plans that offered 100, 200 and 300 Mbps.

79. As of October 2016, Spectrum-TWC offered subscribers in the New York City area the following plans:

Speed Plan	List Price	Modem Fee
10 Mbps	$49.99	$10
50 Mbps	$59.99	$10
100 Mbps	$69.99	$10
200 Mbps	$79.99	$10
300 Mbps	$109.99	$10

80. For the rest of New York State, Spectrum-TWC offered the following plans as of October 2016:

Speed Plan	List Price	Modem Fee
3 Mbps	$49.99	$10
15 Mbps	$59.99	$10
20 Mbps	$69.99	$10
30 Mbps	$79.99	$10
50 Mbps	$109.99	$10

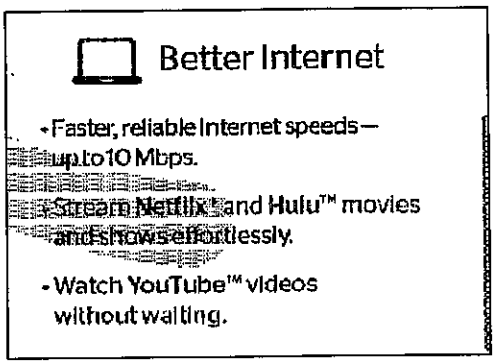
81. Throughout the Relevant Period, Spectrum-TWC's advertising led subscribers to believe that the Internet speed on the high-speed plans offered a qualitatively different user experience akin to driving a turbo-charged sports car rather than a family sedan.

82. For example, Spectrum-TWC tagged its high-speed plans across the State with adjectives like "Turbo," "Extreme," and "Ultimate," to convey the benefits of choosing them over cheaper plans which advertised slower speeds.

83. Spectrum-TWC reinforced the impression that subscribers would experience the promised speeds any time they used the Internet by pairing the numerical speed promises in its advertising with promises of "consistently" fast or "reliable" Internet service.

84. During the Relevant Period, Spectrum-TWC's television, Internet, print and direct mail advertisements focused on the consistent delivery of promised speeds throughout the home on multiple devices.

85. For example, as excerpted below, a 2012 Spectrum-TWC direct mailing promised that subscribers would get "Faster, reliable Internet speeds":



86. Similarly, in a 2013 mailing, Spectrum-TWC promised subscribers that "[o]ur network is built to handle all of your activities, **without any slowdowns**. Whether you're just checking email or downloading a whole album of photos, our network won't let you down." (Emphasis added.)

87. Spectrum-TWC also represented to subscribers that they would experience the same promised Internet speeds with no "slowdowns" when connecting wirelessly.

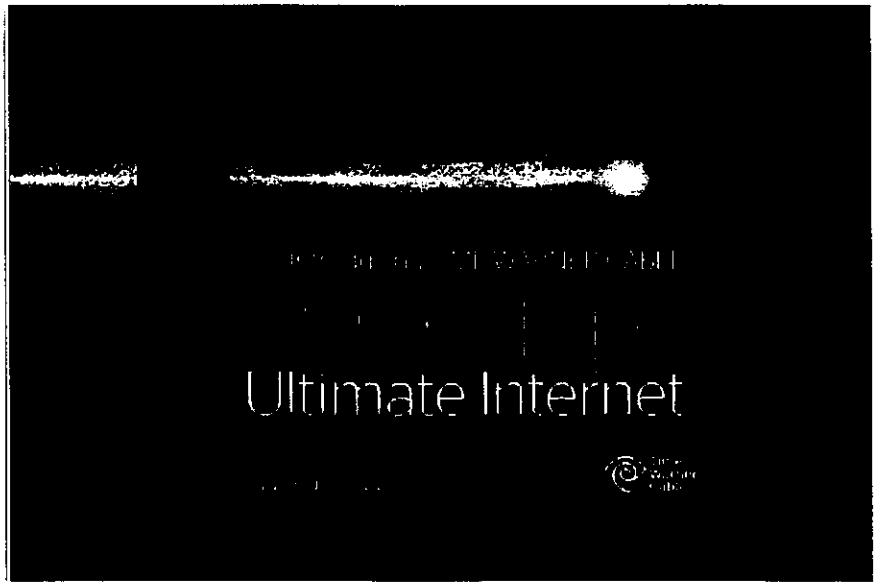
88. For example, Spectrum-TWC marketed this purported equivalence of wired and wireless connections as a feature of its 50 Mbps plans, telling consumers in a 2013 mailing that, with Spectrum-TWC's wireless routers, "Everyone at home can use their laptops, tablets and smartphones at the same time — **without slowdowns**." (Emphasis added.)

89. In 2013, Spectrum-TWC ran a television commercial called "The Test," that showed its employees testing the wireless speeds achieved on a smartphone and a tablet across a large room buzzing with computers and interference. The employees gleefully exclaim, "tablet: running at 50 [Mbps]," "smartphone: lightning fast," and "Our fiber-rich network is crushing it!" The terminal screen in front of one Spectrum-TWC employee showed the results of a "dual speed test" that indicated both wireless devices

had *simultaneously* achieved nearly identical speeds of about 50 Mbps, which was the top advertised speed in much of New York State at that time.

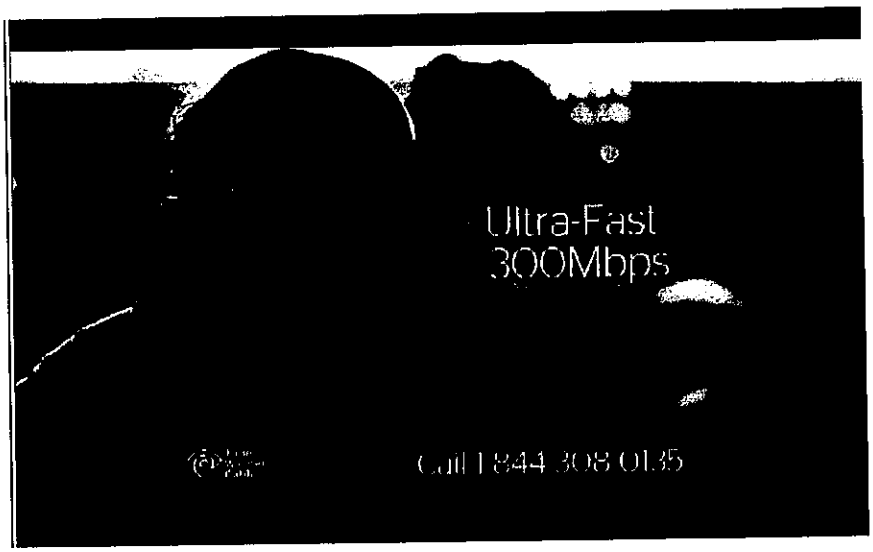
90. Through this advertisement and others like it, Spectrum-TWC created the impression that it would simultaneously deliver the promised Internet speeds wirelessly, with no drop-offs, to multiple users in a household.

91. In a 2014 television commercial, shown in the screenshot below, Spectrum-TWC introduced a 300 Mbps "Ultimate Internet" plan while the voice-over heralded "a new dimension of *reliability* and a revolution in *velocity* essential for today's online life":



92. Spectrum-TWC espoused the benefits of faster speeds by linking its advertising of high-speed plans to the activities it knew subscribers used the Internet to access.

93. For example, a 2015 television commercial (screenshot below) promoted the 300 Mbps plan by explaining "We do more games – and more streaming. So we need more speed":



94. In another television ad touting its 300 Mbps plan that aired in 2016, an actor exclaimed "I didn't know your home WiFi could stream so many devices at the same time!" while the neighbor's son explains, "Dad, it's Time Warner Cable 300 [Mbps]. Crazy fast!"

95. In these ways, Spectrum-TWC advertisements during the Relevant Period gave subscribers the impression that they needed more speed to enjoy Internet content and that Spectrum-TWC would deliver those promised speeds to them on any device in their home regardless of whether they used a wired or wireless connection.

96. Spectrum-TWC emphasized speed because it wanted consumers to sign up for the more expensive plans that promised higher speeds.

97. A 2013 internal Spectrum-TWC presentation explained that a key "strategic pillar" for Spectrum-TWC was to "capture premium pricing" and "drive migration to higher tiers."

98. One strategy used by Spectrum-TWC to promote migration of subscribers to high-speed plans was to tie its customer service representatives' compensation to the

monthly recurring revenue earned from subscribers. This incentivized representatives to push subscribers to pay for higher speed plans, regardless of their need for fast Internet speeds.

99. Some representatives pushed back against the mandate to upsell in an employee survey. They noted, for example, that "[w]e are constantly pushed to 'create need' . . .[but this] ignore[s] the impact of pushing pricier products on people who don't need or really want them."

100. Another representative reported: "Our customers NEED to be put into the proper packages so that we are conducting business with integrity. It seems as if this is a hustlers job trying to out hustle everyone else trying to make the most money WE can and not doing the right thing . . . By operating like this, customers laugh at our integrity as a company."

B. Spectrum-TWC Leased To Subscribers Deficient Equipment That Was Not Capable Of Delivering The Promised Speeds

101. During the Relevant Period, Spectrum-TWC typically leased to its subscribers either a gateway device that had a combined modem and wireless router or a standalone modem. It promised subscribers that these devices would be appropriate for the subscriber's speed plan and that it would upgrade the devices at no charge as necessary. As described below, Spectrum-TWC did not honor the commitments it made to over a million New York subscribers.

1. Spectrum-TWC Leased Older-Generation, Single-Channel Modems To Subscribers

102. Over the Relevant Period, Spectrum-TWC leased to over 900,000 subscribers, older-generation, single-channel D1 and D2 modems that it knew were incapable of delivering the promised Internet speeds.

103. In October 2012, Spectrum-TWC started to charge subscribers a monthly lease fee for modems it had previously provided at no charge.

104. Although Spectrum-TWC allowed subscribers to use their own modems, the vast majority of subscribers opted to pay a monthly lease fee for the use of a Spectrum-TWC-supplied modem, usually as part of a gateway device that also included a wireless router.

105. In connection with its modem lease program, Spectrum-TWC promised subscribers that it would provide them with "the appropriate modem for your Internet service plan and speed tier." Spectrum-TWC also promised that it would upgrade leased equipment "at no additional cost if we update Internet plan speeds and when technology improves."

106. In making such claims, Spectrum-TWC represented that it would provide subscribers with a modem that could support the Internet speeds of their plans and that it would upgrade the modem at no additional charge as Internet speeds increased.

107. Spectrum-TWC's training materials instructed employees to tell subscribers that Spectrum-TWC's modem lease program "ensures that you always have the right modem in your home to meet the ever-changing needs of technology."

108. Even absent such explicit assurances, a subscriber leasing a modem directly from Spectrum-TWC would expect that the modem would be able to support the Internet speeds promised in Spectrum-TWC's ads and the speed plan for which she paid.

109. Conversely, a subscriber leasing a modem from Spectrum-TWC would expect that Spectrum-TWC would not charge for a speed plan that the modem provided by the company could not support. Yet that is precisely what Spectrum-TWC did.

110. In 2013, Spectrum-TWC determined that D2 modems were "non-compliant" for speeds of 20 Mbps or higher for the simple reason that they were incapable of delivering speeds of 20 Mbps or higher. Instead of replacing modems as promised, Spectrum-TWC continued to charge subscribers for plans that promised Internet speeds of 20 Mbps and higher.

111. Spectrum-TWC's former head of corporate strategy admitted in a February 2015 email that, "the effective speeds we are delivering customers in a 20 Mbps tier when they have a D2.0 modem is meaningfully below 20 Mbps."

112. As a Spectrum-TWC engineer explained in a March 2015 email, the company's network utilization targets would result in subscribers using the single-channel modems to routinely experience speeds below 10 Mbps during peak hours:

> [A] single channel modem **MUST be able to achieve its provisioned speed during peak usage** (when customers are using the service) which would be in the neighborhood of 80% utilization. It doesn't matter if a modem "could" achieve the speed, it really only matters when they are most commonly using it. Therefore, **given the data, we need to severely limit single channel modems to <10 mbps or so.**

(Emphases added.)

113. This conclusion was repeated in Spectrum-TWC's February 3, 2016 letter to the OAG that admitted: "[a]chieving broadband download speeds of 20 Mbps and above requires a [D3] modem."

114. Yet during that same month, February 2016, Spectrum-TWC leased D2 modems to over 185,000 Spectrum-TWC subscribers on plans of 20 Mbps or higher, as reflected in Table 1:

Table 1: Distribution Of Deficient D2 Modems (February 2016)

Speed Plan	Number Of Subscribers With D2 Modems
20 Mbps	89,250
50 Mbps	80,769
100 Mbps	9,564
200 Mbps	5,235
300 Mbps	361
Total	**185,179**

115. The subscriber numbers from the February 2016 billing period present only a snapshot in time and therefore exclude subscribers who had the older-generation, single-channel modems during the Relevant Period, but who may have cancelled their Spectrum-TWC account, obtained a new modem, or changed to a lower speed plan.

116. In fact, Spectrum-TWC's leasing practices short-changed a much larger group of subscribers. During the Relevant Period, the company's records show that almost 800,000 New York subscribers on speed plans of 20 Mbps and higher leased deficient D2 modems from Spectrum-TWC for periods of three consecutive months or longer.

117. Similarly, Spectrum-TWC had determined in June 2012 that D1 modems should no longer be deployed on *any* speed plan it offered.

118. Yet the company's records show that during the Relevant Period, over 100,000 New York subscribers leased obsolete, single-channel D1 modems from Spectrum-TWC for periods of three consecutive months or longer.

119. Even though Spectrum-TWC knew that each of the subscribers who leased older-generation, single-channel D1 and D2 modems would not achieve the promised Internet speeds, Spectrum-TWC nonetheless continued to charge these subscribers for more expensive high-speed plans than their modems could support.

a. In Its Effort To Cut Costs And Boost Profits, Spectrum-TWC Did Not Replace Deficient Modems

120. The widespread distribution of deficient modems among Spectrum-TWC subscribers was the result of Spectrum-TWC's deliberate strategy of placing its own business interests ahead of its obligation to fulfill the express promises it made to its subscribers.

121. In February 2013, after determining that the older-generation, single-channel D2 modems were incapable of delivering the promised speeds, Spectrum-TWC deemed such modems to be "non-compliant," and its engineers recommended replacing such modems, stating that "[w]e need the right modems in place and the network needs to be provisioned correctly. There's no silver bullet."

122. An internal Spectrum-TWC presentation from June 2013 observed that 75% of the modems associated with the 20 Mbps plan across the country were non-compliant, but "D2 modems are still being deployed due to budget restraints."

123. This presentation went on to note that because D2 modem replacement was beyond the company's "capital ability," "[n]o communications have been sent to the existing customer base with D2 modems to swap out their devices."

124. The presentation also warned, presciently as it turned out, that "recycling D2 modems to support lower tiers would make them vulnerable to underperform with the next speed increase (specifically in the Standard Tier)."

125. The presentation issued a specific recommendation: "Swap non-compliant modems to improve the performance of this tier [i.e., the 20 Mbps tier]."

126. For self-serving financial reasons, Spectrum-TWC rejected its own engineers' recommendations to swap modems. As one senior executive stated clearly in a February 2015 email: "The solution is to get the D2s out, but we don't have that kind of capital."

127. In the summer of 2013, Spectrum-TWC assured the FCC that it would replace the deficient D2 modems for all its subscribers, but it wanted to start by replacing the D2 modems of subscribers who had volunteered to assist the FCC in testing Internet speeds (the "FCC Panelists").[8]

128. In September 2013, the FCC agreed to exclude the slower speed results associated with any D2 modems on the 20 Mbps or higher tiers from its forthcoming report and allowed Spectrum-TWC to replace the FCC Panelists' modems.

129. Although Spectrum-TWC replaced the FCC Panelists' modems and instructed customer service representatives to make sure FCC Panelists received "VIP treatment" and the "best in class devices" when swapping their modems, Spectrum-TWC, contrary to its representation to the FCC, did not proactively replace deficient D2 modems for all subscribers across New York.

[8] The FCC Panel consisted of a subset of Spectrum-TWC subscribers across different service groups nationwide that assisted the FCC in testing Internet speeds.

130. For the September 2013 billing period, the company's records confirmed that about 280,000 subscribers in New York on speed plans of 20 Mbps or higher still had deficient D2 modems.

131. Spectrum-TWC's actions also contradicted its representations to the FCC in the Code of Conduct it signed in connection with the FCC's testing program. The FCC's Code of Conduct required Spectrum-TWC to "at all times act in good faith" and not do anything "if the intended consequence of such act or omission is to enhance, degrade or tamper with the results of any test." Specifically, the Code of Conduct prohibited the company from "modifying or improving services delivered to any class of subscribers" that was not "consistent with normal business practices."

132. In fact, at the same time that Spectrum-TWC determined the D2 modems were non-compliant and replaced them for the FCC Panelists, it aggressively pushed subscribers in New York to pay to upgrade their Internet service plans—without ever checking whether the modems it leased to subscribers were capable of actually supporting their new speed plans.

133. As a result, in 2012 and 2013, in all parts of the State, Spectrum-TWC routinely upgraded subscribers with deficient D2 modems to the 30 and 50 Mbps speed plans—plans it knew required D3 modems to achieve the promised speeds.

134. Around the time it approached the FCC to persuade it to ignore the Internet speed test results from the deficient D2 modems, Spectrum-TWC explored how to retain subscribers and attract new ones in New York City where it faced increased competition from other ISPs.

135. Spectrum-TWC commissioned a June 2013 consulting study that recommended it offer higher speeds to retain subscribers, but acknowledged that implementing that recommendation would require replacing all the deficient single-channel modems.

136. The June 2013 study explained that "increasing speed can offset sub[scriber] losses from price increases and increase overall revenue" and that "[i]ncreasing speed with no price increase produces sub[scriber] gains."

137. In 2014, Spectrum-TWC partially implemented the study's recommendation to upgrade subscribers' speed plans across the board through New York City's MAXX upgrade.

138. As part of the MAXX upgrade, Spectrum-TWC marketed some of the highest Internet speeds advertised in the state—100, 200, and 300 Mbps.

139. Based on Spectrum-TWC's advertising promises, hundreds of thousands of New York residents signed up for these high-speed plans.

140. As shown in Table 2 below, Spectrum-TWC had over 550,000 subscribers in these high-speed plans in New York as of February 2016:[9]

[9] The numbers from the February 2016 billing period are a snapshot in time and therefore exclude subscribers who, during the Relevant Period, cancelled their Spectrum-TWC account or later changed to a lower tier of service. The company's records show that over 640,000 subscribers paid for speeds plans of 100 Mbps, or higher, for at least three consecutive months during the Relevant Period.

Table 2: Distribution Of Subscribers In MAXX High-Speed Plans

Speed Plan	Distinct Subscribers	Monthly List Price
100 Mbps	214,606	$69.99
200 Mbps	271,962	$89.99
300 Mbps	73,179	$109.99
Total	559,747	

141. Through the MAXX upgrade, Spectrum-TWC led subscribers with D2 modems to believe that it was offering faster Internet speeds for the same price in an effort to convince such subscribers to stay with Spectrum-TWC and not switch to another ISP.

142. However, because Spectrum-TWC did not undertake to proactively replace subscribers' deficient, single-channel modems, it knew it was not actually delivering these faster Internet speeds.

143. For example, under the MAXX upgrade plan, Spectrum-TWC promised speeds of 100 Mbps to subscribers who were on the old "Turbo" 20 Mbps tier with D2 modems that its own analysis showed delivered less than 10 Mbps during peak hours.

144. Similarly, Spectrum-TWC promised subscribers with D2 modems on the old "Standard" 15 Mbps tier that they would get 50 Mbps, even though Spectrum-TWC knew that those subscribers could never achieve that speed with their deficient D2 modems.

145. During the early MAXX rollout in 2014, Spectrum-TWC experimented with a plan it called "Ship to All" that sent new D3 modems to all subscribers with deficient modems at no charge, or offered to have a professional install such a modem.

146. In April 2014, however, Spectrum-TWC rejected the "Ship to All" plan as too expensive. Instead, Spectrum-TWC devised a strategy with the opposite objective: to minimize the number of deficient modems Spectrum-TWC would replace.

147. Known internally as the "Raise Your Hand" plan, this strategy required subscribers to go through several bureaucratic steps to receive and install the modem appropriate for their speed plans.

148. Spectrum-TWC required subscribers to request a new replacement modem by contacting customer service, which would have subjected the subscriber to notoriously long hold times, or lost time spent visiting a service center in-person.

149. Spectrum-TWC's notice to subscribers telling them about the opportunity to get a new D3 modem failed to explain that retaining an existing D2 modem could result in getting only one-tenth or less of the promised speeds.

150. Even in instances where the deficient D2 modem had been professionally installed, Spectrum-TWC required subscribers to personally install the replacement D3 modem or pay a fee to have it installed by a technician.

151. Finally, Spectrum-TWC required subscribers to return the old D2 modems or face a large "unreturned equipment fee" as a penalty. This requirement was particularly egregious since at this point, D2 modems were considered to be "end of life" by the cable industry and were no longer being deployed by many other ISPs.

152. Spectrum-TWC premised the "Raise Your Hand" plan explicitly on the company's expectation that large numbers of subscribers would not follow through on the process required to receive a replacement D3 modem.

153. The math was simple: every deficient modem that remained under lease was one less replacement modem that Spectrum-TWC had to buy and help install.

154. An internal Spectrum-TWC presentation, dated January 2015, reviewed cost projections and boasted that "[c]hanging the MAXX approach to a raise-your-hand approach (65% of subscribers take an active swap, with passive swaps for the balance) helped us reduce our capital budget by $45[Million]."

155. Later in 2015, Spectrum-TWC reported internally that the actual "Raise Your Hand response rate in 2014 MAXX markets was 25%." As a result, Spectrum-TWC spent even less money than it had originally budgeted.

156. Spectrum-TWC also did not follow the recommendation of one of its engineers to "change [the subscriber's] tier to speed their modem can handle" if the subscriber did not respond to the Raise Your Hand communication.

157. Instead, Spectrum-TWC rolled out a new policy for all subscribers with D2 modems in New York State that programmed their D2 modems to cap their speeds at 20 Mbps, but continued to charge them for higher speed plans.

158. As an example, Spectrum-TWC still charged a subscriber with a D2 modem on the 100 Mbps plan as much as $70 per month, but it actually programmed the D2 modem so that its top speed would never exceed 20 Mbps even during non-peak hours.

159. Spectrum-TWC's "Raise Your Hand" plan also did nothing to address the thousands of subscribers who had leased deficient D2 modems in upstate New York because Spectrum-TWC did not even contact such subscribers to replace their modems.

2. Spectrum-TWC Leased Deficient Wireless Routers To Subscribers

160. As with modems, most subscribers leased a wireless router directly from Spectrum-TWC as a component of a gateway device that included both a modem and a router.

161. Spectrum-TWC expressly promised that leasing such wireless routers from the company would guarantee subscribers had the appropriate equipment as speeds increased and technology improved.

162. Spectrum-TWC also made specific representations in its commercials about the quality and performance of the wireless routers it leased to its customers.

163. For example, one television commercial from 2015 promised that Spectrum-TWC's home wireless connection would be "powered by the latest equipment available, to cover all your devices."

164. As with modems, wireless routers are rated for the speeds they can deliver.

165. While several variables can affect the maximum speed for a wireless router, an important initial determinant of the speed was the protocol used by the router.

166. The protocols reference a standard known as 802.11 first released in 1997 and amended several times since. The two most recent amendments to the standards are "802.11n" and "802.11ac."

167. In 2014, Spectrum-TWC leased to most of its subscribers on high-speed plans wireless routers that employed the 802.11n standard (the "802.11n wireless routers").

168. But Spectrum-TWC knew that the 802.11n wireless router could not deliver anywhere close to the promised speeds of the high-speed plans.

169. Spectrum-TWC's former Vice President of Customer Equipment observed in an October 16, 2014 internal email to senior colleagues that "we do not offer a [device] today that is capable of the peak Maxx speed of 300 Mbps via wireless."

170. This executive went on to admit: "Generally a customer connecting via wireless will receive **less than 100 Mbps**" using the 802.11n wireless routers that Spectrum-TWC leased to subscribers. (Emphasis added.) As a result, he told his colleagues that "**we are going to experience a mismatch between what we sell the customer and what they actually measure on their laptop/tablet/etc.**" (Emphasis added.)

171. A separate Spectrum-TWC technical document discussing wireless connectivity, dated January 2015, concluded that "[i]n a real world scenario, most [802.11n] adapters will produce speeds of 50-100 Mbps."

172. In fact, a Spectrum-TWC internal presentation, dated June 12, 2014, recommended that the company deploy devices with newer generation 802.11ac wireless routers to all subscribers on speed tiers of 200 Mbps or higher because such routers came closer to delivering the promised speed.

173. Spectrum-TWC rejected that recommendation, again for financial reasons.

174. As with modems, Spectrum-TWC continued to lease deficient wireless routers to subscribers to cut costs and boost profits.

175. As of February 2016, over 250,000 subscribers, or four out of five Spectrum-TWC subscribers on the 200 and 300 Mbps plans who leased devices from Spectrum-TWC, had 802.11n wireless routers that the company knew could not deliver close to the promised speeds even under ideal circumstances.

176. Despite this knowledge, Spectrum-TWC did not take any steps to inform subscribers on its high-speed plans that the promised speeds were generally not attainable over wireless routers it supplied subscribers.

177. Nor did Spectrum-TWC offer to replace the older-generation wireless routers for existing subscribers with the new-generation wireless routers.

C. Spectrum-TWC's Network Could Not Consistently Deliver Promised Speeds

178. Even for subscribers who had the appropriate modems and wireless routers, Spectrum-TWC failed to deliver the fast Internet service it had promised.

1. Spectrum-TWC Did Not Allocate Sufficient Resources For Its Network To Reliably Deliver The Promised Speeds

179. Spectrum-TWC engineers, consistent with the company's advertising, saw their job as delivering a network that should allow "customers to achieve 100% speed attainment regardless of time of day or day of week."

180. If it designed its network correctly, Spectrum-TWC expected subscribers to get "good speed test results . . . at or above our speed tiers" any time they conducted a speed test.

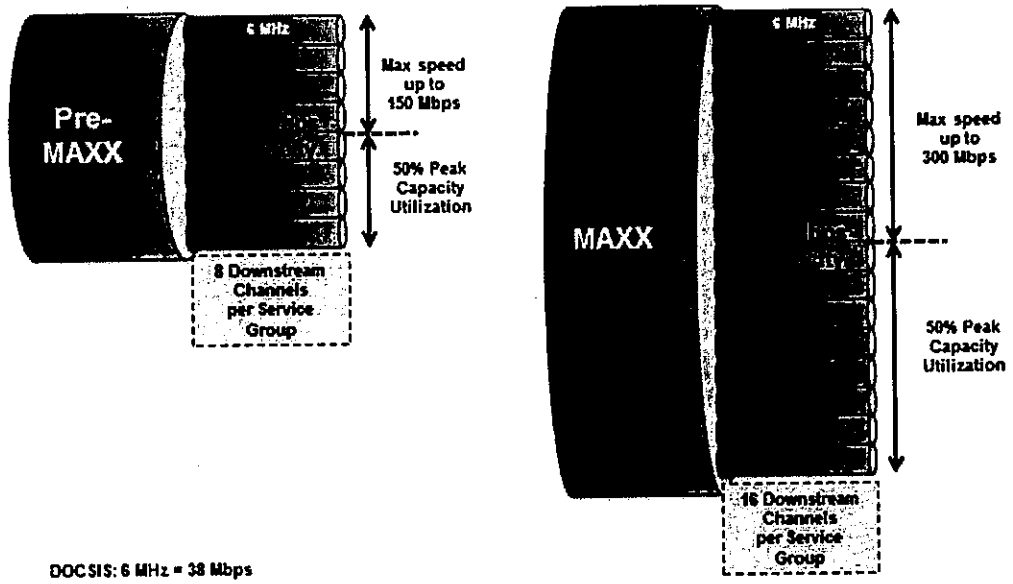
181. But to deliver those speeds, Spectrum-TWC had to allocate sufficient bandwidth to each subscriber in a service group—the group of subscribers who share the "last mile" of bandwidth—so that they could achieve the promised speeds.

182. In February 2016, an average Spectrum-TWC service group in New York City had 340 subscribers sharing 608 Mbps of bandwidth. Spectrum-TWC understood how much bandwidth these subscribers were likely to use during peak hours and how much bandwidth was needed to deliver the promised speeds.

183. In helping to determine which speeds to offer subscribers, Spectrum-TWC's engineers developed a rule of thumb: a service group should have enough bandwidth available that any given subscriber could achieve the promised speed offered during peak hours.

184. A graphic in a Spectrum-TWC presentation from August 2015, depicted below, showed that the maximum speed the company offered should be no more than 50% of the service group's total bandwidth because the other 50% is utilized during peak hours:

Spectrum: 16 Downstream Channels (6 MHz) enable 300 Mbps downstream speeds in MAXX markets



185. This graphic illustrated the engineers' mathematical calculation that with eight channels with a total capacity of 300 Mbps, the maximum speed Spectrum-TWC could provide if a service group utilized 50% of bandwidth was 150 Mbps. With 16 channels with a total capacity of 600 Mbps,[10] the maximum speed Spectrum-TWC could provide was 300 Mbps.

186. This graphic showed that Spectrum-TWC knew that if it allowed a service group to utilize more than 50% of its bandwidth during peak hours, then Spectrum-TWC could not reliably deliver 300 Mbps to a subscriber who had paid for that high-speed plan.

[10] 16 channels x 38Mbps = 608 Mbps, but the Spectrum-TWC presentation used a rounded down 600 Mbps.

187. In practice, Spectrum-TWC failed to maintain the bandwidth required for subscribers to consistently experience their promised speeds.

188. Instead of using the 50% threshold recommended by its engineers, Spectrum-TWC allocated resources to increase the bandwidth available to a subscriber—either through splitting service groups or adding more channels—only after a service group used about 80% of its shared bandwidth during peak hours.

189. Spectrum-TWC's policy to use 80% of the service group's bandwidth meant that only 20% of 608 Mbps, or roughly 120 Mbps, of bandwidth could be available to most subscribers during peak hours.

190. Thus, subscribers on the 200 Mbps or 300 Mbps tiers who attempted to use their full bandwidth would achieve speeds that were only a half to a third of their promised speeds.

191. At one point, a Spectrum-TWC executive suggested in a February 2015 email that the company needed to lower its 80% peak utilization target to allow subscribers to attain the speeds promised to them.

192. A co-worker swiftly rejected the suggestion, explaining "I don't necessarily disagree with that logic" but, he continued, "[i]f we make that statement, then we are all saying that . . . we must go to all maxx markets and anything above 50% utilization (16 channels*38mbps=608mbps) **must be mitigated to support 300 Mbps tier and that would drive 100's of millions in investment . . . .**" (Emphasis added.)

193. In fact, many Spectrum-TWC service groups across the State routinely exceeded the 80% utilization threshold and some service groups even exceeded 90%

utilization during peak hours. This high utilization rate further reduced the ability of all subscribers in that service group to achieve their promised speeds.

194. Spectrum-TWC could have delivered the promised speeds either by reducing the size of service groups sharing bandwidth, or by adding more channels to increase the available bandwidth. Alternatively, it could have simply corrected its advertising and sold slower speeds.

195. Instead, Spectrum-TWC chose to mislead subscribers by promoting expensive high-speed plans that provided only a fraction of the promised speed to most subscribers on those plans.

2. Speed Tests Confirmed That Spectrum-TWC's Network Did Not Reliably Deliver Promised Speeds

196. Spectrum-TWC's failure to deliver the promised speeds was confirmed by actual speed test data collected from thousands of New York subscribers.

197. There are several different Internet speed measurement tools that test whether subscribers are getting the Internet speed they paid for. The speed test results discussed below come from three sources.

198. **Speedtest.net**: This was one of the most popular tests for subscribers to measure their Internet speeds. This test reported on the quality of the last mile of service by measuring how quickly a subscriber can download data from a test server that was typically hosted on the ISP's network.

199. Spectrum-TWC acknowledged that the Speedtest.net test was "recognized across the Internet as a good speed test." The company hosted the testing platform on its network, recommended the test to its subscribers, and used the test internally for network diagnostics.

200. **Sam Knows**: This test was administered by an FCC contractor, Sam Knows, and systematically tested the Internet speeds ISPs delivered to modems in homes of volunteers across the United States. Periodically, the FCC released a report analyzing the results of systematic tests across ISPs for a single month of a year.

201. The FCC and ISPs recruited volunteers to assist the FCC and provided them with a device, called a "whitebox," which they attached to their modem. This whitebox automatically ran speed tests when the modem was not otherwise in use, including during peak hours (which the FCC defined as weeknights from 7 to 11 p.m. local time). This methodology deliberately excluded any performance degradation that may have occurred within the home as the result of a subscriber's device or accessing the Internet over a wireless connection. In 2016, approximately 800 subscribers spread throughout different service groups across the country comprised Spectrum-TWC's FCC panel (the "FCC Panel").

202. Spectrum-TWC independently contracted with Sam Knows to install a parallel, internal panel of whiteboxes in Spectrum-TWC network centers and the homes of Spectrum-TWC employees across the country (the "Spectrum-TWC Panel") to conduct network diagnostics and anticipate any concerns raised by results from the FCC Panel. In 2016, Spectrum-TWC had about 1,200 such whiteboxes distributed across different service groups in its network nationwide.

203. One key performance indicator the Sam Knows whiteboxes helped track was the FCC's "80/80" consistent speed result. This refers to the "speed that at least 80% of the subscribers experience at least 80% of the time over peak periods."

204. **Internet Health Test**: This test measured how quickly a subscriber can download data from test computer servers hosted on different backbone providers.

205. Using the period from August 2015 to January 2016 as a baseline to compare different speed test results, data compiled from each of the three speed test methods confirmed that Spectrum-TWC repeatedly and consistently failed to provide subscribers with the Internet speeds that they were promised.

206. *First*, the Speedtest.net results from tests taken by tens of thousands New York subscribers who paid for the 100, 200 and 300 Mbps plans confirmed that they did not get the promised speeds. The results (excluding results from tests on handheld devices) for August 2015 to January 2016 are summarized in Table 3 below.

Table 3: Speedtest.net Results (Aug. 2015 – Jan. 2016)

Speed Plan	Subscribers Who Took Tests	Median Speed
100 Mbps	28,089	55 Mbps
200 Mbps	36,337	62 Mbps
300 Mbps	15,706	85 Mbps

207. The Speedtest.net results confirmed that Spectrum-TWC did not deliver the promised speeds to subscribers on each of the high-speed plans. Subscribers on the 100 Mbps plan achieved a median speed of 55 Mbps (55% of the promised speed); those on the 200 Mbps plan achieved a median speed of 62 Mbps (31% of the promised speed); and those on the 300 Mbps plan achieved a median speed of 85 Mbps (28% of the promised speed).[11]

[11] Table 3 was constructed using data from Speedtest.net. The speed test results were matched to account data provided by Spectrum-TWC. Then the results were averaged by subscriber, month and speed plan

208. *Second*, as represented in Chart 1 in the Appendix, the Sam Knows test for FCC Panelists confirmed that subscribers on the 100, 200 and 300 Mbps plans received speeds that were consistently well below the speeds that they paid for.[12] FCC panelists on the 100 Mbps plan generally received 73% to 87% of the advertised speed, panelists on the 200 Mbps plan generally received 49% to 58% of the promised speed, and panelists on the 300 Mbps plan generally received 33% to 52% of the promised speed.

209. The Spectrum-TWC Panel results further confirmed the FCC Panel's findings as demonstrated in Chart 2 in the Appendix.[13] Spectrum-TWC Panel results confirmed that over this six month period, subscribers on the 100 Mbps plan received less than 80% of the advertised speed; subscribers on the 200 Mbps plan received less than 60% of the advertised speed, and subscribers on the 300 Mbps plan generally received 38% to 74% of the promised speeds.

210. *Third*, the results of tests conducted using the Internet Health Test also confirmed that Spectrum-TWC failed to deliver the promised speeds to its New York subscribers, especially for the fastest speed plans as shown in Table 4.

("monthly readings"). These monthly readings were then averaged and the median results across all subscribers on a plan were calculated and reported in the table.

[12] Chart 1 was constructed using Sam Knows data and shows the peak hours "80/80" speed results for each speed plan.

[13] Chart 2 was constructed using Sam Knows data and shows the peak hours "80/80" speed results for each speed plan.

Table 4: Internet Health Test Results (Aug. 2015 – Jan. 2016)

Speed Plan	Subscribers Who Took Tests	Median Speed
100 Mbps	910	24 Mbps
200 Mbps	1,305	29 Mbps
300 Mbps	573	32 Mbps

211. The average subscriber on the 100 Mbps plan received 24% of the promised speed, the average subscriber on the 200 Mbps plan received 15% of the promised speed and the average subscriber on the 300 Mbps plan received 11% of the promised speed.[14]

212. The results across the different test sources taken over the same period of time were remarkably consistent. They confirmed that Spectrum-TWC consistently failed to deliver the speeds it promised to its subscribers.

213. Spectrum-TWC's poor performance in earlier periods is reflected in the data from FCC Panel and Spectrum-TWC Panel results for 2013 to 2014. Chart 3 and Chart 4 in the Appendix depict the consistent speeds for the 20, 30 and 50 Mbps plans using the FCC Panel and Spectrum-TWC Panel data from March 1, 2013 to March 31, 2014.[15] Both charts highlight that during this period Spectrum-TWC routinely delivered speeds that were at least 10% to 30% below what it had promised.

3. Spectrum-TWC Manipulated The FCC's Speed Tests

214. Spectrum-TWC skewed the average speed results in the FCC reports by giving panelists the ability, at times, to report higher-than-advertised speeds

[14] Table 4 is constructed using a similar methodology to Table 3 above to represent the results of tests from the Internet Health Test.
[15] Chart 3 is constructed using Sam Knows data and shows the peak hours "80/80" speed results for each speed plan.

("overprovisioning") to conceal the fact that most subscribers, particularly those on congested service groups, received far less than their promised speed.

215. Using the highway analogy, Spectrum-TWC's overprovisioning strategy amounts to allowing cars to go faster than the posted speed limit at certain times to compensate for the fact that often the highway slowed to a crawl. Boosting the average results with outlier results masked the enormous frustration for most subscribers stuck in traffic.

216. Spectrum-TWC's former head of corporate strategy candidly acknowledged the strategic goal in a July 7, 2014 internal email to senior colleagues: "We recommend increasing over-provisioning our modem speeds to around 20% to drive our Sam Knows scores > 100% and then to market that we deliver more than promised speeds."

217. The overprovisioning strategy manipulated the Sam Knows test by padding the test result average with scores from times when a service group was not heavily utilized—either because at the moment the test ran the service group was not congested, or because the service group was not heavily utilized in general—to compensate for the lower scores from service groups that were congested.

218. A 2013 Spectrum-TWC engineering presentation, which predated the decision to overprovision speeds by 20%, bluntly characterized the overprovisioning maneuver as putting "lipstick on a pig."

219. As the presentation explained, overprovisioning masked the widespread deployment of deficient older-generation, single-channel modems, the prevalence of

heavily congested service groups and the poor physical health of neighborhood cable lines.

220. Overprovisioning boosted Spectrum-TWC's average speed results in the FCC's speed test measurements and concealed the underlying problems. Spectrum-TWC's manipulation of the FCC test helped the company mask the fact that Spectrum-TWC consistently failed to deliver advertised speeds to most subscribers under typical service group utilization scenarios.

D. Spectrum-TWC Misled Subscribers By Promising Wireless Speeds That It Knew It Could Not Deliver

221. Spectrum-TWC knew that its advertising reinforced subscribers' expectations that they would experience the same Internet speed regardless of whether they connected through a wired connection or a wireless router.

222. For example, in a September 30, 2014 email, a senior customer service representative explained to other Spectrum-TWC executives, "[w]e are getting a ton of service calls in regards to slow wireless speeds, these customers have 300 down and only getting 50 down on wireless." The representative continued: "[c]ustomer expectation vs. actual results is what we are trying to get some clarity on. Customers are paying for 300 down and they are expecting wireless to be close."

223. Similarly, an internal Spectrum-TWC email dated July 8, 2015 noted:

> The concern is around MAXX customers (that have recently received their new MAXX HSD speeds) **having the expectation** that their WiFi enabled devices in their home (primarily mobile devices – tablets, smart phones, smart TV's, etc.) will be able to **achieve the same wire-line MAXX speed on all WiFi devices**. This is leading to increased unnecessary truck [rolls] for customer education.[16]

(Emphases added.)

[16] The reference to "truck rolls" described the need to dispatch a technician to the home to fix the problem.

224. The promised wireless connectivity, however, defied the technical bounds of wireless technology. In the real world, wireless speeds were almost always slower, often much slower, than the high-speed plans Spectrum-TWC advertised.

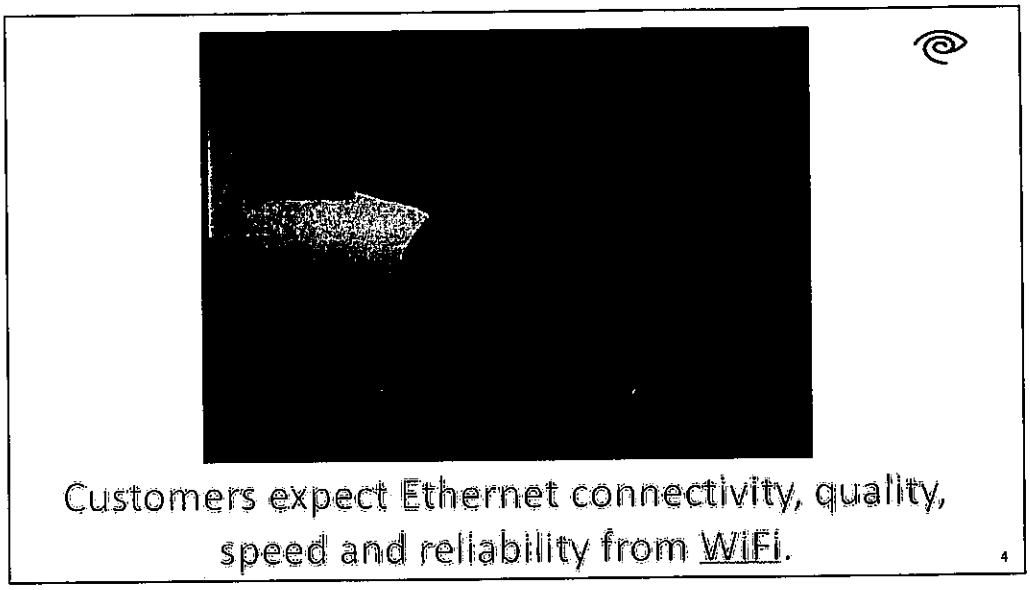
225. The quality of the wireless connection was affected by distance, interference and the number of devices simultaneously accessing the Internet.

226. In fact, Spectrum-TWC's engineers warned senior executives in a March 2014 presentation to "refrain from making any (implied) guarantees about wireless performance until we have a better way to measure it in the home."

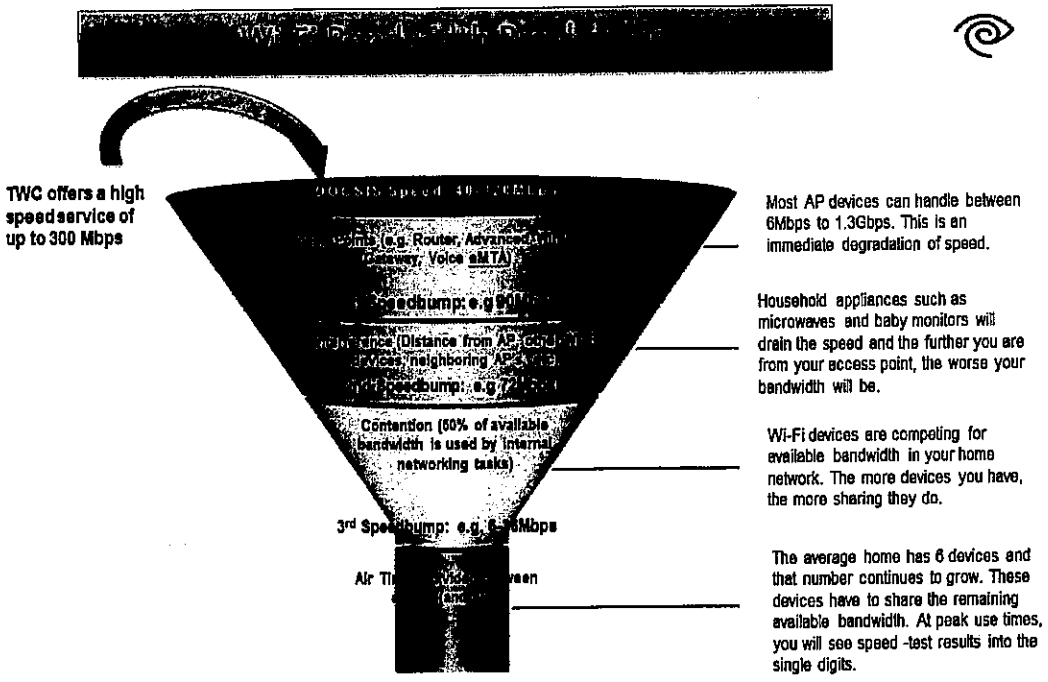
227. Spectrum-TWC nonetheless persisted with deceptive advertising, even though its executives acknowledged in internal communications that the company's advertising would result in complaints from subscribers confused about why their wireless speeds were much slower than promised.

228. A Spectrum-TWC engineering presentation from February 2015, titled "WiFi and Home Networking" included the slide below, which implied that Spectrum-TWC must address the proverbial elephant in the room that "Customers expect Ethernet connectivity, quality, speed and reliability from WiFi":[17]

[17] The "Ethernet" reference in the slide is to a wired connection.



229. In another graphic from the same internal presentation, Spectrum-TWC's engineers illustrated how subscribers on a 300 Mbps plan may only see "speed test results into the single digits" because of the various limitations on wireless speeds:



230. Notably, the presentation pointed out that there was an "immediate degradation of speed" from the moment a wireless router was used in the subscriber's home.

231. An internal Spectrum-TWC Customer Care Department fact sheet, dated January 29, 2016, discussed the myriad factors that eroded wireless connectivity, including the limited "Indoor Range" of Spectrum-TWC wireless routers, the "slower speeds" experienced when "multiple users" access content at once, and the adverse effects of interference. These same factors caused dead spots within a home where connecting wirelessly might be impossible at any speed.

232. Spectrum-TWC ignored these basic facts and instead continued to promise subscribers through advertising and other means that they could use a wireless connection to access "blazing fast speeds" "throughout the home."

233. Spectrum-TWC also instructed its customer service representatives to reiterate the same false advertising claims with little or no qualification when interacting with subscribers.

234. A Frequently Asked Questions (FAQ) guide for Spectrum-TWC customer service representatives, which was current as of February 2016, provided the following demonstrably false guidance:

- *Question:* "Will Wireless Home Networking affect the speed of my connection on any of my computers?"

  Answer: "Under normal usage, with a maximum number of computers on the network, the speed of your Internet connection should not be affected."

- *Question:* "What is the range of the wireless cable modem?"

Answer: "In 'real-world' testing, users were able to connect from as far as 150 feet away – more than enough range to connect from just about anywhere in your home."

- *Question:* "How will multiple users affect the speed of my Internet cable modem?"

  Answer: "Under normal usage, the speed of your Internet connection should not be affected."

235. Each of the above answers was false or misleading.

236. First, as noted above, wireless speeds were consistently slower than wired speeds.

237. Second, numerous factors reduced the speeds achieved wirelessly, including electronic interference, building materials, and other ordinary household conditions.

238. Third, when multiple devices attempted to simultaneously access a single wireless connection, they shared the available bandwidth. For example, if four devices simultaneously ran a speed test on a 20 Mbps connection, the maximum speed any one device could achieve would be 5 Mbps.

239. Consumer speed test data from thousands of tests run on the popular Speedtest.net website confirmed that Spectrum-TWC subscribers experienced a sharp drop in speeds when connecting wirelessly.

240. Table 5 below summarizes the Speedtest.net results of tests measured on handheld devices that relied exclusively on wireless connectivity for the period August 2015 to January 2016:[18]

[18] Table 5 is constructed using a similar methodology to Table 3 above to represent the results of the Speedtest.net tests. It reports results taken from tests run on devices that use a mobile operating system, and therefore necessarily connected to the Internet wirelessly.

Table 7: Speedtest.net Results For Handheld Devices (Aug. 2015 – Jan. 2016)

Speed Plan	Subscribers Who Took Tests	Median Speed
50 Mbps	43,390	29 Mbps
100 Mbps	11,328	39 Mbps
200 Mbps	15,572	41 Mbps
300 Mbps	6,669	46 Mbps

241. The results show that the average subscriber on the 50 Mbps plan achieved about 29 Mbps, the average subscriber on the 100 Mbps plan achieved about 39 Mbps; the average subscriber on the 200 Mbps plan achieved about 41 Mbps; the average subscriber on the 300 Mbps plan achieved about 46 Mbps, or just over one-fifth of the promised speed.

II. Spectrum-TWC Misled Subscribers By Promising Reliable Access To Online Content That It Chose Not to Deliver

242. Subscribers use the Internet to access online content, which can include Internet websites and applications like Facebook, YouTube and FreshDirect; gaming platforms like League of Legends; television shows and sports events through streaming video connections on Hulu or ESPN.com; and movies on sites like Netflix, to name a few examples.

243. During the Relevant Period, Spectrum-TWC served as a virtual gatekeeper to a subscriber's access to such products and services available on the Internet. Not only did Spectrum-TWC have control over the equipment it leased to a subscriber and the bandwidth it made available to her, Spectrum-TWC also determined whether a subscriber had reliable access to online content because that content had to travel through Spectrum-TWC's interconnection points with backbone and content providers.

244. Despite making reliable access to online content a cornerstone of its marketing during much of the Relevant Period, Spectrum-TWC did not maintain sufficient ports[19] in its connections with backbone and content providers to process the ever-increasing volume of online content sought by its subscribers.

245. Spectrum-TWC's decision not to install the required port capacity led to its interconnection points routinely becoming over-congested with traffic.

246. This congestion was the result of Spectrum-TWC's deliberate strategy to use its own subscribers as leverage to extract fees from backbone and content providers.

247. As a result of this congestion, Spectrum-TWC subscribers faced the slowdowns, buffering, interruptions and other frustrations that Spectrum-TWC's ads specifically promised would not exist when accessing online content, including Netflix, online games and other content featured in Spectrum-TWC's advertising materials.

A. Spectrum-TWC Represented That Subscribers Would Get Reliable Access To Online Content

248. Virtually every Spectrum-TWC advertisement for Internet service during the Relevant Period explicitly promised reliable Internet service, or made one or more of several concrete claims about the type of Internet service it would provide to its subscribers.

249. For example, Spectrum-TWC ads repeatedly told subscribers they could get Internet content with "no buffering," "no slowdowns," "no lag," and that they could access online content "without interruptions," "without downtime" and "without the wait."

[19] Ports are physical hardware sockets where one network can plug into another network through a fiber-optic wire. Ports are located at interconnection points between the ISP and backbone and content providers. Higher port capacity at an interconnection point allows more data to be transferred between networks at a given time.

250. Often, Spectrum-TWC linked the company's performance claims to popular Internet activities, like streaming movies on Netflix or playing online games.

251. In early 2012, to highlight its role in getting its subscribers popular online content, Spectrum-TWC launched an $80 million advertising campaign called "Enjoy better."

252. As Spectrum-TWC's Chief Marketing Officer explained at the time, the new campaign aimed to link Spectrum-TWC to "the things that consumers love to do and get through us" so that consumers would understand that "we help you get to things you love."

253. Spectrum-TWC's campaign ran extensively in New York and highlighted the popular online products and services that subscribers could access through Spectrum-TWC's Internet service.

254. Often, Spectrum-TWC's commercials inserted the names of companies like Facebook and Netflix between "Enjoy" and "better," so they read, for example, "Enjoy Netflix better."

255. During this time, Spectrum-TWC also promised its customers that they could "Stream Netflix and Hulu movies and shows effortlessly" and "Watch YouTube video[s] without waiting."

256. A Spectrum-TWC commercial in 2012 showed wireless devices reliably streaming movies and games, displayed logos for popular web services like Netflix, and featured a voiceover pledging that Spectrum-TWC would deliver: "Movies *without downtime*. Games *without lag time*. Do whatever you love with the best Internet around":

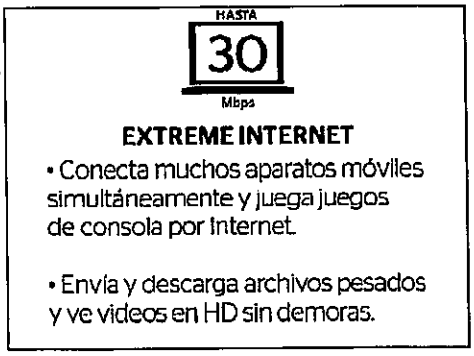
257. A mailer from 2013 promised:

> With Internet from TWC, you're connected to everything you love to do online, faster. Streaming your favorites for movie night? **With no buffering,** you can spend more time watching and less time waiting. Getting your game on? You've got a true edge with all the speed you need and **none of the lag.** Your wait is over. Get ready to log on to the most instant Internet ever.

(Emphases added.)

258. The 2013 mailer also pledged, without qualification, that subscribers could stream high-definition movies with "absolutely no buffering."

259. Spectrum-TWC delivered a similar message to Spanish speakers. For example, a Spectrum-TWC mailer from 2013 (excerpted below) promoted the 30 Mbps "Extreme Internet" speed plan by assuring subscribers, among other things, that they could stream high-definition video content "sin demoras" (which translates as "without delays"):

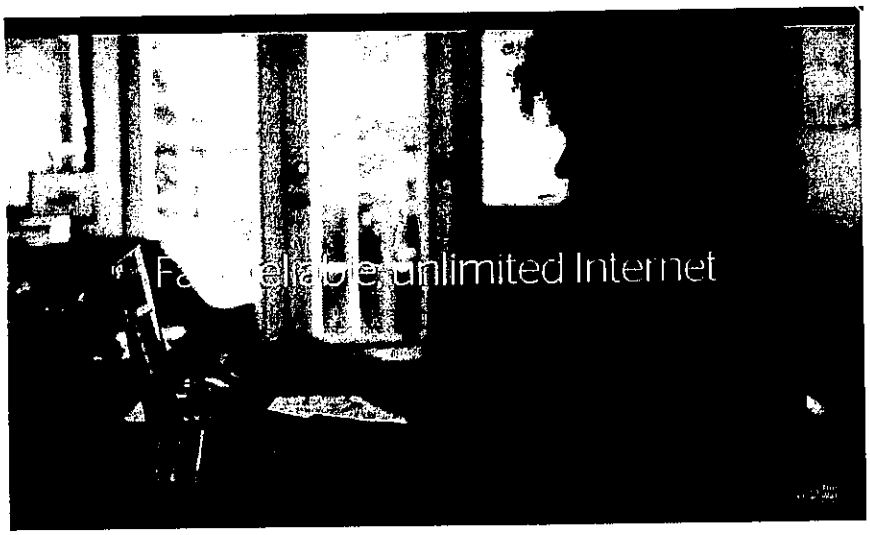


260. Similarly, a Spectrum-TWC mailing in 2015 specifically promised that subscribers could stream Netflix and Hulu "without interruptions:"

261. The second page of the mailing made the same claim in Spanish: "El redimiento que necesitas para transmitir y ver películas y programas en Netflix™ y Hulu™, sin interrupciones."

262. In certain advertisements, Spectrum-TWC depicted the frustrations users commonly faced with a spotty and unreliable connection in an effort to induce consumers to sign up with Spectrum-TWC.

263. For example, a 2016 web commercial, shown in the screenshot below, promised "Fast, reliable, unlimited Internet" on screen while a voiceover assured consumers that they would receive Internet service that "includes much more than just a connection. It starts with our *blazing fast, super-reliable* connection." The voiceover continued, "stream your favorite movies and TV shows with *no buffering*."



264. Based on these ads, a Spectrum-TWC subscriber would have expected to receive reliable access to online content in general and, in particular, to Netflix, online games, and the other popular content providers. Conversely, the same subscriber would have expected to avoid several specific hallmarks of an unreliable and underperforming Internet connection, including buffering, interruptions and lag time.

B. Spectrum-TWC's Failure To Add Port Capacity Deprived Its Subscribers Of Reliable Access To Online Content

265. Throughout the Relevant Period, subscribers' demand for online content continued to grow exponentially, causing traffic flowing through Spectrum-TWC's interconnection points to grow by 40% or more each year.

266. To keep up with this exponential growth in traffic, Spectrum-TWC needed to regularly add ports to its interconnection points to meet the growing content demands of its subscribers.

267. Spectrum-TWC knew that by failing to add more ports to its interconnection points with its backbone and content providers, its network would suffer

from interruptions and slowdowns during peak hours, and deprive its subscribers of reliable access to online content.

268. Despite making access to online content a central theme of its "Enjoy better" marketing campaign, Spectrum-TWC, for much of the Relevant Period, failed to maintain sufficient ports at its interconnection points with backbone and content providers.

269. Spectrum-TWC's subscribers were effectively pawns in the company's deliberate strategy to extract fees from backbone and content providers in exchange for granting access to Spectrum-TWC's subscribers.

270. The high congestion levels at interconnection points had a foreseeable and measurable negative impact on the reliability of a Spectrum-TWC subscriber's access to online content.

271. The effects of high congestion levels at interconnection points are measured by two metrics of Internet reliability: packet loss and latency.

272. Packet loss is when packets of data being communicated between networks fail to reach their destination. High levels of packet loss result in slower download and upload speeds, poor quality Internet phone services and pauses or interruptions when streaming media or playing games online.

273. Latency is the time for a data packet to go from a device to the content provider and back. High latency, also called "lags," adversely affects the reliability of Internet service. A high-latency network connection could disrupt the performance of online gaming, videoconferencing, internet phone service, and streaming media services.

274. Spectrum-TWC used an industry rule of thumb to assess whether there was traffic congestion at an interconnection point. This standard generally dictated that ISPs should add more ports if over 70% of the interconnection ports' capacity were utilized during peak hours.

275. At 70% port capacity utilization, ports may have episodes of congestion that result in slowdowns and interruptions for subscribers. The episodes of congestion increase in frequency and severity as port utilization approaches 90%, and can cause certain applications like streaming video and online gaming to stop working entirely. To continue with the highway analogy, if there are not enough access lanes to a bridge, that can cause a traffic jam.

276. At various times during the Relevant Period, Spectrum-TWC's ports with certain of its backbone and content providers far exceeded the 70% threshold.

277. Table 8 provides a snapshot of the monthly peak hours port utilization for Spectrum-TWC's top backbone and content providers between December 2013 and February 2014:

Table 8: Monthly Peak Hours Port Utilization (2013-2014)

Backbone/Content Provider	Dec.	Jan.	Feb.
XO	91%	92%	92%
Tata	88%	83%	87%
Akamai	73%	73%	81%
Level3	82%	87%	91%
NLayer	87%	89%	80%
Cogent	96%	96%	90%

278. These high levels of port utilization with Spectrum-TWC's backbone and content providers resulted in Spectrum-TWC's subscribers failing to receive reliable access to online services and applications.

C. Spectrum-TWC Promised Reliable Access To Online Content That It Intentionally Failed To Deliver In A Bid To Extract Fees From Backbone and Content Providers

279. At the same time it advertised reliable access to online content, Spectrum-TWC rolled out a new interconnection strategy that it knew would cause subscribers to experience the very performance issues that Spectrum-TWC's ads promised they would avoid.

280. In 2011, with consumer demand for content poised to grow dramatically, Spectrum-TWC saw an opportunity to generate additional revenue by renegotiating its arrangements with its backbone and content providers.

281. Revisiting earlier arrangements, in which Spectrum-TWC often exchanged data with backbone and content providers for free, Spectrum-TWC now sought to make those providers pay Spectrum-TWC for access to its subscribers.

282. A March 2011 strategy document for senior management titled "Internet Economics" detailed Spectrum-TWC's approach.

283. In that document, Spectrum-TWC outlined how ending such free arrangements "should eventually lead to longer-term revenue growth and cost containment."

284. A senior Spectrum-TWC executive explained in an email a short time later that, as consumer demand for content exploded, the company wanted to take the opportunity to extract additional revenues from content providers:

> Our interconnect strategy these days, is more about how we manage our backbone and especially edge resources with the enormous growth in content. The transit costs are rounding errors compared to impacts to the edge of making the wrong decisions. **We really want content networks paying us for access** and right now we force those through transit that do not want to pay.

(Emphasis added.)

285. Spectrum-TWC's ability to control access to Spectrum-TWC subscribers gave it leverage over backbone and content providers in the negotiations.

286. Absent a payment, Spectrum-TWC could effectively "throttle" or limit the ability of backbone and content providers to deliver online content by either decommissioning ports or failing to maintain sufficient ports at interconnection points to handle the ever-increasing traffic load.

287. As a Spectrum-TWC executive observed in an internal email from 2013, its contentious relationships with its backbone and content providers "may be **artificially throttling** [subscriber] demand." (Emphasis added.)

288. The specific tactic Spectrum-TWC used most frequently to limit port capacity was to refuse to add additional ports, thereby leaving its backbone and content providers to drop data packets or find a more circuitous route to transmit the traffic, which increases latency.

289. Internal documents from Spectrum-TWC confirmed that subscribers experienced the harm expected from Spectrum-TWC's sharp interconnection practices.

290. In the second quarter of 2015, for example, as part of an effort to track the experience of subscribers, Spectrum-TWC surveyed its customers about certain reliability issues. In the prior 30 days: (i) 42% of subscribers reported an "interruption in Internet

service"; (ii) 37% of subscribers reported a "buffering problem"; and (iii) 25% experienced "Issue with streaming video content."

291. These poor customer survey results were the predictable outcome of Spectrum-TWC's strategy to extract revenues from backbone and content providers, at the expense of Spectrum-TWC's subscribers.

1. Spectrum-TWC Misled Subscribers By Falsely Promising Reliable Access To Online Content Broadly

292. Content providers rely on several major backbone providers to carry their traffic to ISPs.

293. For example, one major backbone provider was Cogent. For much of the Relevant Period, Cogent and Spectrum-TWC had a dispute because Cogent refused to pay for access to Spectrum-TWC's subscribers.

294. Spectrum-TWC responded to Cogent's refusal to pay for access to its subscribers by delaying or avoiding capacity upgrades, which had the effect of throttling incoming traffic from Cogent.

295. Cogent explained the consequences of Spectrum-TWC's actions to delay or avoid capacity upgrades in a letter dated July 29, 2015:

> The problem that exists today – packets dropping on the ground to the detriment of your customers and ours – is the direct and foreseeable result of TWC's decision to cease upgrading peering capacity with Cogent . . . . This has been going on for **more than two years**. Our proposal is that the parties use all the tools to alleviate congestion . . . with each side bearing its own very small expense ($10,000 for a 10 Gbps port) of adding capacity. TWC has rejected that.

(Emphasis added.)

296. As mentioned in the letter, Spectrum-TWC could have unclogged the congested interconnection ports with Cogent at any time for a relatively low cost of

$10,000 per 10 Gbps[20] of additional capacity. But Spectrum-TWC did not do so for many years.

297. On one occasion during its dispute with Cogent, a senior Spectrum-TWC executive even suggested temporarily alleviating congestion with Cogent because high levels of congestion could have harmed Spectrum-TWC's FCC test scores.

298. In an email, dated June 17, 2013, Spectrum-TWC's head of strategy for Spectrum-TWC, suggested:

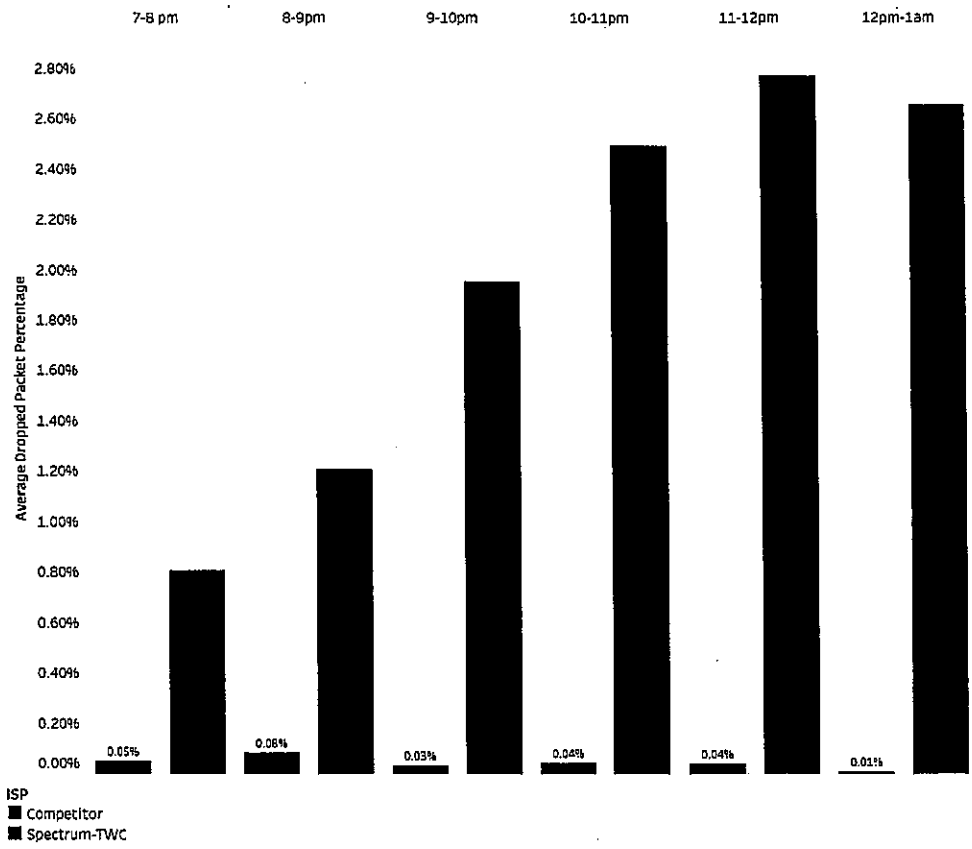
> Our Sam Knows scores are like watching a slow-motion train wreck. We need to get in front of this. One thing I think we may need to be prepared to do **is just give more ports to Cogent during sweeps month** [when FCC results are measured for purposes of the MBA report]. **We don't have to make any promises, we just have to make it work temporarily.**

(Emphasis added.)

299. As depicted in Chart 5 below, the average peak hour packet loss for traffic carried by Cogent to Spectrum-TWC subscribers from 2014 through 2015 was far higher than the packet loss experienced by subscribers to another major New York-area cable ISP that maintained sufficient port capacity with Cogent:[21]

[20] "Gbps" is gigabits-per-second.
[21] Chart 5 was constructed using Cogent packet loss data.

Chart 5: Cogent Ports Average Peak Hour Packet Loss (2014-2015)



300. Spectrum-TWC's higher level of packet loss led to interruptions and slowdowns for its subscribers seeking content delivered through Cogent's network.

301. Spectrum-TWC knew that during the pendency of its dispute with Cogent, Spectrum-TWC's subscribers were not getting reliable access to online content, and were experiencing packet loss and high latencies. Despite its knowledge that it was not delivering the Internet services it had promised to its subscribers, Spectrum-TWC failed to take any steps to invest in additional port capacity for its network for much of the Relevant Period.

302. It was only after the FCC's Open Internet Order required Spectrum-TWC to provide Cogent with equal access to its subscribers, did Spectrum-TWC resolve its

dispute with Cogent and agreed to add additional ports. Within a few months after it signed the agreement in October 2015, Spectrum-TWC added additional ports. This quickly reduced the level of packet loss and improved the experience of Spectrum-TWC's subscribers who consumed content delivered through Cogent.

2. Spectrum-TWC Misled Subscribers By Falsely Promising Reliable Access To Netflix

303. Between 2012 and 2014, Spectrum-TWC ran advertisements assuring subscribers they could "Enjoy Netflix better." At the same time Spectrum-TWC ran these ads it was engaged in a long running dispute with Netflix that had a measurable negative impact on the quality of subscribers' Netflix video streams.

304. During the Relevant Period, Netflix was one of the most popular sources of streaming video and was also a competitor to Spectrum-TWC's own cable television offerings.

305. For much of the Relevant Period, Netflix accounted for over 40% of Internet traffic on Spectrum-TWC's network.

306. Netflix could only deliver its content to subscribers through the last mile access network controlled by Spectrum-TWC. Netflix even offered to install for free its own equipment on Spectrum-TWC's network to ensure smooth content delivery to subscribers. Spectrum-TWC, however, rejected that offer and sought payment from Netflix in exchange for unimpeded access to the last mile connection to Spectrum-TWC subscribers.

307. Absent a payment, Spectrum-TWC failed to maintain enough port capacity at interconnection points to handle the ever-increasing traffic load, and thereby, effectively limited the Netflix traffic flowing to Spectrum-TWC subscribers.

308. While negotiations with Netflix were ongoing between 2012 and June 2014 (the "Dispute Period"), Spectrum-TWC did not inform subscribers about the negative effect that the protracted dispute with Netflix had on its subscribers' ability to enjoy content from Netflix.

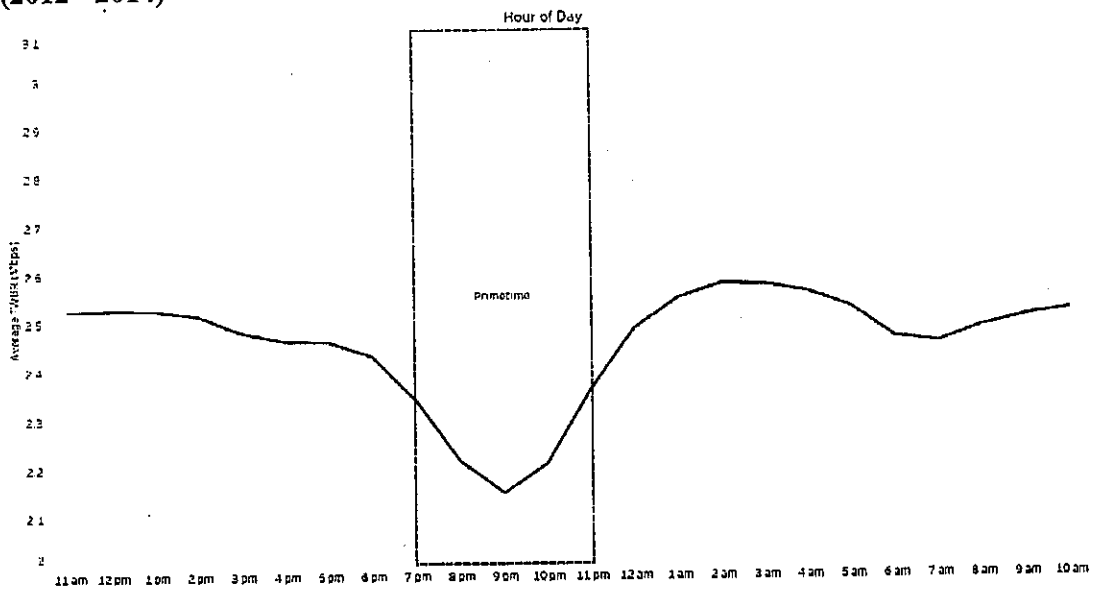
309. The negative effects of Spectrum-TWC's bargaining tactics, which included deliberately failing to provide sufficient interconnection capacity to meet subscriber demand for Netflix, are reflected in Netflix's time-weighted bit rate metric ("TWBR"). TWBR measures the average streaming video speed received by Spectrum-TWC subscribers. Slower streaming speeds are associated with reduced picture resolution (e.g., from high definition to standard definition or lower), additional buffering and other video performance issues, including pixelated screens, interruptions and outages.

310. Netflix's top high-definition streams traveled at a bit rate of about 4.8 Mbps. Standard definition streams traveled at speeds below 3 Mbps.

311. Chart 6 below shows that the quality of the Netflix video streams received by Spectrum-TWC subscribers dipped significantly during peak hours during the Dispute Period.[22] This resulted in subscribers getting poorer quality streams during the very hours when they were most likely to access Netflix.

[22] Chart 6 is constructed using Netflix data.

Chart 6: Average Netflix Streaming Speed For Spectrum-TWC Subscribers (2012 - 2014)



312. In June 2014, Netflix finally agreed to Spectrum-TWC's demands and paid for access to Spectrum-TWC's network. In a few months, Spectrum-TWC upgraded its interconnection ports and the quality of Netflix streams for subscribers improved dramatically.

313. Spectrum-TWC knew that its refusal to add capacity to ports carrying Netflix traffic reduced the quality of Netflix content provided to its subscribers.

314. In an email to a Netflix employee, dated July 23, 2014, an employee of Spectrum-TWC expressed concern at the company's poor streaming quality results and asked: "Do you have a high level explanation for that (that you're at liberty to say)? I'm just wondering if there is something we need to address on our side (**besides firing up the peering with you** we have on deck)." (Emphasis added.)

315. Netflix's response confirmed that "firing up the peering," (in other words, adding ports) would solve the problem and explained that "[i]n the end, if you increase

hours of viewing at peak without having any more bandwidth available it results in lower speed per subscriber."

316. An internal Spectrum-TWC presentation, dated February 2015, summarized the impact on various performance metrics after Netflix agreed to pay Spectrum-TWC for access to the last mile:

NFLX Bit Rate Impact on Backbone Traffic (TWC + BHN backbone traffic)

	Apr 2014 Pre Netflix Deal	December 2014 Post Netflix Deal	December 2014 [illegible]
Backbone Traffic P95 (Gbps)	5,478	7,951	7,261
Netflix [illegible]	*34%*	*40%*	*34%*
Netflix Peak Traffic (Gbps)	1,846	3,180	2,490
TWC Avg. Stream Rate (Mbps)	**2.49**	**3.18**	**2.49**
Netflix Peak Streams	741,400	1,000,126	1,000,126

317. This table showed that once Netflix agreed in June 2014 to pay Spectrum-TWC, Spectrum-TWC subscribers' average TWBR (referenced in the table as "TWC Avg. Stream Rate") quickly jumped by 28%—from 2.49 Mbps in April 2014 to 3.18 Mbps in December 2014. The higher speeds improved picture quality and reduced buffering and other interruptions that Spectrum-TWC's subscribers experienced.

318. Had Spectrum-TWC not reached a deal with Netflix, as represented in the column marked "December 2014 No Deal Assumption," Spectrum-TWC calculated that subscribers would have continued to suffer by receiving slower, lower quality streams despite Spectrum-TWC's promises to the contrary.

3. Spectrum-TWC Misled Subscribers By Falsely Promising Reliable Access To Online Games

319. In its advertisements, Spectrum-TWC made specific appeals to online gamers, featuring popular gaming systems in its advertisements and promising gaming

without "lag time." However, for much of the Relevant Period, Spectrum-TWC's interconnection practices led to many subscribers experiencing lag and other interruptions when playing online games.

320. One of the most popular online games during the Relevant Period was League of Legends, which was developed and published by Riot Games. League of Legends is a multiplayer, online battle arena video game. It was launched in October 2009 and rapidly grew in popularity.

321. As of January 2014, globally, over 67 million people played League of Legends per month, 27 million per day, and over 7.5 million concurrently during peak hours. In September 2016, Riot Games estimated that over 100 million people worldwide played each month.

322. Riot Games carefully tracked the latency of its servers and packet loss to measure its customers' service quality.

323. In general, Riot Games specified a "stable latency" of less than 60 milliseconds and a packet loss of less than two percent to ensure a "good network experience."

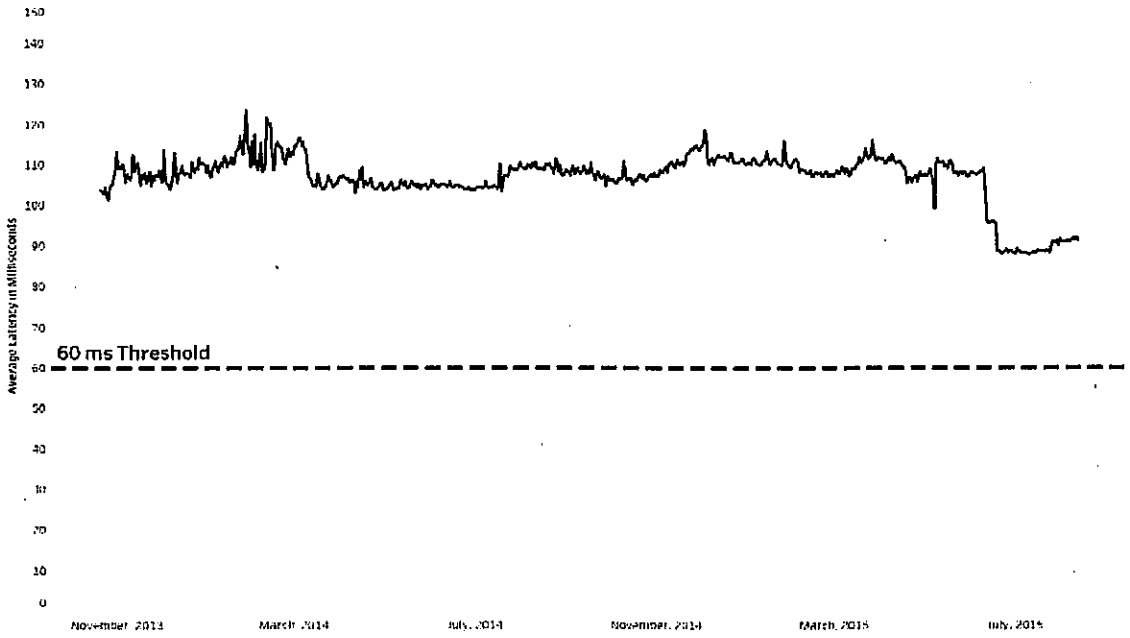
324. Latency above 100 milliseconds affected performance in key parts of the game, creating lag time that put Spectrum-TWC subscribers at a disadvantage to their gaming competitors on other ISP networks. Similarly, packet loss of more than two percent resulted in interruptions, buffering, and other performance issues.

325. Data from Riot Games confirmed that from at least September 2013, when Riot Games started to maintain this data, through August 2015, when Riot Games agreed

to pay Spectrum-TWC for access, Spectrum-TWC subscribers did not enjoy a "good network experience."

326. As reflected in Chart 7 below, Spectrum-TWC subscribers in New York experienced average latencies above 100 milliseconds when playing League of Legends until the summer of 2015:[23]

Chart 7: Average Latency For Spectrum-TWC Subscribers On League of Legends (Nov. 2013-Aug. 2015)

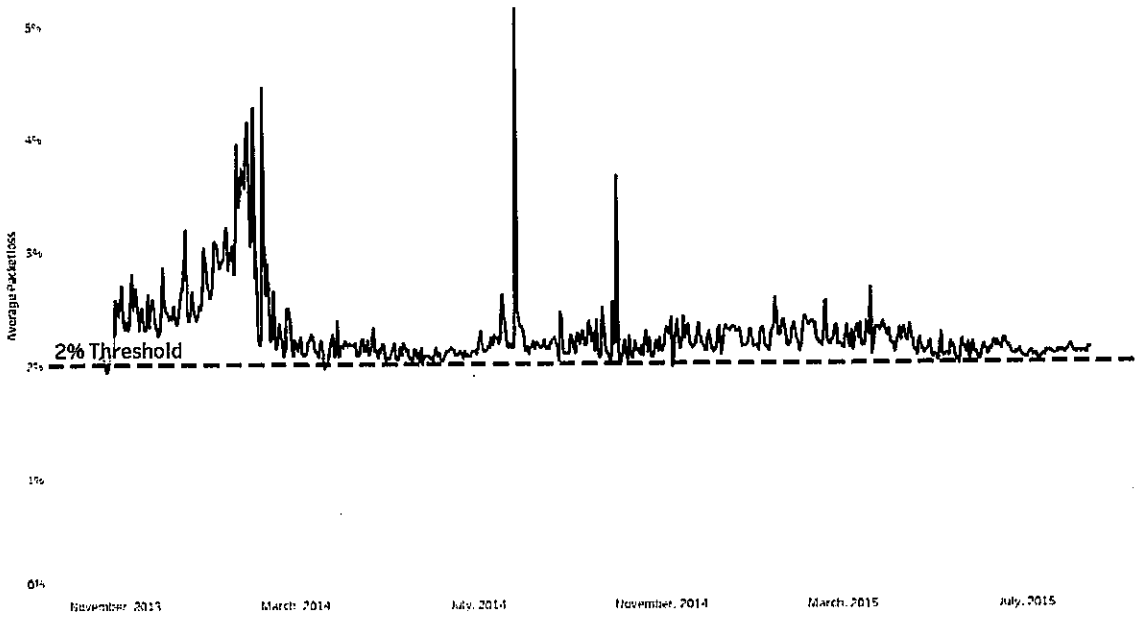


327. On average, these Spectrum-TWC subscribers experienced greater latency than subscribers of other New York-based ISPs.

328. Similarly, as shown in Chart 8 below, for most of the Relevant Period the packet loss experienced by Spectrum-TWC subscribers ran at or significantly above Riot Games' two percent threshold:

[23] Chart 7 and 8 are constructed using Riot Games data.

Chart 8: Average Packet Loss For Spectrum-TWC Subscribers On League Of Legends (Nov. 2013-Aug. 2015)



329. It was not until Riot Games agreed to pay Spectrum-TWC for access to its subscribers, that Spectrum-TWC agreed to connect its ports to Riot Games. Prior to this, Spectrum-TWC deprived its subscribers of reliable access to online content as promised.

330. This data confirmed that Spectrum-TWC's network failed to deliver the reliable, interruption and lag-free gaming experience it had promised to subscribers.

CONCLUSION

331. Throughout the Relevant Period, Spectrum-TWC relentlessly touted consistently fast Internet speeds and reliable access to online content to solicit and retain subscribers. However, in reality, Spectrum-TWC knowingly failed to deliver on such promises.

332. Spectrum-TWC's deceptive advertising and business practices induced New York subscribers to overpay month-in and month-out for Internet services that Spectrum-TWC deliberately refused to provide.

FIRST CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW § 63(12): REPEATED AND PERSISTENT FRAUDULENT CONDUCT

333. The OAG repeats and realleges paragraphs 1 through 332 as if fully set forth herein.

334. Executive Law § 63(12) authorizes the OAG to bring an action to enjoin repeated or persistent fraudulent conduct.

335. As set forth above, Defendants have engaged in repeated and persistent fraudulent acts, including but not limited to:

a. Misrepresenting the speed of the Internet service consistently delivered to subscribers, including by:

   i. Leasing subscribers older-generation, single-channel modems and deficient wireless routers that were incapable of delivering the promised speeds;

   ii. Failing to allocate sufficient resources for Spectrum-TWC's network to reliably deliver the speeds promised to subscribers, including by failing to reduce the size of service groups or to add additional channels to each service group; and

   iii. Promising subscribers wireless speeds that Spectrum-TWC could not deliver, including by omitting to disclose the real-world conditions that significantly limit wireless performance.

b. Misrepresenting the ability of subscribers to reliably access online content, including by:

i. Failing to maintain sufficient port capacity to ensure that subscribers would not experience buffering, slowdowns, interruptions, lags, down times or other indicators of unreliable Internet service; and

ii. Failing to maintain sufficient port capacity to ensure that subscribers could reliably access Netflix, online games and other specifically promised sources of content.

336. By these actions, Defendants have engaged in repeated and persistent fraudulent conduct in violation of Executive Law § 63(12).

SECOND CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW § 63(12): VIOLATIONS OF GENERAL BUSINESS LAW § 349: DECEPTIVE BUSINESS PRACTICES

337. The OAG repeats and re-alleges paragraphs 1 through 332 and incorporates them by reference herein.

338. Executive Law § 63(12) authorizes the Attorney General to bring an action to enjoin repeated illegal acts or persistent illegality in the carrying on, conducting, or transaction of business.

339. GBL § 349 prohibits deceptive acts and practices in the conduct of any business, trade, or commerce or in the furnishing of any service in the state of New York.

340. Defendants have engaged in repeated and persistent deceptive acts and practices, including but not limited to:

a. Misrepresenting the speed of the Internet service consistently delivered to subscribers, including by:

   i. Leasing subscribers older-generation, single-channel modems and deficient wireless routers that were incapable of delivering the promised speeds;

   ii. Failing to allocate sufficient resources for Spectrum-TWC's network to reliably deliver the speeds promised to subscribers, including by failing to reduce the size of service groups or to add additional channels to each service group; and

   iii. Promising subscribers wireless speeds that Spectrum-TWC could not deliver, including by omitting to disclose the real-world conditions that significantly limit wireless performance.

b. Misrepresenting the ability of subscribers to reliably access online content, including by:

   i. Failing to maintain sufficient port capacity to ensure that subscribers would not experience buffering, slowdowns, interruptions, lags, down times or other indicators of unreliable Internet service; and

   ii. Failing to maintain sufficient port capacity to ensure that subscribers could reliably access Netflix, online games and other specifically promised sources of content.

341. By these actions in violation of GBL § 349, Defendants have engaged in repeated and persistent illegality in violation of Executive Law § 63(12).

THIRD CAUSE OF ACTION PURSUANT TO EXECUTIVE LAW § 63(12): VIOLATIONS OF GENERAL BUSINESS LAW § 350: FALSE ADVERTISING

342. The OAG repeats and re-alleges paragraphs 1 through 332 and incorporates them by reference herein.

343. Executive Law § 63(12) authorizes the Attorney General to bring an action to enjoin repeated illegal acts or persistent illegality in the carrying on, conducting, or transaction of business.

344. GBL § 350 prohibits false advertising in the conduct of any business, trade, or commerce or in the furnishing of any service in the state of New York

345. Defendants have engaged in false advertising, including but not limited to:

a. Misrepresenting the speed of the Internet service consistently delivered to subscribers, including by:

i. Leasing subscribers older-generation, single-channel modems and deficient wireless routers that were incapable of delivering the promised speeds;

ii. Failing to allocate sufficient resources for Spectrum-TWC's network to reliably deliver the speeds promised to subscribers, including by failing to reduce the size of service groups or to add additional channels to each service group; and

iii. Promising subscribers wireless speeds that Spectrum-TWC could not deliver, including by omitting to disclose the real-world conditions that significantly limit wireless performance.

b. Misrepresenting the ability of subscribers to reliably access online content, including by:

i. Failing to maintain sufficient port capacity to ensure that subscribers would not experience buffering, slowdowns, interruptions, lags, down times or other indicators of unreliable Internet service; and

ii. Failing to maintain sufficient port capacity to ensure that subscribers could reliably access Netflix, online games and other specifically promised sources of content.

346. By these actions in violation of GBL § 350, Defendants have engaged in repeated and persistent illegality in violation of Executive Law § 63(12).

FOURTH CAUSE OF ACTION
VIOLATIONS OF GENERAL BUSINESS LAW § 349

347. The OAG repeats and realleges paragraphs 1 through 332 as if fully set forth herein.

348. GBL § 349 prohibits deceptive acts and practices in the conduct of any business, trade, or commerce or in the furnishing of any service in the state of New York.

349. As set forth above, Defendants have engaged in deceptive acts and practices in violation of GBL § 349, including, but not limited to:

a. Misrepresenting the speed of the Internet service consistently delivered to subscribers, including by:

i. Leasing subscribers older-generation, single-channel modems and deficient wireless routers that were incapable of delivering the promised speeds;

ii. Failing to allocate sufficient resources for Spectrum-TWC's network to reliably deliver the speeds promised to subscribers, including by failing to reduce the size of service groups or to add additional channels to each service group; and

iii. Promising subscribers wireless speeds that Spectrum-TWC could not deliver, including by omitting to disclose the real-world conditions that significantly limit wireless performance.

b. Misrepresenting the ability of subscribers to reliably access online content, including by:

i. Failing to maintain sufficient port capacity to ensure that subscribers would not experience buffering, slowdowns, interruptions, lags, down times or other indicators of unreliable Internet service; and

ii. Failing to maintain sufficient port capacity to ensure that subscribers could reliably access Netflix, online games and other specifically promised sources of content.

FIFTH CAUSE OF ACTION
VIOLATIONS OF GENERAL BUSINESS LAW § 350

350. The OAG repeats and realleges paragraphs 1 through 332 as if fully set forth herein.

351. GBL § 350 prohibits false advertising in the conduct of any business, trade, or commerce or in the furnishing of any service in the state of New York.

352. As set forth above, Defendants have engaged in false advertising in violation of GBL § 350, including, but not limited to:

a. Misrepresenting the speed of the Internet service consistently delivered to subscribers, including by:

   i. Leasing subscribers older-generation, single-channel modems and deficient wireless routers that were incapable of delivering the promised speeds;

   ii. Failing to allocate sufficient resources for Spectrum-TWC's network to reliably deliver the speeds promised to subscribers, including by failing to reduce the size of service groups or to add additional channels to each service group; and

   iii. Promising subscribers wireless speeds that Spectrum-TWC could not deliver, including by omitting to disclose the real-world conditions that significantly limit wireless performance.

b. Misrepresenting the ability of subscribers to reliably access online content, including by:

   i. Failing to maintain sufficient port capacity to ensure that subscribers would not experience buffering, slowdowns, interruptions, lags, down times or other indicators of unreliable Internet service; and

ii. Failing to maintain sufficient port capacity to ensure that subscribers could reliably access Netflix, online games and other specifically promised sources of content.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests an order and judgment:

a. Permanently and preliminarily enjoining Defendants from violating the laws of the State of New York, including: Executive Law § 63(12); General Business Law §§ 349 and 350;

b. Directing Defendants to produce an accounting of monies collected from consumers in New York paying for Internet services in violation of Executive Law § 63(12) or General Business Law §§ 349 and 350;

c. Directing Defendants to disgorge all monies resulting from the fraudulent and illegal practices alleged herein;

d. Directing Defendants to make full restitution to consumers and pay damages caused, directly or indirectly, by the fraudulent and deceptive acts and repeated fraudulent acts and persistent illegality complained of herein plus applicable pre-judgment interest;

e. Directing Defendants to pay a civil penalty of $5,000 for each violation of GBL Article 22-A, pursuant to GBL § 350-d;

f. Directing such other equitable relief as may be necessary to redress defendants' violations of New York law;

g. Awarding plaintiff costs of $2,000 pursuant to CPLR § 8303(a)(6); and

h. Granting such other and further relief as the Court deems just and proper.

New York, NY
January 31, 2017

Respectfully submitted,
ERIC T. SCHNEIDERMAN
Attorney General of New York

By _____
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Assistant Attorneys General
ALEXANDER GOLDMAN
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APPENDIX

Chart 1: FCC Panel Consistent Speeds (Aug. 2015 – Jan. 2016)

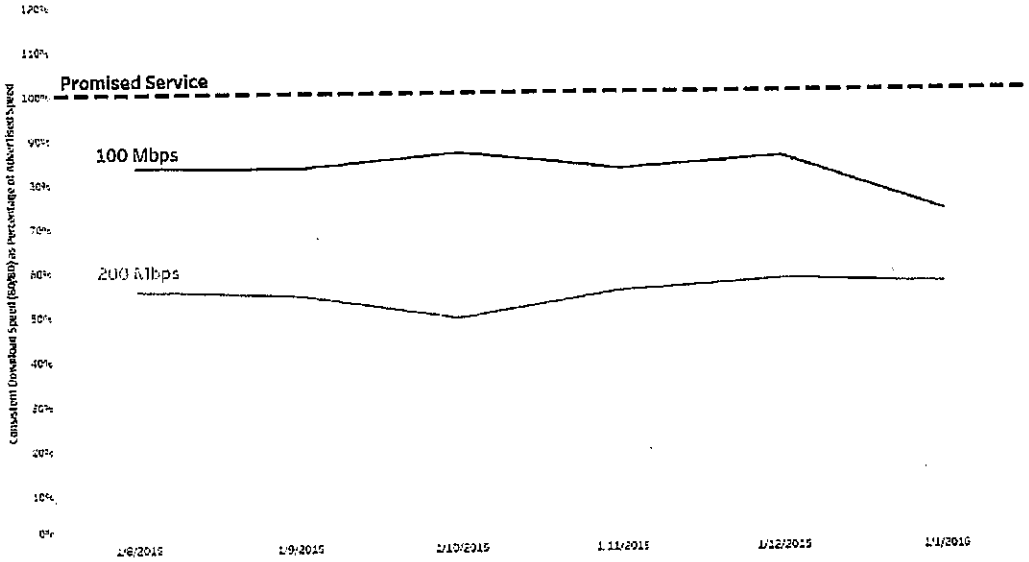

Chart 2: Spectrum-TWC Panel Consistent Speeds (Aug. 2015 – Jan. 2016)

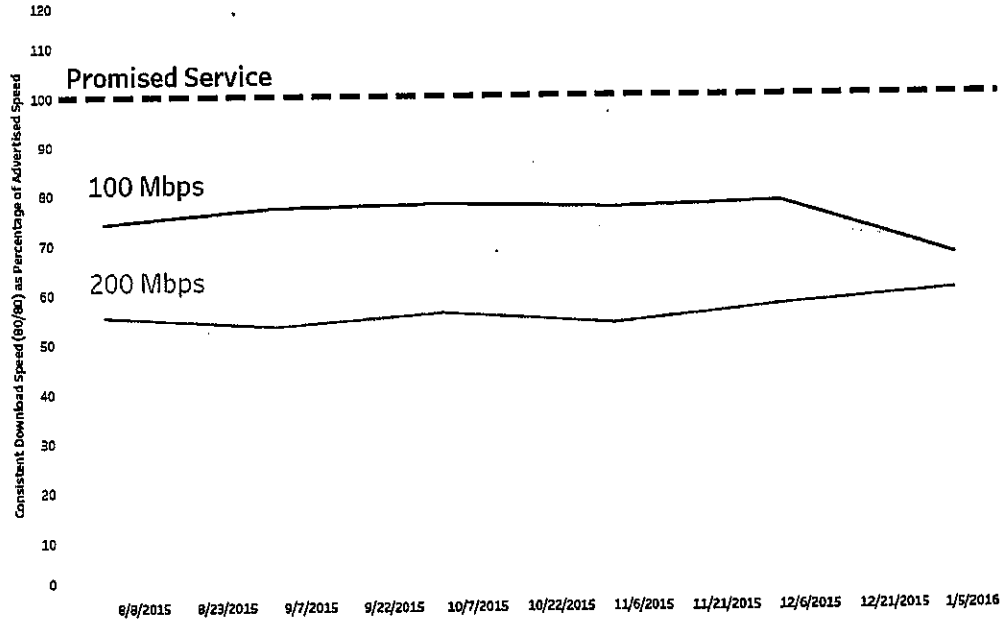

Chart 3: FCC Panel Consistent Speed Results (Mar. 2013 - Mar. 2014)

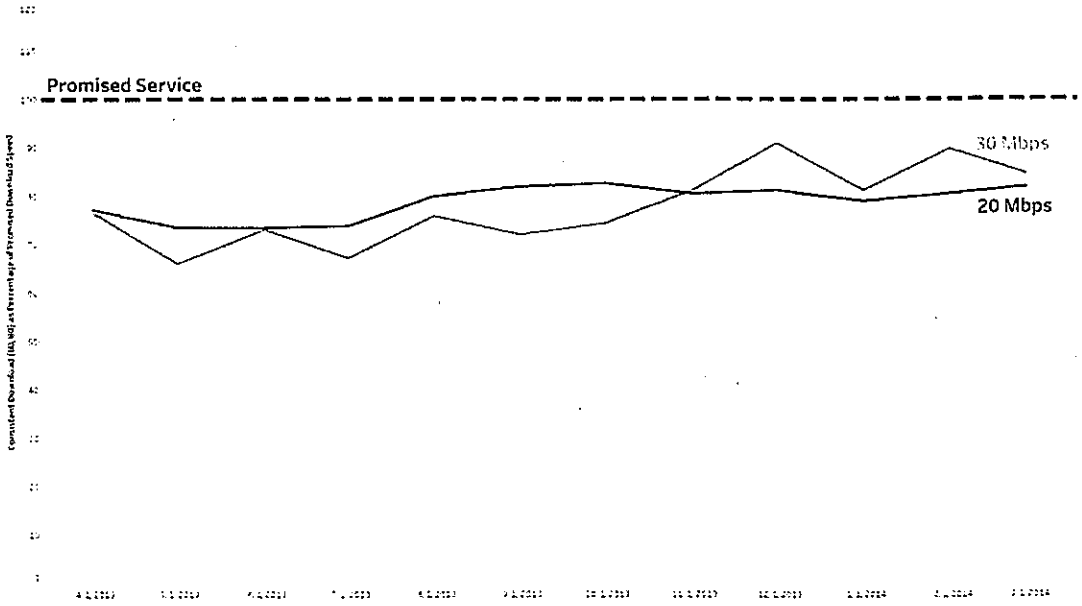

Chart 4: Spectrum-TWC Consistent Speed Results (Mar. 2013 - Mar. 2014)

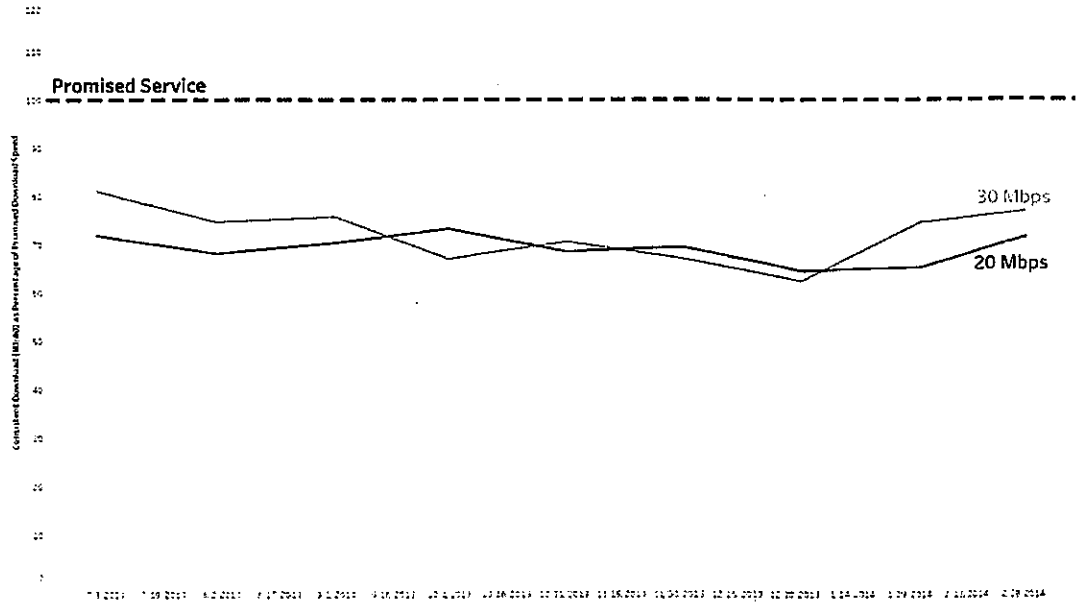

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK — New York COUNTY
PRESENT: O. PETER SHERWOOD PART 49
Justice

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, INC., *et al.*,

Defendants.

INDEX NO.	450318/2017
MOTION DATE	Nov. 28, 2017
MOTION SEQ. NO.	004
MOTION CAL. NO.	

The following papers, numbered 1 to _____ were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: February 13, 2018

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

CHARTER COMMUNICATIONS, INC. and SPECTRUM MANAGEMENT HOLDING COMPANY, LLC (f/k/a TIME WARNER CABLE, INC.),

Defendants.

----------X

DECISION AND ORDER

Index No.: 450318/2017
Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

Plaintiff, The Office of the Attorney General (the OAG) brings this civil enforcement action against defendants Charter Communications, Inc. (Charter) and Spectrum Management Holding Company, LLC (f/k/a Time Warner Cable, Inc. [TWC], and together, Spectrum-TWC), alleging that defendants deliberately and systematically defrauded New York consumers from January 1, 2012, through the filing date of February 1, 2017 (the Covered Period), by promising high-speed Internet services and reliable access to online content that defendants knew they could not, or would not, deliver. Plaintiff alleges that defendants' fraud violates three New York consumer protection statutes: Section 53(12) of the Executive Law, and sections 349 and 350 of the General Business Law (GBL).

Defendants now move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint on the ground that it is preempted by federal law, and for failure to state a cause of action. Although not set forth in the notice of motion, in their motion papers, defendants also alternatively seek to stay this action pending a possible response by the Federal Communications Commission (the FCC) to a petition filed by an industry trade group.

For the reasons set forth below, the motion to dismiss the complaint is denied.

FACTS

The following facts are drawn from the complaint (and assumed to be true for the purposes of this motion), and from the documentary evidence that is cited and incorporated by reference in the complaint.

Before May 18, 2016, TWC provided and marketed broadband cable Internet service to New York subscribers under the brand name "Time Warner Cable" (Complaint, ¶ 28). On May 18, 2016, TWC merged with and into Spectrum, a subsidiary of Charter (*id.*). Since the merger, Charter and Spectrum have continued to provide Internet services to New York subscribers under the brand names "Time Warner Cable" and "Spectrum" (*id.*, ¶ 31). Collectively, defendants are the largest provider of residential Internet services in the state of New York, providing over 2.5 million households with Internet service (*id.*, ¶ 2).

According to the complaint, during the Covered Period, Spectrum-TWC has "conducted a systematic scheme to defraud and mislead subscribers to its Internet service by promising to deliver Internet service that it knew it could not and would not deliver" (*id.*, ¶ 3). There were two components to this scheme: (1) defendants promised to provide Internet speeds that they knew they could not deliver to subscribers; and (2) defendants promised reliable access to online content (like Netflix, YouTube, and Amazon) that they knew they could not or would not, provide (*id.*).

Misrepresentations Regarding Internet Speeds

Spectrum-TWC advertised specific Internet speeds, available in tiers ranging from 20 to 300 megabits per second (Mbps), and promised its subscribers that it would deliver such speeds in exchange for a fee, with higher fees for faster-speed tiers (*id.*, ¶¶ 79-84). Spectrum-TWC assured subscribers not only that they could achieve the advertised speeds, but that subscribers were guaranteed "reliable Internet speeds," delivered "consistently," "without slowdowns," and otherwise without interruption (*id.*, ¶¶ 83, 85-86). Spectrum-TWC assured subscribers that the promised speeds would be delivered anywhere in their homes, at any time, and on any number of devices, regardless of whether the subscriber connected by wire or wirelessly (*see id.*, ¶¶ 74, 83, 89, 94-95).

According to the complaint, Spectrum-TWC did not deliver the promised level of service (*id.*, ¶¶ 75-76, 80-83, 178-241). For many customers, the promised Internet speeds were impossible to attain because of technological bottlenecks for which Spectrum-TWC was responsible. First, in early 2013, defendants determined (as a result of Internet speed tests conducted by the FCC) that the older generation modems they leased to many of their subscribers were incapable of reliably achieving Internet speeds of even 20 Mbps per second (*id.*, ¶¶ 9, 76, 101-177) (the Modem Failures). These failures date back to early in the Covered Period, and intensified when Spectrum-TWC began to promise New York City subscribers faster speeds in connection with its MAXX upgrade, which was launched in 2014 (*id.*, ¶ 78). These failures were not resolved by the company's modem "replacement" program, which was designed to result in many subscribers continuing to pay for promised speeds beyond the technical capabilities of their Spectrum-TWC-provided modems (*id.*, ¶¶ 121, 146, 151, 159). Plaintiff alleges that, in fact, Spectrum-TWC knew that the modems it leased to many subscribers were "non-compliant," or incapable of delivering the speeds promised (*id.*, ¶¶ 76, 110-113, 169). Plaintiff alleges this failure affected 900,000 subscribers (*id.*, ¶ 102).

Second, Spectrum-TWC also failed to maintain its network as necessary to deliver the promised speeds (*id.*, ¶¶ 178-200) (the Network Failures). Plaintiff alleges that, although Spectrum-TWC knew the precise levels of network congestion at which customers would be prevented from achieving the promised speeds, it deliberately hid and exceeded those congestion levels to save itself money (*id.*, ¶¶ 184-193).

Third, plaintiff alleges that, due to older or slower wireless routers it provided, and other technological limitations, Spectrum-TWC knew that its subscribers could not achieve the same speeds wirelessly as through a wired connection (*id.*, ¶¶ 221-241) (the Wireless Failures).

Plaintiff asserts that Spectrum-TWC's failure to deliver its promised Internet speeds is confirmed by the results of at least three independent tests of Internet speed: (1) a test used by the FCC to generate its annual "Measuring Broadband America" report; (2) a test used by Spectrum-TWC to monitor speeds on its last miles of service; and (3) a test recommended by Spectrum-TWC to its subscribers for testing Internet speeds (Complaint, ¶¶ 196-213). Each

test reveals that Spectrum-TWC consistently failed to deliver the Internet speeds it had promised (*id.*, ¶ 205).

Misrepresentations Regarding Reliable Access to Content

The second component of defendants' alleged scheme consisted of Spectrum-TWC representing that its subscribers would receive reliable, uninterrupted access to the Internet content of their choice, but failing to deliver on these promises (*id.*, ¶¶ 19, 248-330). Spectrum-TWC's assurances of reliability were specific and unconditional, guaranteeing access to specific content with "absolutely no buffering," "no lag," "without interruptions," and with "no downtime" (*id.*, ¶¶ 258-264) (the Service Reliability Failures). These promises were explicitly tied to the delivery of some of the Internet's most popular content, including Netflix and online games, and Spectrum-TWC's advertisements prominently featured such content as being accessible without interruption (*id.*, ¶¶ 250, 254-256).

According to the complaint, Spectrum-TWC failed to maintain enough network capacity in the form of interconnection ports (the physical hardware sockets where one network connects to another) to deliver this promised content to its subscribers without slowdowns, interruptions and data loss (*id.*, ¶¶ 19, 67-71). It also effectively "throttled" access to Netflix and other content providers by allowing those interconnection ports to degrade, causing slowdowns (*id.*, ¶¶ 265-278). Spectrum-TWC then extracted payments from those content providers as a condition for upgrading the ports (*id.*, ¶¶ 279-291). As a result, Spectrum-TWC's subscribers could not reliably access the content as they were promised, and instead were subject to the buffering, slowdowns, and other interruptions in service that they had been assured they would not encounter (*id.*, ¶¶ 247-291).

Since 2015, the OAG has fielded thousands of consumer complaints from subscribers who allege that they did not receive the Internet access speeds or reliable access promised to them by defendants (*id.*, ¶¶ 24-25).

Relevant FCC Regulations

The Federal Communications Act (the FCA) governs "all interstate and foreign communication by wire or radio" (47 USC § 152 [a]), a phrase which includes the Internet (*Verizon v FCC*, 740 F3d 623, 629 [DC Cir 2014]). However, only entities that constitute

"common carriers," are subject to regulation under Title II of the FCA (*see* 47 USC § 153 [11]). Title II subjects common carriers, including, during the Covered Period, broadband Internet access service (BIAS) providers like defendants, to various substantive requirements (*id.*, ¶¶ 201 and 202).

Throughout the Covered Period at issue in the complaint, the FCC regulated BIAS providers through its Transparency Rule, first promulgated in its 2010 Open Internet Order (*Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905 [2010] *petition for review denied in relevant part, Verizon* 740 F 3d at 659). That rule requires BIAS providers to "disclose accurate information regarding the network management practices, performance, and commercial terms of [their] broadband Internet access services sufficient for consumers to make informed choices regarding use of such services" (2010 Open Internet Order, ¶ 54). More specifically, the rule requires BIAS providers to disclose "expected and actual access speed and latency," as well as accurate monthly subscription rates and usage-based fees (*id.*, ¶ 56). The FCC did not mandate a single measure of speed measurement, but instead concluded that "the best approach is to allow flexibility in implementation of the Transparency Rule, while providing guidance regarding effective disclosure models" (*id.*).

To support its Transparency Rule, the FCC established a "safe harbor" program called Measuring Broadband American (MBA) to "measure the actual speed and performance of broadband service," with the expectation that "the data generated . . . will inform [FCC] efforts regarding disclosure" (*id.*, ¶ 58, n188). In the Advisory Guidance for Compliance with Open Internet Transparency Rule (the 2011 Advisory Guidance), the FCC stipulated that a BIAS provider could satisfy the transparency standard by "disclos[ing] data from the project showing the mean upload and download speeds in megabits per second during the 'busy hour' between 7:00 p.m. and 11:00 p.m. on weeknights" (2011 Advisory Guidance at 4 [GN Docket No. 09-191, June 30, 2011).

In 2015, the FCC further refined its broadband transparency regime (*see* Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, ¶¶ 154-184 [2015]) (the 2015 Open Internet Order). The 2015 Open Internet Order states that the FCC "expect[s] that disclosures to consumers of actual network performance

data should be reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service," and reiterated that BIAS providers should characterize their actual network performance based on "average performance over a reasonable period of time and during times of peak usage" (2015 Open Internet Order, ¶ 166).

As part of the 2015 Open Internet Order, the FCC created a "Broadband Nutrition Label," which, in addition to the MBA program, is a second "voluntary safe harbor for the format and nature of the required disclosure to consumers," modeled on nutrition labels used for food products (*see id.*, ¶¶ 176-171). Under this program, BIAS providers provide consumers with the format for an easy-to-understand label that discloses a service plan's "typical speed[s]" (*see id.*, ¶ 179; FCC, *Consumer Labels for Broadband Services*, https://www.fcc.gov/consumers/guides/consumer-labels-broadband-services), *i.e.*, "typical speed downstream," and "typical speed upstream," which reflect averages measured during the peak usage period of the service" (*id.*).

However, FCC regulations make it clear that, even if a broadband provider uses the nutrition label format for its disclosure, the provider could still be found in violation of the FCA if the content of the disclosure is "misleading or inaccurate," or if the provider "makes misleading or inaccurate statements in another context, such as advertisements or other statements to consumers" (2015 Open Internet Order, ¶ 181).

TWC-Spectrum asserts that, throughout the Covered Period, it advertised its broadband offerings by informing customers that they could expect to receive "up to" certain maximum speeds (as measured in Mbps), and that it relied on the FCC's safe harbors (which measure actual speeds based on average peak period data) to substantiate these performance claims (*see e.g.* FCC, *2011 MBA Fixed Broad Report* [August 1, 2011], at 3, n10, https://transition.fcc.gov/cgb/measuringbroadbandrport/Measuring_U.S._-_Main_Report_Full.pdf [noting TWC's participation in the safe harbor program for 2010]). TWC-Spectrum further asserts that the MBA reports have regularly shown that its actual speeds – based on mean or median peak-period speeds – met or exceeded the maximum advertised speeds (*see* defendants' memorandum of law at 5).

Since TWC merged with Spectrum, TWC-Spectrum has participated in the FCC's safe-harbor consumer labeling program (*see* Spectrum, *Broadband Label Disclosure*, https://www.spectrum.com/browse/content/ratecard). TWC-Spectrum contends it provides consumers with FCC-approved performance labels for each speed tier for which it offers broadband services and that, pursuant to the FCC's guidelines, it describes the performance of each tier by reference to the median peak-hour speeds for customers in that tier, as measured by the FCC (*see id.*).

Procedural History

On February 4, 2017, defendants removed this action to the United States District Court for the Southern District of New York, arguing that the FCA, and subsequent action by the FCC, including the Transparency Rule (47 CFR § 8.3), had "completely preempted" all state deceptive practice actions involving Internet speeds, thereby divesting this court of jurisdiction.

The district court rejected defendants' argument, affirming the "dual state-federal regulation" of broadband providers, and finding that there was "no indication" whatsoever – not in the FCA, the Open Internet Orders or any other FCC rule – that Congress or the FCC had "intended . . . to preempt state-law claims like those asserted by Plaintiff" (*People v Charter Comm., Inc.*, 2017 US Dist LEXIS 68415, 2017 WL 1755958, *9 [SD NY April 27, 2017) (the Remand Decision). The district court emphasized that, even if Spectrum-TWC had voluntarily disclosed speed-related information in the format required by the FCC, this would not absolve it of liability for any "misleading or inaccurate statements in another context, such as advertisements or other statements to consumers" (*id.*, *7). Accordingly, on April 27, 2017, the district court remanded this proceeding back to this court (*id.*, *11).

The Complaint

In the first cause of action, plaintiff asserts a claim under Executive Law § 63 (12), which authorizes the OAG to bring an action to enjoin repeated or persistent fraudulent conduct. Plaintiff alleges defendants have engaged in repeated and persistent fraudulent acts, including misrepresenting the speed of the Internet service consistently delivered to subscribers and misrepresenting the ability of subscribers to reliably access online content (*see* Complaint, ¶¶ 333-336).

In the second cause of action, plaintiff asserts a second claim under Executive Law § 63 (12). In the second and fourth causes of action, plaintiff also asserts violations of GBL § 349, which prohibits deceptive acts and practices in the conduct of any business, trade, or commerce in the furnishing of any service in the state of New York. In the second and fourth causes of action, plaintiff alleges that defendants engaged in repeated and persistent deceptive acts and practices by misrepresenting the speed of the Internet service consistently delivered to subscribers, and misrepresenting the ability of subscribers to reliably access online content (*see id.*, ¶¶ 337-341; 347-349).

In the third and fifth causes of action, plaintiff asserts claims under GBL § 350, which prohibits false advertising in the conduct of any business, trade or commerce, or in the furnishing of any service in the state of New York. Plaintiff alleges defendants have engaged in false advertising, including misrepresenting the speed of the Internet service consistently delivered to subscribers and misrepresenting the ability of subscribers to reliably access online content (*see id.*, ¶¶ 342-346; ¶¶ 350-352).

By this action, plaintiff seeks an order preliminarily and permanently enjoining defendants from violating Executive Law Section 63 (12) and GBL Sections 349 and 350. Plaintiff also seeks an order directing defendants to produce an accounting of monies collected from consumers in New York paying for Internet services in violation of those statutes, directing defendants to disgorge all monies resulting from the allegedly fraudulent and illegal practices, and to make full restitution to consumers.

DISCUSSION

Conflict Preemption

Defendants' first argues in support of their motion to dismiss that the allegations set forth in the complaint are preempted by federal law under the doctrine of conflict preemption. Defendants contend that federal law preempts this action in two ways: (1) the claims set forth in the complaint conflict with the FCC's regulatory safe harbors by treating speed characterizations sanctioned by the FCC as deceptive under state law; and (2) the claims interfere with the FCC's policy of giving BIAS providers flexibility in the measurement of actual speeds. More specifically, defendants argue that the central allegation underlying the complaint is that

Spectrum-TWC failed to deliver the broadband speeds advertised to its customers, and that plaintiff is basing this assertion on methodologies for calculating actual broadband speeds that are starkly inconsistent with the federal methodology.

In opposition to the motion to dismiss, plaintiff argues that federal law does not preempt the OAG's claims regarding TWC-Spectrum's deceptive conduct in advertising Internet speeds, as there is no evidence that Congress intended to preempt, or authorized the FCC to preempt, such claims. Plaintiff further argues that, more importantly, New York's consumer protection laws do not conflict with the purposes and objectives of the Transparency Rule, which was designed for statutory reporting purposes, and was not intended to insulate broadband providers from liability for misrepresentations in their advertisements or other communications, or to replace traditional state safeguards for protecting consumer rights.

As more fully set out below, this court agrees with plaintiff, and finds that the claims asserted by the OAG are not preempted by federal law.

The preemption analysis begins with ascertaining the "intent of Congress" (*People v Applied Card Sys., Inc.*, 11 NY3d 105, 113 [2008]; *Medtronic, Inc. v Lohr*, 518 US 470, 485 [1996] ["the purpose of Congress is the ultimate touch-stone in every pre-emption case"] [internal citation and quotations omitted]). "[T]he 'starting presumption is that Congress does not intend to supplant state laws,' unless its intent to do so is 'clear and manifest'" (*Applied Card*, 11 NY3d at 113 [citation omitted]). This presumption against preemption is particularly strong with respect to state efforts to enforce consumer protection laws. As the Supreme Court has emphasized, "[c]onsideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of States [are] not to be superseded . . . by Federal Act unless that is the clear and manifest purpose of Congress'" (*Cipollone v Ligget Grp., Inc.*, 505 U.S. 504, 516 [1992] [citation omitted]; *see also Wyeth v Levine*, 555 US 555, 565 [2009] [only a "'clear and manifest'" Congressional intent will supersede state law, particularly in "'a field which the States have traditionally occupied'"] [citation omitted]).

Spectrum-TWC fails to identify any provision of the FCA that preempts state anti-fraud or consumer-protection claims, or reflects any intention by Congress to make federal law the exclusive source of law protecting consumers from broadband providers' deceptive conduct.

Indeed, no such provisions exist (*see* Remand Decision at *13 ["the FCA generally provides for dual state-federal regulation of Title II common carriers"]; *see also Wyeth*, 555 US at 575 [federal drug labeling standards do not preempt state law as Congress's "silence on the issue coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness"]).

To the contrary, Congress expressly preserved the states' authority in both the general saving clause of the FCA, Section 414 ["(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"], and in the specific saving clause in section 253 (b) ["(n)othing in this section shall affect the ability of a State to impose . . . requirements necessary to . . . protect the public safety and welfare . . . and safeguard the rights of consumers"]). Thus, the FCA "not only does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertisement, or common law fraud, it evidences Congress's intent to allow such claims to proceed under state law" (*Marcus v AT&T Corp.*, 138 F3d 46, 54 [2d Cir 1998]; *see also* Remand Decision at *8-9 ["there is no indication . . . that the FCC intended the [2015 Open Internet Order] to preempt state-law claims like those asserted by Plaintiff," and there is no "'uniquely federal interest in common carriers' unfair and deceptive [advertising] practices'"] [citation omitted]).

An administrative agency cannot exceed the authority Congress has granted it (*Verizon*, 740 F3d at 649 [the FCC cannot regulate "in a manner that contravenes any specific prohibition contained in the Communications Act"]). Rather, "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority" (*Louisiana Pub. Serv. Comm. v FCC*, 476 US 355, 374 [1986]).

Here, the FCC lacks the authority to preempt state law because the FCA does not clearly authorize it to do so. Indeed, the FCC, itself, has repeatedly recognized that federal regulation of telecommunication carriers co-exists with, rather than displaces, state laws protecting the rights of consumers (*see e.g. Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, ¶ 5 [1996] [citing the FCC's "historic commitment to protecting consumers of

interstate telecommunications services," and noting that "consumers will be able to take advantage of remedies provided by state consumer protection laws"]; *Wireless Consumers All., Inc.*, 5 FCC Rcd 17021, ¶ 35 [2000] [FCA §§ 201 and 202 remedies are "alternate avenues of relief [that] supplement rather than replace claims under state law"]).

Defendants do not appear to contest the fact that the FCA does not preempt state-law consumer protection and false advertising claims against telecommunications services providers. Rather, defendants contend that New York State's application of consumer protection laws conflict with the FCC's Transparency Rule, and that thus, this complaint is preempted by federal law. More specifically, defendants argue that the claims set forth in the complaint "thwart[]" the FCC's purposes and objectives in promulgating the Transparency Rule, and that it is "impossible for broadband providers in New York to rely on the FCC's safe harbors without running afoul of state law" (Defendants' Memorandum at 8). However, the FCC's purposes and objectives are irrelevant to the preemption analysis where, as here, Congress has expressly preserved state laws. In any event, the FCC promulgated the Transparency Rule with full recognition of concurrent state authority over deceptive practices, and it is clear that the claims brought here do not conflict with that rule.

First, it is evident that, although the Transparency Rule requires certain performance disclosures by BIAS providers, it does not, contrary to defendants' arguments, provide a safe harbor for statements outside those disclosures.

The Transparency Rule was first issued in 2010, and later enhanced in 2015, with the explicit recognition that it complemented the states' "vital role in protecting end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints" (2010 Open Internet Order at ¶ 232, n 374; 2015 Open Internet Order at ¶ 154]). This endorsement of concurrent state authority over deceptive practices in the provision of broadband services completely conflicts with Spectrum-TWC's assertion that the Transparency Rule preempts the state law claims here.The Transparency Rule requires broadband providers to have a page on their website that displays information regarding three items – their "network management practices, performance, and commercial terms" – to assist consumers to "make informed choices regarding the purchase and use of broadband service, which promotes a more competitive market

for broadband services" (2010 Open Internet Order, ¶ 97; 2015 Open Internet Order, ¶ 157). The Rule also provides for a limited federal "safe harbor" from FCC enforcement actions on transparency grounds for broadband providers who participate in the MBA program, insofar as their official disclosures comply with the "format" specified by the FCC (2015 Open Internet Order, ¶ 181).

Accordingly, the Rule, its voluntary safe harbor, and the "nutrition label" that the FCC added to the Rule in 2015, give broadband providers an option to disclose the required information in a particular format to satisfy the Rule. However, nothing in the Rule suggests that making this disclosure would insulate broadband providers from liability for misrepresentations made in other consumer communications. Indeed, in announcing the nutrition label on October 26, 2016, the FCC specifically explained that "providers may still be in violation of FCC rules if the content of their labels is misleading or inaccurate or if they make misleading or inaccurate statements to consumers in ads or elsewhere" (*see* Broadband Nutrition Label). Moreover, as the FCC has repeatedly emphasized, "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" (2015 Open Internet Order, ¶ 160).

Second, it is also clear that the consumer protection claims set forth in the complaint do not conflict with the Transparency Rule, its safe harbors, or the Nutrition Label. The Supremacy Clause of the United States Constitution requires that any state law that "interfere[s] with" or is "contrary to" federal law "must yield" to the federal law (*Gibbons v Ogden*, 22 US (9 Wheat) 1, 211 [1824]). This court must therefore dismiss any state-law claim that would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v Davidowitz*, 312 US 52, 67 [1941]). Federal law must also prevail where a state law "interferes with the methods by which [a] federal statute was designed to reach [its] goal" (*International Paper Co. v Ouellette*, 479 US 481, 494 [2987]). In addition to federal statutes, federal agency regulations also preempt conflicting state requirements (*see Wyeth*, 555 US at

565). However, the Supreme Court has cautioned that conflict preemption of the type asserted by Spectrum-TWC is a "demanding defense" (*id.* at 573).

At the outset, this court notes that Spectrum-TWC's preemption argument does not apply to the claims relating to modem failures, wireless failures and service reliability failures, because those claims are entirely unrelated to Spectrum-TWC's official disclosures pursuant to the Transparency Rule. In addition, the complaint alleges that some of the most serious performance problems related to the network failures affected the 100, 200, and 300 Mbps plans – plans that, at various times in the Covered Period, were not comprehensively measured by the MBA program, and were therefore excluded from Spectrum-TWC's official disclosures pursuant to the Transparency Rules (Complaint, ¶¶ 213-220; *see* June 12, 2015, Disclosure of TWC, attached as Exhibit A to Aaron Chase Aff). Claims related to those speed plans are not subject to, or protected by, the safe harbor, even for the purposes of federal law (2015 Open Internet Order, ¶ 166).With respect to the remaining claims regarding Internet speeds, this court finds that, contrary to defendants' contentions, the FCC's goal of promoting competition through the Transparency Rule is not thwarted by state laws that require broadband providers to speak truthfully. 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" (FCC, *Consumer Guide: Open Internet Transparency Rule* [2014], https://transition.fcc.gov/cgb/consumerfacts/Open-Internet-Transparency-Rule.pdf). "New York's Executive Law and Consumer Protection Act, collectively, do not require respondents to disclose anything. These statutes simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers" (*Applied Card*, 11 NY3d at 114-115]). Thus, 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.

The court rejects defendants' argument that "the insurmountable problem for the Attorney General is that the actual speeds alleged in the complaint are based on metrics that cannot be squared with federal law, which looks to the *average peak-period speeds* measured by the MBA

as the appropriate way to measure and describe actual broadband performance," and that "this conflict would render meaningless the FCC's safe-harbor program" (Defendants' Memorandum at 10). The complaint details numerous ways that many of the disclosures are deceptive, without reference to particular speed tests (*see e.g.* Complaint, ¶¶ 111-112, 170, 179, 192-193 [citing various internal Spectrum-TWC documents acknowledging consumers were shortchanged]).Moreover, the claims alleged here are not challenging the "typical speed downstream" and "typical speed upstream" disclosures made by Spectrum-TWC in the format specified by the Transparency Rule. Rather, the allegations made in the complaint relate to misrepresentations made by TWC in a completely different context – the marketing and advertising messages made by Spectrum-TWC on television, through the mail, and in other media that conveyed the overall impression that subscribers would have "consistent" or "reliable" service at the speeds advertised for the plans that they paid for.

Accordingly, New York's consumer protection laws do not conflict with the purposes and objectives of the Transparency Rule.

Finally, this court finds that the primary New York authority Spectrum-TWC relies on in support of its proposition that "federal rules governing consumer disclosures preempt inconsistent state standards" (Defendants' Memorandum at 10), is inapplicable to the facts of this case. In *Guice v Charles Schwab & Co.* (89 NY2d 31 [1996]), two classes of retail investors who purchased securities through stock brokerages brought suit against those brokerages for alleged violations of New York's General Business Law and common law. The investors alleged the brokerages had violated state law by accepting "order flow payments" from wholesale securities dealers in exchange for routing the retail customers' orders through those dealers, without disclosing to the customers that such payments were flowing to the brokerages. The Court of Appeals held regulations promulgated by the SEC preempted the plaintiffs' state law claims, as expanded state-law disclosure obligations would have undermined the SEC's disclosure rules at issue. Defendants argue that here, too, "the Attorney General's claims would plainly frustrate the FCC's transparency regime, just as expanded state-law disclosure obligations would have undermined the SEC's disclosure rules at issue in *Guice*" (Defendants' Memorandum at 11).

The court rejects this argument. *Guice* concerned Congress's express mandate to the federal agency to balance competing disclosure obligations and issue nationwide standards. In finding that state law was preempted, the Court of Appeals relied on congressional statements to identify the purpose behind the authority it delegated to the federal agency to carry out Congress's objective of ensuring "'economically efficient execution of securities transactions'" in a "'national market system for securities'" (*Guice*, 89 NY2d at 40 [citation omitted]). After a careful analysis of both the congressional and agency record, the Court concluded that the SEC, cloaked with a specific congressional mandate, promulgated a system of disclosure requirements that preempted state law from imposing additional disclosure requirements that frustrated the system of federal disclosures (*id.* at 48). Here, in contrast, there is no such grant of congressional authority to the FCC, or agency finding of frustration.

Defendants also argue that federal law preempts state regulation of interconnection disputes. The complaint alleges that Spectrum-TWC deceived its customers by "fail[ing] to maintain sufficient ports at its interconnection points with backbone and content providers" and knowingly causing "interruptions and slowdowns during peak hours" (Complaint, ¶¶ 267-269). Defendants argue that these allegations seek to regulate bilateral agreements between content providers and Internet service providers, and to treat their ordinary contractual negotiations as fraud, thus undermining the FCC's "authority to adjudicate any interconnection disputes between BIAS providers and other network operators" (Defendants' Memorandum at 14). This argument is baseless. Contrary to defendants' contention, the complaint does not seek to regulate such bilateral agreements. Rather, the complaint simply alleges that Spectrum-TWC misled subscribers by claiming that specific online content would be swiftly accessible through its network, while it was simultaneously deliberately allowing that service to degrade that service and failing to upgrade its network's capacity to meet demand for this content (*see* Complaint, ¶¶ 244-247; 289 [internal email observed that the company's approach to intentionally delaying capacity upgrades "may be artificially throttling [subscriber] demand"]).

Failure to State a Cause of Action

"The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373,

375 [1st Dept 2003]). Thus, on "a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

In order to prevail on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff's claims (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]; *see McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009] [a motion to dismiss pursuant to CPLR CPLR 3211 (a) (1) "'may be appropriately granted only where the documentary evidence *utterly refutes* plaintiff's factual allegations, *conclusively establishing* a defense as a matter of law'"] [citation omitted, emphasis in original]). To proceed with causes of action arising under GBL §§ 349-350 and Executive Law § 63 (12), the Attorney General must plead and eventually prove that Spectrum-TWC "'engaged in an act or practice that is deceptive or misleading in a material way'" (*Applied Card*, 41 AD3d 4, 8 [3d Dept 2007], *aff* 11 NY3d 105 [citation omitted]). A "deceptive" or "misleading" practice is one "'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000] [citation omitted]).

Under New York law, deception claims are evaluated in the context of the "general impression[]" conveyed by a statement (*Guggenheimer v Ginzburg*, 43 NY2d 268, 273 [1977]; *see also People v GE*, 302 AD2d 314, 315 [1st Dept 2003]). The issue "is not whether, as a matter of law, reasonable consumers would be misled in a material way, but whether that prospect is enough to create a question of fact" (*Gaidon v Guarding Life Ins. Co. of Am.*, 94 NY2d 330, 345 [1999]).

Defendants move for dismissal of the complaint on the ground that it fails to allege facts plausibly indicating Spectrum-TWC misled consumers. Defendants' motion to dismiss is denied, as plaintiff has sufficiently pled its claims arising under GBL §§ 349-350 and Executive Law § 63 (12). The complaint alleges that Spectrum-TWC's advertisements created the net

impression that subscribers would consistently receive the advertised "up to" speeds (Complaint, ¶¶ 15, 74, 83-84, 187, 205, 208, 212, 220). The company reinforced this perception with additional explicit reliability promises, including that speeds would be delivered "consistently" and "without slowdowns" (*id.*, ¶¶ 83, 85-86). Plaintiff alleges that Spectrum-TWC failed to deliver on these promises, with subscribers rarely, if ever, experiencing the advertised speeds.

Defendants argue that their representations regarding internet speeds were not misleading. Spectrum-TWC explains it advertised its broadband service plans as providing speeds "up to" a particular speed, such as 20 Mbps downstream (*see e.g. id.*, ¶¶ 25, 85, 93, 259), promising nothing more than maximum speeds, so consumers should have expected to receive the advertised speeds or less (*see* Defendants' Memorandum at 17 [arguing that "(r)easonable consumers understand that this is not a promise of *minimum* performance, but rather of *maximum* performance"]).

Defendants' theory is contrary to New York law regarding "up to" claims. Spectrum-TWC's argument that consumers should have expected to receive anything less than or equal to the advertised "up to" speeds has been rejected by the Court of Appeals where, as alleged here, the advertised "up to" speeds are functionally unattainable as a result of the defendants' knowing conduct. In *Goshen v Mutual Life Ins. Co.* (98 NY2d 314 [2002]), the Court of Appeals reinstated the plaintiffs' deceptive practices claims alleging that their Internet connections "'rarely, if ever, approache[d] the high speed'" expressly represented by the defendant Internet service provider (*id.* at 323 [citation omitted]). The plaintiff consumers alleged that their ISPs advertised speeds "up to 126x faster than your 56K modem" when the services rarely, if ever, reached the promised "up to" speeds (*id.* at 322-323). Although the Appellate Division found that the "up to" language "clearly sets forth a maximum possible speed, not the standard speed at which the service would operate" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 184 [1st Dept 2001], *affd as modified sub nom Goshen*, 98 NY2d 314), the Court of Appeals reversed this ruling, noting that the plaintiffs' allegation that "the service [consumers] purchased was defective due to malfunctions largely or wholly within defendants' control," clearly stated a claim for deceptive business practices (*Goshen*, 98 NY2d at 326-327). Likewise, here, plaintiff alleges Spectrum-TWC was unable to fulfill the promises it made to consumers to

provide specific Internet speeds due to factors "wholly within [its] control," namely the Modem Failures, Network Failures, and Wireless Failures.

Moreover, the Third Department has held that, for purposes of a consumer fraud action, the phrase "up to" does not reflect a maximum, but rather, expresses a representative amount a consumer would receive. In *Applied Card* (27 AD3d at 108), the Attorney General alleged that the respondent had falsely advertised that approved credit applicants would receive credit limits of "up to" $2,500, when actual limits were often less than $400. The court concluded that a reasonable consumer would expect that "the 'up to' amount boldly displayed . . . was representative of a likely amount that a consumer would receive" (*id.*). Similarly, here, plaintiff alleges not only that consumers expected to receive the speeds that Spectrum-TWC falsely advertised, but that Spectrum-TWC knew it could not meet its own subscribers' expectations (*see* Complaint, ¶¶ 222-23).

Furthermore, New York courts recognize FTC pronouncements as persuasive authority in the context of consumer protection suits brought under GBL sections 349 and 350 (*Applied Card*, 27 AD3d at 107; *see also Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). The FTC interprets "up to" language similarly. Following *Applied Card*, the FTC stated that advertisers must substantiate "up to" claims with evidence that substantially all consumers received the numerical value advertised. In 2012, the FTC announced consent orders with five window companies, some of which had made "up to" claims in their advertisements, like "Guaranteed to reduce your heating and cooling use by up to 49%." The consent order required each company to substantiate any "up to" savings claims with "competent and reliable scientific evidence" that "all or almost all consumers are likely to receive the maximum represented savings" (*Gorell Enters.*, 2012 FTC LEXIS 96, *6 [May 16, 2012]). The FTC has also made clear that "up to" statements provide no safe haven to advertisers, stating that companies would be required to show "the same level of substantiation regardless of whether the covered representation includes the words 'up to'" (*Gorell Enter.*; *Analysis of Proposed Order to Aid Public Comment*, 77 Fed Reg 12584, 12586 [FTC March 1, 2012]).

In support of its argument that its representations regarding broadband speeds were not misleading, Spectrum-TWC relies on an inapposite federal court ruling, *Fink v Time Warner*

Cable (837 F Supp 2d 279 [SD NY 2011], *affd* 714 F3d 739 [2d Cir 2013]). In *Fink*, the Second Circuit affirmed dismissal of an action against TWC under GBL section 349 after concluding that promising "up to 3 times the speed of most standard DSL packages" is not actionable misrepresentation where the service sometimes falls short of that speed, because "the phrase 'up to' would lead a reasonable consumer to expect that [broadband] speeds could be less than the advertised . . . speeds" (*id.* at 284). The district court based its dismissal of the complaint on the fact that plaintiffs had "merely" alleged that Internet speeds "while using a *limited subset of applications* [such as Skype and BitTorrent] were slower than promised" – which was insufficient to show that *overall* Internet speeds were slower than promised (*id.* at 283 [emphasis added]; *see also id.* at 286). Indeed, this was the basis on which the *Fink* court distinguished *Goshen*, stating that, unlike in *Fink*, the plaintiffs' allegations in *Goshen* "pertained to their Internet service *as a whole*" (*id.* at 284 [emphasis added]). Here, as in *Goshen*, and unlike in *Fink*, plaintiff alleges that Spectrum-TWC consistently failed to deliver the overall Internet speeds it promised to its subscribers (Complaint, ¶ 212).

Spectrum-TWC also argues that its advertisements promising "up to" specific speeds are not deceptive because they are literally true (*see* Defendants' Memorandum at 17 [citing dictionary definition of "up to"]). However, "literal truth" is no defense to a claim of deceptive advertising where, as here, the claims create a false "net impression," or are subject to more than one interpretation, one of which is false (*GE*, 302 AD2d at 315 ["literal truth is not an availing defense in light of the evident capacity of the representations at issue to mislead even reasonable consumers acting reasonably under the circumstances"]). Here, as alleged in the complaint, defendants' advertisements gave consumers the net impression that they would consistently receive advertised "up to" speeds, but, in fact, consumers did not experience those speeds consistently (*see* Complaint, ¶¶ 196-241). Therefore, the advertisements were not literally true.

Defendants next argue that their representations regarding Wi-Fi speeds, reliability and access to content were not misleading, because they amount to no more than non-actionable "puffery." Commercial representations that are "simply puffery or opinion" cannot form the basis for a cause of action in fraud, false advertising, or unfair business practices under New York law (*Lacoff v Buena Vista Publishing, Inc.*, 183 Misc 2d 600, 610 [Sup Ct, NY County

2000]; *see also Fink*, 810 F Supp 2d at 644). Puffery is a kind of "'exaggeration or overstatement expressed in broad, vague, and commendatory language'" that does not "provide any 'concrete representations'" (*Fink*, 810 F Supp 2d at 644 [citation omitted]).

The complaint further alleges that Spectrum-TWC misled customers when it "explicitly promised reliable Internet service" (*id.*, ¶ 248), citing an advertisement pledging a "blazing fast, super-reliable connection" (*id.*, 263), on which they could "stream so many devices at the same time" (Complaint, ¶ 94) and campaigns that said "[e]njoy Netflix better" (*id.*, ¶ 254), or "[s]tream Netflix and Hulu movies and shows effortlessly" (*id.*, ¶ 255). Defendants contend that these "subjective declarations of quality are prototypical instances of non-actionable puffery" (defendants' memorandum at 21). Defendants further contend that "statements like 'none of the lag' and 'no buffering'," "which are related to the performance concept of latency, are not concrete statements of latency performance", "just as 'blazing fast' and 'most Internet ever' are not concrete statements of speed performance" (Defendants' Memorandum at 21-22).

However, advertising claims that are easily capable of being proved to be true or false through common testing methodologies are, by definition, not puffery (*see Gillette Co. v Wilkinson Sword, Inc.*, 1991 US Dist LEXIS 21006, *54 [SD NY 1991] [claims that are "capable of being measured" are not puffery"]; *see also FTC v National Urological Group, Inc.*, 645 F Supp 2d 1167, 1206 [ND GA 2008] ["representations that are either true or false" are not puffery). Contrary to defendants' arguments, plaintiff's allegations that Spectrum-TWC advertised its Internet service as having "no buffering," "no lag," with "no slowdowns," "without interruptions," and "without downtime" (Complaint, ¶ 20), are all highly specific claims that are easily capable of being proven to be true or false through common testing methodologies, and, by definition, are not puffery. Indeed, Spectrum-TWC concedes that "lag" and "buffering" can be "measured in milliseconds" (Defendants' Memorandum at 22). Thus, the issue of whether Spectrum-TWC actually delivered the reliable Internet service it promised is ascertainable.

Although Spectrum-TWC points to other descriptive statements like "blazing fast, super-reliable connection" and "throughout the home," in support of its puffery argument, these statements cannot be read in isolation. Again, it is the net impression an advertisement leaves

with a consumer that counts, not the specific meaning of any term of the advertisement in isolation (*see Guggenheimer*, 43 NY 2d at 273).

For instance, in *National Urological*, the FTC brought false advertising claims against the marketers and distributors of dietary supplements under the FTC Act. While recognizing that "[t]he advertisements at issue in this case are indisputably riddled with puffery," that court criticized the defendants for parsing "the advertisements sentence by sentence and sometimes even phrase by phrase" to highlight language that could be called puffery (645 F Supp 2d at 1206). The *National Urological* court explained that "[b]y deconstructing the advertisements, the defendants attempt to create the overall impression that substantive claims could not arise from such vague, subjective statements" (*id.*). It found that "[d]espite the defendants' focus on the words and phrases of the advertisements, the focus of this case is on the claims derived from each of the advertisements as a whole." The court further found that the majority of claims "are phrased as factual statements that can be verified." It concluded that, given that puffery was combined with "concrete factual statements and phrases that also comprise the advertisements," the fact "that puffery is present cannot serve as a shield for the advertisements' deceptive, factual representations" (*id.*). This court finds that, likewise, while the advertisements alleged here may contain some puffery, as a whole, the advertisements regarding Internet speeds contain concrete statements of fact that are legally sufficient to withstand this motion to dismiss.

Defendants' final argument addressed to the sufficiency of the complaint is that the allegations regarding cable modems are undermined by documents cited in the complaint. Defendants argue that the complaint alleges certain TWC subscribers leased modems that were "incapable of delivering" the speeds associated with the tier of service to which they subscribed (Complaint, ¶¶ 102, 106-107), while at the same time conceding that TWC promised to "provide" customers with the appropriate modem," and that it would upgrade lease equipment "at no additional cost if we update Internet plan speeds and when technology improves" (*id.*, ¶ 105).

Although Spectrum-TWC admits that a large number of its subscribers would never be able to attain the promised Internet speeds because of obsolete modems, it argues that the modem allegations must be dismissed because the documents cited in the complaint show that the allegations do not account for (1) Spectrum-TWC's promise to upgrade deficient equipment; (2)

the "circumstances" surrounding the increasing number of deficient modems; (3) the "extensive[ness]" of the company's replacement efforts; and (4) the modem-related "billing credits" that Spectrum-TWC claims it gave certain subscribers (*see* Defendants' Memorandum at 22-23). However, at most, these contentions reflect defendants' alternative view of the facts and, as such, fail to utterly refute plaintiff's claims. Accordingly, this court finds that the Modem Failure claims are legally sufficient.

Primary Jurisdiction

In the alternative, Spectrum-TWC requests that this court stay the action in deference to the FCC's "primary jurisdiction" over this suit. The court also rejects this request. First, it would be procedurally improper to grant this request, as Spectrum-TWC failed to include it in a notice of motion or cross motion (*see* CPLR 2214 [a]; *Arriaga v Laub Co.*, 233 AD2d 244, 245 [1st Dept 1996] [as plaintiffs failed to formally and specifically demand in notice of motion that counterclaims be stricken, the trial court did not err in denying such relief]).

In any event, the primary jurisdiction doctrine has no application to this action, which raises in purely state law claims over which the FCC has neither jurisdiction nor expertise, and which involves misrepresentations in advertisements and other media not governed by FCC regulations. The primary jurisdiction doctrine ensures the proper relationship between administrative agencies and courts, and "comes into play whenever enforcement of [a] claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body" (*United States v Western Pac. R.R. Co.*, 352 US 59, 64 [1956]). Thus, a court should stay or dismiss a case that involves issues that fall "'within the realm of administrative discretion'" assigned to an administrative agency with specialized experience regarding those issues (*National Communications Assn. v American Tel. & Tel. Co.*, 46 F3d 220, 222-223 [2d Cir 1995] [citation omitted]). Courts commonly invoke the doctrine in cases that involve technical and intricate questions of fact and policy that the legislature has assigned to a specific agency (*see e.g. Heller v Coca-Cola Co.*, 230 AD2d 768 [2d Cir 1996]; *see also Goya Foods, Inc. v Tropicana Prods., Inc.*, 846 F2d 848, 851 [2d Cir 1988]).

Though there is "no fixed formula governing the application of the doctrine" (*Heller*, 230 AD2d at 769), some New York courts have applied a four-factor test to determine whether to

dismiss or stay a case on primary jurisdiction grounds: (1) whether the question at issue is within the conventional experience of judges, or whether it involves technical or policy considerations within the agency's particular field of expertise; (2) whether the question at issue is particularly within the agency's discretion; (3) whether there exists a substantial danger of inconsistent rulings; and (4) whether a prior application to the agency has been made (*Feinberg v Colgate-Palmolive Co.*, 34 Misc 3d 1243[A], 2012 NY Slip Op 954271, *12 [Sup Ct, NY County 2012]; *New York Auto. Ins. Plan v American Transit Ins. Co.*, 176 Misc 2d 791, 794 [Sup Ct NY County 1998]). However, even where all four factors favor application of the doctrine, "deferral is not statutorily required" (*Feinberg*, 2012 WL 9544271 at *12).

First, the primary issue in this case – whether Spectrum-TWC engaged in deceptive practices in connection with its provision of Internet services – is not, contrary to defendants' arguments, a "complex and technical question[] of engineering and policy" (Defendants' Memorandum at 27). Rather, at the heart of the complaint is a deceptive practices claim that falls traditionally within the "conventional competence of courts" (*Nader v Allegheny Airlines*, 426 US 290, 305 [1976]). Second, it cannot be said that the FCC has particular discretion over fraud and deceptive practices claims against Internet service providers when Congress has specifically preserved the role of state courts in "safeguard[ing] the rights of consumers" against the power of telecommunication and Internet companies (47 USC § 253 [b]). Third, there does not appear to be a substantial danger of inconsistent rulings, as defendants' representations outside of its disclosures pursuant to the Transparency Rule must comply with state law, regardless of any action taken by the FCC.

With respect to the fourth factor, defendants contend that the NCTA - the National Cable & Telecommunications Association – and USTelecom (the two leading national associations representing broadband providers) "have petitioned the FCC for a declaratory ruling that would address several key issues in this case" (Defendants' Memorandum at 28). The petition asks the FCC to confirm that (1) a BIAS provider's disclosure of its average speeds during period of peak demand complies with the Commission's transparency rules; (2) BIAS providers can meet their federal disclosure obligations by posting certain required information on the provider's website; and (3) it is consistent with federal law for BIAS providers to advertise the maximum ("up to")

speeds available to subscribers on a particular tier. In response to the petition, the FCC has initiated a proceeding, and is currently seeking public comment.

Although Spectrum-TWC contends that the petition seeks a "declaratory ruling that would address several key issues in this case," the petition does not ask the FCC to weigh in on any issues actually in dispute in this case. Rather, it asks the FCC only to clarify its position with respect to broadband service providers' compliance with *federal* laws and regulations, which matters are neither raised in nor implicated by the complaint.

Accordingly, the application of these factors to the facts of this case confirm that this court should not defer to the FCC here.

Net Neutrality

Finally, in letter submissions, defendants contend that the draft Order released by the FCC on November 22, 2017, in its *Restoring Internet Freedom* proceeding (WC Docket No. 17-108), and the final Order dated January 4, 2018, which retains the Transparency Rule while rescinding other "open Internet" or "net neutrality" rules, is relevant to the motion to dismiss. This court disagrees. The Order – which promulgates a new deregulatory policy effectively undoing network neutrality, includes no language purporting to create, extend or modify the preemptive reach of the Transparency Rule. It notes that "[a]lthough we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, 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" (Order, § 196). The Order notes that the FCC "appreciate[s] the many important functions served by our state and local partners, and [they] 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, and generally responding to consumer inquiries and complaints (*id.*, [internal quotation omitted]). "[T]he continued applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here" (*id.*).

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, defendants' motion to dismiss the complaint is denied.

This constitutes the order and decision of the court.

DATED: **February 13, 2018**

ENTER,

O. P. Sherwood

O. PETER SHERWOOD J.S.C.

EXHIBIT E

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February 23, 2018

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Re: **Draft Letter Report Regarding Charter's Compliance with Article 17 of Franchise Agreements**

Dear Mr. Falk:

This Letter Report follows New York City Department of Information Technology & Telecommunications' (DoITT) audit of the compliance of Charter Communications, and its predecessor Time Warner Cable (collectively, "Charter") with Section 17 of the cable franchise agreements (collectively, the Franchise Agreements) between Charter and the City of New York. The objective of this audit was to determine if Charter has been and continues to be compliant with Section 17 of the Franchise Agreements, which is intended to ensure that entities awarded the right to utilize City property in the operation of their businesses engage in fair labor practices and contract with New York City vendors whenever feasible.

Background

The City of New York is committed to promoting opportunities for and protecting the rights of its workers. The City therefore requires that any business that it awards a franchise to agrees to certain obligations related to its labor practices. City franchises for telecommunications, including cable television, public pay telephones, mobile telecommunications, and local high capacity telecommunications, are managed by DoITT. Charter, through its acquisition of Time Warner Cable (now Spectrum), currently holds five cable franchise agreements for operations in Manhattan, Brooklyn, Queens and Staten Island. All of the Franchise Agreements include the following section related to labor practices:

17. EMPLOYMENT AND PURCHASING

17.1 Right to Bargain Collectively: Franchisee shall recognize the right of its employees to bargain collectively through representatives of their own choosing in accordance with applicable law. Franchisee shall recognize and deal with the representatives duly designated or selected by the majority of its employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or any other terms, conditions, or privileges of employment as required by law. Franchisee shall not dominate, interfere with, participate in the management or control of, or give financial support to any union or association of its employees.

17.2 No Discrimination: Franchisee shall not: (i) refuse to hire, train, or employ; (ii) bar or discharge from employment; or (iii) discriminate against any individual in compensation, hours of employment, or any other term, condition, or privilege of employment, including, without limitation, promotion, upgrading, demotion, downgrading, transfer, layoff, and termination, on the basis of race, creed, color, national origin, sex, age, handicap, marital status, affectional preference or sexual orientation in accordance with applicable law. Franchisee agrees to comply in all respects with all applicable federal, state and local employment discrimination laws and requirements during the term of this Agreement.

17.3 Local' Employment Plan: Within thirty (30) days of the Effective Date hereof, Franchisee shall, at its own cost and expense, develop, maintain, implement and disclose to the City (subject to appropriate and lawful confidentiality restrictions), a plan, consistent with Franchisee's collective bargaining agreements, for the recruitment, education, training, and employment of residents of the City for the opportunities to be created by. the deployment and provision of service contemplated in this Agreement.

17.4 City Vendors: To the extent feasible and consistent with applicable law, and with due regard to price and quality considerations, Franchisee shall utilize vendors located in the City in connection with the deployment and provision of service contemplated by this Agreement.

17.5 Local Law Requirements: Franchisee agrees to comply in all respects with the provisions of the Mayor's Executive Order No. 50 (April 25, 1980) (codified at Title 10 Sections 1-14 of the Rules of the City of New York) and City Administrative Code 6-108.1 (1984) and all rules and regulations promulgated thereunder) (collectively, the "EEO Requirements"), as such EEO Requirements may be amended, modified or succeeded throughout the Term of this Agreement. Notwithstanding the fact that the EEO Requirements do not apply on their face to Franchisee in its capacity as a franchisee, Franchisee shall comply in all respects with

> the provisions of such EEO Requirements and successor and replacement laws, orders and regulations adopted following the date of this Agreement. As required by said Executive Order No. 50, the provisions of Sections 50.30 and 50.31 of the Final Rule implementing said Order are incorporated herein by this reference.

Roughly 1800 of Charter's workers are represented by the International Brotherhood of Electrical Workers, Local 3 (Local 3). In March 2017, Local 3 went on strike against Charter over complaints related to wages and benefits and disciplinary procedures. Local 3 subsequently contacted DoITT to report its belief that Charter, in hiring replacement workers, was not complying with its obligation to use local vendors whenever feasible as required by Section 17.4 of the Franchise Agreements. Local 3 also provided DoITT with a number of charges of labor law violations it had filed with the National Labor Relations Board, which has authority to oversee compliance with federal laws on labor standards and practices. 29 U.S.C. §§ 151-169.

DoITT initiated this audit in August 2017 with a focus on evaluating Charter's compliance with Sections 17.1 and 17.4 of the Franchise Agreements. DoITT requested that Charter provide DoITT with the following information related to compliance with Section 17.4:

- An itemized listing, by vendor and date, of all expenses incurred, or copies of all vendor invoices and proof of payment;
- Un-redacted copies of all vendor agreements in effect during the requested time period;
- Policies and procedures governing the selection of and payment to vendors performing work pursuant to the franchise agreements;
- Evidence, including email correspondence, documenting Charter's efforts to use City based vendors.

In relation to compliance with Section 17.1, DoITT requested that Charter provide "[a]ny records (a) reflecting a final disposition of the NLRB related to charges filed by either Charter or Local 3 with the National Labor Relations Board; or (b) containing communications between the NLRB and Charter on any such charges."

DoITT subsequently conducted an entrance conference by telephone and made two visits to Charter's offices to inspect responsive records that Charter made available to the audit team. DoITT provided Charter with a Preliminary Draft Letter Report on December 13, 2017, and Charter presented DoITT with a responsive letter on January 10, 2018.

Audit Summary

Findings:

DoITT's audit revealed that, because of Charter's overly broad interpretation of the term "located in the City", Charter failed to engage in practices with respect to its vendor selection that demonstrate compliance with the requirement set forth in Section 17.4 of the Franchise Agreements. In particular, Charter provided virtually no evidence that it considered the requirement of Section of 17.4 when selecting vendors. DoITT also found that an Administrative Law Judge ("ALJ") at the NLRB found labor law violations on the part of Charter that constitute a default of its obligations under Section 17.1 of the Franchise Agreements.

Recommendations:

DoITT recommends that, going forward, Charter employ more stringent criteria and process for determining whether or not a vendor is a "City vendor" under the Franchise Agreements and systematically document in writing both its determination process and efforts to engage local vendors. DoITT also requests that Charter inform DoITT on any Board decision with respect to the labor law violations discussed herein.

Findings

With respect to Section 17.4, DoITT's audit found that Charter relied on an extremely broad interpretation of "located in New York City" and, consequently, did not undertake steps to document best efforts in hiring New York City vendors. Rather than finding a default at this time based on this deficiency, DoITT notifies Charter, through this audit report, that, absent evidence of bona fide efforts to comply with Section 17.4 when selecting vendors, DoITT will find a default in a follow-up audit, which it intends to conduct within the next twelve months. In connection with that notification, DoITT, as set forth below, provides Charter with suggested criteria that would be useful in determining if a particular vendor is "located in the City" as required by Section 17.4.

With respect to Section 17.1, DoITT became aware, during the course of the audit, of an NLRB finding of Charter labor law violations that constitute a default of its Section 17.1 obligations. Because Charter filed exceptions to those findings, however, DoITT will hold its determination of default in abeyance. If the Board affirms the ALJ, finding that Charter committed unfair labor practices, DoITT will issue a default letter to Charter.

Compliance with Section 17.4 – City Vendors

Efforts to use City Vendors

In response to DoITT's request to provide evidence documenting Charter's efforts to use City based vendors, Charter provided DoITT inspectors with printed copies of email correspondence with the vendors as set forth in the following chart:

Vendor	**Approximate Date of Correspondence**	**Substance of Communication**
VENDOR 19	March 2016	Notice of intent to terminate 2011 Agreement
VENDOR 5	January 2017	Discussion of VENDOR 5's staffing capabilities
VENDOR 24	January 2017	Discussion of VENDOR 24's staffing capabilities

VENDOR 29	January 2017	Discussion of VENDOR 29's staffing capabilities
VENDOR 23	February 2017	Discussion of deployment strategy and available technicians
VENDOR 28	February 2017	Discussion of possible work for power supply that ended with confirmation does not perform work outside NYC
VENDOR 26	March 2017	Discussion regarding availability of technicians during pending strike
VENDOR 25	April 2017	Confirmation that VENDOR 25 was approved to perform work in New York City and details on availability of technicians to perform work during strike and internal Charter discussion noting that VENDOR 25 "has shops in Brooklyn and Nassau County with 50 trained Techs ready to go"
VENDOR 23	April 2017	Confirmation of VENDOR 23's technician headcount and billing process
VENDOR 12	April 2017	Discussions regarding finalizing contractor agreement.
VENDOR 24	April 2017	Discussion regarding VENDOR 24's manpower shortfall and plans to reassign some technicians to Brooklyn
VENDOR 7	April 2017	Charter's instructions to VENDOR 7 technicians performing work during strike
VENDOR 11	May 2017	Discussion of engaging VENDOR 11 to assist Charter with Fiber audit in Manhattan
VENDOR 21	May 2017	Discussion of technician shortages and of Charter's attempt to "persuade VENDOR 21 to bring on locals"
VENDOR 4	June 2017	Discussion regarding procurement of technicians to address backlog in business class services
VENDOR 17	June 2017	Solicitation by VENDOR 17 to provide technical services to Charter and discussion of possible meeting

Notably, with the exception of the internal discussion of persuading VENDOR 21 to utilize additional local workers, none of these communications evinces any effort on Charter's part to establish the various vendors' connection to New York City. In particular, Charter did not ask any vendors whether they were registered with the New York Secretary of State to do business in the State of New York and, if so, whether the vendor was registered in one of New York City's five counties. Additionally, the communications did not demonstrate consistent efforts by

Charter to establish the existence and extent the vendors' New York City office or business presence. Furthermore, Charter presented no evidence that the work performed by vendors that Charter concedes are not located in New York City could not have been performed by its established City vendors, or that Charter made any attempt to engage City vendors for such work.

As discussed below, Charter's failure to inquire into or otherwise investigate the relationship with and presence in New York City of its vendors likely stems from its view of what qualifies a vendor as being "located in the City" for purposes of Section 17.4 of the Franchise Agreements. According to Charter, a vendor qualifies as a City Vendor under Section 17.4 if it has a "location in New York City from which it conducts business," even if such a location is merely a temporary storage facility. Thus, under Charter's view, any vendor who procures space within the City to store its equipment while it performs work for Charter qualifies as a City vendor under Section 17.4. DoITT expressly rejects that position.

Vendors Engaged by Charter During the Period March 1, 2016 - July 31, 2017

During the course of the audit, Charter provided information and confirmed that during the period spanning March 1, 2016 to July 31, 2017, it engaged 26 vendors to perform work relevant to this audit. Charter also stated that, using the criteria discussed above, it determined that 20 of the vendors were City Vendors for the purposes of Section 17.4 of the Franchise Agreements. This analysis presumably provided the basis for Charter's testimony to City Council in May 2017 that its "contractors overwhelmingly come from the City."

A DoITT review of the vendors utilized by Charter, however, indicates that Charter's determination as to which vendor qualified as a City Vendor under Section 17.4 was based solely on the vendor supplying Charter with an unverified New York address for what Charter refers to as a "Local Technical Center" ("LTC"). The following chart shows information relating to vendors' registration with New York Department of State (if any), and the Local Technical Center address (if any) provided to Charter.

Vendor Name	**NY DOS Registration**	**DOS County**	**LTC**	**Claimed by Charter to be a City Vendor**
VENDOR 10	Domestic LLC	Erie	None Given	Yes
VENDOR 1	None		None Given	No
VENDOR 2	None		[redacted] Jericho, NY	Yes

VENDOR 3	None		[redacted] Lowell, MA. 01851	No
VENDOR 4	Foreign LLC	Monroe	[redacted] Long Island City, New York 11301	Yes
VENDOR 5	Domestic LLC	Kings	[redacted] Bronx, NY 10454	Yes
VENDOR 6	Domestic Business Corp.	Westchester	[redacted] Jamaica, NY	Yes
VENDOR 7	Domestic LLC	Bronx	[redacted] Bronx, NY 10455	Yes
VENDOR 8	Foreign Business Corp.	Nassau	[redacted] Rahway, NJ 07065	No
VENDOR 9	None		None Given	No
VENDOR 11	Foreign Business Corp.	New York	[redacted] New York, NY	Yes
VENDOR 13	Domestic Business Corp.	New York	[redacted] Long Island City, NY 11101	Yes
VENDOR 14	Foreign LLC	Richmond	[redacted] Maspeth, NY	Yes
VENDOR 15	Domestic Business Corp.	Richmond	[redacted] Staten Island, NY	Yes
VENDOR 16	Domestic Business Corp.	Westchester	[redacted] Bronx NY	Yes

VENDOR 18	Domestic Business Corp.	Kings	[redacted] hitestone NY 11357	Yes
VENDOR 19	Foreign LLC	Queens	[redacted] NY 11378	Yes
VENDOR 20	Domestic Business Corp.	Nassau	[redacted] Hicksville NY, 11801	No
VENDOR 21	None		[redacted] Flushing, NY	Yes
VENDOR 22	None		[redacted] Milburn, NJ 07041	No
VENDOR 23	None		[redacted] Brooklyn NY	Yes
VENDOR 24	Foreign LLC	Kings	[redacted] Long Island City, NY	Yes
VENDOR 25	Foreign Business Corp.	Suffolk	[redacted] Brooklyn, NY	Yes
VENDOR 26	Domestic Business Corp.	Suffolk	[redacted] Maspeth, NY 11378	Yes
VENDOR 27	Domestic Business Corp.	Erie	[redacted] Brooklyn, NY	Yes
VENDOR 29	Domestic Business Corp.	Bronx	[redacted] Bronx NY, 10454	Yes

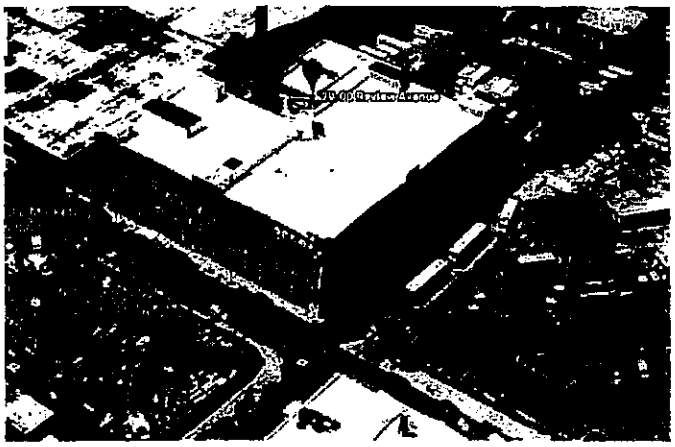
As of December 13, 2017, DoITT was not able to verify that VENDOR 1 , VENDOR 2 , VENDOR 9 , VENDOR 21 , VENDOR 22 , or VENDOR 23 had registered, either as foreign or domestic business entities, to do business in the state of New York. DoITT, therefore, rejects Charter's determination that

VENDOR 2 , VENDOR 21 and VENDOR 23 qualify as City Vendors for the purposes of Section 17.4 of the Franchise Agreement.[1]

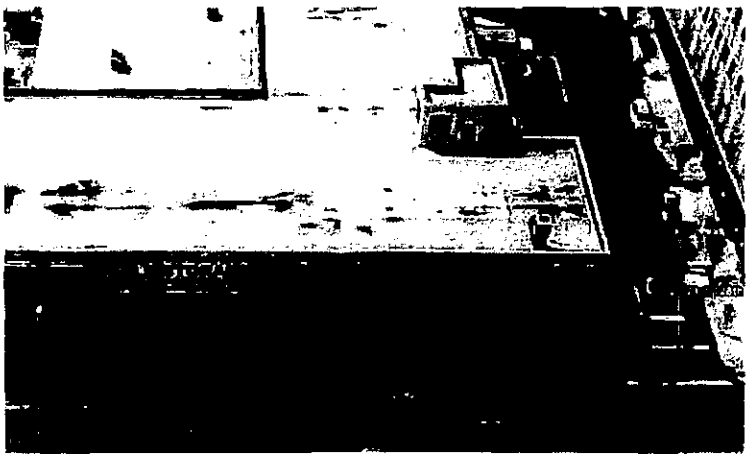
While irrelevant to DoITT's analysis of their status during the audit period, Charter notified DoITT that subsequent to the issuance of the preliminary draft version of this audit report on December 13, 2017, VENDOR 21 appears to have registered with the New York Department of State.

In addition, a review of the Local Technical Center addresses for the vendors above reveals that many of them do not provide indicia of a substantive presence by the vendor in New York City. Indeed, at least three of these addresses appear to be for self-storage facilities:

- VENDOR 4 - [redacted], Long Island City, New York 11301



- VENDOR 21 - [redacted], Flushing, NY

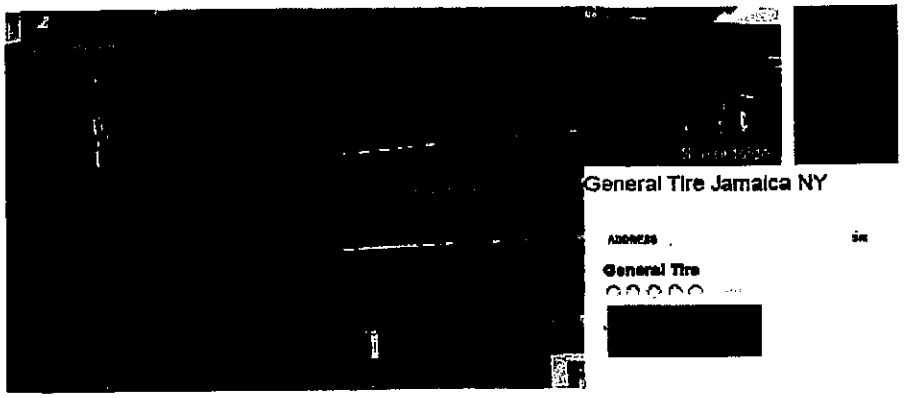


[1] DoITT notes that regardless of whether a vendor is a City Vendor for the purposes of Section 17.4, it is required to register with the New York Secretary of State if it is doing business in the state.

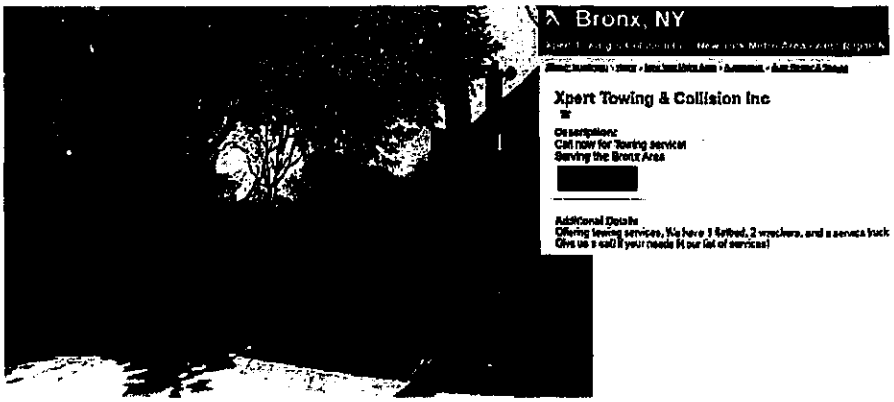
- VENDOR 23 - [redacted], Brooklyn NY

In addition, many of the alleged New York City vendor locations are listed addresses for unrelated business and appear to have no connection to the associated vendor:

- VENDOR 6 - [redacted], Jamaica, NY



- VENDOR 16 - [redacted] Bronx NY



- VENDOR 18 - [redacted]., Maspeth, NY 11378

- VENDOR 24 - [redacted], Long Island City, NY

- VENDOR 27 - [redacted], Brooklyn, NY

EKS Manufacturing

Directions

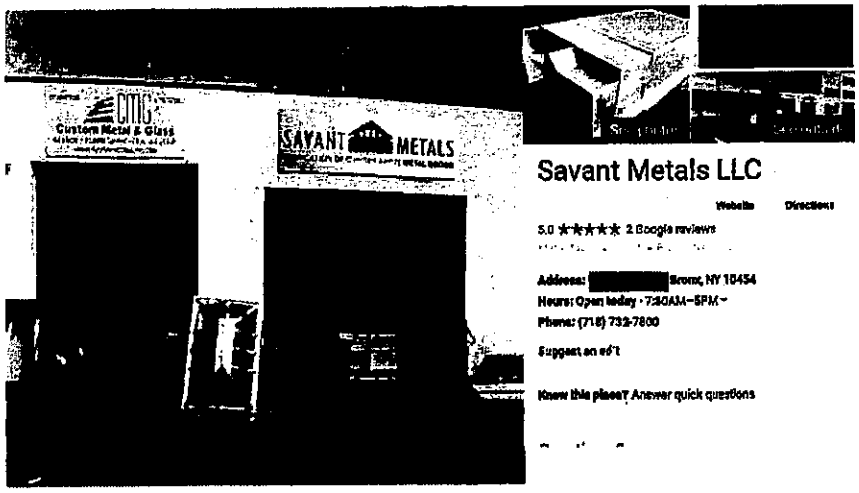
Manufacturer in Brooklyn, New York

Address: [redacted] Brooklyn, NY 11208

Phone: (718) 272-5360

Suggest an edit · Own this business?

- VENDOR 29 - [redacted] Bronx NY, 10454



Savant Metals LLC

Website Directions

5.0 ★★★★★ 2 Google reviews

Address: [redacted] Bronx, NY 10454

Hours: Open today · 7:30AM–5PM

Phone: (718) 732-7800

Suggest an edit

Know this place? Answer quick questions

DoITT therefore concludes that, contrary to Charter's determination, none of these vendors have provided sufficient evidence of local presence to qualify as City Vendors under the terms of the Franchise Agreement. Accordingly, DoITT finds that of the 26 vendors utilized by Charter during the audit period, only seven—VENDOR 5, VENDOR 7, VENDOR 11, VENDOR 13, VENDOR 14, VENDOR 15, and VENDOR 18 are "located in the City" for the purposes of Section 17.4 of the Franchise Agreement. Thus, DoITT concludes that the percentage of

Charter's vendors that are "located in the City" for the purposes of Section 17.4 is roughly 27 percent, not 77 percent, as claimed by Charter.

Subsequent to the issuance of the preliminary draft version of this audit report on December 13, 2017, Charter relayed a number of assertions it received from the vendors listed above regarding the functions performed at the locations in question. Charter acknowledged, however, that it did not undertake any efforts to verify the information it received from said vendors. DoITT, therefore, maintains its findings above and notes that there are numerous types of documentation that Charter could request from its vendors to determine the actual nature and level of activity conducted from a purported City location—copies of leases, invoices for rental payments, vendor questionnaires etc.—and that such verification would require minimal effort and would comport with the requirement of Section 17.4. Section 17.4 obligates Charter, not its vendors, to use best efforts to utilize vendors located in New York City.

Compliance with Section 17.1 – Fair Labor Practices

International Brotherhood of Electrical Workers, Local 3 (Local 3), through its attorney, submitted to DoITT copies of unfair labor practice charges that it had filed against Time Warner Cable or its successor, Charter Communications. The NLRB cases for those charges included the following:

Case No.	Date Filed.	Charges	Outcome
02-CA-126154	4/9/2014	8(a)(3) Changes in Terms and Conditions of Employment 8(a)(3) Discipline	Settled on 2/20/2015
02-CA-127152	4/23/2014	8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline) 8(a)(5) Repudiation/Modification of Contract [Sec 8(d)/Unilateral Changes]	Settled on 2/20/2015
02-CA-126860	4/18/2014	8(a)(1) Interrogation (including Polling) 8(a)(1) Coercive Actions (Surveillance, etc) 8(a)(3) Changes in Terms and Conditions of Employment 8(a)(3) Discipline	June 14, 2016 – ALJ Finds Time Warner violated labor law by unlawfully suspending and coercively interrogating four employees for participating in protected activity.

02-CA-125694	4/2/2014	8(a)(3) Changes in Terms and Conditions of Employment 8(a)(4) Changes in Terms and Conditions of Employment 8(a)(3) Discipline 8(a)(4) Discipline	Charge withdrawn on 1/5/2015
02-CA-131456	6/24/2014	8(a)(5) Refusal to Bargain/Bad Faith Bargaining (incl'g surface bargaining/direct dealing) 8(a)(5) Refusal to Furnish Information 8(a)(5) Repudiation/Modification of Contract [Sec 8(d)/Unilateral Changes]	Charge withdrawn on 1/5/2015
02-CA-151838	5/7/2015	8(a)(1) Coercive Statements (Threats, Promises of Benefits, etc.) 8(a)(3) Changes in Terms and Conditions of Employment	Appeal from regional director's refusal to issue complaint affirmed and case closed on 10/19/2015
02-CA-152655 ** Moved to 29-CA-180230	5/20/2015	8(a)(5) Repudiation/Modification of Contract [Sec 8(d)/Unilateral Changes]	Settled on 6/5/2017 without admission of unfair labor practice by Charter
02-CA-183148	08/29/2016	8(a)(5) Repudiation/Modification of Contract [Sec 8(d)/Unilateral Changes] 8(a)(5) Refusal to Furnish Information 8(a)(5) Refusal to Bargain/Bad Faith Bargaining (incl'g surface bargaining/direct dealing)	Settled on 6/5/2017 without admission of unfair labor practice by Charter
02-CA-186603	10/19/2016	8(a)(5) Repudiation/Modification of Contract [Sec 8(d)/Unilateral Changes]	Settled on 6/5/2017 without admission of unfair labor practice by Charter

Charter was generally unwilling to provide DoITT access to documents relating to NLRB cases, despite the relevance of such documents to Charter's labor practices. Charter did allow DoITT to review the settlement orders in the final three cases listed above. DoITT did, however, review publicly available information and documents related to all of the above cases. As shown above, with the exception of NLRB case no. 02-CA-126860, all of the above cases were dismissed, withdrawn or settled and did not result in an NLRB finding of a labor law violation against Charter.

In Case No. 02-CA-126860, an ALJ found in June 2016 that Charter violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act when it suspended and coercively interrogated four employees in connection with a work disruption that occurred at a Charter facility in April of 2014. While Charter and Local 3 have engaged in extensive litigation related to whether or not Local 3 was bound by a no-strike provision in April 2014 and, if so, whether the work stoppage was a violation of that provision, the ALJ found that Charter's conduct violated the NLRA even if the work stoppage was prohibited activity. In particular, the ALJ determined that the evidence indicated that Charter suspended four employees who were not scheduled to work that day but had been informed that the union was conducting a "safety meeting". The ALJ further determined that there was no evidence to support a finding that those employees arrived at the Charter facility with the intention of participating in prohibited activity or that they actually did so. Instead, the ALJ found that the evidence suggested that the four employees went to the Charter facility on the day of the disruption "for a union meeting relating to working conditions, disciplinary actions, grievances and employees' *Weingarten* rights." (Administrative Law Judges Decision, June 14, 2016 NLRB Case No. 02-CA-126860.) Accordingly, the ALJ found that suspending the four employees for exercising their rights to participate in valid union activity violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. In addition, the ALJ also determined that Charter further violated Section 8(a)(1) by subjecting the employees to interrogations that went beyond the incident in question and included questioning related to protected union organization and activity.

DoITT finds that the labor law violations described above, which stem from punishing employees for participation in protected union activities and coercively interrogating such employees about union activities, constitute a default of Charter's obligations under Section 17.1 to recognize employees collective bargaining rights. DoITT will hold this finding in abeyance until the Board rules on Charter's exceptions to the ALJ's findings. If the Board affirms the ALJ's findings, DoITT will immediately issue its determination of Charter's default of its obligations under Section 17.1

During the course of the audit, Charter argued that the pending findings of labor law violations in Case No. 02-CA-126860 do not constitute defaults of its obligations under Section 17.4 because (a) the findings have yet to be affirmed by the Labor Board and Charter has pending objections to the findings, and (b) Section 17.1 is directed to compliance with sections 8(a)(5) and 8(d) of the NLRA, not sections 8(a)(1) or 8(a)(3). Charter's first argument is moot because, as stated above, DoITT intends to issue a finding of default only in the event the ALJ's determination is affirmed. With respect to Charter's second argument, DoITT disagrees with Charter's interpretation of Section 17.1 of the Franchise Agreement. Section 17.1 includes the requirement that Charter "recognize the right of its employees to bargain collectively through representatives of their own choosing in accordance with applicable law." DoITT views activities that subvert the functioning of the union activities within Charter as violation of that obligation. The findings of the NLRB in Case No. 02-CA-126860—that Charter punished employees for participating in union activities and coercively interrogated employees about union activities—are actions that undermine the rights of employees to bargain collectively through participation in a union. Accordingly, DoITT will issue a finding of a default in the event those findings are affirmed.

Recommendations

In the future, DoITT recommends that Charter require that each of its vendors complete a questionnaire that includes at least the following information:

- Information regarding vendor's registration with the New York State Department of State, including DOS ID number;
- Information regarding that vendor's facility(ies) in New York City, including:
  - Number of employees whose regular daily indoor workspace is in the facility;
  - Number of employees who regularly report for work at the facility; and
  - Details regarding the vendor's lease for the facility property;
  - Percentage of vendor's work portfolio that is based out of the facility.
- Number of vendor's employees who are residents of New York City.

Using this information, Charter should determine that a particular vendor is a City Vendor based on the following factors: (a) whether the vendor is registered with the New York Department of State, as a local or foreign business entity, in one of the City's five counties; (b) whether the vendor's City facility includes a regular indoor workspace for at least one employee; (c) whether at least fifty percent of the workers who will perform work for Charter regularly report to the facility; (d) whether the vendor owns or holds a long term commercial lease for the property on which the facility is located; and (e) whether at least thirty percent of the workers who will perform work for Charter are residents of New York City. No single factor need be dispositive but DoITT expressly rejects Charter's position that the mere presence of vendor personnel or equipment at the time work is performed means that the vendor in question is located in the City for purposes of Section 17.4.[2]

DoITT further recommends that Charter implement a process for its efforts to engage City vendors in a systematic manner, including a record of the basis for its determinations as to which vendors qualify as City vendors, a log of vendors contacted and the results returned by such vendors to the questionnaire described above.

In addition, DoITT requests that Charter immediately update DoITT with regards to any activity in NLRB Case No. 02-CA-126860.

[2] DoITT notes that Charter's purported interpretation renders Section 17.4 meaningless, as any vendor who performed work within the City limits would meet the requirement as long as they stored some equipment in the City during the engagement.

Audit Completion

The matters covered in this report were discussed with Charter officials during and at the conclusion of this audit. A preliminary draft letter report was sent to Charter officials and discussed at an exit conference on December 20, 2017. Subsequent to the exit conference, Charter officials provided additional information regarding the issues discussed in the report which was considered in connection with the preparation of this letter report. DoITT issued a draft report on January 12, 2018 and Charter provided DoITT with a formal written response, which is attached here, on January 26, 2018.

Very truly yours,

MICHAEL PASTOR
General Counsel
New York City
Department of Information Technology and
Telecommunications

EXHIBIT F

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on December 8, 2017

COMMISSIONER PRESENT:

John B. Rhodes, Chair

CASE 17-C-0757 - In the Matter of a Management and Operations Audit of Time Warner Cable Information Services (New York), LLC.

ORDER INITIATING A MANAGEMENT AND OPERATIONS AUDIT

(Issued and Effective December 8, 2017)

INTRODUCTION

This Order directs the Department of Public Service Staff (DPS Staff), on behalf of the Commission, to initiate a management and operations audit of Time Warner Cable Information Services (New York), LLC (TWCIS(NY)) a wholly-owned indirect subsidiary of Charter Communications, Inc. (Charter). Management and operations audits involve, among other things, forward-looking evaluations of management processes, systems, operational practices, and organizational effectiveness, for the purpose of improving performance. This management and operations audit should focus on TWCIS(NY)'s management and affiliate responses to network and service outages that have occurred since March 2017. During that time, Charter, the ultimate parent company of TWCIS(NY), has been engaged in an ongoing labor dispute with the International Brotherhood of Electrical Workers (IBEW) representing employees in the New York City area. DPS Staff is directed to take steps necessary to assist the Commission in conducting the audit by DPS Staff and to engage an independent consultant.

BACKGROUND

Pursuant to PSL §96(6), "[t]he commission shall have the power to provide for a management and operations audit of any telephone corporation." In 2012, TWCIS(NY) sought Commission designation as an Eligible Telecommunications Carrier (ETC) in order to receive federal universal service support for offering Lifeline Service pursuant to 47 U.S.C. §214. At that time, TWCIS(NY) was a wholly-owned subsidiary of Time Warner Cable (TWC) and authorized to provide telecommunications services in New York pursuant to Certificates of Public Convenience and Necessities (CPCNs) issued by the Commission on December 31, 1993 in Case 93-C-0569 and on August 25, 1994 in Case 93-C-0899.[1] In March, 2013, the Commission further determined that TWCIS(NY) held a valid CPCN under PSL §99 and had tariffs in effect offering intrastate telephone services.

TWCIS(NY) subsequently filed a replacement tariff effective February 23, 2013 offering Voice over Internet

[1] The Commission authorized TWCIS(NY)'s predecessor entities, Time Warner AxS of Rochester, L.P. and Time Warner AxS of New York City, L.P., to provide telecommunications services. See, Joint Petition of Time Warner Communications Holdings, Inc. et al. for Transfers and Rescissions of Certain Certificates of Public Convenience and Necessity and Approval for Corporate Restructuring, Including the Issuance or Transfer of Stock and the Issuance of Debt, Case 98-C-0593 (issued May 12, 1998). The Commission later granted its approval of a corporate restructuring plan and the transfer of CPCNs from Time Warner AxS of Rochester, L.P. and Time Warner AxS of New York City, L.P. to Time Warner ResCom of New York, LLC. Id. Petitioner's name change from Time Warner ResCom of New York, LLC to Time Warner Cable Information Services (New York), LLC became effective on October, 6, 2011. See, Letter from David W. Cramer, Utility Analyst II (Telecom), State of New York Public Service Commission, to Carey Roesel, Consultant to Time Warner Cable Information Services (New York), LLC, Matter No. 11-02116 (effective Oct. 11, 2011).

Protocol (VoIP) Home Phone and commercial Business Class Phone services on a fully regulated basis. It committed to be regulated by the Commission as any other competitive local exchange carrier (CLEC) in New York would, including being subject to the Commission's service quality regulation (16 NYCRR Part 602).[2]

Although TWCIS(NY) subsequently requested certain waivers of the Commission's telephone regulations, it was granted only waivers relating to partial payments and distribution of directories. TWCIS(NY) was required to continue to report on all applicable service quality metrics consistent with the Commission's rules for at least six months.[3]

The Commission further authorized TWCIS(NY) to limit its service quality reporting to "Core" customers, provided the Director of the Office of Telecommunications was satisfied that the initial six months of TWCIS(NY) reporting complied with established reporting guidelines (16 NYCRR §603.4(a)). To date, however, no such determination has been made by the Director of the Office of Telecommunications and TWCIS(NY) continues to be required to report on the full panoply of applicable Commission regulations.

Charter's merger with TWC included the acquisition of TWC's TWCIS(NY) subsidiary. A supplement to Charter's Joint

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[2] See, Case 12-C-0510, Petition of Time Warner Cable Information Services (New York), LLC for Modification of Its Existing Eligible Telecommunications Carrier Designation, Order Approving Designation as A Lifeline-Only Eligible Telecommunications Carrier (issued March 18, 2013).

[3] See, Case 13-C-0193, Petition of Time Warner Cable Information Services (New York), LLC for Waivers of Certain Commission Regulations Pertaining to Partial Payments, Directory Distribution, Timing for Suspension or Termination of Service, and a Partial Waiver of Service Quality Reporting Requirements, Order Granting in Part and Denying in Part Requests for Waivers of Rules (issued October 21, 2013).

Petition in Case 15-M-0388, dated July 10, 2015, stated that "Petitioners … may also require Commission approval under Section 99(2) of the PSL, which applies to transfers of telephone franchises. Time Warner Cable Information Services (New York), LLC (f/k/a Time Warner Cable ResCom of New York, LLC) ("TWCIS") and Time Warner Cable Business LLC ("TWCB"). . . will continue to operate in New York under their existing certificates, and Petitioners do not seek approval at this time to transfer the Competitive Carrier Subsidiaries' certificates to any other entity." As such, Charter, through its merger with TWC, acquired, among other things, the previously-approved CPCNs held by subsidiaries of TWC.

In the Commission's Approval Order on the merger between TWC and Charter, it noted that "[w]ith respect to ETC and Lifeline … [Charter is] … not proposing any changes and will seek Commission approval in the future if changes are so desired."[4] Thus, Charter's wholly-owned subsidiary TWCIS(NY) remains an ETC and is obligated to comply with Commission regulations as a CLEC, including service quality requirements, subject to the limited waivers granted in Case 13-C-0193.

Further, in the Commission's Approval Order, Charter was also required, among other conditions, to not cause any net loss in customer facing jobs for four years following the close of the transaction.[5] This condition was adopted to ensure that Charter, and by extension its operating subsidiaries, did not

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[4] Case 15-M-0388, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Granting Joint Petition Subject to Conditions (issued January 8, 2016), f.n. 103 (Approval Order).

[5] Id., pp. 64-65; Appendix A, p. 5.

reduce its customer facing workforce in order to achieve synergy savings associated with the transaction. The Commission was concerned such a reduction would ultimately result in diminished service quality for New York customers.[6] In response to an inquiry from Chairman Rhodes,[7] Charter reported in October 2017 that it currently has a customer facing workforce that complies with the level it is required to maintain.[8] Charter indicated, however, that the workforce figure includes approximately 1,700 striking IBEW members in the New York City area.[9]

LEGAL AUTHORITY

TWCIS(NY) is subject to the Commission's authority to order a management and operations audit pursuant to PSL §96(6)(a). TWCIS(NY) holds a CPCN and has on file a tariff offering intrastate telecommunications service, and is therefore functioning as a telecommunications provider in New York under PSL Article 5 (Telephone).[10] PSL §96(6)(a) gives the Commission the authority to "provide for a management and operations audit of any telephone corporation. The commission shall have discretion to have such audits performed by its staff or by independent auditors."[11] The Commission may further require that TWCIS(NY) pay for the audit and require that it implement any

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[6] Id., pp. 63-64

[7] Case 15-M-0388, Letter from Chairman Rhodes to Charter CEO Tom Rutledge (issued October 12, 2017).

[8] Case 15-M-0388, Charter Response to Chairman Rhodes' Letter (filed October 27, 2017).

[9] Id.

[10] Case 98-C-0593, Time Warner Communications Holdings, Inc., et al. Certificates of Public Convenience and Necessity, Untitled Order (issued April 23, 1998)

[11] PSL §96(6)(a).

recommendations that result from the audit. In addition, the Commission also approved the Charter/TWC merger pursuant to PSL §§99, 100, 101 (Article 5) and 222, subject to the conditions discussed in the body of the Approval Order. That Approval Order resulted in the TWC subsidiaries, including TWCIS(NY), being transferred to Charter.[12]

DISCUSSION AND CONCLUSION

The Commission's Orders in Cases 12-C-0510, 13-C-0193, and 15-M-0388 show that TWCIS(NY)'s service quality is critically important. Since the IBEW strike began in March of 2017, Charter and more specifically its operating subsidiaries including TWCIS(NY) have experienced a number of service related problems, including nine major outages in the New York City area and more than 125 intentional cable cuts.[13] These cuts have resulted in more than 320,000 telephone, cable, and broadband service outages for a substantial number of TWCIS(NY)'s voice customers in the New York City area, as well as disrupting cellular networks and various New York City government and emergency response entities. According to media reports, prior

[12] Approval Order, pp. 68-69.

[13] See, New York Post, Striking Spectrum Workers cut cable lines as acts of sabotage: suit (October 11, 2017), available at https://nypost.com/2017/10/11/striking-spectrum-workers-cut-cable-lines-as-acts-of-sabotage-suit/; Ars Technica, Charter accuses its employees of cutting cables 125 times during strike (October 18, 2017), available at https://arstechnica.com/tech-policy/2017/10/charter-accuses-its-employees-of-cutting-cables-125-times-during-strike/

to the strike, Charter and its subsidiaries experienced only four such cable cut incidents over a three-year period.[14]

Given these developments, a process shall be initiated to determine whether TWCIS(NY) and its affiliates have adequately responded to the strike by making personnel, maintenance, construction, or other management and operational changes necessary to continue to provide customers with adequate telephone service quality. DPS Staff is directed to begin the management and operations audit process consistent with the discussion in this Order. The scope of the audit should include examination of TWCIS(NY)'s response to the IBEW strike. That examination shall include, but not necessarily be limited to, an examination of TWCIS(NY)'s affiliate transactions related to the preservation of service quality during the strike, practices of hiring contractors to replace striking employees, adequacy of its response to acts of vandalism, and whether TWCIS(NY) should be taking or should have taken other steps to protect the interests of its New York customers during the strike.

It is ordered:

1. Department of Public Service Staff is directed to take steps necessary to assist the Commission in conducting a management and operations audit of Time Warner Cable Information Services (New York), LLC and engaging an independent consultant consistent with the discussion in this Order.

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[14] See, New York Post, Spectrum offering $50K reward for info on vandalized cables (November 23, 2017), available at https://nypost.com/2017/11/23/spectrum-offering-50k-reward-for-info-on-vandalized-cables/; Brooklyn Daily Eagle, New allegations leveled at striking Charter-Spectrum workers (October 16, 2017), available at http://www.brooklyneagle.com/articles/2017/10/16/new-allegations-leveled-striking-charter-spectrum-workers

2. This proceeding is continued.

(SIGNED) _____
Commissioner

EXHIBIT G

NEW YORK
STATE OF
OPPORTUNITY.

Department of
Public Service

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

December 8, 2017

Thomas Rutledge
Chairman/CEO
Charter Communications, Inc.
400 Atlantic Street
Stamford, CT 06901

Via U.S. Mail and Electronic Mail

Re: Initiation of Management and Operations Audit

Dear Mr. Rutledge,

I write to notify you that today I have issued the attached order initiating a management and operations audit of Time Warner Cable Information Services (New York), LLC, a wholly-owned indirect subsidiary of Charter Communications, Inc. The audit will be performed by the Department of Public Service staff and an independent auditor pursuant to Public Service Law Section 96(6). As Chairman of the Public Service Commission, I am very concerned that your company's protracted labor dispute with the International Brotherhood of Electrical Workers (IBEW), involving approximately 1,700 workers, is having an adverse impact on New York consumers. The management and operations audit will examine your company's response to the IBEW strike and actions to preserve service quality during the strike, among other areas.

I look forward to your full cooperation in this matter.

Sincerely,

John B. Rhodes
Chairman

EXHIBIT H

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

DECLARATORY RULING, REPORT AND ORDER, AND ORDER

Adopted: December 14, 2017 **Released: January 4, 2018**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioners Clyburn and Rosenworcel dissenting and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. Over twenty years ago, in the Telecommunications Act of 1996, President Clinton and a Republican Congress established the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[1] Today, we honor that bipartisan commitment to a free and open Internet by rejecting government control of the Internet. We reverse the Commission's abrupt shift two years ago to heavy-handed utility-style regulation of broadband Internet access service and return to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades. We eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs.

2. We take several actions in this Order to restore Internet freedom. First, we end utility-style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom. In the 2015 *Title II Order*, the Commission abandoned almost twenty years of precedent and reclassified broadband Internet access service as a telecommunications service subject to myriad regulatory obligations under Title II of the Communications Act of 1934, as amended (the Act).[2] We reverse this misguided and legally flawed approach and restore broadband Internet access service to its Title I information service classification. We find that reclassification as an information service best comports with the text and structure of the Act, Commission precedent, and our policy objectives. We thus return to the approach to broadband Internet access service affirmed as reasonable by the U.S. Supreme Court.[3] We also reinstate the private mobile service classification of mobile broadband Internet access service and return to the Commission's definition of "interconnected service" that existed prior to 2015. We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service. Our balanced approach also restores the authority of the nation's most experienced cop on the privacy beat—the Federal Trade Commission—to police the privacy practices of Internet Service Providers (ISPs).

[1] 47 U.S.C. § 230(b)(2). *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) (1996 Act).

[2] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

[3] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

EXHIBIT I

I. INTRODUCTION

1. Over twenty years ago, in the Telecommunications Act of 1996, President Clinton and a Republican Congress established the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[1] Today, we honor that bipartisan commitment to a free and open Internet by rejecting government control of the Internet. We reverse the Commission's abrupt shift two years ago to heavy-handed utility-style regulation of broadband Internet access service and return to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades. We eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs.

2. We take several actions in this Order to restore Internet freedom. First, we end utility-style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom. In the 2015 *Title II Order*, the Commission abandoned almost twenty years of precedent and reclassified broadband Internet access service as a telecommunications service subject to myriad regulatory obligations under Title II of the Communications Act of 1934, as amended (the Act).[2] We reverse this misguided and legally flawed approach and restore broadband Internet access service to its Title I information service classification. We find that reclassification as an information service best comports with the text and structure of the Act, Commission precedent, and our policy objectives. We thus return to the approach to broadband Internet access service affirmed as reasonable by the U.S. Supreme Court.[3] We also reinstate the private mobile service classification of mobile broadband Internet access service and return to the Commission's definition of "interconnected service" that existed prior to 2015. We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service. Our balanced approach also restores the authority of the nation's most experienced cop on the privacy beat—the Federal Trade Commission—to police the privacy practices of Internet Service Providers (ISPs).

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[1] 47 U.S.C. § 230(b)(2). *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) (1996 Act).

[2] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

[3] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

3. Next, we require ISPs to be transparent. Disclosure of network management practices, performance, and commercial terms of service is important for Internet freedom because it helps consumers choose what works best for them and enables entrepreneurs and other small businesses to get technical information needed to innovate. Individual consumers, not the government, decide what Internet access service best meets their individualized needs. We return to the transparency rule the Commission adopted in 2010[4] with certain limited modifications to promote additional transparency, and we eliminate certain reporting requirements adopted in the *Title II Order* that we find to be unnecessary and unduly burdensome.

4. Finally, we eliminate the Commission's conduct rules. The record evidence, including our cost-benefit analysis, demonstrates that the costs of these rules to innovation and investment outweigh any benefits they may have. In addition, we have not identified any sources of legal authority that could justify the comprehensive conduct rules governing ISPs adopted in the *Title II Order*. Lastly, we find that the conduct rules are unnecessary because the transparency requirement we adopt, together with antitrust and consumer protection laws, ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet.

5. Through these actions, we advance our critical work to promote broadband deployment in rural America and infrastructure investment throughout the nation, brighten the future of innovation both within networks and at their edge, and move closer to the goal of eliminating the digital divide.

II. BACKGROUND

6. Since long before the commercialization of the Internet, federal law has drawn a line between the more heavily-regulated common carrier services like traditional telephone service and more lightly-regulated services that offer more than mere transmission. More than fifty years ago, the Commission decided *Computer I*, the first of a series of decisions known as the *Computer Inquiries*,[5] which, in combination, created a dichotomy between "basic" and "enhanced" services.[6] In 1980's *Second Computer Inquiry*, the Commission established that basic services offered "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information"[7] and were "regulated under Title II of the [Communications] Act."[8] Enhanced services, by contrast, were "any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information."[9] Unlike basic services, the Commission found that "enhanced services should not be regulated under the Act."[10]

7. Just two years later, the federal courts would draw a similar line in resolving the government's antitrust case against AT&T. The Modification of Final Judgment (MFJ) of 1982 distinguished between "telecommunications services," which Bell Operating Companies could offer when

[4] *See Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972-80, 17981, paras. 124-35, 137 (2010) (*Open Internet Order*).

[5] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966).

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, para. 97 (1980) (*Computer II Final Decision*).

[7] *Id.* at 420, para. 96.

[8] *Id.* at 428, para. 114.

[9] *Id.* at 420, para. 97.

[10] *Id.* at 428, para. 114.

"actually regulated by tariff,"[11] and "information services," including "data processing and other computer-related services"[12] and "electronic publishing services,"[13] which Bell Operating Companies (BOCs) were prohibited from offering under the terms of that court decision.[14] The Telecommunications Act of 1996's (the 1996 Act) "information service" definition is based on the definition of that same term used in the MFJ, which governed the Bell Operating Companies after the breakup of the Bell system.[15]

8. In the 1996 Act, intended to "promote competition and reduce regulation,"[16] Congress drew a line between lightly regulated "information services" and more heavily regulated "telecommunications services."[17] It also found that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation"[18] and declared it the policy of the United States to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[19] The 1996 Act went on to define "interactive computer service" to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."[20]

9. For the next 16 years, the Commission repeatedly adopted a light-touch approach to the Internet that favored discrete and targeted actions over pre-emptive, sweeping regulation of Internet service providers. In the 1998 *Stevens Report*, the Commission comprehensively reviewed the Act's definitions as they applied to the emerging technology of the Internet and concluded that Internet access service was properly classified as an information service.[21] The *Stevens Report* also found that subjecting Internet service providers and other information service providers to "the broad range of Title II constraints," would "seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry."[22]

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[11] *U.S. v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228-29 (D.D.C. 1982) (*MFJ Initial Decision*), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983).

[12] *Id.* at 179.

[13] *Id.* at 180.

[14] *Id.* at 228.

[15] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21954, para. 99 (1996) (*Non-Accounting Safeguards Order*); *see also, e.g.*, H.R. Conf. Rep. No. 104-458 at 126 (Jan. 31, 1996) ("'Information service' and 'telecommunications' are defined based on the definition used in the Modification of Final Judgment."); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11514, para. 28 (1998) (*Stevens Report*) (citing *MFJ Initial Decision*, 552 F. Supp. at 226-32).

[16] Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[17] 47 U.S.C. § 153(24), (53).

[18] 47 U.S.C. § 230(a)(4).

[19] 47 U.S.C. § 230(b)(1), (2).

[20] 47 U.S.C. § 230(f)(2).

[21] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*).

[22] *Id.* at 11524, para. 46.

10. In the 2002 *Cable Modem Order*, the Commission classified broadband Internet access service over cable systems as an "interstate information service,"[23] a classification that the Supreme Court upheld in June 2005 in the *Brand X* decision.[24] There was no dispute that at least some of the elements of Internet access met the definition of "information services," and the Court rejected claims that "[w]hen a consumer goes beyond those offerings and accesses content provided by parties other than the cable company" that "consumer uses 'pure transmission.'"[25] To the contrary, the Court found "reasonable" "the Commission's understanding of the nature of cable modem service"—namely, that "[w]hen an end user accesses a third party's Web site" that user "is equally using the information service provided by the cable company that offers him Internet access as when he accesses the company's own Web site, its e-mail service, or his personal Web page," citing as examples the roles of Domain Name System (DNS) and caching.[26]

11. In 2004, then-FCC Chairman Michael Powell announced four principles for Internet freedom to further ensure that the Internet would remain a place for free and open innovation with minimal regulation.[27] These four "Internet freedoms" include the freedom to access lawful content, the freedom to use applications, the freedom to attach personal devices to the network, and the freedom to obtain service plan information.[28]

12. In the 2005 *Wireline Broadband Classification Order*, the Commission classified broadband Internet access service over wireline facilities as an information service.[29] At the same time, the Commission also unanimously endorsed the four Internet freedoms in the *Internet Policy Statement*.[30] The *Internet Policy Statement* announced the Commission's intent to "incorporate [these] principles into its ongoing policymaking activities" in order to "foster creation, adoption and use of Internet broadband content, applications, services and attachments, and to ensure consumers benefit from the innovation that comes from competition."[31]

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[23] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802, para. 7 (2002) (*Cable Modem Order*).

[24] *Brand X*, 545 U.S. 967.

[25] *Id.* at 998.

[26] *Id.* at 998-1000.

[27] Michael K. Powell, Chairman, FCC, Preserving Internet Freedom: Guiding Principles for the Industry, Remarks at the Silicon Flatirons Symposium (Feb. 8, 2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf (*Powell Speech*).

[28] *Id.* at 5.

[29] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Classification Order*), *aff'd Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[30] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, GN Docket No. 00-185, CC Docket Nos. 02-33, 01-33, 98-10, 95-20, CS Docket No. 02-52, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

[31] *Id.* at 14988, para. 5. The Commission did this, for example, by incorporating such principles in its rules governing certain wireless spectrum. *See Service Rules For the 698-746, 747-762 and 777-792 MHz Bands et al.*, WT Docket No. 06-150 et al., Second Report and Order, 22 FCC Rcd 15289, 15361, 15365, paras. 194, 206 (2007).

13. In the 2006 *BPL-Enabled Broadband Order*, the Commission concluded that broadband Internet access service over power lines was properly classified as an information service,[32] and in the 2007 *Wireless Broadband Internet Access Order*, the Commission classified wireless broadband Internet access service as an information service, again recognizing the "minimal regulatory environment" that promoted the "ubiquitous availability of broadband to all Americans."[33] The Commission also found that "mobile wireless broadband Internet access service is not a 'commercial mobile radio service' as that term is defined in the Act and implemented in the Commission's rules."[34]

14. In the 2008 *Comcast-BitTorrent Order*, the Commission sought to directly enforce federal Internet policy that it drew from various statutory provisions consistent with the *Internet Policy Statement*, finding certain actions by Comcast "contravene[d] . . . federal policy" by "significantly imped[ing] consumers' ability to access the content and use the applications of their choice."[35] In 2010, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's action, holding that the Commission had not justified its action as a valid exercise of ancillary authority.[36]

15. In response, the Commission adopted the 2010 *Open Internet Order*, where once again the Commission specifically rejected Title II-based heavy-handed regulation of broadband Internet access service.[37] Instead, the *Open Internet Order* relied on, among other things, newly-claimed regulatory authority under section 706 of the Telecommunications Act to establish no-blocking and no-unreasonable-discrimination rules as well as a requirement that broadband Internet access service providers "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services."[38]

16. In 2014, the D.C. Circuit vacated the no-blocking and no-unreasonable-discrimination rules adopted in the *Open Internet Order*, finding that the rules impermissibly regulated broadband Internet access service providers as common carriers,[39] in conflict with the Commission's prior determination that broadband Internet access service was not a telecommunications service and that mobile broadband Internet access service was not a commercial mobile service.[40] The D.C. Circuit nonetheless upheld the transparency rule,[41] held that the Commission had reasonably construed section

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[32] *See United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (*BPL-Enabled Broadband Order*).

[33] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5902, para. 2 (2007) (*Wireless Broadband Internet Access Order*).

[34] *Id.* at 5916, para. 41.

[35] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management*, File No. EB-08-IH-1518, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13052, 13054, paras. 43, 45 (2008) (*Comcast-BitTorrent Order*).

[36] *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*). Among other things, the court held that section 706 of the 1996 Act could not serve as the source of direct authority to which the Commission's action was ancillary because the Commission was bound in *Comcast* by a prior Commission determination that section 706 did not constitute a direct grant of authority. *Id.* at 658-59.

[37] *Open Internet Order*, 25 FCC Rcd at 17972-80, 17981, paras. 124-35, 137.

[38] *Id.* at 17992 (Appendix A).

[39] *Verizon v. FCC*, 740 F.3d 623, 655-58 (D.C. Cir. 2014) (*Verizon*).

[40] *Id.* at 650.

[41] *Id.* at 635-42.

706 of the Telecommunications Act as a grant of authority to regulate broadband Internet access service providers, and suggested that no-blocking and no-unreasonable-discrimination rules might be permissible if Internet service providers could engage in individualized bargaining.[42]

17. Later that year, the Commission embarked yet again down the path of rulemaking, proposing to rely on section 706 of the 1996 Act to adopt enforceable rules using the D.C. Circuit's "roadmap."[43] But in November 2014, then-President Obama called on the FCC to "reclassify consumer broadband service under Title II of the Telecommunications Act."[44] Three months later, the Commission shifted course and adopted the *Title II Order*, reclassifying broadband Internet access service from an information service to a telecommunications service,[45] and reclassifying mobile broadband Internet access service as a commercial mobile service.[46] The Commission also adopted three bright-line rules prohibiting blocking, throttling, and paid-prioritization, as well as a general Internet conduct standard and "enhancements" to the transparency rule.[47] In 2016, a divided panel of the D.C. Circuit upheld the *Title II Order* in *United States Telecom Association v. FCC*, concluding that the Commission's classification of broadband Internet access service was permissible under *Chevron* step two.[48] The D.C. Circuit denied petitions for rehearing of the case *en banc*,[49] and petitions for *certiorari* remain pending with the Supreme Court.[50]

18. In May 2017, we adopted a *Notice of Proposed Rulemaking* (*Internet Freedom NPRM*),[51] in which we proposed to return to the successful light-touch bipartisan framework that promoted a free and open Internet and, for almost twenty years, saw it flourish. Specifically, the *Internet Freedom NPRM* proposed to reinstate the information service classification of broadband Internet access service. The *Internet Freedom NPRM* also proposed to reinstate the determination that mobile broadband Internet access service is not a commercial mobile service.[52] To determine how to best honor the Commission's commitment to ensuring the free and open Internet, the *Internet Freedom NPRM* also proposed to re-evaluate the Commission's existing rules and enforcement regime to analyze whether *ex ante* regulatory

[42] *See, e.g., id.* at 657 (quoting *Cellco Partnership v. FCC*, 700 F.3d 534, 549 (D.C. Cir. 2012)).

[43] *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) (*2014 Notice*).

[44] President Obama, Statement on Net Neutrality (Nov. 10, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/10/statement-president-net-neutrality.

[45] *Title II Order*, 30 FCC Rcd 5601.

[46] *Id.* at 5778, para. 388.

[47] *Id.* at 5607-09, paras. 15-24.

[48] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (*USTelecom*).

[49] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017) (Srinivasan, J., and Tatel, J., concurring in the denial of rehearing *en banc*) (stating that "[e]n banc review would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order").

[50] *See* Petition for Writ of Certiorari, *Berninger v. FCC*, 825 F.3d 674 (No. 17-498); Petition for Writ of Certiorari, *AT&T v. FCC*, 825 F.3d 674 (No. 17-499); Petition for Writ of Certiorari, *American Cable Ass'n v. FCC*, 825 F.3d 674 (No. 17-500); Petition for Writ of Certiorari, *CTIA-The Wireless Ass'n v. FCC*, 825 F.3d 674 (No. 17-501); Petition for Writ of Certiorari, *NCTA-The Internet & Television Ass'n v. FCC*, 825 F.3d 674 (No. 17-502); Petition for Writ of Certiorari, *TechFreedom v. FCC*, 825 F.3d 674 (No. 17-503); Petition for Writ of Certiorari, *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (No. 17-504)..

[51] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) (*Internet Freedom NPRM*).

[52] *Id.* at 4453, para. 55.

intervention in the market is necessary.[53] Specifically, the *Internet Freedom NPRM* proposed to eliminate the Internet conduct standard and the non-exhaustive list of factors intended to guide application of that rule.[54] It also sought comment on whether to keep, modify, or eliminate the bright-line conduct and transparency rules.[55]

19. The *Internet Freedom NPRM* prompted more comments than any other rulemaking in the Commission's history. Between release of the *Internet Freedom NPRM* and the close of the comment period on August 30, 2017, more than 22 million comments were filed in our Electronic Comment Filing System (ECFS), with even more submissions lodged during the *ex parte* period.[56] The Commission is grateful to all commenters who engaged the legal and public policy questions presented by this important rulemaking.

III. ENDING PUBLIC-UTILITY REGULATION OF THE INTERNET

20. We reinstate the information service classification of broadband Internet access service, consistent with the Supreme Court's holding in *Brand X*.[57] Based on the record before us, we conclude that the best reading of the relevant definitional provisions of the Act supports classifying broadband Internet access service as an information service. Having determined that broadband Internet access service, regardless of whether offered using fixed or mobile technologies, is an information service under the Act, we also conclude that as an information service, mobile broadband Internet access service should not be classified as a commercial mobile service or its functional equivalent. We find that it is well within our legal authority to classify broadband Internet access service as an information service, and reclassification also comports with applicable law governing agency decisions to change course. While we find our legal analysis sufficient on its own to support an information service classification of broadband Internet access service, strong public policy considerations further weigh in favor of an information service classification. Below, we find that economic theory, empirical data, and even anecdotal evidence also counsel against imposing public-utility style regulation on ISPs. The broader Internet ecosystem thrived under the light-touch regulatory treatment of Title I, with massive investment and innovation by both ISPs and edge providers, leading to previously unimagined technological developments and services. We conclude that a return to Title I classification will facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs.

A. Reinstating the Information Service Classification of Broadband Internet Access Service

1. Scope

21. We continue to define "broadband Internet access service" as a mass-market[58] retail service by wire or radio that provides the capability to transmit data to and receive data from all or

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[53] *Id.* at 4458, para. 70.

[54] *Id.* at 4458, para. 72.

[55] *Id.* at 4460, para. 76, 4461-64, paras. 80-91.

[56] Initial comments on the *Internet Freedom NPRM* were due on July 17, 2017. Reply comments were originally due on August 16, 2017, but the Commission granted a two-week extension until August 30, 2017, to allow parties "additional time to analyze the technical, legal, and policy arguments raised by initial commenters [and] provide the Commission with more thorough comments, ensuring that the Commission has a complete record on which to develop its decisions." *FCC Extends Restoring Internet Freedom Reply Deadline to Aug. 30*, WC Docket No. 17-108, Order, 32 FCC Rcd 6535, 6535-36, para. 2 (WCB 2017).

[57] *Brand X*, 545 U.S. at 980.

[58] By mass market, we mean services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. "Schools" would include institutions of higher education to the extent that they purchase these standardized retail services. For purposes of this definition,

(continued....)

substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service.[59]

22. The term "broadband Internet access service" includes services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite. For purposes of our discussion, we divide the various forms of broadband Internet access service into the two categories of "fixed" and "mobile." With these two categories of services—fixed and mobile—we intend to cover the entire universe of Internet access services at issue in the Commission's prior broadband classification decisions,[60] as well as all other broadband Internet access services offered over other technology platforms that were not addressed by prior classification orders. We also make clear that our classification finding applies to all providers of broadband Internet access service, as we delineate them here, regardless of whether they lease or own the facilities used to provide the service.[61] "Fixed" broadband Internet access service refers to a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the Internet.[62] The term encompasses the delivery of fixed broadband over any medium, including various forms of wired broadband services (e.g., cable, DSL, fiber), fixed wireless broadband services (including fixed services using unlicensed spectrum), and fixed satellite broadband services. "Mobile" broadband Internet access service refers to a broadband Internet access service that serves end users primarily using mobile stations.[63] Mobile broadband Internet access includes, among other things, services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet.[64] The term also encompasses mobile satellite broadband services.

23. As the Commission found in 2010, broadband Internet access service does not include services offering connectivity to one or a small number of Internet endpoints for a particular device, e.g., connectivity bundled with e-readers, heart monitors, or energy consumption sensors, to the extent the service relates to the functionality of the device.[65] To the extent these services are provided by ISPs over last-mile capacity shared with broadband Internet access service, they would be non-broadband Internet access service data services (formerly specialized services). As the Commission found in both 2010 and 2015, non-broadband Internet access service data services do not fall under the broadband Internet access

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"mass market" also includes broadband Internet access service purchased with the support of the E-rate and Rural Healthcare programs, as well as any broadband Internet access service offered using networks supported by the Connect America Fund (CAF), but does not include enterprise service offerings or special access services, which are typically offered to larger organizations through customized or individually negotiated arrangements. *See Open Internet Order*, 25 FCC Rcd at 17932, para. 45; *Title II Order*, 30 FCC Rcd at 5745-46, para. 336 & n.879.

[59] 47 CFR § 8.11(a); *Open Internet Order*, 25 FCC Rcd at 17932, para. 44; *id.* at 17935, para. 51 (finding that the market and regulatory landscape for dial-up Internet access service differed from broadband Internet access service).

[60] *See Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5909-10, paras. 19, 22; *Cable Modem Order*, 17 FCC Rcd at 4818-19, para. 31; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14860, para. 9; *BPL-Enabled Broadband Order*, 21 FCC Rcd 13281; *Title II Order*, 30 FCC Rcd at 5746, para. 337.

[61] As the Supreme Court observed in *Brand X*, "the relevant definitions do not distinguish facilities-based and non-facilities-based carriers." *Brand X*, 545 U.S. at 997.

[62] *Open Internet Order*, 25 FCC Rcd at 17934, para. 49; *Title II Order*, 30 FCC Rcd at 5683, para. 188.

[63] *See* 47 U.S.C. § 153(34); *Open Internet Order*, 25 FCC Rcd at 17934, para. 49.

[64] We note that "public safety services" as defined in section 337(f)(1) would not meet the definition of "broadband Internet access service" subject to the rules herein given that "such services are not made commercially available to the public by the provider" as a mass-market retail service. 47 U.S.C. § 337(f)(1).

[65] *See Open Internet Order*, 25 FCC Rcd at 17933, para. 47, n.149.

service category.[66] Such services generally are not used to reach large parts of the Internet; are not a generic platform, but rather a specific applications-level service; and use some form of network management to isolate the capacity used by these services from that used by broadband Internet access services.[67] Further, we observe that to the extent ISPs "use their broadband infrastructure to provide video and voice services, those services are regulated in their own right."[68]

24. Broadband Internet access service also does not include virtual private network (VPN) services, content delivery networks (CDNs), hosting or data storage services, or Internet backbone services (if those services are separate from broadband Internet access service), consistent with past Commission precedent.[69] The Commission has historically distinguished these services from "mass market" services, as they do not provide the capability to transmit data to and receive data from all or substantially all Internet endpoints.[70] We do not disturb that finding here.

25. Finally, we observe that to the extent that coffee shops, bookstores, airlines, private end-user networks such as libraries and universities, and other businesses acquire broadband Internet access service from an ISP to enable patrons to access the Internet from their respective establishments, provision of such service by the premise operator would not itself be considered a broadband Internet access service unless it was offered to patrons as a retail mass market service, as we define it here.[71] Likewise, when a user employs, for example, a wireless router or a Wi-Fi hotspot to create a personal Wi-Fi network that is not intentionally offered for the benefit of others, he or she is not offering a broadband Internet access service under our definition, because the user is not marketing and selling such service to residential customers, small business, and other end-user customers such as schools and libraries.

2. Broadband Internet Access Service Is an Information Service Under the Act

26. In deciding how to classify broadband Internet access service, we find that the best reading of the relevant definitional provisions of the Act supports classifying broadband Internet access service as an information service. Section 3 of the Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[72] Section 3 defines a "telecommunications service," by contrast, as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[73] Finally, section 3 defines "telecommunications"—used in each of the prior two definitions—as "the transmission, between or among points specified by the user, of information of the user's choosing,

[66] *Id.* at 17965-66, paras. 112-13; *Title II Order*, 30 FCC Rcd at 5696, para. 207; *see also* Illinois DoIT Comments at 1-2 ("We believe it is important to highlight this distinction between BIAS and non-BIAS data services to allow development of innovative business models that address consumer needs, that are not met through a standard BIAS offering.").

[67] *Title II Order*, 30 FCC Rcd at 5697, para. 209.

[68] Cox Comments at 33.

[69] *Open Internet Order*, 25 FCC Rcd at 17933, para. 47.

[70] *Id.* Consistent with past Commissions, we note that the transparency rule we adopt today applies only so far as the limits of an ISP's control over the transmission of data to or from its broadband customers.

[71] *See Open Internet Order*, 25 FCC Rcd at 17935, para. 52. Although not bound by the transparency rule we adopt today, we encourage premise operators to disclose relevant restrictions on broadband service they make available to their patrons. *See id.* at 17936, para. 163.

[72] 47 U.S.C. § 153(24).

[73] 47 U.S.C. § 153(53).

without change in the form or content of the information as sent and received."[74] Prior to the *Title II Order* the Commission had long interpreted and applied these terms to classify various forms of Internet access service as information services—a conclusion affirmed as reasonable by the Supreme Court in *Brand X*.[75] Our action here simply returns to that prior approach.

27. When interpreting a statute it administers, the Commission, like all agencies, "must operate 'within the bounds of reasonable interpretation.' And reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"[76] Below, we first explore the meaning of the "capability" contemplated in the statutory definition of "information service," and find that broadband Internet access service provides consumers the "capability" to engage in all of the information processes listed in the information service definition. We also find that broadband Internet access service likewise provides information processing functionalities itself, such as DNS and caching, which satisfy the capabilities set forth in the information service definition. We then address what "capabilities" we believe are being "offered" by ISPs, and whether these are reasonably viewed as separate from or inextricably intertwined with transmission, and find that broadband Internet access service offerings inextricably intertwine these information processing capabilities with transmission.

28. We find that applying our understanding of the statutory definitions to broadband Internet access service as it is offered today most soundly leads to the conclusion that it is an information service. Although the Internet marketplace has continued to develop in the years since the earliest classification decisions, broadband Internet access service offerings still involve a number of "capabilities" within the meaning of the section 3 definition of information services, including critical capabilities that all ISP customers must use for the service to work as it does today. While many popular uses of the Internet have shifted over time, the record reveals that broadband Internet access service continues to offer information service capabilities that typical users both expect and rely upon. Indeed, the basic nature of Internet service—"[p]rovid[ing] consumers with a comprehensive capability for manipulating information using the Internet via high-speed telecommunications"—has remained the same since the Supreme Court upheld the Commission's similar classification of cable modem service as an information service twelve years ago.[77]

29. A body of precedent from the courts and the Commission served as the backdrop for the 1996 Act and informed the Commission's original interpretation and implementation of the statutory definitions of "telecommunications," "telecommunications service," and "information service." The classification decisions in the *Title II Order* discounted or ignored much of that precedent. Without viewing ourselves as formally bound by that prior precedent,[78] we find it eminently reasonable, as a legal matter, to give significant weight to that pre-1996 Act precedent in resolving how the statutory definitions apply to broadband Internet access service, enabling us to resolve statutory ambiguity in a manner that we believe best reflects Congress's understanding and intent.[79]

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[74] 47 U.S.C. § 153(50).

[75] *Brand X*, 545 U.S. at 998 (finding "reasonable" "the Commission's understanding of the nature of cable modem service" and affirming its classification as an information service).

[76] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014).

[77] *Brand X*, 545 U.S. at 987.

[78] Our analysis thus is not at odds with the statement in *USTelecom* that the 1996 Act definitions were not "intended to freeze in place the Commission's existing classification of various services." *USTelecom*, 825 F.3d at 703; *see also, e.g.*, Free Press Reply at 10 (arguing that the Commission should not "base its current judgments solely in analogies to proceedings from the Bell era").

[79] *See, e.g., Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 48 (2007) ("[R]egulatory history helps to illuminate the proper interpretation and application" of the provisions of the Act at

(continued....)

a. Broadband Internet Access Service Information Processing Capabilities

30. We begin by evaluating the "information service" definition and conclude that it encompasses broadband Internet access service. Broadband Internet access service includes "capabilit[ies]" meeting the information service definition under a range of reasonable interpretations of that term. In other contexts, the Commission has looked to dictionary definitions and found the term "capability" to be "broad and expansive," including the concepts of "potential ability" and "the capacity to be used, treated, or developed for a particular purpose."[80] Because broadband Internet access service necessarily has the capacity or potential ability to be used to engage in the activities within the information service definition—"generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"[81]—we conclude that it is best understood to have those "capabilit[ies]." The record reflects that fundamental purposes of broadband Internet access service are for its use in "*generating*" and "*making available*" information to others, for example through social media and file sharing;[82] "*acquiring*" and "*retrieving*" information from sources such as websites and online streaming and audio applications, gaming applications, and file sharing applications;[83] "*storing*" information in the cloud and remote servers, and via file sharing applications;[84] "*transforming*" and "*processing*" information such as by manipulating images and documents, online gaming use, and through applications that offer the ability to send and receive email, cloud computing and

issue there); *Brand X*, 545 U.S. at 992-93 ("Congress passed the definitions in the Communications Act against the background of [the Commission's *Computer Inquiries*] regulatory history, and we may assume that the parallel terms 'telecommunications service' and 'information service' substantially incorporated their meaning, as the Commission has held."); ADTRAN Comments at 10 ("This precedent is relevant not simply as *stare decisis*, but because the Commission in those previous decisions had analyzed the facts, nature of the services, and the legislative interplay and history to conclude that BIAS is an information service."); ACA Comments at 44. Consistent with this approach as a traditional tool of statutory interpretation, we reject arguments that suggest that we should disregard this precedent largely out-of-hand. *See, e.g.*, Free Press Reply at 11 ("[T]he MFJ and *Computer Inquiries* were based in large part on the Commission's interpretation of its own rules and authority, but the passage of the 1996 Act superseded them."); Public Knowledge Reply at 32 ("[T]he 1996 Telecommunications Act supersedes the MFJ."). More generally, of course, this precedent—*Brand X* in particular—demonstrates that the Act does not compel a telecommunications service classification. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017) (Srinivasan, J., and Tatel, J., concurring in the denial of rehearing *en banc*) ("The issue in *Brand X* was whether the Communications Act compelled the FCC to classify cable broadband ISPs as telecommunications providers subject to regulatory treatment as common carriers. The Court answered that question no.").

[80] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 98-147, 96-98, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17020, para. 54 & n.194 (2003) (*Triennial Review Order*), *rev'd on other grounds U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[81] 47 U.S.C. § 153(24).

[82] *See, e.g.*, ACA Comments, Exh. B, Decl. of Chris Kyle at 2, Exh. C, Decl. of Brian Lynch at 2, Exh. E, Decl. of Steve Timcoe at 2; Cisco Comments at 14, n.43; Comcast Comments at 13; CenturyLink Comments at 23; Cox Comments at 9; Free State Foundation Comments at 10; Mobile Future Comments at 10-11; Verizon Comments at 35.

[83] *See, e.g.*, Cisco Comments at 14, n.43; Free State Foundation Comments at 10; Mobile Future Comments at 10-11; ADTRAN Comments at 5-6; CenturyLink Comments at 21-23; Verizon Comments at 35; Comcast Comments at 12; Cox Comments at 9; NCTA Comments at 13-14.

[84] *See, e.g.*, Verizon Comments at 35; CenturyLink Comments at 23; Cisco Comments at 14, n.43; Comcast Comments at 13; Cox Comments at 9; Free State Foundation Comments at 10; Mobile Future Comments at 10-11; NCTA Comments at 13-14.

machine learning capabilities;[85] and "*utilizing*" information by interacting with stored data.[86] These are just a few examples of how broadband Internet access service enables customers to generate, acquire, store, transform, process, retrieve, utilize, and make available information. These are not merely incidental uses of broadband Internet access service—rather, because it not only has "the capacity to be used" for these "particular purpose[s]" but was designed and intended to do so,[87] we find that broadband Internet access is best interpreted as providing customers with the "capability" for such interactions with third party providers.[88]

31. We also find that broadband Internet access is an information service irrespective of whether it provides the *entirety* of any end user functionality or whether it provides end user functionality in tandem with edge providers.[89] We do not believe that Congress, in focusing on the "offering of a capability," intended the classification question to turn on an analysis of which capabilities the end user selects. Further, we are unpersuaded by commenters who assert that in order to be considered an "information service," an ISP must not only offer customers the "capability" for interacting with information that may be offered by third parties ("click-through"), but must also provide the ultimate content and applications themselves.[90] Although there is no dispute that many edge providers likewise perform functions to facilitate information processing capabilities,[91] they *all* depend on the combination of information-processing and transmission that ISPs make available through broadband Internet access

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[85] *See, e.g.*, ACA Comments, Exh. B, Decl. of Chris Kyle at 2, Exh. C, Decl. of Brian Lynch at 2, Exh. E, Decl. of Steve Timcoe at 2 (asserting that their broadband Internet access services grants their customers the capability to transform content at their request); Cisco Comments at 14, n.43 (asserting that broadband Internet access users transform and process information every time they input a plaintext command into a browser or search engine); Cox Comments at 9; Mobile Future Comments at 10-11; CenturyLink Comments at 22-24; Free State Foundation Comments at 10; Verizon Comments at 35; Comcast Comments at 13.

[86] *See, e.g.*, CenturyLink Comments at 21- 22; Cisco Comments at 14, n.43; Comcast Comments at 13; Cox Comments at 9; Free State Foundation Comments at 10; Mobile Future Comments at 11; NCTA Comments at 13-14.

[87] *Triennial Review Order*, 18 FCC Rcd at 17020, para. 54 n.194 (discussing definition of "capability").

[88] AT&T Comments at 3, 4 ("Giving consumers the 'capability for' such interactions with third party providers is of course the very essence of broadband Internet access."); *see also* NCTA Comments at 13; Comcast Comments at 12; Verizon Comments at 35; Charter Comments at 14; NCTA Comments at 13; Reason Foundation Comments at 9; ADTRAN at 5-6; Alaska Communications Comments at 4; ACA Comments at 50-51; CenturyLink Comments at 20; CTIA Comments at 28-29; Free State Foundation Comments at 2; ITIF Comments at 12-13; Inmarsat Comments at 9-10; LGBT Technology Partnership Comments at 4; Mobile Future Comments at 10-11; T-Mobile Comments at 13; AT&T Reply at 60; Comcast Reply at 4-6; CTIA Reply at 22; Free State Foundation Comments at 10; Cox Reply at 3. We further observe that even though the record reflects that broadband Internet access service possesses all of the statutorily enumerated "capabilities," the use of the conjunction "or" among the listed capabilities requires that a service only offer one capability to bring a service within the statutory definition of information service. *See* Comcast Comments at 19; Free State Foundation Comments at 10, 12; AT&T Comments at 3.

[89] *See* NCTA Reply at 6.

[90] *See* Public Knowledge Comments at 27; Internet Engineers Comments at 20-21; CDT Comments at 5; *see also* OTI New America Comments at 29-30 (asserting that when "information service" was defined in the MFJ, the phrase "meant that the information service provider itself is engaged in the processing of the information [but] the examples listed in the NPRM are not that," and "[i]f a telecommunications service were transformed into an information service because it made available the information services *of others*, then no general use service could ever constitute a telecom service." (emphasis in original)); Peha Reclassification Comments at 1; Ben Kreuter Comments at 4; New Media Rights Comments at 7; Netflix Reply at 4.

[91] *Cf., e.g.*, Mitchell Lazarus Comments at 2 ("Examples are Facebook, Wikipedia, and almost any other website.").

service.[92] The fundamental purpose of broadband Internet access service is to "enable a constant flow of computer-mediated communications between end-user devices and various servers and routers to facilitate interaction with online content."[93]

32. From the earliest decisions classifying Internet access service, the Commission recognized that even when ISPs enable subscribers to access third party content and services, that can constitute "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[94] As the Commission explained in the *Stevens Report*, "[s]ubscribers can retrieve files from the World Wide Web, and browse their contents, *because* their service provider offers the 'capability for . . . acquiring, . . . retrieving [and] utilizing . . . information.'"[95] Thus, even where an ISP enables end-users to access the content or applications of a third party, the Commission nonetheless found that constituted the requisite information service "capability."[96] When the *Title II Order* attempted to evaluate customer perception based on their usage of broadband Internet access service, it failed to persuasively grapple with the relevant implications of prior Commission classification precedent. The *Title II Order* argued that broadband Internet access service primarily is used to access content, applications, and services from third parties unaffiliated with the ISP

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[92] *See* Comcast Comments at 14 ("When a consumer uploads new content to Facebook, for instance, it is not only Facebook that provides the information-processing functionality necessary for such activity; it is also the BIAS provider whose information-processing capabilities enable consumers to connect and interact with Facebook's servers in the first place.").

[93] NCTA Reply at 7; *see also* Free State Foundation Reply at 30 (explaining that ISPs' coordination with third parties, by itself, does not alter the "nature of the functionality or service that broadband ISPs ultimately offer to end users. In such circumstances, it is the broadband ISPs that combine third-party supplied functionalities with their own and ultimately provide the integrated service offering to end users—with end users routinely unaware of whether or which particular functions might happen to be performed by third parties rather than broadband ISPs"); *infra* para. 56.

[94] *See, e.g.*, *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5910, para. 25; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13285-86, para. 9; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14860-61, para. 9; *Cable Modem Order*, 17 FCC Rcd at 4821-22, para. 37; *Stevens Report*, 13 FCC Rcd at 11537, para. 76.

[95] *Stevens Report*, 13 FCC Rcd at 11538, para. 76 (emphasis added); *see also id.* at 11538-39, para. 78 (explaining with specific respect to e-mail that the ISP "does not send that message directly to the recipient" akin to a "'paperless fax,'" but instead sends it to the recipient's mail server, which stores it until it is further stored, rewritten, forwarded or otherwise processed). Attempts to distinguish the Commission's classification precedent thus are unfounded insofar as they fail to account for this aspect of the Commission's analysis in those orders. *See, e.g.*, Scott Jordan Reply at 9 ("The *Stevens Report* concluded that dial-up Internet access service was an information service because ISP-provided webpage hosting, webpage caching, and email offered such capabilities, not because dial-up Internet access service enabled an end user to utilize third party information service applications." (footnotes omitted)).

[96] *See, e.g.*, ACA Comments at 43 ("'[O]ffering of a capability' for engaging in all of these activities" such as using Facebook or YouTube "is exactly what is provided by broadband Internet access" (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 395 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing *en banc*) and citing *Stevens Report*, 13 FCC Rcd at 11537-38, para. 76); AT&T Comments at 69-70 ("As the Commission and Solicitor General explained in *Brand X*, Internet access inherently offers the capability to 'click[] through' to third-party websites and obtain the 'contents of the requested web page[],' allowing a subscriber to 'interact[] with stored data. . . . The Commission's reclassification decision erroneously turned this point on its head, finding that Internet access is a pure transmission service because it is 'useful to consumers today primarily as a conduit for reaching modular content, applications, and services that are provided by unaffiliated third parties.' To the contrary, it is precisely because Internet access is useful to consumers for these purposes that it falls squarely within the statutory definition of information service."); USTelecom Comments at 31-32; Comcast Reply at 11 ("[T]he definition of 'information service' nowhere requires that ISP capabilities be *solely* responsible for any end-user functionality; it requires only that ISPs 'offer' an integrated 'capability' beyond mere transmission, which they unquestionably do."); Cox Reply at 5-6; NCTA Reply at 6-7; Verizon Reply at 32, 34.

in support of the view that customers perceive it as a separate offering of telecommunications.[97] The *Title II Order* offers no explanation as to why its narrower view of "capability" was more reasonable than the Commission's previous, long-standing view (other than seeking to advance the classification outcome that *Order* was driving towards). Consequently, the *Title II Order* essentially assumed away the legal question of whether end-users perceive broadband Internet access service as offering them the "capability for . . . acquiring, . . . retrieving [and] utilizing . . . information" under the broader reading of "capability" in prior Commission precedent.

33. But even if "capability" were understood as requiring more of the information processing to be performed by the classified service itself, we find that broadband Internet access service meets that standard. Not only do ISPs offer end users the capability to interact with information online in each and every one of the ways set forth above, they also do so through a variety of functionally integrated information processing components that are part and parcel of the broadband Internet access service offering itself.[98] In particular, we conclude that DNS and caching functionalities, as well as certain other information processing capabilities offered by ISPs,[99] are integrated information processing capabilities offered as part of broadband Internet access service to consumers today.[100]

34. *DNS.* We find that DNS is an indispensable functionality of broadband Internet access

[97] *See, e.g.*, *Title II Order*, 30 FCC Rcd at 5753-55, paras. 347-50; *see also USTelecom*, 825 F.3d at 698-99; AARP Comments at 91; Atty's General et al. Comments at 13-15; Internet Engineers Comments at 13; OTI New America Comments at 28; Public Knowledge Comments at 31-32, 39; RISE Stronger Comments at 15-16; Electronic Frontier Foundation (EFF) Comments at 17-19; OTI New America Reply at 18-19.

[98] *See, e.g.*, CenturyLink Comments at 24; AT&T Comments at 4 ("But even if ISPs had to provide 'data-processing' or 'data storage' functionalities *of their own* before Internet access could qualify as an information service, Internet access would still qualify as such because it invariably includes such functionalities (*e.g.*, DNS and/or caching)."); Comcast Comments at 7-8 ("Not only does BIAS still offer end users the capability to interact with information online *in each and every one of the ways* set forth in the Act's 'information service' definition, it also does so through a variety of functionally integrated information-processing components—such as Domain Name Service ('DNS') functionalities; spam, malware, and other consumer protection security features; caching; email; storage; and other capabilities—that are part and parcel of the 'offer' of broadband service and that confirm the correctness of the information service classification.").

[99] In addition to DNS and caching, the record reflects that ISPs may also offer a variety of additional features that consist of information processing functionality inextricably intertwined with the underlying service. *See, e.g.*, CenturyLink Comments at 26. These additional features include, and are not limited to: email, speed test servers, backup and support services, geolocation-based advertising, data storage, parental controls, unique programming content, spam protection, pop-up blockers, instant messaging services, on-the-go access to Wi-Fi hotspots, and various widgets, toolbars, and applications. *See, e.g.*, CenturyLink Comments at 24-26; AT&T Comments at 80-81. While we do not find the offering of these information processing capabilities determinative of the classification of broadband Internet access service, their inclusion in the broadband Internet access service, and the capabilities and functionalities necessary to make these features possible, further support the "information service" classification. *See* CTIA Comments at 40; AT&T Reply at 77 ("The additional functionalities offered by most ISPs are plainly information services, and because they are routinely 'offer[ed]' with Internet access as part of a service bundle, they independently compel an 'information service' classification" (citation omitted)); Comcast Comments at 7-8; CenturyLink Comments at 24.

[100] *See* Peha Reclassification Comments at 5 ("It is not relevant which services were offered or used decades ago. It is the Internet services and technology of 2017 that matter."); *cf.* Commercial Network Services Comments at 1 ("The definition of 'information service' was created by the telecommunications act of 1996, at a time when CompuServe, America Online and Prodigy were how America's spent their time online and all were accessed by dial-up telephone modem company."); ACLU/EFF Reply at 13; OTI New America Reply at 8.

service.[101] DNS is a core function of broadband Internet access service that involves the capabilities of generating, acquiring, storing, transforming, processing, retrieving, utilizing and making available information.[102] DNS is used to facilitate the information retrieval capabilities that are inherent in Internet access.[103] DNS allows "'click through' access from one web page to another, and its computer processing functions analyze user queries to determine which website (and server) would respond best to the user's request."[104] And "[b]ecause it translates human language (*e.g.*, the name of a website) into the numerical data (i.e., an IP address) that computers can process, it is indispensable to ordinary users as they navigate the Internet."[105] Without DNS, a consumer would not be able to access a website by typing its advertised name (*e.g.*, fcc.gov or cnn.com).[106] The *Brand X* Court recognized the importance of DNS, concluding that "[f]or an Internet user, 'DNS is a must. . . . [N]early all of the Internet's network services use DNS. That includes the World Wide Web, electronic mail, remote terminal access, and file transfer.'"[107] While ISPs are not the sole providers of DNS services,[108] the vast majority of ordinary consumers rely upon the DNS functionality provided by their ISP,[109] and the absence of ISP-provided DNS would fundamentally change the online experience for the consumer.[110] We also observe that DNS, as it is used today, provides

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[101] While we accept that DNS is not necessary for transmission, we reject assertions that it is not indispensable to the broadband Internet access service customers use—and expect—today. *But see, e.g.*, Peha Reclassification Comments at 13, 18; CDT Comments at 8-9; ITIF Comments at 13.

[102] *See* Nominum Comments at 2; Sandvine Comments at 2 (explaining that such servers generate recursive DNS queries, acquire and store domain name information, transform and process end user queries, retrieve domain name data from the Internet, utilize domain name data, and make available information of various types that is stored in the DNS); AT&T Comments at 73 (asserting that DNS provides ISPs with data-processing and data storage functionalities of its own).

[103] *See* CTIA Comments at 39; AT&T Comments at 74-75.

[104] AT&T Comments at 74.

[105] AT&T Comments at 73 (citations omitted); *see also* Reason Foundation Comments at 9-10 ("DNS is of fundamental importance to the functionality of the Internet, enabling users' devices, though web browsers, search engines and other tools, to identify and connect to websites and web pages. . . . Eliminating DNS would likely dramatically reduce the value of the entire domain naming system, harming both providers of content and services and users of that content and those services.").

[106] AT&T Comments at 74-75; *see also* Farsight Comments at 2 (explaining that "With the Domain Name System, you're able to easily get to Google by just typing in google.com. Without the Domain Name System you'd have to remember and enter a numeric IPv4 address such as 172.217.7.228, or, even worse, an IPv6 address such as 2607:f8b0:4004:802::2004. This would fundamentally (and negatively) change a broadband Internet user's online experience."); Fred Baker Comments at 2; Sandvine Comments at 1; Cox Comments at 11; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14864, para. 15 ("[A]n end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Nam[e] Service (DNS) capability. . . . The end user therefore receives more than transparent transmission whenever he or she accesses the Internet."); *see also* Nominum Reply at 3.

[107] *Brand X*, 545 U.S. at 999 (quoting P. Albitz & C. Liu, DNS and BIND 10 (4th ed. 2001)); *see also* AT&T Comments at 75 (quoting *Brand X*, 545 U.S. at 998, 1000).

[108] *See, e.g.*, Internet Engineers Comments at 26; Commercial Network Services Comments at 3; Atkins Comments at 1-2; David Ha Comments at 3; Benjamin Kreuter Comments at 8.

[109] *See, e.g.*, Nominum Reply at 4 ("[A]pproximately 97 percent of consumers receive their DNS service through their ISP's broadband offering. . . . This sky-high adoption of and reliance on the DNS service provided by ISPs, particularly when there are other alternatives on the market, many of which are free, indicates that consumers want and expect their broadband service to include DNS. Much as consumers expect to purchase a car with a steering wheel and tires, consumers expect a turnkey broadband service from their ISPs and that includes DNS services.").

[110] *See, e.g.*, Farsight Comments at 2; Charter Comments at 14-15 (explaining that DNS is more than merely incidental to the broadband Internet service that ISPs provide, and that without DNS, broadband Internet access

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more than a functionally integrated address-translation capability, but also enables other capabilities critical to providing a functional broadband Internet access service to the consumer, including for example, a variety of underlying network functionality information associated with name service, alternative routing mechanisms, and information distribution.[111]

35. The treatment of similar functions in MFJ precedent bolsters our conclusion.[112] In particular, when analyzing "gateway" functionalities by which BOCs would provide end-users with access to third party information services, the MFJ court found that "address translation," which enabled "the consumer [to] use an abbreviated code or signal . . . in order to access the information service provider" such as through "the translation of a mnemonic code into [a] telephone number," rendered gateways an information service.[113] The "address translation" gateway function appears highly analogous

would cease to resemble the seamless information retrieval service to which customers have become accustomed); Sandvine Comments at 2 ("Yes, it is correct that for the overwhelming majority of customers, the ISP is performing the DNS function. It is a rare customer in the United States that knows how to manually change their DNS settings, takes time to do so, and does so on all of their many connected devices."); AT&T Comments at 74 (asserting that "[v]irtually all consumers today rely on their broadband ISP to include DNS look-up functionality as an integral part of broadband Internet access service" and that "[m]ass-market consumers would find broadband services without DNS utterly useless for accessing the Internet"); Satchell Comments at 26 ("DNS is *very useful* to the customer. The use of names instead of numbers is key to the acceptance of the Web by the general public. Without DNS, the Internet would not be as ubiquitous as it is today."); *see also* Sandvine Comments at 3 ("ISP DNS servers tend to be superior to 3rd party DNS servers simply because they reside within the ISP network and are distributed much more widely and locally than 3rd party DNS servers, which tend to be centralized in just a few datacenters to serve the entire U.S. As a result, queries to a 3rd party DNS may traverse a large section of the country to get to a 3rd party DNS. As the industry knows, the trend is towards more locally distributed content and services; the closer they are to the end user the better the performance will be.").

[111] *See* CenturyLink App. 2, Bronsdon Decl. at 7-8 (asserting that DNS enables a variety of underlying network functionality information such as name service (NS), mail exchange (MX) and service (SRV) records; enables mechanisms, such as canonical name (CNAME), delegation name (DNAME), and pointer (PTR) records for selecting alternative routes to information; and facilitates information distribution or content delivery systems); Cox Comments at 10, 11; Comcast Comments 15-16; Farsight Comments at 3 ("DNS is widely used as more than 'just' an addressing scheme.").

[112] Despite the fact that the telecommunications management exception (and information service definition more broadly) was drawn most directly from the MFJ, the *Title II Order* essentially ignored MFJ precedent when concluding that DNS fell within the statutory telecommunications management exception. *See generally Title II Order*, 30 FCC Rcd at 5765-69, 5770, paras. 365-69, 371; *see also, e.g.*, INCOMPAS Comments at 54-55 (arguing that finding DNS to fall within the telecommunications management exception is "in keeping with *Computer II*"); *cf. id.* at 56 ("[A]s Justice Scalia argued, 'DNS 'is scarcely more than routing information, which is expressly excluded from the definition of 'information service' by the telecommunications systems management exception set out in the last clause of section 3(24) of the Act.'"'); NASUCA Comments at 16; OTI New America Comments at 29-30. In addition, even the *Title II Order*'s limited use of *Computer Inquiries* precedent focused mostly on relatively high-level Commission statements about the general sorts of capabilities that could be basic (or adjunct-to-basic) or drew analogies to specific holdings that are at best ambiguous as to their application to broadband Internet access service. *See, e.g.*, *Title II Order*, 31 FCC Rcd at 5768-69, 5771-72, paras. 367, 373, 375; *see also, e.g.*, Barbara van Schewick and Patrick Leerssen Reply at 29-31 (citing general statements in *Computer Inquiries* precedent regarding "data processing features necessary for the operation of a packet-switched network").

[113] *U.S. v. West. Elec. Co., Inc.*, 673 F. Supp. 525, 593 & n.307 (D.D.C. 1987) (*MFJ Initial Gateway Decision*), *aff'd in part and rev'd in part on other grounds*, 900 F.2d 283 (D.C. Cir. 1990). We recognize that gateway functionalities and broadband Internet access service are not precisely coextensive in scope. *See, e.g.*, Public Knowledge Reply at 33 (arguing that "broadband internet does not provide, for example, 'billing management' for all the edge services that users access, or 'introductory information content'"). We do, however, find similarities between functionalities such as address translation and storage and retrieval to key functionalities provided by ISPs as part of broadband Internet access service, and we conclude the court found such gateway and similar functionalities independently sufficient to warrant an information service classification under the MFJ. *See, e.g.*, *U.S. v. West. Elec. Co.*, 714 F. Supp. 1, 19-20 (D.D.C. 1988) (*MFJ Gateway/Storage & Retrieval Decision*)

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to the DNS function of broadband Internet access service, which enables end users to use easier-to-remember domain names to initiate access to the associated IP addresses of edge providers. That MFJ precedent, neglected by the *Title II Order*, thus supports our finding that the inclusion of DNS in broadband Internet access service offerings likewise renders that service an information service.[114]

36. We thus find that the *Title II Order* erred in finding that DNS functionalities fell within the telecommunications systems management exception to the definition of "information service."[115] That exception from the statutory information service definition was drawn from the language of the MFJ,[116] and was understood as "directed at internal operations, not at services for customers or end users."[117] We interpret the concepts of "management, control, or operation"[118] in the telecommunications management exception consistent with that understanding. Applying that interpretation, we find the record reflects that little or nothing in the DNS look-up process is designed to help an ISP "manage" its network; instead, DNS functionalities "provide stored information to *end* users to help them navigate the Internet."[119] As AT&T explains: "When an end user types a domain name into his or her browser and sends a DNS query to an ISP, . . . the ISP . . . converts the human-language domain name into a numerical IP address, and it then conveys that information back to the end user . . . [who] (via his or her browser)

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(analyzing storage and retrieval separately from other gateway functionalities); *MFJ Initial Gateway Decision*, 673 F. Supp. at 587 n.275 (observing that the transmission of information services at issue there "involves a number of functions that by any fair reading of the term 'information services' would be included in that definition").

[114] We rely on this analogy between DNS and particular functions classified under pre-1996 Act precedent not because the technologies are identical in all particulars, but because they share the same relevant characteristics for purposes of making a classification decision under the Act. Given the close fit between DNS and the address translation function classified as an information service under the MFJ coupled with the fact that the statutory information service definition (and telecommunications management exception) was drawn more directly from the MFJ, we find the MFJ precedent entitled to more weight than analogies to *Computer Inquiries* precedent. We thus are not persuaded by arguments seeking to analogize DNS to directory assistance, which the Commission classified as "adjunct-to-basic" under the *Computer Inquiries*. *See, e.g.*, OTI New America Comments at 33-34 ("The parallel in telephone service is computer-assisted directory assistance, where a user can find the phone number (like an IP address in BIAS) of a person based on their name (like a domain name in BIAS). This service has long been adjunct-to-basic and did not transform telephone service into an information service. DNS similarly does not direct a classification of BIAS as an information service."); Barbara van Schewick and Patrick Leerssen Reply at 32-33; Harold Hallikainen Comments at 13; Peha Reclassification Comments at 19; Ben Kreuter Comments at 4; Commercial Network Services Comments at 3; Satchell Comments at 26.

[115] *Title II Order*, 30 FCC Rcd at 5765-66, para. 366.

[116] The court's definition of information services excluded capabilities "for the management, control, or operation of a telecommunication system or the management of a telecommunications service." *MFJ Initial Decision*, 552 F. Supp. at 229. Under the Communications Act, the definition of "information services" includes an identically-worded "telecommunications management" exception. 47 U.S.C. § 153(24). Commission precedent and legislative history likewise recognize that the definition was drawn from the MFJ. *See, e.g.*, *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21954, para. 99; H.R. Conf. Rep. No. 104-458 at 126 (Jan. 31, 1996) ("'Information service' and 'telecommunications' are defined based on the definition used in the Modification of Final Judgment.").

[117] *United States v. Am. Tel. & Tel. Co.*, 1989 WL 119060, *1 (D.D.C. Sept. 11, 1989) (citing Department of Justice, *United States v. Western Electric Company, Inc., and American Telephone & Telegraph Company; Competitive Impact Statement in Connection With Proposed Modification of Final Judgment*, Notice, 47 Fed. Reg. 7170, 7176 (Feb. 17, 1982) (*DOJ Competitive Impact Statement*)).

[118] Although the exception is worded in terms of "management, control, or operation," for convenience here we refer to those collectively at times as "management" or the like.

[119] AT&T Comments at 77-78; *see also* T-Mobile Comments at 14; Charter Comments at 13-14; CTIA Comments at 39-40; Harold Hallikainen Comments at 8; Verizon Comments at 58; AT&T Reply at 70-71; Cox Reply at 6-7; CTIA Reply at 28-30; NCTA Reply at 9-10; Comcast Comments at 19.

thereafter sends a follow-up request for the Internet resources located at that numerical IP address."[120] DNS does not merely "manage" a telecommunications service, as some commenters assert,[121] but rather is a function that is useful and essential to providing Internet access for the ordinary consumer.[122] We are persuaded that "[w]ere DNS simply a management function, this would not be the case."[123] Comparing functions that *would* fall within the exception illustrates the distinction. For example, in contrast to DNS's interaction with users and their applications,[124] "non-user, management-only protocols might include things such as Simple Network Management Protocol (SNMP), Network Control Protocol (NETCONF), or DOCSIS bootfiles for controlling the configuration of cable modems."[125] These protocols support services that manage the network independent of the transmission of information initiated by a user.[126]

37. The *Title II Order* drew erroneous conclusions from *Computer Inquiries* precedent and too quickly rejected objections to its treatment of DNS as meeting the telecommunications management exception.[127] Under the *Computer Inquiries* framework, the Commission held that some capabilities "may properly be associated with basic [common carrier] service without changing its nature, or with an enhanced service without changing the classification of the latter as unregulated under Title II of the Act."[128] These commonly came to be known as "adjunct" capabilities.[129] The Commission has held that functions it had classified as "adjunct-to-basic" under the *Computer Inquiries* framework will fall within the statutory telecommunications management exception to the information service definition.[130]

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[120] AT&T Comments at 78.

[121] CDT Comments at 8; ITIF Comments at 13; New Media Rights Comments at 4-5 ("[B]ecause these services [like DNS, DHCP, caching, and others] are necessary to route, manage, or otherwise use BIAS, they fall under the management exception embodied in the definition of information service." (citations omitted)); AARP Comments at 85; WGAW Comments at 8.

[122] Nominum Comments at 5 (asserting that the "features of DNS-based services are focused on enhancing the consumer's Internet experience and go well-beyond what is needed for the management and control of telecommunications system").

[123] Sandvine Comments at 5; *see also* USTelecom Comments at 35 (asserting that DNS "capabilities uniformly permit or enhance the use of the World Wide Web; they do not manage a telecommunications system or service").

[124] *See* IANA, *Domain Name System (DNS) Parameters*, https://www.iana.org/assignments/dns-parameters/dns-parameters.xhtml (last visited Dec. 1, 2017) (for full set of information types supported by the DNS protocol).

[125] Sandvine Comments at 5.

[126] Other functions that would fall into the telecommunications systems management exception might include information systems for account management and billing, configuration management, and the monitoring of failures and other state information, and to keep track of which addresses are reachable through each of the interconnected neighboring networks. *See* Peha Reclassification Comments at 20.

[127] The same shortcomings are present in the *Title II Order*'s analysis of caching, as well.

[128] *Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, GN Docket No. 80-756, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 591, para. 15 (1983) (*Protocols Order*).

[129] *See, e.g., North American Telecommunications Association Petition for Declaratory Ruling Under §64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 FCC 2d 349, 359, para. 24 (1985) (*NATA Centrex Order*) ("The computer processing services we recognized as permissible adjuncts to basic service are services which might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly 'basic' in purpose and use.").

[130] *See, e.g., Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 107.

Drawing loose analogies to certain functions described as adjunct-to-basic under Commission precedent, the *Title II Order* held that DNS fell within the telecommunications management exception.

38. The *Title II Order* incorrectly assumed that so long as a functionality was, in part, used in a manner that could be viewed as adjunct-to-basic, it necessarily was adjunct-to-basic regardless of what the functionality otherwise accomplished.[131] Although confronted with claims that DNS is, in significant part, designed to be useful to end-users rather than providers, the *Title II Order* nonetheless decided that it fell within the telecommunications management exception.[132] While conceding that DNS, as well as other functions like caching, "do provide a benefit to subscribers,"[133] the *Title II Order* held that they nonetheless fell within the telecommunications management exception because it found some aspect of their operation also was of use to providers in managing their networks.[134] This expansive view of the telecommunications management exception—and associated narrowing of the scope of information services—is a transposition of the analytical approach embodied in the MFJ and *Computer Inquiries*; under the approach in the pre-1996 Act precedent, the analysis would instead begin with the broad language of the information service or enhanced service definitions, generally excluding particular functions only if the purpose served clearly was narrowly focused on facilitating bare transmission. The Commission and the courts made clear the narrow scope of the 'adjunct-to-basic' or 'telecommunications management' categories in numerous decisions in many different contexts.[135]

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[131] *See, e.g., Title II Order*, 30 FCC Rcd at 5766-68, paras. 367-68. In addition to the MFJ precedent, Bureau precedent similarly has observed that adjunct-to-basic capabilities do not include functions "useful to end users, rather than carriers." *Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities, Bell Operating Companies*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2639, para. 18 (CCB 1998) (*272 Forbearance Order*). Given the lack of ambiguity in the MFJ's holding in this regard, we find it more reasonable to interpret this precedent to call for a similar requirement that "adjunct to basic" services do not include services primarily useful to end-users, and reject arguments to the contrary. *See, e.g.*, Public Knowledge Reply at 37 ("The 'rule' AT&T attempts to extract from this is simply another paragraph of the telecommunications management exception which, applied to DNS, still does not lead to the result it wants.").

[132] *Title II Order*, 30 FCC Rcd at 5768, para. 368 & n.1037. The same is true of the *Title II Order*'s treatment of caching. *Id.* at 5768, para. 368 n.1037.

[133] *Id.*

[134] *Id.*

[135] *See, e.g., Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) et al.*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958, 967-68, para. 10 (1986) (*Computer III Phase I Order*) ("[d]ata processing, computer memory or storage, and switching techniques can be components of a basic service if they are used *solely* to facilitate the movement of information" (emphasis added)); *NATA Centrex Order*, 101 FCC 2d at 360, para. 26 (speed dialing and call forwarding "*serve but one purpose*: facilitating establishment of a transmission path over which a telephone call may be completed" (emphasis added)); *id.* at 360, para. 26 (directory assistance that "provides *only* that information about another subscriber's telephone number which is *necessary to allow use of the network to place a call* to that other subscriber . . . may be offered as an adjunct to basic service" while "an offering of access to a data base for most other purposes is the offering of an enhanced service" (emphasis added)); *Computer II Final Decision*, 77 FCC 2d at 419, para. 93 ("[a] basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information"); *id.* at 420-21, para. 97 ("[a]n enhanced service is any offering over the telecommunications network which is more than a basic transmission service"); *id.* at 421, para. 98 ("computer processing applications such as call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, voice encryption, etc. . . . are ancillary services directly related to [the] provision" of basic telephone service "that do not raise questions about the fundamental communications or data processing nature of a given service" (internal quotation marks omitted)); *MFJ Initial Gateway Decision*, 673 F. Supp. at 587 n.275 (rejecting arguments that transmission of information services fall outside the definition of information services by focusing in the first instance on "the breadth of the information services definition"); *see also DOJ Competitive Impact Statement*, 47 Fed. Reg. at 7176 (telecommunications

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39. The *Title II Order* also put misplaced reliance on *Computer Inquiries* adjunct-to-basic precedent from the traditional telephone service context as a comparison when evaluating broadband Internet access service functionalities.[136] Because broadband Internet access service was not directly addressed in pre-1996 Act *Computer Inquiries* and MFJ precedent, analogies to functions that were classified under that precedent must account for potentially distinguishing characteristics not only in terms of technical details but also in terms of the regulatory backdrop. The 1996 Act enunciates a policy for the Internet that distinguishes broadband Internet access from legacy services like traditional telephone service. The 1996 Act explains that it is federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[137] The application of potentially ambiguous precedent to broadband Internet access service should be informed by how well—or how poorly—it advances that deregulatory statutory policy. We find that our approach to that precedent, which results in an information service classification of broadband Internet access service, better advances that deregulatory policy than the approach in the *Title II Order*, which led to the imposition of utility-style regulation under Title II.

40. The regulatory history of traditional telephone service also informs our understanding of *Computer Inquiries* precedent, further distinguishing it from broadband Internet access service. Given the long history of common carriage offering of that service by the time of the *Computer Inquiries*, it is understandable that some precedent started with a presumption that the underlying service was a "basic service."[138] But similar assumptions would not be warranted in the case of services other than traditional telephone service for which there was no similar longstanding history of common carriage. Thus, not only did the *Title II Order* rely on specific holdings that are at best ambiguous in their analogy to

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services may "include related functions" that are "essential to such transmission," so, for example, where a function "constitutes an inherent aspect of the technology used in transmission and switching," it would not result in the service being classified an information service under the MFJ). Notably, the focus remains on the purpose or use of the specific function in question and not merely whether the resulting service, as a whole, is useful to end-users. *See, e.g.*, Public Knowledge Reply at 37 ("To maintain, as AT&T does, that something that is 'useful' to an end user cannot fall under the management exception is absurd, as the entire purpose of broadband is to be useful to end users, as is the entire purpose of telephony.").

[136] *See, e.g., Title II Order*, 30 FCC Rcd at 5768-69, para. 369.

[137] 47 U.S.C. § 230(b)(2).

[138] *See, e.g., NATA Centrex Order*, 101 FCC 2d at 358, para. 23 ("[W]e did not intend that our definition of enhanced services should be interpreted as forbidding carriers to use the processing and storage capabilities within their networks to offer optional tariffed features which facilitate use of traditional telephone service. Accordingly, the Final Decision carried forward from the Tentative Decision our recognition that there are computer processing services which may be offered in conjunction with basic telephone service."); *Computer II Final Decision*, 77 FCC 2d at 421, para. 98 ("The intent was to recognize that while POTS is a basic service, there are ancillary services directly related to its provision that do not raise questions about the fundamental communications or data processing nature of a given service. Accordingly, we are not here foreclosing telephone companies from providing to consumers optional services to facilitate their use of traditional telephone service."); *US West Communications Petition for Computer III Waiver*, Docket No. 90-623, Order, 11 FCC Rcd 1195, 1199, para. 27 (CCB 1995) ("[T]he Commission held in the NATA Centrex Order that carriers may use some of the processing and storage capabilities within their networks to offer optional tariffed features as 'adjunct to basic' services, if the services: (1) are intended to facilitate the use of traditional telephone service; and (2) do not alter the fundamental character of telephone service."); *cf., e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4830-31, paras. 15-16 (2005) (*AT&T Calling Card Order*) (AT&T's prepaid calling card service involves "no 'offer' to the customer of anything other than telephone service, nor is the customer provided with the 'capability' to do anything other than make a telephone call," and relying on *Computer Inquiries* precedent, the Commission found that unprompted advertisements inserted by AT&T were adjunct-to-basic and thus leave the service a "telecommunications service" under the 1996 Act definitions.).

technical characteristics of broadband Internet access service, but it failed to adequately appreciate key regulatory distinctions between traditional telephone service and broadband Internet access service.[139]

41. *Caching.* We also conclude that caching, a functionally integrated information processing component of broadband Internet access service, provides the capability to perform functions that fall within the information service definition.[140] As the record reflects, "[c]aching does much more than simply enable the user to obtain more rapid retrieval of information through the network; caching depends on complex algorithms to determine what information to store where and in what format."[141] This requires "extensive information processing, storing, retrieving, and transforming for much of the most popular content on the Internet,"[142] and as such, caching involves storing and retrieving capabilities required by the "information service" definition.[143] The Court affirmed this view in *Brand X*, finding "reasonable" the "Commission's understanding" that Internet service "facilitates access to third-party Web pages by offering consumers the ability to store, or 'cache,' popular content on local computer servers," which constitutes "the 'capability for . . . acquiring, [storing] . . . retrieving [and] utilizing information.'"[144]

42. We find that ISP-provided caching does not merely "manage" an ISP's broadband Internet access service and underlying network, it enables and enhances consumers' access to and use of information online.[145] The record shows that caching can be realized as part of a service, such as DNS, which is predominantly to the benefit of the user (DNS caching).[146] Caching can also be realized in terms of content that can be accumulated by the ISP through non-confidential (i.e., non-encrypted) [147] retrieval

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[139] *Title II Order*, 30 FCC Rcd at 5768-69, para. 369 (summarily asserting that the traditional telephone service context of its cited precedent "provides no basis to discard the logic of that analysis in the broadband context"); *see also, e.g.*, ACLU/EFF Reply at 4 ("If the NATA Centrex Order had concerned Internet access, it would doubtless have read 'offering of access to a data base for purposes of obtaining *Internet* numbers' is an 'adjunct to basic *Internet* service.'"). Thus, for example, the fact that the adjunct-to-basic classification of directory assistance arose in the traditional telephone context likewise persuades us to give it relatively little weight here as an analogy to DNS, and we reject arguments to the contrary. *See, e.g.*, OTI New America Comments at 33-34; Barbara van Schewick and Patrick Leerssen Reply at 32-33.

[140] *See* Comcast Comments at 15-16; ITIF Comments at 13; Charter Comments at 14.

[141] ITIF Comments at 13. *See also* CTIA Comments at 37; AT&T Comments at 75-76 ("ISPs routinely arrange for the use of caching to enhance their customers' ability to acquire information. Caching technologies use powerful information-processing algorithms to determine what to cache, where to cache it, and how long the content should be cached." (citation omitted)).

[142] ITIF Comments at 13.

[143] *See* AT&T Comments at 75-76 ("The prevalence of caching confirms . . . that broadband Internet access falls within the scope of 'information service' (because by definition it consists of 'storing' and 'retrieving' information."). As such, we reject commenter assertions to the contrary. *See, e.g.*, Public Knowledge Comments at 48-49.

[144] *Brand X*, 545 U.S. at 999-1000.

[145] *See* Comcast Comments at 19; Verizon Comments at 58; CTIA Comments at 36-37 ("'Caching's capabilities enhance users' quality of experience and add[] value to their broadband Internet access service,' Rysavy explains, 'by providing faster and more dependable service.'" (citations omitted)); Reason Foundation Comments at 10; Charter Comments at 14-15.

[146] *See Stevens Report*, 13 FCC Rcd at 11537-38, para. 76; *Cable Modem Order*, 17 FCC Rcd at 4809-10, para. 17 n.76 ("Caching is similarly a behind-the-scenes service that speeds content delivery and thus improves consumers' online experience.").

[147] We disagree with assertions in record that suggest that ISP-provided caching is not a vital part of broadband Internet access service offerings, as it may be stymied by the use of HTTPS encryption. *See* ACLU/EFF Reply (stating "ISP caching is significantly stymied by the use of HTTPS encryption, which has increased from just 2% in

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of information from websites (Web caching). In this case, the user benefits from a rapid retrieval of information from a local cache or repository of information while the ISP benefits from less bandwidth resources used in the retrieval of data from one or more destinations. DNS and Web caching are functions provided as part and parcel of the broadband Internet access service. When ISPs cache content from across the Internet, they are not performing functions, like switching, that are instrumental to pure transmission, but instead storing third party content they select in servers in their own networks to enhance access to information.[148] The record reflects that without caching, broadband Internet access service would be a significantly inferior experience for the consumer, particularly for customers in remote areas, requiring additional time and network capacity for retrieval of information from the Internet.[149] Thus, because caching is useful to the consumer, we conclude that the *Title II Order* erred in incorrectly categorizing caching as falling within the telecommunications system management exception to the definition of "information service."

43. In addition, the *Title II Order*'s failure to consider applicable MFJ precedent led to mistaken analogies when it concluded that caching fell within the statutory telecommunications management exception.[150] In relevant precedent, the MFJ court observed that the information service restriction generally "prohibits the [BOCs] from 'storing' and 'retrieving' information," but identified "quite distinct settings in which storage capabilities of the [BOCs] could be used in the information services market."[151] One of the categories of storage and retrieval identified by the court appears highly comparable to caching. That category involved BOC provision of "storage space in their gateways for databases created by others" such as "information service providers and end users," making "communication more efficient by moving information closer to the end user, thereby reducing

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2010 to more than 50% in 2017") (citations omitted); *see also* Public Knowledge Comments at 13 ("HTTP Secure ('HTTPS') accounted for 49% of web traffic in February 2016, as compared to 13% in April 2014" (citing Peter Swire et al., *Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others*, The Inst. for Info. Sec. & Privacy at Ga. Tech at 10 (Feb. 29, 2016) (white paper), http://www.iisp.gatech.edu/sites/default/files/images/online_privacy_and_isps.pdf)). Recently, the Commission concluded that encryption is not yet ubiquitous and that "truly pervasive encryption on the Internet is still a long way off, and that many sites still do not encrypt." *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd 13911, 13922, para. 34 (2016) (*2016 Privacy Order*), *nullified by* Pub. L. 115-22. In the same proceeding, the Commission also found that DNS queries are almost never encrypted. *Id.* at 13921, n.39. While we recognize that the *2016 Privacy Order* and the rules adopted therein have been nullified under the Congressional Review Act, we nonetheless find the Commission's analysis of the record in that proceeding on this point relevant.

[148] *See* USTelecom Comments at 34-35.

[149] *See, e.g.*, NCTA Comments at 15; *Brand X*, 545 U.S. at 999 (noting that caching "obviates the need for the end user to download anew information from third-party Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval"); Charter Comments at 14-15 (explaining that without caching, customers would experience greater delays in retrieving such information if and when they find it); Verizon Comments at 58 (explaining that caching is a behind-the-scenes service that speeds content delivery and thus improves consumers' online experience, and for that reason, is not a network management process but instead a valuable component of the information service that ISPs offer to consumers). For these reasons, we reject arguments to the contrary. *See, e.g.*, Public Knowledge Comments at 49 (Caching operates "not just for the benefit of the end user, who may experience faster transmission, but also for the benefit of the network provider, reducing the resource demands and traffic loads of their network"); Scott Jordan Reply at 12-13 ("[I]f a broadband Internet access service provider chooses to implement caching inside its network, and not as a content delivery network service offered to edge providers, then it is doing so in order to manage its broadband Internet access service.").

[150] *See generally Title II Order*, 30 FCC Rcd at 5770-71, para. 372; *see also, e.g.*, INCOMPAS Comments at 54-55 (arguing that finding caching to fall within the telecommunications management exception is "in keeping with *Computer II*").

[151] *MFJ Gateway/Storage & Retrieval Decision*, 714 F. Supp. at 18 n.73, 19.

transmission costs."[152] This functionality—recognized as an information service by the MFJ court—appears highly analogous to caching, and lends historical support to our view that the caching functionality within broadband Internet access service is best understood as rendering broadband Internet access service an information service.[153]

44. Ignoring that MFJ precedent, the *Title II Order* erred in seeking to analogize caching to "'store and forward technology [used] in routing messages through the network as part of a basic service'" mentioned in the *Computer II Final Decision*.[154] In fact, consistent with the MFJ court's identification of distinct uses of storage and forwarding, the cited portion of the *Computer II Final Decision* recognized that "the kind of enhanced store and forward services that can be offered are many and varied."[155] In that regard, the *Computer II Final Decision* distinguished "[t]he offering of store and forward *services*" from "store and forward *technology*," explaining that "[m]essage or packet switching, for example, is a store and forward technology that may be employed in providing basic service."[156] Reading that discussion in full context and in harmony with subsequent MFJ precedent, the reference in the *Computer II Final Decision* to "store and forward technology" appears better understood as mirroring a category of storage and retrieval of information that the MFJ court suggested was not an information service—in particular, "the basic packet switching function, . . . [which] involves the breakdown of data or voice communications into small bits of information that are then collected and transmitted between nodes."[157] That category of activity relied upon in the *Title II Order* thus actually appears to be barely or not at all analogous to caching. We instead find more persuasive the MFJ court's information service treatment of BOC provision of "storage space in their gateways for databases created by others" such as "information service providers and end users"—a distinct category of storage and retrieval functionality that is a close fit to caching.[158]

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[152] *Id.* at 19.

[153] The first category the court identified was "very short term storage," including, among other things, "the basic packet switching function," which "involves the breakdown of data or voice communications into small bits of information that are then collected and transmitted between nodes," involving "constant storage, error checking, and retransmission, as required for accurate transmission." *Id.* at 19. Although the court was not entirely clear, it seemed to suggest that such functions were not information services under the MFJ. This category appears to bear little similarity to caching, however. The third category of "storage and retrieval" information service functions identified by the court would include the BOC's provision of "voice messaging, voice storage and retrieval, and electronic mail." *Id.* at 19-20 (footnotes omitted). Because that category does not appear as analogous to caching as the category identified by the court and described above, nor was it relied upon in the *Title II Order*'s discussion of caching, we do not focus on that third category in our discussion here.

[154] *Title II Order*, 30 FCC Rcd at 5770-71, para. 372, n.1052 (quoting *Computer II Final Decision*, 77 FCC 2d at 420-21, para. 97, n.35); *see also, e.g.*, Public Knowledge Comments at 61 (citing "message or packet switching" functions).

[155] *Computer II Final Decision*, 77 FCC 2d at 420-21, para. 97.

[156] *Id.* at 420-21, para. 97, n.35.

[157] *MFJ Gateway/Storage & Retrieval Decision*, 714 F. Supp. at 19.

[158] *Id.* We are unpersuaded by claims that this MFJ precedent only is analogous to CDNs and not "transparent caching" based on asserted differences in how it is determined what content will be stored in each scenario. Letter from Jon Peha, Professor, Carnegie Mellon University, WC Docket No. 17-108, at 3-4 (filed Dec. 7, 2017) (Peha Dec. 7, 2017 *Ex Parte* Letter). Although the factual scenario discussed in the MFJ anticipated end-users or information service providers electing what information to store, and that fact may have partially informed the court's decision whether to ultimately allow BOCs to provide that capability notwithstanding its classification as an information service, we do not read the underlying classification as turning on that issue. *MFJ Gateway/Storage & Retrieval Decision*, 714 F.Supp. at 19. Further, in addition to the distinctions between caching and store-and-forward technology acknowledged even in this filing, Peha Dec. 7, 2017 *Ex Parte* Letter at 4, we find additional shortcomings in how the *Title II Order* relied on adjunct-to-basic precedent. *See, e.g., supra* paras. 38-40.

b. ISPs' Service Offerings Inextricably Intertwine Information Processing Capabilities with Transmission

45. Having established that broadband Internet access service has the information processing capabilities outlined in the definition of "information service," the relevant inquiry is whether ISPs' broadband Internet access service offerings make available information processing technology inextricably intertwined with transmission. Below we examine both how consumers perceive the offer of broadband Internet access service, as well as the nature of the service actually offered by ISPs, and conclude that ISPs are best understood as offering a service that inextricably intertwines the information processing capabilities described above and transmission.

46. We begin by considering the ordinary customer's perception of the ISP's offer of broadband Internet access service. As *Brand X* explained, "[i]t is common usage to describe what a company 'offers' to a consumer as what the consumer perceives to be the integrated finished product."[159] ISPs generally market and provide information processing capabilities and transmission capability together as a single service.[160] Therefore, it is not surprising that consumers perceive the offer of broadband Internet access service to include more than mere transmission, and that customers want and pay for functionalities that go beyond mere transmission.[161] As Cox explains, "[w]hile consumers also place significant weight on obtaining a reliable and fast Internet connection, they view those attributes as a means of enabling these capabilities to interact with information online, not as ends in and of themselves."[162] Indeed, record evidence confirms that consumers highly value the capabilities their ISPs offer to acquire information from websites, utilize information on the Internet, retrieve such information, and otherwise process such information.[163]

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[159] *Brand X*, 545 U.S. at 990.

[160] *See* ACA Comments at 52 ("ACA members confirm that their marketing of broadband Internet access service has not undergone substantial change since the inception of the service and that it has always emphasized both the always-on capabilities that broadband Internet access would afford subscribers, including the ability to retrieve and utilize the panoply of available Internet content and applications, and the fast speeds at which they would be able to stream, download and upload Internet content.").

[161] *See, e.g.*, MSI Survey Report at 4; *see also* NCTA Reply at 7-8 ("[A] recent survey of consumers confirms that they highly value the capabilities their BIAS providers offer to '*acquire* information' from internet websites, '*utilize* information' on the internet, '*retrieve*' such information,' [sic] and otherwise '*process*' such information. Not only do consumers expect their BIAS providers to offer such capabilities, but the vast majority view the functions they enable—such as the ability to search for and find information on the web, to send and receive emails, to surf the Internet, and to shop online—as 'must have.'"); Cox Reply at 4-5 (similar); USTelecom Reply at 7-11 ("[W]e wanted to confirm (or debunk), based on objective, data-driven analysis, the Commission's assertion that consumers understand their BIAS to function only as a 'transmission platform' that they can use to access third-party content, applications and services of their choosing. It turns out that consumers expect their BIAS to offer far more than just a pathway to the Internet."); Comcast Comments at 23 ("[M]any of the information components of BIAS are now taken for granted as being included—and expected to be included—in the offered service."); Comcast Reply at 6 ("[M]ost consumers are aware of integrated service features offered by their BIAS provider—such as online storage, parental controls, and e-mail. . . . Not only do consumers expect their BIAS provider(s) to offer such capabilities over fast and reliable Internet connections, but a significant majority view the functions enabled by these capabilities—such as surfing the web, streaming media, or shopping online—as 'very' important."); Free State Foundation Comments at 15 ("[E]nd user consumers perceive, even if tacitly, that broadband ISPs are offering a functionally integrated service. They do not perceive that they are purchasing transmission as a standalone service.").

[162] Cox Reply at 5; *see also* Letter from Diane Holland, Vice President, USTelecom and Rick Chessen, Senior Vice President, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108, Attach. A (MSI Survey Report) at 4-5 (filed Aug. 28, 2017) (USTelecom and NCTA *Ex Parte*).

[163] *See* MSI Survey Report at 4; *see also* NCTA Reply at 7-8; Cox Reply at 4-5; USTelecom Reply at 7-11. *But see* (continued....)

47. This view also accords with the Commission's historical understanding that "[e]nd users subscribing to . . . broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services—both Internet access service and a distinct transmission service, for example."[164] While the *Title II Order* dwells at length on the prominence of transmission speed in ISP marketing, it makes no effort to compare that emphasis to historical practice.[165] In fact, ISPs have been highlighting transmission speed in their marketing materials since long before the *Title II Order*.[166] The

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Letter from Carmen Scurato, Director, Policy and Legal Affairs, NHMC, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-108 at 2 (filed Nov. 20, 2017) (NHMC Expert Analysis of Open Internet Consumer Complaints) ("Consumers and carriers, at least according to their responses to consumer complaints, appear to conceptualize broadband Internet access as basic telecommunications service and characterize it in terms of quality and capacity of connections."). NHMC's argument, based on what it asserts to be a representative sample of consumer complaints filed with the Commission, is not persuasive. NHMC's methodology relied on Natural Language Processing (NLP) to determine words that co-occur in such complaints, and then used "iterative clustering algorithms" to "ma[p] connections among them." *See id.* attachment at 13-15. Neither NHMC's methodology nor the representative extracts of the complaints NHMC submitted demonstrate that individual complaints about particular aspects of service reflect how a customer would perceive service offerings as a whole. Indeed, the sample of complaints attached by NHMC features a broad set of issues, ranging widely from questions about speed to "losing my Internet connection," "charg[ing] extra for your services," "interrupt[ing] the service," "bully[ing] me into share plans," "Google arbitrarily engag[ing] in monopolistic practices," "charg[ing] me modem rental fee," or "basically no technical support." *See id.* at 40-71. We further note that to the extent that perceived speed is a common complaint, that does not mean consumers view broadband Internet access service as a pure transmission service. A consumer's perceived speed for many activities (such as web browsing) depends on information-processing elements of the service like DNS and caching; indeed, caching's primary consumer benefit is allowing a more rapid retrieval of information from a local cache (increasing the perceived speed of a consumer's connection). Moreover, the Commission has never relied on such complaints to identify what a service is. And for good reason: We expect consumer complaints about problems with a service—not every aspect of it. Indeed, applying such a methodology would lead to absurd results: Should we redefine the public switched network based on the millions of robocall complaints we get each year or the rural-call-completion problems that we know are too prevalent? Of course not.

[164] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14910-11, para. 104; *see also, e.g., Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5913, para. 31 (same); *Cable Modem Order*, 17 FCC Rcd at 4822-23, para. 38 ("Consistent with the analysis in the [*Stevens Report*], we conclude that the classification of cable modem service turns on the nature of the functions that the end user is offered. We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.").

[165] *See Title II Order*, 30 FCC Rcd at 5755-57, paras. 351-54; *see also USTelecom*, 825 F.3d at 699, 704-05 (discussing the *Title II Order*'s analysis of marketing); AARP Comments at 83 (discussing certain ISPs' marketing statements); Free Press Comments at 42 (similar); Public Knowledge Comments, App. A (similar); OTI New America Comments at 27 ("BIAS providers today market their services as an access path to internet based content. BIAS providers distinguish, and indeed consumers compare, their services based on factors such as speed."); Vimeo Comments at 28 (discussing certain ISPs' marketing statements); EFF Comments at 17-19 ("Today's BIAS providers, while they may offer email, are not marketed or perceived as providers of content, storage, data processing, or other information services. Indeed, unlike the America Online of two decades ago, today's BIAS providers advertise the speed and reliability of their data transmission, not the information services they offer."); Peha Reclassification Comments at 5 (asserting that ISPs market their service by bragging about the quality of IP packet transfer, rather than the quality of information services such as proprietary content or email); *cf.* AARP Comments at 91 ("Consumers have tools available, such as bandwidth testing meters, that enable them to understand what download speeds their service provider delivers."); *id.* at 94 ("Bandwidth is what matters to consumers of broadband Internet access service.").

[166] *See, e.g.*, USTelecom Comments at 32-33; Verizon Comments at 57; CenturyLink Comments at 27 ("[T]he relative prominence of speed as a focus in CenturyLink marketing efforts has not changed materially over time since 2000."); ACA Comments at 41, n.126 (affirming that ACA members "had not fundamentally changed the way in
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very first report on advanced telecommunication capability pursuant to section 706(b) of the 1996 Act, released in 1999, cited ISPs' marketing of their Internet access service speed.[167] ISPs' inclusion of speed information in their marketing also was acknowledged by the Court in *Brand X*, which nonetheless upheld the Commission's information service classification as reasonable.[168] Indeed, consideration of ISP marketing practices has been part of the backdrop of all of the Commission's decisions classifying broadband Internet access service as an information service and thus cannot justify a departure from the historical classification of broadband Internet access service as an information service.

48. The *Title II Order*'s reliance on ISP marketing also assumes that it provides a complete picture of what consumers perceive as the finished product. First, the record reflects that ISP marketing of broadband encompasses features beyond speed and reliability.[169] Further, because all broadband Internet access services rely on DNS and commonly also rely on caching by ISPs, to the extent that those capabilities, in themselves, do not provide a point of differentiation among services or providers, it would be unsurprising that ISPs did not feature them prominently in their marketing or advertising, particularly to audiences already familiar with broadband Internet access service generally.[170] Indeed, speed and reliability are not exclusive to telecommunications services; rather, the record reflects that speed and reliability are crucial attributes of an information service.[171] Consequently, the mere fact that broadband

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which they advertise their broadband Internet access service—they have always emphasized both its enhanced functionalities and fast speeds").

[167] *See, e.g., Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2431, Chart 2 (1999).

[168] *Cf., e.g., Brand X*, 545 U.S. at 1007 n.1 (Scalia, J., dissenting) (arguing that just as when a "pizzeria advertises quick delivery as one of its advantages over competitors" that also "is the case with cable broadband"); *id.* at 991-92 (Court majority rejecting the dissent's pizzeria analogy—along with another analogy involving dogs and dog leashes—and observing that "unlike the transmission component of Internet service, delivery service and dog leashes are not integral components of the finished products (pizzas and pet dogs)").

[169] *See, e.g.*, CenturyLink Comments at 26; CenturyLink Comments Appx. 1, Decl. of Dane Folster at 2 ("CenturyLink promotes Wi-Fi capabilities, 24/7 technical support, and a free Norton AntiVirus solution and other features of our BIA service."); Cox Comments at 11 ("Cox's broadband marketing focuses not only on transmission speeds but also on advanced connectivity features, including the wall-to-wall range of Cox's 'Panoramic WiFi,' Cox Security Suite Plus, WebMail, and SpamBlocker services.").

[170] *See, e.g.*, Comcast Comments at 23 ("[M]any of the information components of BIAS are now taken for granted as being included—and expected to be included—in the offered service, so there is no reason to advertise them."); ACA Comments at 41, n.126 ("Indicating that any greater emphasis on speed in recent years was a reflection of the public's growing understanding of the service and the faster speeds their networks could obtain."); *Sours v. General Motors Co.*, 717 F.2d 1511 (6th Cir. 1983) (holding that in a products liability case, lack of advertising about car safety in accidents—which had been present in an earlier products liability case involving off-road vehicles—did not preclude findings regarding consumer expectations of the cars at issue because "[t]he automobile is hardly a new product," and "[t]he expectations of ordinary automobile owners with respect to foreseeable accidents in the course of everyday on-road vehicle operation probably are easier to define than the adventurers' expectations concerning inherently hazardous off-road performance in open jeeps, advertising notwithstanding"); *Cunningham v. Mitsubishi Motors Corp.*, 1993 WL 1367436, *4 (S.D. Ohio 1993) (holding that in a products liability case, the "Court does not agree with Defendants' contention that the absence of advertising regarding the safety of their seat belts prevents the use of the consumer expectation test" where "consumers have had ample opportunity to develop expectations regarding the safety of seat belts").

[171] *See, e.g.*, Verizon Comments at 57-58 ("Advertising the speed and reliability with which [] data is transferred is not remotely inconsistent with broadband Internet service being an information service—service providers are simply informing consumers how they can use the speed and reliability of their connection *for the purpose of* 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.'"); Comcast Comments at 24 ("Even Justice Scalia remarked in his dissent in *Brand X* that broadband providers 'advertise[] quick delivery as one of [their] advantages over competitors.' In any event, BIAS providers routinely include more than just 'speed' claims in their advertisements. And 'there is little reason to think consumers might

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Internet access service marketing often focuses on characteristics, such as transmission speed, by which services and providers can be differentiated sheds little to no light on whether consumers perceive broadband Internet access service as inextricably intertwining that data transmission with information service capabilities.[172]

49. Separate and distinct from our finding that an ISP "offers" an information service from the consumer's perspective, we find that as a factual matter, ISPs offer a single, inextricably intertwined information service. The record reflects that information processes must be combined with transmission in order for broadband Internet access service to work,[173] and it is the combined information processing capabilities and transmission functions that an ISP offers with broadband Internet access service. Thus, even assuming that any individual consumer could perceive an ISP's offer of broadband Internet access service as akin to a bare transmission service,[174] the information processing capabilities that are actually offered as an integral part of the service make broadband Internet access service an information service as

want a fast or reliable 'transmission . . . of information' but not a fast or reliable 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.'"). As such, we reject assertions that speed and reliability are only characteristics of telecommunications services and further note that ISPs market these aspects because they can be differentiated, unlike DNS or caching. *See, e.g.*, Peha Reclassification Comments at 13 (asserting that speed and reliability are not characteristics of an information service, but rather characteristics of a telecommunications service).

[172] Neither the discussion of the consumer's perspective by Justice Scalia nor that in the *Title II Order* identifies good reasons to depart from the Commission's prior understanding that broadband Internet access is a single, integrated information service. Justice Scalia contended that how customers perceive cable modem service is best understood by considering the services for which it would be a substitute—in his view at the time, dial-up Internet access and digital subscriber line (DSL) service over telephone networks. *Brand X*, 545 U.S. at 1008-09. However, dial-up Internet access has substantially diminished in marketplace significance in the subsequent years. *See, e.g.*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability To All Americans In A Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, As Amended By the Broadband Data Improvement Act*, GN Docket No. 16-245, Twelfth Broadband Progress Notice of Inquiry, 31 FCC Rcd 9140, 9171, Table 1, n.181 (2016) (*Twelfth Section 706 NOI*) ("Based upon households with Internet services at home, NTIA reports 61 percent of households have mobile Internet services, 76 percent have wired Internet services, 3 percent have satellite Internet services and 0.7 percent have dial-up Internet services."); AT&T Comments at 84, n.124 ("[T]he virtual disappearance of dial-up (in which separate companies provided Internet access and last-mile transmission) has made it even *less* likely that broadband consumers would perceive two different services rather than one."). In addition, the legal compulsion for facilities-based carriers to offer broadband transmission on a common carrier basis was eliminated in 2005. *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14872-903, paras. 32-95. Fixed and mobile wireless broadband Internet access service have grown to play a much more prominent role in the broadband Internet access service marketplace, along with satellite broadband Internet access service, none of which ever was under a legal compulsion to offer broadband transmission on a common carrier basis—nor, prior to the *Title II Order*, were they interpreted as voluntarily doing so. *See, e.g.*, *Twelfth Section 706 NOI*, 31 FCC Rcd at 9171, Table 1, n.181. Consequently, whatever might have been arguable at the time of *Brand X*, the service offerings in the marketplace as it developed thereafter provide no reason to expect that consumers "inevitabl[y]" would view broadband Internet access service as involving "*both* computing functionality *and* the physical pipe" as separate offerings based on comparisons to the likely alternatives. *Brand X*, 545 U.S. at 1009 (Scalia, J., dissenting).

[173] *See, e.g.*, CTIA Reply at 23; CTIA Comments, Exh. A, Rysavy Decl. at 3-4, para. 4 ("Transmission of data has become intertwined with other services that provide value to users. The very transmission of data in the internet involves processing of information, in some cases transforming packets."); *see also supra* paras. 34, 42.

[174] *See, e.g.*, AARP Comments at 90-91; CDT Comments at 8; Internet Engineers Comments at 18; WGAW Comments at 5; Free Press Comments at 41.

defined by the Act.[175] As such, we reject commenters' assertions that the primary function of ISPs is to simply transfer packets and not process information.[176]

50. The inquiry called for by the relevant classification precedent focuses on the nature of the service offering the provider makes, rather than being limited to the functions within that offering that particular subscribers do, in fact, use or that third parties also provide.[177] The *Title II Order* erroneously contended that, because functions like DNS and caching potentially could be provided by entities other than the ISP itself, those functions should not be understood as part of a single, integrated information service offered by ISPs.[178] However, the fact that some consumers obtain these functionalities from third-party alternatives is not a basis for ignoring the capabilities that a broadband provider actually "offers." The *Title II Order* gave no meaningful explanation why a contrary, narrower interpretation of "offer" was warranted other than, implicitly, its seemingly end-results driven effort to justify a telecommunications service classification of broadband Internet access service.

51. Our findings today are consistent with classification precedent prior to the *Title II Order*, which consistently found that ISPs offer a single, integrated service.[179] Even the early classification

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[175] *See, e.g.*, CenturyLink Comments at 25; Comcast Comments at 14; AT&T Comments at 69; *see also* Verizon Comments at 39; CTIA Comments at 36; Oracle Comments at 2; Free State Foundation Comments at 13; Cox Comments at 9.

[176] *See, e.g.*, CDT Comments at 8; Stein Comments at 3; Internet Engineers Comments at 20, 22; EFF Comments at 17-18; Peha Reclassification Comments at 18; Volo Comments at 1; Daily Kos Comments at 3; Harold Hallikainen Comments at 1; Ryan Blake Comments at 1-2; ILSR Comments at 1; Multifreq LLC Comments at 1.

[177] As the Commission recognized in the *Cable Modem Order*, Internet access service was appropriately classified as an offering of the capabilities with the definition of an information service "regardless of whether subscribers use all of the functions provided as part of the service." *Cable Modem Order*, 17 FCC Rcd at 4822-23, para. 38; *see also, e.g.*, ACA Comments at 50-51; AT&T Comments at 81-82; CTIA Comments at 41; Comcast Comments at 18; Comcast Reply at 8-9; Free State Foundation Comments at 12-13; NCTA Comments at 16-17; AT&T Reply at 71-72; CTIA Reply at 25-26; Verizon Reply at 35.

[178] *See, e.g.*, *Title II Order*, 30 FCC Rcd at 5769-71, paras. 370-72; *see also, e.g.*, AARP Comments at 84-85; CDT Comments at 9 ("[I]nternet users commonly access services like DNS and email from separate third-party sources without any additional difficulty."); Harold Hallikainen Comments at 5; INCOMPAS Comments at 56; Public Knowledge Comments at 45 ("A broadband customer can configure the software on her device and router to use one of these alternative DNS servers, instead of her ISP's."); *id.* at 49, 50-51 ("[I]t is not the ISPs but other third-parties who provide much of the actual caching functionality for broadband customers in the present day."); Barbara A. Cherry et al. Reply, Attach. at 6-7; Scott Jordan Reply at 10-12; Barbara van Schewick and Patrick Leerssen Reply at 22, 36-38; Internet Engineers Comments at 13, 15.

[179] Although we find the pre-1996 Act *classification* precedent relevant to our classification of broadband Internet access service, we reject the view that Congress would have expected classification under the 1996 Act's statutory definitions to be tied to the substantive common carrier transmission *requirements* imposed under those frameworks. *See, e.g.*, Free Press Comments at 58-61. We conclude that the best view of the text and structure of the Act undercuts arguments that Congress sought to preserve the substance of pre-1996 Act regulations through the definitions it adopted. Instead, where Congress sought to address substantive requirements akin to those in the MFJ and *Computer Inquiries*, it did so by adopting subjective obligations in the 1996 Act—even if not identical to the pre-1996 Act requirements—and subject to their own Congressionally specified standards for when and to what entities they apply. *See, e.g.*, 47 U.S.C. §§ 251, 256. In addition, the wholesale service focus of substantive MFJ and *Computer Inquiries* common carrier transmission obligations also distinguishes them from the retail service we classify here, likewise undermining any claimed relevance of those pre-1996 Act transmission requirements to our classification decision. The Commission recognized, for example, that the transmission underlying broadband Internet access required by the *Computer Inquiries* to be offered on an unbundled, common carrier basis and provided to ISPs was not a "retail" service within the meaning of section 251(c)(4) resale requirements. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237 (1999). Nor did such a common carrier transmission service itself enable access to the Internet, even if purchased by end-users. *See, e.g.*, *id.* at 19240, para. 6 & n.16 (noting a DSL transmission offering (continued....)

analysis in the *Stevens Report* recognized that "[i]n offering service to end users" ISPs "do more than resell [] data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service."[180] In *Brand X*, the Court rejected claims that "[w]hen a consumer . . . accesses content provided by parties other than the cable company" that "consumer uses 'pure transmission.'"[181] The Court further found that "the high-speed transmission used to provide cable modem service is a functionally integrated component of that service because it transmits data only in connection with the further processing of information and is necessary to provide Internet service."[182] The core, essential elements of these prior analyses of the

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that, as explained in the associated marketing materials, end-users could purchase and use in conjunction with certain partner ISPs). By comparison, under the *Computer Inquiries*, the finished service offered to end-users relying on the required common carrier transmission as an input was regulated as an enhanced service, not a common carrier offering, even when offered by the facilities-based carrier's subsidiary. *See, e.g., Computer II Final Decision*, 77 FCC 2d at 474, para. 230 (when carriers' enhanced services subsidiaries offer enhanced services "the subsidiary itself is not regulated"). Given our focus here on the finished retail broadband Internet access service, we see little relevance to prior regulatory requirements that were imposed to ensure competing providers had access to a wholesale input in the form of a compelled common carriage offering of bare transmission that did not itself provide Internet access.

[180] *Stevens Report*, 13 FCC Rcd at 11540, para. 81.

[181] *Brand X*, 545 U.S. at 998. Subsequent Commission decisions involving other forms of broadband Internet access likewise all concluded that the broadband Internet access service was a single, integrated service that did not involve a stand-alone offering of telecommunications. *See, e.g., Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5911, 5913, paras. 26, 31; *BPL-Enabled Broadband Order*, 21 FCC Rcd at 13285-89, paras. 8-14; *Wireline Broadband Classification Order*, 20 FCC Rcd at 14864-65, 14910-11, paras. 15-16, 104. Although parties have, over time, held various views regarding the proper classification of broadband Internet access services, the mere fact that a party held such a view in the past, or holds such a view today, does not render a Commission decision confirming a particular view "moot," *see, e.g.*, Free Press Reply at 14 ("AT&T's new notion that DSL offered at retail was somehow an information service after the passage of the 1996 Act would render the 2005 *Wireline Broadband Order* moot"), since a private party's subjective view is not authoritative. *Brand X*, 545 U.S. at 998.

[182] *Brand X*, 545 U.S. at 998. This distinction makes broadband Internet access service fundamentally different than standard telephone service, which the Supreme Court noted does not become an "information service" merely because its transmission service may be "trivially affected" by some additional capability such as voicemail. *Id.* Where the addition of some further capability has appeared to have only a trivial effect on the nature of a service, the Commission has previously declined requests for reclassification. *AT&T Calling Card Order*, 20 FCC Rcd at 4832-33, para. 20 ("AT&T offers its 'enhanced' calling card service to consumers solely as a telecommunications service. The advertising information it provides is not in any sense an integral or essential part of the service AT&T offers to consumers. Rather, it is completely incidental to that service and therefore not sufficient to warrant reclassification of the service as an information service." (footnote omitted)); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7295-96, paras. 15, 16 (2006) (*Prepaid Calling Card Order*) ("The customer may use only one capability at a time and the use of the telecommunications transmission capability is completely independent of the various other capabilities that the card makes available. . . . The prepaid calling card services we address in this *Order* offer consumers the ability to make telephone calls, just like the AT&T card that the Commission addressed in the [*AT&T Calling Card Order*]."); *Request For Review By Intercall, Inc. of Decision of Universal Service Administrator*, CC Docket No. 96-45, Order, 23 FCC Rcd 10731, 10735, para. 13 (2008) (*InterCall Order*) ("[T]he other features offered in conjunction with InterCall's conferencing service, such as muting, recording, erasing, and accessing operator services, do not alter the fundamental character of InterCall's telecommunications offering so that the entire offering becomes an information service."). Due to the functionally integrated nature of broadband Internet access service, however, we reject claims that those decisions call for a different approach than we adopt here. *See, e.g.*, Barbara van Schewick and Patrick Leerssen Reply at 25-26 (discussing the *AT&T Calling Card Order*, *Prepaid Calling Card Order*, and *InterCall Order*). Likewise, the outcome in the Bureau-level *Cisco WebEx Order* accords with our approach, given the finding that the information service capabilities more than trivially affected the transmission capability in the scenario addressed there. *See, e.g., Universal Service Contribution Methodology; Request For Review of a Decision of the Universal Service Administrator by Cisco WebEx LLC*, WC Docket No. 06-122, Order, 31 FCC Rcd 13220,
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functional nature of Internet access remain persuasive as to broadband Internet access service today. We adhere to that view notwithstanding arguments that some subset of the array of Internet access uses identified in the *Stevens Report* or subsequent decisions either are no longer as commonly used,[183] or occur more frequently today.[184]

52. We disagree with commenters who assert that ISPs necessarily offer both an information service and a telecommunications service because broadband Internet access service includes a transmission component.[185] In providing broadband Internet access service, an ISP *makes use* of telecommunications—i.e., it provides information-processing capabilities "via telecommunications"—but does not separately *offer* telecommunications on a stand-alone basis to the public.[186] By definition, *all* information services accomplish their functions "via telecommunications,"[187] and as such, broadband Internet access service has always had a telecommunications component intrinsically intertwined with the computer processing, information provision, and computer interactivity capabilities an information service offers.[188] Indeed, service providers, who are in the best position to understand the inputs used in

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13230-31, para. 24 (WCB 2016) (*Cisco WebEx Order*) (In the *Prepaid Calling Card Order*, "[t]he Commission noted that the customer may use only one capability at a time, and the use of the telephone calling capability was completely independent of the other capabilities unlike the services in the *Prepaid Calling Card Order* that were only minimally linked because they were not engaged or used simultaneously, . . . here the services are capable of — and are — used together and exhibit functional integration when they are so used."). Contrary to some arguments, the Bureau had no need to—and did not—address the classification of other service scenarios, *see Cisco WebEx Order*, 31 FCC Rcd at 13224, paras. 11-12, and we reject arguments for a different classification approach that are premised on assumptions about how those unaddressed scenarios would have been analyzed or classified. *See, e.g.*, Barbara van Schewick and Patrick Leerssen Reply at 26-28 ("The FCC concluded that Cisco's PSTN telephony feature was a 'telecommunications service' when used without the Desktop application (i.e. the information service).").

[183] *See, e.g.* Ad Hoc Comments at 5-6 (citing use of Internet access for things like "'FTP clients, Usenet newsreaders, electronic mail clients,' and 'Telnet applications'" as well as storing "'files on internet service provider computers to establish 'home pages'"); Free Press Comments at 26 & n.42 (similar); *id.* at 30-31 (alleging that the *Cable Modem Order* was focused on things like "email, newsgroups, and webpage creation" but "not connectivity to the Internet"); Public Knowledge Comments at 38-41 (discussing the reference to "'e-mail, newsgroups, and the ability to create a web page").

[184] *See, e.g.*, AARP Comments at 87-90 (arguing that "[t]oday, Internet users are also edge providers" and that "[t]he technology setting that inspired the *Cable Modem Order* clearly no longer exists"). Even at the time of the *Cable Modem Order* the Commission recognized the role of user-generated content, and its decision in no way hinged on distinctions in how retail customers of cable modem service used that service in that respect. *See, e.g.*, *Cable Modem Order*, 17 FCC Rcd at 4822-23, para. 38 (discussing, among other things, newsgroups and the ability for the user to create a webpage).

[185] *See, e.g.*, INCOMPAS Comments at 41-46; OTI New America Comments at 26; Interisle Comments at 2; AARP Comments at 90-91.

[186] *See, e.g.*, Cox Comments at 12-13; *see also Stevens Report*, 13 FCC Rcd at 11522, para. 41 ("When an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' it does not *provide* telecommunications; it is *using* telecommunications." (emphasis added)); Hance Haney Reply at 3 (citing *Stevens Report*, 13 FCC Rcd at 11536, para. 39).

[187] 47 U.S.C. § 153(50) (defining "telecommunications"). We observe that placing information in IP packets does not change the form of information. We find that the transmission of IP packets is transmission of the user's choosing, and also agree that "[c]hanging the packet structure of an IP packet from IPv4 to IPv6" does not change the form of the information. Internet Engineers Comments at 29; *see also* Scott Jordan Reply at 27.

[188] CTIA Comments at 33-34; Comcast Comments at 14; Verizon Comments at 40; *see also* Vimeo Comments at 27 (asserting that "it has always been understood that BIAS's pathway component was a telecommunications service"). As just one example, in support of its classification decision, the *Title II Order* notes that it is technically possible
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broadband Internet access service, do not appear to dispute that the "via telecommunications" criteria is satisfied even if also arguing that they are *not providing* telecommunications to end-users.[189] For example, ISPs typically transmit traffic between aggregation points on their network and the ISPs' connections with other networks.[190] Whether self-provided by the ISP or purchased from a third party, that readily appears to be transmission between or among points selected by the ISP of traffic that the ISP has chosen to have carried by that transmission link.[191] Such inclusion of a transmission component does not render broadband Internet access services telecommunications services; if it did, the entire category of information services would be narrowed drastically.[192] Because we find it more reasonable to conclude that at least some telecommunications is being used as an input into broadband Internet access service—thereby satisfying the "via telecommunications" criteria—we need not further address the scope of the "telecommunications" definition in order to justify our classification of broadband Internet access service

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for a transmission component underlying broadband Internet access service to be separated out and offered on a common carrier basis. *See Title II Order*, 31 FCC Rcd at 5774-75, para. 381. The same would be equally true of many information services, however, given that the information service capabilities are, by definition, available "via telecommunications." 47 U.S.C. § 153(24); *see also, e.g.*, OTI New America Comments at 26-27 (stating that "[b]ecause the functionality in both telecommunications and information services are separated into different layers, and those layers are modular such that the layers can interact without the telecommunications portion depending in any way on information service, telecommunications and information services are clearly separable," and going on to argue that "[t]he technology itself clearly delineates between telecommunications and information service, and so should the law").

[189] *See, e.g.*, NCTA Comments at 9-10, 19-21 (arguing that "via telecommunications" is satisfied through the use of telecommunications as an input but also that the service provided to end-users lacks elements of the definition of "telecommunications"); AT&T Reply at 60, 66 (arguing that broadband Internet access service meets the "information service" definition but also that the service provided to end-users lacks elements of the definition of "telecommunications"); *see also Stevens Report*, 13 FCC Rcd at 11534-35, para. 69 n.138 ("When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.").

[190] *See, e.g.*, Stanley M. Besen & Mark A. Israel, *The Evolution of Internet Interconnection from Hierarchy to "Mesh": Implications for Government Regulation*, 25 Info. Econ. & Pol'y 235, 237-39 (2013) (discussing connections among ISPs and other networks and providers), cited in AT&T Reply at 38 n.58.

[191] We reject as overbroad the claim that "a transmission is 'telecommunications' within the meaning of 47 U.S.C. § 153(30) *only* if the transmission is capable of communicating with *all* circuit switched devices on the PSTN or has the purpose of facilitating the use of the PSTN without altering its fundamental character as a telephone network." Tech Knowledge Comments at 5; *see also, e.g.*, Tech Knowledge Reply at 11. This claim appears premised on incorporating section 332's definition of a commercial mobile service (which must be "interconnected" with the "public switched network") into section 3 of the Act and drawing from pre-1996 Act precedent using an end-to-end analysis to determine the regulatory jurisdiction of communications traffic to inform the interpretation of the term "points." *See, e.g.*, Tech Knowledge Comments at 34-35; Tech Knowledge Reply at 11-17; Letter from Fred Campbell, Director, Tech Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108, at 1-2 (filed Sept. 19, 2017). But we find no evidence in the text of the statute that Congress intended to import the commercial mobile service definition from one section into another, and our precedent similarly does not countenance such an importation. Nor is the end-to-end analysis the only pre-1996 Act precedent from which the concept of "points" in the "telecommunications" definition might have been drawn so as to unambiguously foreclose our conclusion that "via telecommunications" is satisfied here. *See, e.g.*, 47 CFR § 21.2 (1995).

[192] *See, e.g.*, Verizon Comments at 40; CTIA Comments at 29; *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 et al., Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-39, para. 40 (2006) (An entity can "provide" telecommunications even if it does not "offer" telecommunications because "'provide' is a different and more inclusive term than 'offer.'"); *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239-41 (D.C. Cir. 2007) (upholding the FCC's distinction between "providing" telecommunications and "offering" telecommunications service).

as an information service. We thus do not comprehensively address other criticisms of the *Title II Order*'s interpretation and applications of the "telecommunications" definition, which potentially could have implications beyond the scope of issues we are considering in this proceeding.[193]

53. The approach we adopt today best implements the Commission's long-standing view that Congress intended the definitions of "telecommunications service" and "information service" to be mutually exclusive ways to classify a given service.[194] As the *Brand X* Court found, the term "offering" in the telecommunications service definition "can reasonably be read to mean a 'stand-alone' offering of telecommunications."[195] Where, as in the case of broadband Internet access services, a service involving transmission inextricably intertwines that transmission with information service capabilities—in the form of an integrated information service—there cannot be "a 'stand-alone' offering of telecommunications" as required under that interpretation of the telecommunications service definition.[196] This conclusion is true even if the information service could be said to involve the provision of telecommunications as a component of the service.[197] The Commission's historical approach to Internet access services carefully navigated that issue, while the *Title II Order*, by contrast, threatened to usher in a much more sweeping scope of "telecommunications services."[198]

54. The *Title II Order* interpretation stands in stark contrast to the Commission's historical classification precedent and the views of all Justices in *Brand X*. Beginning with the earliest classification decisions, the Commission found that transmission provided by ISPs outside the last mile was part of an integrated information service.[199] The DSL transmission service previously required to be unbundled by the *Computer Inquiries* rules likewise was limited to the "last mile" connection between the

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[193] *See generally* Tech Knowledge Comments at 1-39; Tech Knowledge Reply at 1-45.

[194] *See, e.g., Wireline Broadband Classification Order*, 20 FCC Rcd at 14911, para. 105; *Petition For Declaratory Ruling That AT&T's Phone-To-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7460-61, para. 6 (2004); *Cable Modem Order*, 17 FCC Rcd at 4823-24, para. 41; *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Order on Remand, 16 FCC Rcd 9751, 9755, 9770, paras. 8, 36 (2001); *Stevens Report*, 13 FCC Rcd at 11520, para. 39.

[195] *Brand X*, 545 U.S. at 989.

[196] *Id.* at 989.

[197] *Id.* at 992 ("[T]he statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering.").

[198] *See, e.g., Title II Order*, 30 FCC Rcd at 5685-87, 5693-94, 5764-65, paras. 193, 195, 204, 364.

[199] As the *Stevens Report* explained, "[i]n offering service to end users," ISPs "do more than resell [] data transport services. They conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service." *Stevens Report*, 13 FCC Rcd at 11540, para. 81. The Commission further explained that, even though enhanced services were "offered '*over* common carrier transmission facilities,' [they] were themselves not to be regulated under Title II of the Act, *no matter how extensive their communications components*." *Stevens Report*, 13 FCC Rcd at 11514, para. 27 (emphasis added, quoting *Computer II Final Decision*, 77 FCC 2d at 428, para. 114); *see also, e.g.*, ACA Comments at 46 (asserting that the Commission employed a narrow definition of "basic service in the Computer II Final Decision—*i.e.*, *anything* more than basic is enhanced"); AT&T Comments at 64-65 (quoting *Stevens Report*, 13 FCC Rcd at 11514, para. 27); Hance Haney Comments at 4 ("Basic/telecommunications services were defined narrowly, and enhanced/information services were defined expansively."). Indeed, under the *Computer Inquiries*, non-facilities-based providers of enhanced services "'combin[ed] communications and computing components,' yet the Commission held that they should 'always be deemed enhanced' and therefore not subject to common carrier regulation." *Brand X*, 545 U.S. at 994 (quoting *Stevens Report*, 13 FC Rcd at 11530, para. 60).

end-user and the ISP.[200] Nor did any Justice in *Brand X* contest the view that, beyond the last mile, cable operators were offering an information service. Indeed, the *Title II Order*'s broad interpretation of "telecommunications service" stands in contrast to the views of Justice Scalia himself,[201] on which the *Title II Order* purports to rely.[202] Justice Scalia was skeptical that a telecommunications service classification of cable modem service would lead to the classification of ISPs as telecommunications carriers based on the transmission underlying their "connect[ions] to other parts of the Internet, including Internet backbone providers."[203] Yet the *Title II Order* reached essentially that outcome. The *Title II Order*'s interpretation of the statutory definitions did not merely lead it to classify "last mile" transmission as a telecommunications service. Rather, under the view of the *Title II Order*, even the transmissions underlying an ISP's connections to other parts of the Internet, including Internet backbone providers, were part of the classified telecommunications service.[204] Even if the *Title II Order*'s classification approach does not technically render the category of information services a nullity, the fact that its view of telecommunications services sweeps so much more broadly than previously considered possible provides significant support for our reading of the statute and the classification decision we make today.[205]

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[200] *See, e.g., GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22471-72, paras. 8-11 (1998).

[201] *See, e.g., Brand X*, 545 U.S. at 1010-11 (Scalia, J., dissenting) ("When cable-company-assembled information enters the cable for delivery to the subscriber, the information service is already complete."); *see also, e.g.*, ADTRAN Comments at 7 ("[T]he functionality that Justice Scalia was addressing in *Brand X* was solely the last-mile connection -- not the complete package of Internet access service and capabilities that was reclassified in the *2015 Open Internet Order*."); AT&T Comments at 84 ("[T]he *Title II Order* embraced a position that none of the litigants or the Justices accepted: that broadband Internet access is a single, unitary telecommunications service. The *Title II Order* defined, as a telecommunications service, not merely a transmission link connecting a consumer to the broadband provider's network, but rather the entire Internet access service that the Commission had for decades concluded was an information service.").

[202] *See, e.g., Title II Order*, 30 FCC Rcd at 5614-15, 5745, 5757-58, 5767-68, 5773, paras. 44-46, 333, 356, 366-67, 376.

[203] *Brand X*, 545 U.S. at 1010-11 (Scalia, J., dissenting).

[204] *See, e.g., Title II Order*, 30 FCC Rcd at 5685-87, 5693-94, 5764-65, paras. 193, 195, 204, 364.

[205] *See, e.g.*, NCTA Comments at 21-25 ("Under [the *Title II Order*'s] reasoning, a whole host of other entities that make use of their own broadband transmission facilities to deliver Internet content likely would qualify as providers of 'telecommunications services' as well. . . . The potentially far-reaching implications of the *Title II Order*'s broad reading of the definition of 'telecommunications service' only underscore that a Title II classification is a poor fit for BIAS."). That the Commission previously identified policy concerns about Internet traffic exchange says nothing about classification, and thus is not to the contrary. *See, e.g.*, INCOMPAS Comments at 58-59 ("[E]ven the *2010 Open Internet Order* understood that the point at which a broadband provider's network connects to the Internet is capable of being used to circumvent the no-blocking rule."); *id.* at 62 (discussing prior investigations of interconnection issues in mergers). Nor did the *Advanced Services* proceedings identify interconnection obligations on providers of xDSL transmission as services necessary to ensure the provision of Internet access. *See, e.g.*, Scott Jordan Reply at 18 ("The next type of Internet access service that the Commission considered [in the *Advanced Services Order*] was *xDSL-based advanced service*, . . . including: . . . (3) interconnection arrangements with providers necessary to fulfill the service."); *id.* at 23 ("The *Advanced Services Remand Order* clarifies that the FCC has 'consistently rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers', and that xDSL-based advanced service provides transmission between the customer's modem and the other party with which the customer is communicating, e.g., a website."). Instead, any interconnection obligations identified there were limited to interconnection between providers of common carrier xDSL transmission service and other telecommunications carriers (rather than providers of edge services or non-common carrier backbone services). *See Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.*, CC Docket No. 98-147 et al., Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24034, paras. 45, 46 (1998) (*Advanced Services Order*). The cited portion of the *Advanced Services Remand*

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55. In contrast, our approach leaves ample room for a meaningful range of "telecommunications services." Historically, the Commission has distinguished service offerings that "always and necessarily combine" functions such as "computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications such as e-mail, and access web pages and newsgroups," on the one hand, from services "that carriers and end users typically use [] for basic transmission purposes" on the other hand.[206] Thus, an offering like broadband Internet access service that "always and necessarily" includes integrated transmission and information service capabilities would be an information service.[207] The Commission's historical interpretation thus gives full meaning to both "information service" and "telecommunications service" categories in the Act.

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Order does not even have anything to do with interconnection requirements or the scope of functions in an xDSL-based advanced service. Rather, it analyzed the jurisdiction of the traffic being carried over the service, which, under the traditional end-to-end analysis, was not limited in scope to any given service within a broader communications pathway. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability et al.*, CC Docket No. 98-147 et al., Order on Remand, 15 FCC Rcd 385, 391-92, para. 16 (1999) (*Advanced Services Remand Order*), *vacated*, *WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001).

[206] *Wireline Broadband Classification Order*, 20 FCC Rcd at 14860-61, para. 9. Our interpretation thus stops far short of the view that "every transmission of information becomes an information service." Free Press Comments at 52 (emphasis in original); *see also, e.g.*, Public Knowledge Comments at 28-31 (asserting that a broad reading of "capability" consistent with the *Internet Freedom NPRM* would have made it unnecessary for the *Brand X* court to consider whether transmission was functionally integrated with information service capabilities and that such an interpretation would encompass "voice communications over the traditional telephone network" and would read both the definition of "telecommunications service" and the telecommunications management exception out of the statute); RISE Stronger Comments at 11 (objecting to an interpretation of "capability" it views as "impossibly overbroad").

[207] *See, e.g.*, *Brand X*, 545 U.S. at 992 ("One can pick up a pizza rather than having it delivered, and one can own a dog without buying a leash. By contrast, the Commission reasonably concluded, a consumer cannot purchase Internet service without also purchasing a connection to the Internet and the transmission always occurs in connection with information processing."). The distinction between services that "always and necessarily" include integrated transmission and information service capabilities and those that do not also highlights a critical difference between Internet access service and the service addressed in precedent such as the *Advanced Services Order*. The transmission underlying Internet access service that, prior to the *Wireline Broadband Classification Order*, carriers had been required by the *Computer Inquiries* to unbundle and offer as a bare transmission service on a common carrier basis to ensure its availability to competing enhanced service providers—and which did not itself provide Internet access—is another specific example of a service that does not "always and necessarily" include integrated transmission and information service capabilities. *See, e.g.*, *Wireline Broadband Classification Order*, 20 FCC Rcd at 14875-76, para. 41 ("all wireline broadband Internet access service providers are no longer subject to the *Computer II* requirement to separate out the underlying transmission from wireline broadband Internet access service and offer it on a common carrier basis"); Interisle Consulting Group Comments at 4 (prior to the *Wireline Broadband Classification Order*, "DSL (in its raw form) was tariffed as Special Access"). The Commission naturally recognized at the time that the compelled common carriage offering of bare transmission was a telecommunications service, and we reject the view that such an acknowledgment is inconsistent with, or undercuts our reliance on, precedent classifying Internet access service as an integrated information service. *See, e.g.*, *Title II Order*, 31 FCC Rcd at 5737-38, para. 315 & nn.816-17 (quoting prior Commission observations about carriers' offering of broadband transmission underlying Internet access services as a stand-alone common carrier service as required by the *Computer Inquiries* rules at that time); *see also, e.g.*, AARP Comments at 4-5 (stating that "high capacity broadband telecommunications services were also covered under Title II" and citing precedent in that regard from 1998); *id.* at 95-96 ("[A]t the time of the *Stevens Report*, the services needed to reach one's ISP were governed by Title II."); Free Press Comments at 28 (discussing precedent from while the *Computer Inquiries* unbundling requirement for transmission underlying Internet access remained in effect); OTI New America Comments at 25 (similar); Barbara A. Cherry et al. Reply at 6 (similar); Free Press Reply at 13-14 (similar); Scott Jordan Reply at 6, 18, 20 (similar); OTI New America Reply at 10-13 (similar). In addition, the discussion of xDSL advanced services in the *Advanced Services Order* cited by commenters addressed the transmission service generally. *See, e.g.*, AARP Comments at 4-5 (quoting *Advanced Services Order*, 13 FCC Rcd at 24029-30, para.
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56. We reject assertions that the analysis we adopt today would necessarily mean that standard telephone service is likewise an information service. The record reflects that broadband Internet access service is categorically different from standard telephone service in that it is "*designed with* advanced features, protocols, and security measures so that it can integrate directly into electronic computer systems and enable users to electronically create, retrieve, modify and otherwise manipulate information stored on servers around the world."[208] Further, "[t]he dynamic network functionality enabling the Internet connectivity provided by [broadband Internet access services] is fundamentally different from the largely static one dimensional, transmission oriented Time Division Multiplexing (TDM) voice network."[209] This finding is consistent with past distinctions. Under pre-1996 Act MFJ precedent, for example, although the provision of time and weather services was an information service, when a BOC's traditional telephone service was used to call a third party time and weather service "the Operating Company does not 'provide information services' within the meaning of section II(D) of the decree; it merely transmits a call under the tariff."[210] In other words, the fundamental nature of traditional telephone service, and the commonly-understood purpose for which traditional telephone service is designed and offered, is to provide basic transmission—a fact not changed by its incidental use, on occasion, to access information services. By contrast, the fundamental nature of broadband Internet access service, and the commonly-understood purpose for which broadband Internet access service is designed and offered, is to enable customers to generate, acquire, store, transform, process, retrieve, utilize, and make available information. In addition, broadband Internet access service includes DNS and

35); Free Press comments at 28 (quoting *Advanced Services Order*, 13 FCC Rcd at 24030, para. 36); Scott Jordan Reply at 18 (citing *Advanced Services Order*, 13 FCC Rcd at 24026-27, 24034-35, paras. 29, 31 & Section V.A.3). It did not purport to be focused specifically on the use of xDSL transmission in connection with Internet access service, rather than addressing the classification of the stand-alone transmission service as a general matter. *See, e.g., Advanced Services Order*, 13 FCC Rcd at 24027, para. 31 ("Once on the packet-switched network, the data traffic is routed to the location selected by the customer, for example, a corporate local area network or an Internet service provider."); *id.* at 24029-30, paras. 35, 36 ("xDSL and packet switching are simply transmission technologies. . . . An end-user *may* utilize a telecommunications service together with an information service, as in the case of Internet access." (emphasis added)); *id.* at 24033, para. 42 ("We note that in a typical xDSL service architecture, the incumbent LEC uses a DSLAM to direct the end-user's data traffic into a packet-switched network, and across that packet-switched network to a terminating point selected by the end-user. Every end-user's traffic is routed onto the same packet-switched network, and there is no technical barrier to any end-user establishing a connection with any customer located on that network (or, indeed, on any network connected to that network).").

[208] Verizon Reply at 32-33.

[209] CenturyLink Comments at 26; *see also* NCTA Comments at 18 (asserting that broadband service is fundamentally different from traditional, circuit-switched telephone service); CenturyLink Comments Appx. 2, Decl. of Phillip Bronsdon at 23-24 ("[T]he Internet is an open, dynamic system that includes an unrestricted community of providers, organizations and individuals that can evolve the functionality of the Internet quickly. In contrast, the TDM network is a static, generally closed system operated securely within the confines of each telecommunications provider based on stable, relatively mature and unchanging standards. Additionally, Internet protocols that control the functionality of the Internet, such as routing protocols, are themselves communicated in-band via the TCP/IP suite and create a dynamic, interactive network functionality that is essential to creating the dynamic and interactive characteristics inherent to BIA service usage. In contrast, the TDM network generally separates the signaling protocols from the information that is being transported, such that the control protocols are out-of-band on isolated secure networks within the control of each telecommunications provider. And, this signaling protocol serves functions based solely upon the set up and tear down of calls.").

[210] *U.S. v. West. Elec. Co., Inc.*, 578 F. Supp. 658, 661 (D.D.C. 1983); *see also, e.g.*, Harold Hallikainen Comments at 7-8, 13 (citing telephone calls to find out the time or weather or to retrieve fax on demand document and stating that "[n]one of these convert the telephone call to an 'information service'"); OTI New America Comments at 30 (similar); Scott Jordan Reply at 9 ("Telephone exchange service enables an end user to perform acquisition of information, namely the information transmitted via the telephone exchange service. Telephone exchange service also enables an end user to perform storing of information, e.g., using an answering machine. But clearly this does not make telephone exchange service an information service.").

caching functionalities, as well as certain other information processing capabilities. As such, we reject assertions that, under the approach we adopt today, any telephone service would be an information service because voice customers can get access to either automated information services or a live person who can provide information.[211]

57. Additionally, efforts to treat the *Stevens Report* as an outlier that should not have been followed in subsequent classification decisions—and should not be followed here—are ultimately unpersuasive. The clear recognition in the *Stevens Report* that the ISPs at issue were themselves providing data transmission as part of their offerings undercuts arguments seeking to distinguish the *Stevens Report* based on the theory that the transmission used to connect to ISPs typically involved common carrier services either directly (via a call to a dial-up ISP using traditional telephone service) or indirectly (with the ISP using common carrier broadband transmission as a wholesale input into its retail information service).[212] While the extent of data transmission provided by the ISPs that were found to be offering information services in the *Stevens Report* might be incrementally less than the transmission provided by the ISPs dealt with in subsequent information service classification decisions, that appears to be at most a difference in degree, rather than a difference in kind, and the record does not demonstrate otherwise.[213] Nor can the *Stevens Report*'s analysis and information service classification be distinguished on the grounds that the ISPs there generally did not own the facilities they used.[214]

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[211] *See, e.g.*, Public Knowledge Comments at 29 ("[U]nder the NPRM's interpretation, any telephone service would be (and always has been) an 'information service'"); Peha Reclassification Comments at 5 (stating that if the Commission concludes that "Internet access is not telecommunications because an IP address can sometimes be mapped to more than one server, some of which support caches, then the FCC must also conclude that telephone service is not telecommunications, because many calls to 800 numbers can be mapped to any one of a number of call centers around the country, and the initiator of the call does not specify which"); OTI New America Comments at 30; Free Press Comments at 54; Free Press Reply at 16 ("Landline services allow customers to 'store' information via voicemail and other data storage services, 'transform' and 'process' the human voice and tones into electrical signals, and 'generate' and 'make available' information via directories and other interactive voice response systems." (footnote omitted)); AARP Comments at 92.

[212] *See, e.g.*, Free Press Comments at 25-28, 31; INCOMPAS Comments at 42-43; Barbara A. Cherry et al. Reply at 5-6. Arguments that go even further and suggest that the service addressed in the *Stevens Report* did not provide transmission at all are clearly at odds with the text of the *Stevens Report* itself. *Compare, e.g.*, Scott Jordan Reply at 18 ("Dial-up Internet access service thus excludes the underlying telecommunications, which was provided in part by the telephone exchange service than an end user separately obtained in order to 'dial-up.'") *with, e.g.*, *Stevens Report*, 13 FCC Rcd at 11532-33, para. 60 (discussing how ISPs engage in data transport even though they often lack their own facilities).

[213] *See, e.g.*, AT&T Reply at 59 ("Internet access functionality *itself* has the same basic attributes whether it is offered by dial-up ISPs or broadband ISPs; the only difference is that broadband ISPs bundle Internet access with last-mile transmission." (emphasis in original)).

[214] *See, e.g.*, Free Press Comments at 26 (citing statements from the *Stevens Report* that "'Internet access providers, typically, own no telecommunications facilities'" and thus would "'lease lines and otherwise acquire telecommunications, from telecommunications providers,'" and arguing that "[t]his emphatically does not describe the facilities-based BIAS providers of today"); Harold Hallikainen Comments at 4-5 ("Internet Service Providers today own copper pairs for DSL, coaxial cable for cable modem service, and optical fiber for fiber Internet access. . . . ISPs that do own telecommunications facilities . . . should be considered telecommunications services and regulated in the same manner as other telecommunications services."); OTI New America Comments at 25 ("[D]ial-up providers typically leased transmission lines (a telecom service) from another provider or required their customers to have access to a separate transmission line, such as their phone provider," a "distinction[that] informed the Commission's earlier determination that dial up 'internet access service' . . . was an information service."); *id.* at 27-28 ("Today, BIAS providers rarely lease telecommunication services from other carriers. . . . The analyses in the *Stevens Report* and *Cable Modem Order* no longer apply to broadband internet access, and therefore do not provide a contemporary basis for reclassifying BIAS back to Title I."); Public Knowledge Comments at 60 (citing "the open access rules that were in effect at the time of the Stevens Report"); Free Press Reply at 15 ("Broadband providers try (continued....)

Although the *Stevens Report* observed that the analysis of whether a single integrated service was being offered was "more complicated when it comes to offerings by facilities-based providers," it did not prejudge the resolution of that question.[215] Thus, there is no reason to simply assume that it was inappropriate for the Commission to build upon the *Stevens Report* precedent when analyzing service offerings from facilities-based providers beginning in the *Cable Modem Order*.[216] Nor do commenters identify material technical differences when facilities ownership is involved that would mandate a different classification analysis.[217] Finally, our reliance on classification precedent does not rest on the *Stevens Report* alone, but draws from the full range of classification precedent, both pre- and post-1996 Act. This reliance notably includes not only the Commission's classification decisions, but the Supreme Court's subsequent analysis in *Brand X*. And although some commenters criticize the lack of express consideration of the possible application of the telecommunications management exception in the *Stevens Report*, our evaluation of the pre-1996 Act MFJ and *Computer Inquiries* precedent better accords with outcome of that *Report* and the subsequent classification decisions than it does with the *Title II Order* in that regard.[218]

3. Other Provisions of the Act Support Broadband's Information Service Classification

58. We also find that other provisions of the Act support our conclusion that broadband Internet access service is best classified as an information service.[219] For instance, Congress codified its view in section 230(b)(2) of the Act, stating that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[220] This statement confirms that the free market

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to appropriate the *Stevens Report*, but as we have shown that decision dealt with over-the-top 90s-era dial-up ISPs and not modern facilities-based BIAS.").

[215] *Stevens Report*, 13 FCC Rcd at 1153, para. 60.

[216] *See, e.g.*, Free Press Comments at 27 n.45 ("[S]ubsequent actions to import [the *Stevens Report*] analysis wholesale are the demarcation point for the Commission's original errors made in the Powell era"). Given that the Commission's inquiries under section 706 of the 1996 Act did not involve the classification of broadband Internet access service, we likewise reject the argument that observations there regarding "broadband service" or the like have any bearing on, or otherwise undercut, the *Cable Modem Order* and subsequent broadband Internet access service classification decisions. *See, e.g.*, OTI New America Reply at 18 ("The *Cable Modem Order* was also inconsistent with the Commission's early Section 706 inquiries, which clearly stated that 'broadband service does not include content, but consists only of making available a communications path on which content may be transmitted and received.'").

[217] While the *Stevens Report* recognized that under *Computer Inquires* precedent "offerings by non-facilities-based providers combining communications and computing components should always be deemed enhanced," *Stevens Report*, 13 FCC Rcd at 11530, para. 60, had its analysis simply been carrying forward that approach most of its analysis would have been unnecessary (since Internet access clearly did combine communications and computing components). Thus, whether or not the more extensive analysis set forth in the *Stevens Report* was necessary to find Internet access provided by non-facilities-based ISPs to be an information service, that analysis cannot be said to be a mere relic of the *Computer Inquiries* approach to non-facilities based providers.

[218] *See, e.g.*, Scott Jordan Reply at 9 n.19. We reject similar criticisms of other precedent for the same reason. *See, e.g., id.* at 12 ("The *Cable Modem Declaratory Ruling* . . . neglected to determine whether [DNS] fell within the telecommunications system management exception when offered by a cable modem provider.").

[219] We do not assert that the language in sections 230 and 231 is determinative of the information service classification; rather, we find it to be supportive of our analysis of the textual provisions at issue. As such, we find Public Knowledge's assertions that the Commission's reasoning "would overrule the Supreme Court's holding in *Brand X* . . . [in which] the Court ruled that the Communications Act does not make explicit the correct classification of BIAS" inapposite. *See* Public Knowledge Comments at 32.

[220] 47 U.S.C. § 230(b)(1).

approach that flows from classification as an information service is consistent with Congress's intent. In contrast, we find it hard to reconcile this statement in section 230(b)(2) with a conclusion that Congress intended the Commission to subject broadband Internet access service to common carrier regulation under Title II.[221]

59. Additional provisions within sections 230 and 231 of the Act lend further support to our interpretation. Section 230(f)(2) defines an interactive computer service to mean "*any information service*, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system *that provides access to the Internet* and such systems operated or services offered by libraries or educational institutions."[222] Thus, on its face, the plain language of this provision appears to reflect Congress' judgment that Internet access service is an information service.[223]

60. Section 230 states that an "information service" includes "a service or system that provides access to the Internet," and we disagree with commenters who read the definition of "interactive computer service" differently. Specifically, we disagree with commenters asserting that it is unclear whether the clause "including specifically a service . . . that provides access to the Internet" modifies "information service" or some other noun phrase, such as "access software provider" or "system."[224] We think it a more reasonable interpretation that the phrase "service . . . that provides access to the Internet" modifies the noun phrase "information service."[225] Similarly, we disagree that section 230(f)(2) proves only "that there exist information services that provide access to the internet, not that all services that provide access to the internet are information services."[226] On the contrary, we agree with AT&T that "the formula 'any X, including specifically a Y,' does logically imply that all Ys are Xs."[227]

61. Reliance on section 230(f)(2) to inform the Commission's interpretations and applications of Titles I and II accords with widely accepted canons of statutory interpretation.[228] The Supreme Court has recognized there is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning."[229] And there is nothing in the context of either section that overcomes the presumption. Indeed, the similarity of circumstances confirms the presumption of similar meaning, as the deregulatory approach to information services embodied in Titles I and II, as well as the deregulatory policy of section 230, were all adopted as part of the 1996 Act.[230] Thus, we disagree with the *Title II Order*'s argument that giving section 230 its plain meaning would be "an oblique" way to "settle the regulatory status of broadband Internet access."[231] On the contrary, we

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[221] *See, e.g.*, ACA Comments at 55.

[222] 47 U.S.C. § 230(f)(2) (emphasis added).

[223] *See, e.g.*, ACA Comments at 53; AT&T Comments at 72; Bennett Comments at 12; NCTA Comments at 25-26; Reason Foundation Comments at 9.

[224] *See, e.g.*, INCOMPAS Comments at 67; OTI New America Comments at 34.

[225] *See* AT&T Reply at 68; 47 U.S.C. § 230(f)(2); *see also* Verizon Reply at 36, n.154.

[226] Public Knowledge Comments at 36.

[227] AT&T Reply at 68.

[228] *See* Free State Foundation Reply at 24-25.

[229] *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 433 (1932); *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning'") (citations omitted); *see also* AT&T Comments at 72.

[230] *See* Free State Foundation Reply at 25.

[231] *Title II Order*, 30 FCC Rcd at 5777, para. 386. This argument was also upheld as reasonable by the majority in *USTelecom*. *USTelecom*, 825 F.3d at 703 (citations omitted); *see also* Public Knowledge Comments at 34 ("[I]t is

(continued....)

agree that "it is hardly 'oblique' for Congress to confirm in section 230 that Internet access should be classified as an unregulated information service when elsewhere in the same legislation Congress codifies a definition of 'information services' that was long understood to include gateway services such as Internet access."[232] And while the *USTelecom* court did not find this definition determinative on the issue, we find that "it is nonetheless a strong indicator that Congress was more comfortable with the prevailing view that provision of Internet access is not a telecommunications service, and should not be subject to the array of Title II statutory provisions."[233] We find inapplicable the *USTelecom* court's invocation of the principle that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[234] Section 230 did not alter any fundamental details of Congress's regulatory scheme but was part and parcel of that scheme, and confirmed what follows from a plain reading of Title I—namely, that broadband Internet access service meets the definition of an information service.[235]

62. Section 231, inserted into the Communications Act a year after the 1996 Act's passage,[236] similarly lends support to our conclusion that broadband Internet access service is an information service. It expressly states that "Internet access service" "does not include telecommunications services," but rather "means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers."[237] Further, the carve-outs in section 231(b)(1)-(2) differentiate the provision of telecommunications services and the provision of Internet

unfathomable that Congress would have buried such a fundamental issue—the appropriate regulatory classification of BIAS—with the ancillary provisions of the Communications Act where Sections 230 and 231 reside.").

[232] AT&T Comments at 72.

[233] WISPA Comments at 25; *see also* Comcast Comments at 24-25; NCTA Comments at 26 ("[E]ven if Section 230 does not preclude a 'telecommunications service' classification for BIAS, it plainly counsels against it.").

[234] *USTelecom*, 825 F.3d at 703 (citing *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

[235] Free State Foundation Reply at 25-26; Comcast Comments at 7-8. The legislative history of section 230 also lends support to the view that Congress did not intend the Commission to subject broadband Internet access service to Title II regulation. The congressional record reflects that the drafters of section 230 did "not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet." *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). We likewise reject arguments premised on the theory that we are treating definitions in section 230 and 231 as dispositive, rather than relying on them to inform our understanding of Congress' intent as revealed by the text and structure of the Act more broadly. *See, e.g.*, Lazarus Comments at 6 (asserting that "[t]hese sections address the specific problems of immunizing ISPs that may carry offensive content (Section 230) and of the Internet material that is harmful to minors (Section 231) . . . [and] do not purport to regulate any other aspect of the Internet. If Congress had meant these definitions to have general applicability, it would have put them among the other general definitions in Section 153."); OTI New America Comments at 34-35 (asserting that "[t]he Section 230 and 231 arguments should be rejected" as "the NPRM claims that Congress hid the elephant of mandatory information services classification of all internet services in the mouse holes of Section 230 and 231, which are separate statutes addressing specifically indecent online content with their own definition sections"); New Media Rights at 6 (asserting that section 230 protects a variety of entities from legal claims based on the behavior and illegal acts of third parties online and has nothing to do with rules governing the behavior of ISPs).

[236] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736, § 1403 (codified at 47 U.S.C. § 231), *enjoined from enforcement in alternative part by American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d. Cir. 2008) (prohibiting enforcement of COPA's civil and criminal penalties contained in 47 U.S.C. § 231(a)(1)), *cert. denied* 555 U.S. 1137.

[237] 47 U.S.C. § 231(e)(4).

access service.[238] It is hard to imagine clearer statutory language. The Commission has consistently held that categories of telecommunications service and information service are mutually exclusive; thus, because it is an information service, Internet access cannot be a telecommunications service.[239] On its face then, this language strongly supports our conclusion that, under the best reading of the statute, broadband Internet access service is an information service, not a telecommunications service.[240]

63. We also find that the purposes of the 1996 Act are better served by classifying broadband Internet access service as an information service. Congress passed the Telecommunications Act to "promote competition and reduce regulation."[241] Further, as a bipartisan group of Senators stated, "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services."[242] Or as Senator John McCain put it, "[i]t certainly was not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act to extend the burdens of current Title II regulation to Internet services, which historically have been excluded from regulation."[243] It stands these goals on their head for the Commission, as deployment of advanced services reaches the mainstream of Americans' lives, to perpetuate the very Title II regulatory edifice that the 1996 Act sought to dismantle.[244] An information service classification will "reduce regulation" and preserve a free market "unfettered by Federal or State regulation."

64. Finally, we observe that the structure of Title II appears to be a poor fit for broadband Internet access service. Indeed, numerous Title II provisions explicitly assume that all telecommunications services are a telephone service. For example, section 221 addresses special

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[238] *Compare* 47 U.S.C. § 231(b)(1) (exempting "a telecommunications carrier engaged in the provision of a telecommunications service"), *with* 47 U.S.C. § 231(b)(2) (exempting "a person engaged in the business of providing an Internet access service").

[239] *Stevens Report*, 13 FCC Rcd at 11507-08, para. 13; *Cable Modem Order*, 17 FCC Rcd at 4823-24, para. 41; *see also* AT&T Comments at 72-73 (asserting that the final sentence of section 231(e)(4), which Congress enacted in October 1998, approximately seven months after the *Stevens Report* confirmed that Internet access is an information service, indicates once more that Congress agreed with the Commission that an Internet access service is not a "telecommunications service" within the meaning of section 3 of the Act). Our interpretation of "telecommunications service" and "information service" as mutually exclusive ways to classify a given service thus demonstrates the relevance of section 231 notwithstanding that it does not expressly define broadband Internet access service as an information service. *See, e.g.*, Peha Reclassification Comments at 11 (asserting that there is nothing in section 231 that defines an information service or states that Internet access service is an information service).

[240] Verizon Comments at 39-40; Free State Foundation Comments at 16-17. Nothing in the text of section 231 reveals that the use of "Internet access service" there is limited to dial-up Internet access. To the contrary, it would seem anomalous for Congress only to exempt entities providing dial-up Internet access and not other forms of Internet access from the prohibitions of section 231(a). *See* 47 U.S.C. § 231(b). We thus are unpersuaded by arguments advocating a narrower interpretation of "Internet access service" in section 231. *See, e.g.*, OTI New America Comments at 35 (arguing that Congress used "Internet access service" to mean dial-up service, and was not specifically referring to broadband Internet access service).

[241] Preamble, Telecommunications Act of 1996.

[242] Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to the Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 23, 1998) (Five Senators Letter), http://apps.fcc.gov/ecfs/document/view?id=2038710001.

[243] *Stevens Report*, 13 FCC Rcd at 11519, para. 37 (quoting Letter from Senator John McCain to the Honorable William E. Kennard, Chairman, FCC).

[244] Alaska Communications Comments at 5; Verizon Reply at 36, n.154.

provisions related to telephone companies,[245] section 251 addresses the obligations of local exchange carriers and incumbent local exchange carriers,[246] and section 271 addresses limitations on Bell Operating Companies' provision of interLATA services.[247] Therefore, it is no surprise that the *Title II Order* found that many provisions of Title II were ill-suited to broadband Internet access services, and the Commission was forced to, on its own motion, forbear either in whole or in part on a permanent or temporary basis from 30 separate sections of Title II as well as from other provisions of the Act and Commission rules.[248] We find that the significant forbearance the Commission deemed necessary in the *Title II Order* strongly suggests that the regulatory framework of Title II, which was specifically designed to regulate telephone services, is unsuited for the dissimilar and dynamic broadband Internet access service marketplace.[249]

B. Reinstating the Private Mobile Service Classification of Mobile Broadband Internet Access Service

65. Having determined that broadband Internet access service, regardless of whether offered using fixed or mobile technologies, is an information service under the Act, we now address the appropriate classification of mobile broadband Internet access service under section 332 of the Act. We restore the prior longstanding definitions and interpretation of this section and conclude that mobile broadband Internet access service should not be classified as a commercial mobile service or its functional equivalent.

66. *Background.* Section 332 of Title III, enacted by Congress as part of the Omnibus Budget Reconciliation Act of 1993 (the Budget Act),[250] provides a specific framework that applies to providers of "commercial mobile service." The section defines "commercial mobile service" as: "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission."[251] "Interconnected service," in turn, is defined as "service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission)."[252] In 1994, the Commission adopted regulations implementing this section, codifying the

[245] 47 U.S.C. § 221.

[246] Many of these obligations are of particular relevance in the context of telephone services. *See, e.g.*, 47 U.S.C. § 251(b)(2) (local number portability), *id.* § 251(b)(3) (dialing parity); *id.* § 251(c)(2) (interconnection for the exchange of telephone exchange service and exchange access traffic).

[247] For example, to obtain authority to offer in-region interLATA services, the BOCs have to offer a number of functions of particular relevance to the provision of telephone service. *See, e.g.*, 47 U.S.C. § 271(c)(1)(B)(vi)-(xii) (obligations regarding switching, numbering and dialing-related issues, white pages, directory assistance, and the like).

[248] *See Title II Order*, 30 FCC Rcd at 5834, para. 486 (sections 254(d), (g), and (k)); 5825, para. 470 (section 225(d)(3)(B)); 5835, para. 488 (section 254(d)'s first sentence); 5841, para. 497 (section 203); 5845, para. 505 (section 204); 5845, para. 506 (section 205); 5846, para. 508 (sections 211, 213, 215, 218, 219, 220); 5847-49, paras. 509-12 (section 214 except for subsection (e)); 5849-50, para. 513 & n.1571 (section 251 except for subsection (a)(2), section 256); 5852, para. 515 (section 258).

[249] *See, e.g.*, ITIF Comments at 6 (arguing *Title II Order*'s forbearance presents slippery slope that the Commission should remove itself from and exposes Title II as a kludge of a legal mechanism); Verizon Comments at 41; TechFreedom Reply at 27-34, 49-52; Comcast Comments at 25 (asserting that "the need to forbear from so much of Title II in the *Title II Order* should have been a red flag that it was 'tak[ing] a wrong interpretive turn,' and provides yet another basis for embracing an information service classification here" (*citing Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014))).

[250] Pub. L. No. 103-66, 107 Stat. 312 (1993).

[251] 47 U.S.C. § 332(d)(1).

[252] 47 U.S.C. § 332(d)(2).

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panel decision, and in doing so it set aside the earlier panel opinion.[699] In light of these considerations and the benefits of reclassification, we find objections based on *FTC v. AT&T Mobility* insufficient to warrant a different outcome.

4. Wireline Infrastructure

185. To the extent today's classification decision impacts the deployment of wireline infrastructure, we will address that topic in detail in proceedings specific to those issues.[700] The importance of facilitating broadband infrastructure deployment indicates that our authority to address barriers to infrastructure deployment warrants careful review in the appropriate proceedings.[701] We disagree with commenters who assert that Title II classification is necessary to maintain our authority to promote infrastructure investment and broadband deployment.[702] Because the same networks are often used to provide broadband and either telecommunications or cable service, we will take further action as is necessary to promote broadband deployment and infrastructure investment.[703] Further, Title I classification of broadband Internet access services is consistent with the Commission's broadband deployment objectives, whereas the Title II regulatory environment undermines the very private

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2017). We note that commenter concerns focus not just on the FTC's privacy authority but its authority more generally. *See, e.g.*, Letter from Harold Feld, Senior Vice President, Public Knowledge et al. to Chairman Ajit Pai, WC Docket No. 17-108, at 2 (filed Dec. 4, 2017). We reject those arguments for the reasons stated above.

[699] *See* Order, *FTC v. AT&T Mobility*, LLC, No. 15-16585 (9th Cir. May 9, 2017) ("The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit."). This *en banc* order means that the *Title II Order*'s reclassification of broadband Internet access service serves as the only current limit on the authority of the FTC to oversee the conduct of Internet service providers. *See* Verizon Comments at 23; *see also* ADTRAN Comments at 29 (asserting that if the decision is not altered by *en banc* review, "the Commission should resolve the problem by deciding to adopt the same privacy requirements as the FTC so that there would be uniform privacy obligations throughout the Internet ecosphere"). We note that at any given time there always may be some litigation pending somewhere in the country challenging the scope or validity of various laws—whether the Communications Act, FTC Act, or state consumer protection laws—that the FCC might seek to rely on directly (in the case of the Act) or indirectly (where relying in part on the availability of protections provided by other laws). The Commission would be paralyzed if it had to wait for all such litigation to be resolved before it acted. Because the panel decision has been set aside in *FTC v. AT&T Mobility*, we do not view that case as materially different than any other such pending litigation—so we likewise do not view it as necessary to wait on the resolution of that case before acting here.

[700] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017); *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383, 5391, para. 21. (2017); *see also* AARP Comments at 76-77; Cisco Comments at 2-3; Mobilitie Comments at 4.

[701] There is widespread agreement in the record that the public interest supports measures that will speed deployment of broadband throughout the Nation and increase competition among ISPs. *See, e.g.*, AARP Comments at 76-77; CEI Comments at 5; INCOMPAS Comments at 35; Mobilitie Comments at 4; National Grange Comments at 4; NTCA Comments at 25-26; Public Knowledge Comments at 99. For example, the CPUC states that it conducted a study of the telecommunications market in California and found that access to utility poles is a competitive bottleneck that "limits new network entrants and may raise prices for some telecommunications services." *See* CPUC Comments 6-7.

[702] *See, e.g.*, Interisle Comments at 17; NASUCA Comments at 5; Edison Electric Institute Reply at 3; Cogent Comments at 32; Public Knowledge Comments at 99-100; Volo Broadband Comments at 1; Public Knowledge Reply at 46.

[703] *See* Cisco Comments at 2-3; Mobilitie Comments at 4; *cf.* Public Knowledge Comments at 99-100 (asserting the Commission must consider what effect a Title I classification will have on small broadband Internet access service providers and new entrants).

investment and buildout of broadband networks the Commission seeks to encourage.[704] Additionally, in the twenty states and the District of Columbia that have reverse-preempted Commission jurisdiction over pole attachments, those states rather than the Commission are empowered to regulate the pole attachment process.[705]

186. We are resolute that today's decision not be misinterpreted or used as an excuse to create barriers to infrastructure investment and broadband deployment. For example, we caution pole owners not to use this *Order* as a pretext to increase pole attachment rates or to inhibit broadband providers from attaching equipment—and we remind pole owners of their continuing obligation to offer "rates, terms, and conditions [that] are just and reasonable."[706] We will not hesitate to take action where we identify barriers to broadband infrastructure deployment. We have been working diligently to remove barriers to broadband deployment and fully intend to continue to do so.[707]

5. Wireless Infrastructure

187. When the Commission first classified wireless broadband Internet access as an information service in 2007, it emphasized that certain statutory provisions in section 224 (regarding pole attachments) and 332(c)(7) (local authority over zoning) of the Act would continue to apply where the same infrastructure was used to provide a covered service (*e.g.*, cable or telecommunications service)[708] as well as wireless broadband Internet access.[709] Section 224 gives cable television systems and providers of telecommunications services the right to attach to utility poles of power and telephone companies at regulated rates. Section 332(c)(7) generally preserves state and local authority over "personal wireless service facilities" siting or modification, but subjects that authority to certain limitations.[710] Among other limitations, it provides that state or local government regulation (1) "shall not unreasonably discriminate among providers of functionally equivalent services," (2) "shall not prohibit or have the effect of prohibiting the provision of personal wireless services" and (3) may not regulate the siting of personal wireless service facilities "on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[711]

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[704] Charter Comments at 9; *see also* ACA Comments at 17-18 (arguing that increased pole attachment rates were a direct result of the *Title II Order*); Mobilitie Comments at 4.

[705] *States That Have Certified That They Regulate Pole Attachments*, Public Notice, 25 FCC Rcd 5541, 5542 (WCB 2010). For example, the CPUC recently opened a comprehensive proceeding on right-of-way access, including the implementation of nondiscriminatory pole attachment rights for broadband Internet access providers pursuant to the CPUC's reverse preemption. CPUC Comments at 8-9. California is among the states that have reverse-preempted the Commission, and therefore we reject California's and San Francisco's objections as to our authority over pole attachments as inapposite. *See* City and County of San Francisco Comments at 10; CPUC Comments at 7-8; CPUC Reply at 1-2.

[706] 47 U.S.C. § 224(b)(1).

[707] *See* AARP Comments at 76 (acknowledging the Commission's recent proposal of "new rules that would diminish entry barriers associated with pole attachments"); Public Knowledge Comments at 100 (acknowledging the Commission's recent efforts to speed access to utility poles and lower other barriers to entry such as high costs).

[708] Section 224 applies to cable and telecommunications service providers, while section 332(c)(7) applies to facilities that provide "personal wireless services," which include "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 224(d), (e), (f); 47 U.S.C. § 332(c)(7)(C)(i).

[709] *Wireless Broadband Internet Access Order*, 22 FCC Rcd 5901, 5921-25, paras. 57-70.

[710] Section 332(c)(7) applies to facilities "for the provision of personal wireless services," 47 U.S.C. § 332(c)(7)(C)(ii), which include "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C)(i).

[711] 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II), (iv).

188. As to section 224, the Commission clarified in the *Wireless Broadband Internet Access Order* that where the same infrastructure would provide "both telecommunications and wireless broadband Internet access service," the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service.[712] The Commission similarly clarified that section 332(c)(7)(B) would continue to apply to wireless broadband Internet access service where a wireless service provider uses the same infrastructure to provide its "personal wireless services" and wireless broadband Internet access service.[713]

189. We reaffirm the Commission's interpretations regarding the application of sections 224 and 332(c)(7) to wireless broadband Internet access service here. The Commission's rationale from 2007, that commingling services does not change the fact that the facilities are being used for the provisioning of services within the scope of the statutory provision, remains equally valid today.[714] This clarification will alleviate concerns that wireless broadband Internet access providers not face increased barriers to infrastructure deployment as a result of today's reclassification.[715] This clarification also is consistent with our commitment to promote broadband deployment and close the digital divide.

190. Although the wireless infrastructure industry has changed significantly since the adoption of the *Wireless Broadband Internet Access Order*, it remains the case that cell towers and other forms of network equipment can be used "for the provision" of both personal wireless services and wireless broadband Internet access on a commingled basis.[716] These communications facilities are sometimes built by providers themselves, but are increasingly being deployed by third-parties who then offer the use of these facilities to wireless service providers for a variety of services, including telecommunications services and information services.[717] To remove any uncertainty, we clarify that section 332(c)(7) applies to facilities, including DAS or small cells, deployed and offered by third-parties for the purpose of provisioning communications services that include personal wireless services.[718] Consistent with the statutory provisions and Commission precedent, we consider infrastructure that will be deployed for the provision of personal wireless services, including third-party facilities such as neutral-host deployments, to be "facilities for the provision of personal wireless services" and therefore subject to section 332(c)(7) as "personal wireless service facilities" even where such facilities also may be used for broadband Internet access services.

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[712] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5922-23, paras. 60-62.

[713] *Id.* at 5923-24, paras. 63-65.

[714] *Id.* at 5924, para. 65.

[715] *See* Interisle Comments at 17; TechFreedom Comments at 96-97.

[716] 47 U.S.C. § 332(c)(7)(C)(ii).

[717] Over the past decade, national and regional wireless carriers have been selling their towers to non-carrier entities, with significant tower transactions in 2008, 2012, 2013, 2014 and 2015. According to the Twentieth Mobile Wireless Competition Report released in September 2017, "a majority of towers are now owned or operated by independent companies rather than by mobile wireless service providers." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Nineteenth Report, 31 FCC Rcd 10534, 10585, para. 70, n.185 (WTB 2016); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services,* Twentieth Report, 32 FCC Rcd 8968, 8999, para. 44 (2017).

[718] *Cf. Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, 12973, para. 270-272 (2014) ("[T]o the extent DAS or small-cell facilities, including third-party facilities such as neutral host DAS deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [shot clock requirements of 332(c)(7)]."); *see also Crown Castle NG East Inc. v. Town of Greenburgh*, 2013 WL 3357169 (S.D.N.Y. 2013), *aff'd*, 552 F. App'x 47 (2d Cir. 2014) (upholding application of section 332(c)(7) to deployments by non-service providers).

191. We reiterate our commitment to expand broadband access, encourage innovation and close the digital divide. We will closely monitor developments on broadband infrastructure deployment and move quickly to address barriers in a future proceeding if necessary.[719]

6. Universal Service

192. The reclassification of consumer and small business broadband access as an information service does not affect or alter the Commission's existing programs to support the deployment and maintenance of broadband-capable networks, i.e., the Connect America Fund's high-cost universal service support mechanisms. As explained in the *USF/ICC Transformation Order*, the Commission has authority to ensure that "the national policy of promoting broadband deployment and ubiquitous access to voice telephony services is fully realized"[720] and require that "carriers receiving support . . . offer broadband capabilities to customers."[721] What services a particular customer subscribes to is irrelevant as long as high-cost support is used to build and maintain a network that provides both voice and broadband Internet access service. Thus, the classification of broadband Internet access as an information service does not change the eligibility of providers of those services to receive federal high-cost universal service support.

193. *Lifeline*. We conclude that we need not address concerns in the record about the effect of our reclassification of broadband Internet access service as an information service on the Lifeline program at this time.[722] In November 2017, we adopted a *Notice of Proposed Rulemaking* in the Lifeline proceeding (*Lifeline NPRM*) in which we proposed limiting Lifeline support to facilities-based broadband service provided to a qualifying low-income consumer over the eligible telecommunication carrier's (ETC's) voice- and broadband-capable last-mile network,[723] and sought comment on discontinuing Lifeline support for service provided over non-facilities-based networks, to advance our policy of focusing Lifeline support to encourage investment in voice- and broadband-capable networks.[724] As explained in the *Lifeline NPRM*, we "believe the Commission has authority under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over facilities-based broadband-capable networks that support voice service" and that "[t]his legal authority does not depend on the regulatory classification of broadband Internet access service and, thus, ensures the Lifeline program has a role in closing the digital divide regardless of the regulatory classification of broadband service."[725] We thus find that today's reinstatement of the information service classification for broadband Internet access service does not require us to address here our legal authority to continue supporting broadband Internet access service in the Lifeline program, as such concerns are more appropriately addressed in the ongoing Lifeline proceeding.

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[719] *See, e.g., Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017).

[720] *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17683-84, para. 60 (2011) (*USF/ICC Transformation Order*).

[721] *Id.* at 17686-87, para. 65 (footnotes omitted).

[722] In the *Internet Freedom NPRM*, we sought comment on what impact, if any, returning broadband Internet access service to its classification as an information service would have on retaining support for broadband Internet access service in the Lifeline program. *Internet Freedom NPRM*, 32 FCC Rcd at 4457, para. 68.

[723] *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, para. 62 (Dec. 1, 2017) (*2017 Lifeline Order*).

[724] *Id.* at para. 64.

[725] *Id.* at para. 72.

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7. Preemption of Inconsistent State and Local Regulations

194. We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing 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. Federal courts have uniformly held that an affirmative federal policy of *de*regulation is entitled to the same preemptive effect as a federal policy of regulation.[726] In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service 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.[727] Just as the *Title II Order* promised to "exercise our preemption authority to preclude states from imposing

[726] *Cf., e.g., Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (state regulation precluded "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580-81 (8th Cir. 2007) (*Minn. PUC*) ("[D]eregulation" is a "valid federal interest[] the FCC may protect through preemption of state regulation.").

[727] *Cf. Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22427, para. 37 (2004) (*Vonage Order*) ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations"); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3323, para. 25 (2004) (*Pulver Order*) ("[I]f Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 states and other jurisdictions"). Many commenters express concern that allowing every state and local government to impose separate regulatory requirements on ISPs would create a patchwork of inconsistent rules that may conflict with one another or with federal regulatory objectives, and that this would impose an undue burden on ISPs that could inhibit broadband investment and deployment and would increase costs for consumers. *See, e.g.*, Cox Comments at 35 (ISPs "rel[y] on . . . uniform national policies to provide service on a consistent basis across [their] footprint without being subject to a patchwork of inconsistent state regulation"); CTIA Comments at 55-56 ("A patchwork quilt of state regulation of the Internet would be unworkable and deeply harmful to consumer interests."); NCTA Comments at 64, 67 (arguing that "inconsistent state regulation undermines 'the efficient utilization and full exploitation' of Internet services" and that ISPs "would be forced to comply with a patchwork of overlapping and potentially conflicting obligations absent federal preemption"); T-Mobile Comments at 26 ("A patchwork quilt of state-by-state regulation would impair providers' ability to offer nationwide service plans and to engage in uniform practices, undermining consumer welfare. It adds operational and financial burdens without corresponding benefit."); WIA Comments at 10 n.39 ("[A] patchwork of state and local requirements . . . can reduce carriers' incentives to invest and hamper their ability to make large scale deployments."); CTIA Reply at 20 ("[Permitting state regulation] will result in obligations that differ in their particulars from those imposed by the federal government or other states. The resulting patchwork will either balkanize a service provider's offerings or force the provider to conform all its offerings to the requirements of the most stringent state."); Verizon Reply at 16 ("[T]he substantial burdens of piecemeal regulation by states would frustrate the federal policy to promote broadband development through light-touch, federal regulation."); Letter from Anand Vadapalli, President & CEO, Alaska Communications Systems, et al., to The Honorable Ajit Pai, Chairman, The Honorable Mignon Clyburn, Commissioner, The Honorable Michael O'Rielly, Commissioner, FCC, WC Docket No. 17-108, at 2 (filed Nov. 17, 2017) (Letter from Rural ISPs) ("[I]t is important that states and localities not be allowed to impose common carrier-like regulations, including economic regulations, on broadband providers."); McDowell Tesimony at 12-15. *see also* Letter from William H. Johnson, Senior Vice President Federal Regulatory and Legal Affairs, Verizon, to Marlene Dortch, Secretary, FCC, at 11 (filed Oct. 25, 2017) ("The possibility of 50 different sets of rules . . . would impose costly requirements, hamstring technological innovations, and create severe regulatory uncertainty; these costs would inevitably hinder investment in broadband Internet.") (Verizon FCC Preemption White Paper).

regulations on broadband service that are inconsistent" with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.[728]

195. We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.[729] Among other things, we thereby preempt any so-called "economic" or "public utility-type" regulations,[730] including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.[731]

196. Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, 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.[732] Indeed, the continued

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[728] *See Title II Order*, 30 FCC Rcd at 5804, para. 433.

[729] This includes any state laws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the transparency rule we adopt herein. Our transparency rule is carefully calibrated to reflect the information that consumers, entrepreneurs, small businesses, and the Commission needs to ensure a functioning market for broadband Internet access services and to ensure the Commission has sufficient information to identify market-entry barriers—all without unduly burdening ISPs with disclosure requirements that would raise the cost of service or otherwise deter innovation within the network.

[730] The terms "economic regulation" and "public utility-type regulation," as used here, are terms of art that the Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements. *See, e.g.*, *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4911-13, paras. 73-74 (2004) (*IP-Enabled Services NPRM*); *Policy and Rules Concerning Rates for Dominant Carriers*, Notice of Proposed Rulemaking, 2 FCC Rcd 5208, 5222, para. 4 n.5 (1987); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 525, para. 19 (1981).

[731] We are not persuaded that preemption is contrary to section 706(a) of the 1996 Act, 47 U.S.C. § 1302(a), insofar as that provision directs state commissions (as well as this Commission) to promote the deployment of advanced telecommunications capability. *See, e.g.*, NARUC Comments at 2; Public Knowledge Reply at 27. For one thing, as discussed *infra*, we conclude that section 706 does not constitute an affirmative grant of regulatory authority, but instead simply provides guidance to this Commission and the state commissions on how to use any authority conferred by other provisions of federal and state law. *See infra* Part IV.B.3.a. For another, nothing in this order forecloses state regulatory commissions from promoting the goals set forth in section 706(a) through measures that we do not preempt here, such as by promoting access to rights-of-way under state law, encouraging broadband investment and deployment through state tax policy, and administering other generally applicable state laws. Finally, insofar as we conclude that section 706's goals of encouraging broadband deployment and removing barriers to infrastructure investment are best served by preempting state regulation, we find that section 706 *supports* (rather than prohibits) the use of preemption here.

[732] *Cf. Vonage Order*, 19 FCC Rcd at 22405, para. 1; *see also National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC Rcd 5051, 5054, para. 9 (2010) (*NARUC Broadband Data Order*) ("Classifying broadband Internet access service as an information service . . . does not by itself preclude" all state measures, such as "[s]tate data-gathering efforts" that do not impose an undue burden or conflict with any federal policy, particularly where the Broadband Data Improvement Act acknowledged such state data collection). We thus conclude that our preemption determination is not contrary to section 414 of the Act,

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applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here.[733] Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under section 214(e);[734] exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters under section 224(c);[735] or authority to adopt state universal service policies not inconsistent with the Commission's rules under section 254.[736] 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, and generally responding to consumer inquiries and complaints" within the framework of this order.[737]

197. *Legal Authority.* We conclude that the Commission has legal authority to preempt inconsistent state and local regulation of broadband Internet access service on several distinct grounds.

198. First, the U.S. Supreme Court and other courts have recognized that, under what is known as the impossibility exception to state jurisdiction, the FCC may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives.[738] Here, both conditions are satisfied. Indeed, because state and local regulation of

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which states that "[n]othing in [the Act] shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414; *see, e.g.*, Public Knowledge Reply at 27. Under this order, states retain their traditional role in policing and remedying violations of a wide variety of general state laws. *See Operator Service Providers of America Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 FCC Rcd 4475, 4477, para. 12 (1991) ("Section 414 of the Act preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation—remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." (footnote omitted)). The record does not reveal how our preemption here would deprive states of their ability to enforce any remedies that fall within the purview of section 414. In any case, a 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." *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, As Amended*, Declaratory Ruling, 6 FCC Rcd 7511, 7513, para. 20 (1991).

[733] *See supra* Part C.3.

[734] *See* 47 U.S.C. § 214(e).

[735] *See* 47 U.S.C. § 224(c). We find no basis in the record to conclude that our preemption determination would interfere with states' authority to address rights-of-way safety issues. *See, e.g.*, CPUC Comments at 4-5 (discussing electrical safety requirements).

[736] *See* 47 U.S.C. § 254(h). We note that we continue to preempt any state from imposing any new state universal service fund contributions on broadband Internet access service. *See Title II Order*, 30 FCC Rcd at 5836-37, para. 490 n.1477.

[737] *Vonage Order*, 19 FCC Rcd at 22405, para. 1. *Cf.* ALEC Comments at 2-4 (discussing the role of state consumer protection laws); NARUC Comments at 4 (discussing "[s]tate authority to address service quality, fraud, issues of public health and safety/reliability, and universal service"); CPUC Reply at 13 (urging the Commission to preserve state authority to "advance universal service, protect the public safety and welfare, ensure the continued qualify of telecommunications services, [and] safeguard[] consumers' rights").

[738] *See, e.g.*, *Vonage Order*, 19 FCC Rcd at 22413-15, 22418-24, paras. 17-19, 23-32; *Minn. PUC*, 483 F.3d at 578-81. The "impossibility exception" was recognized by the Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986) ("FCC pre-emption of state regulation [has been] upheld where it was *not* possible to separate the interstate and intrastate components of the asserted FCC regulation."), and has been applied in circumstances analogous to those here, *e.g.*, *Minn. PUC*, 483 F.3d at 578-81; *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994) (*California III*).

the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today, they are plainly preempted.

199. As a preliminary matter, it is well-settled that Internet access is a jurisdictionally interstate service because "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[739] Thus, when the Commission first classified a form of broadband Internet access service in the *Cable Modem Order*, it recognized that cable Internet service is an "interstate information service."[740] Five years later, the Commission reaffirmed the jurisdictionally interstate nature of broadband Internet access service in the *Wireless Broadband Internet Access Order*.[741] And even when the *Title II Order* reclassified broadband Internet access service as a telecommunications service, the Commission continued to recognize that "broadband Internet access service is jurisdictionally interstate for regulatory purposes."[742] The record continues to show that broadband Internet access service is predominantly interstate because a substantial amount of Internet traffic begins and ends across state lines.[743]

200. Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications.[744] Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission's treatment of interstate traffic, the first condition for conflict preemption is satisfied.[745]

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[739] *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3701-02, para. 18 (1999)); *see also NARUC Broadband Data Order*, 25 FCC Rcd at 5054 n.24 ("Although the Commission has acknowledged that broadband Internet access service traffic may include an intrastate component, it has concluded that broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes."); *High-Cost Universal Service Support et al.*, Order on Remand, 24 FCC Rcd 6475, 6496 n.69 (2008) ("[S]ervices that offer access to the Internet are jurisdictionally interstate services. . . . [T]he Commission has reaffirmed this ruling for a variety of broadband Internet access services.") (collecting authorities).

[740] *Cable Modem Order*, 17 FCC Rcd at 4832, para. 59.

[741] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5911, para. 28.

[742] *Title II Order*, 30 FCC Rcd at 5803, para. 431.

[743] *See, e.g.*, Cox Comments at 35-37; Comcast Comments at 78-82; CTIA Comments at 54-55; NCTA Comments at 65; T-Mobile Comments at 25-26; Mobile Future Reply at 15.

[744] *Cf. California III*, 39 F.3d at 932 (upholding preemption where "the FCC determined that it would not be economically feasible . . . to offer the interstate portion of [enhanced] services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion"); *Vonage Order*, 19 FCC Rcd at 22419-21, para. 25 (discussing the difficulty of distinguishing intrastate and interstate communications over IP-based services); *see also* CTIA Comments at 57 ("While there likely are some slivers of broadband communications that do not cross state boundaries, it would be impossible to apply state regulation to those bits without affecting interstate traffic and thereby interfering with federal aims."); T-Mobile Comments at 26 ("During the course of a [single] fixed broadband connection, a user in one state will almost surely interact many times with information stored in other states and other nations. A mobile broadband communication involves that as well, [and] adds the possibility that the user herself will transit between or among states during the course of a single session."); CTIA Reply at 17 ("[F]ederal preemption is appropriate where, as here, it would be impossible to apply state regulation to this interstate offering without interfering with federal aims."); USTelecom Reply at 22 ("[T]he architecture of the Internet makes it impossible to separate the interstate and intrastate aspects of broadband service. . . . [O]ne could not plausibly offer a separate intrastate broadband internet access service."). We therefore reject the view that the impossibility exception to state jurisdiction does not apply because some aspects of broadband Internet access service could theoretically be regulated differently in different states. *Cf.* Public Knowledge Comments, CG Docket

(continued....)

201. The second condition for the impossibility exception to state jurisdiction is also satisfied. For the reasons explained above, we find that state and local regulation of the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today.[746]

202. Second, the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services.[747] For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services (which were then known as "enhanced services").[748] When Congress adopted the

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No. 17-131, at 3 (June 16, 2017). Even if it were possible for New York to regulate aspects of broadband service differently from New Jersey, for example, it would not be possible for New York to regulate the use of a broadband Internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications*. The relevant question under the impossibility exception is not whether it would be possible to have separate rules in separate states, but instead whether it would be feasible to allow separate state rules for intrastate communications while maintaining uniform federal rules for interstate communications.

[745] OTI insists that broadband service "can easily be separated into interstate and intrastate" communications based on "the location of the ISP." Letter from Chris Laughlin, Counsel for New America's Open Technology Institute, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108, at 3 (filed Dec. 7, 2017) (OTI Dec. 7 *Ex Parte* Letter). In OTI's view, if "the closest ISP headend, tower, or other facility to the customer" is in the same state as the customer, then the customer's Internet communications are all intrastate. *Id.* This view misapprehends the end-to-end analysis employed by the Communications Act to distinguish interstate and intrastate communications, which looks to where a communication ultimately originates and terminates—such as the server which hosts the content the consumer is requesting—rather than to intermediate steps along the way (such as the location of the ISP). *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3697-98, para. 12 (1999) ("Consistent with [our] precedents, we conclude . . . that the communications at issue here do not terminate at the ISP's local server, . . . but continue to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect . . . jurisdiction. . . . Thus, we reject [the] assertion that the . . . facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate." (footnotes omitted)). Indeed, OTI's view that a communication is intrastate whenever the "last mile" facilities between the customer and the communications carrier are within the same state would improperly deem virtually all communications to be intrastate, including interstate telephone calls, contrary to long-settled precedent. *See id.* at 3696-97, para. 11 (discussing *Teleconnect Co. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1628-30, paras. 9-15 (1995), *pets. for review denied, Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997)).

[746] *See supra* para. 194.

[747] *See generally Pulver Order*, 19 FCC Rcd at 3316-23, paras. 15-25 (discussing the federal policy of nonregulation for information services).

[748] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, 541 n.34 (1981) ("[W]e have . . . preempted the states in two respects. . . . [W]e have determined that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation. . . . States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services."), *pets. for review denied, Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 206-07, 209, 214-18 (D.C. Cir. 1982) (*CCIA*); *Computer III Phase I Order*, 104 FCC 2d at 1125, para. 343 ("In the *Computer II* proceeding . . . . we preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings."), *as modified, Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, 7625-37, paras. 110-131 (1991), *pets. for review denied, California III*, 39 F.3d at 931-33; *see also Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) et al.*, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035, 3061 n.374 (1987) ("State public utility regulation of entry and service terms and conditions (including rates (continued....)

Commission's regulatory framework and its deregulatory approach to information services in the 1996 Act, it thus embraced our longstanding policy of preempting state laws that interfere with our federal policy of nonregulation.[749]

203. Multiple provisions enacted by the 1996 Act confirm Congress's approval of our preemptive federal policy of nonregulation for information services. Section 230(b)(2) of the Act, as added by the 1996 Act, declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."[750] The Commission has observed that this provision makes clear that "federal authority [is] preeminent in the area of information services" and that information services "should remain free of regulation."[751] To this same end, by directing that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services," section 3(51)—also added by the 1996 Act—forbids any common-carriage regulation, whether federal or state, of information services.[752]

204. Finally, our preemption authority finds further support in the Act's forbearance provision. Under Section 10(e) of the Act, Commission forbearance determinations expressly preempt any contrary state regulatory efforts.[753] It would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place. Nothing in the Act suggests that Congress intended for state

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and feature availability), ostensibly applied to 'intrastate' enhanced services, would have a severe impact on, and would effectively negate, federal policies promoting competition and open entry in the interstate markets for such services."); *CCIA*, 693 F.2d at 214 ("Courts have consistently held that when state regulation of [communications] equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulation must necessarily yield to the federal regulatory scheme.") (footnotes omitted).

[749] *See City of New York v. FCC*, 486 U.S. 57, 66-70 (1988) (holding that because the Commission had preempted all state and local regulation of cable television signal quality for 10 years before the passage of the Cable Communications Policy Act of 1984, and the Cable Act generally adopted the same regulatory framework that the Commission had been following, Congress implicitly approved the Commission's authority to preempt these laws). Contrary to the suggestions of some commenters, the Supreme Court has held, in cases involving the Communications Act, that no express authorization or other specific statutory language is required for the Commission to preempt state law. *See id.* at 64 ("[A] pre-emptive regulation's force does not depend on express congressional authorization to displace state law. . . . [I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [it] should not [be] disturb[ed] . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." (internal quotation marks omitted)); *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375 n.4 (recognizing implicit FCC preemption authority under the impossibility exception to state jurisdiction). And because the Supreme Court has interpreted the Communications Act to authorize the Commission to supersede state law in many respects, we reject the contention that any presumption against preemption controls here. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (once Congress has decided to preempt state law, "we do not invoke any presumption against pre-emption" in disputes over the *scope* of preemption); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (distinguishing "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute" from "the question *whether* a statute is pre-emptive" and rejecting the view that a presumption against preemption "in effect trumps *Chevron*").

[750] 47 U.S.C. § 230(b)(2), (f)(2).

[751] *Pulver Order*, 19 FCC Rcd at 316, para. 16; *see also Vonage Order*, 19 FCC Rcd at 22425-26, paras. 34-35.

[752] 47 U.S.C. § 153(51)

[753] 47 U.S.C. § 160(e).

or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband Internet access service than that exercised by the federal government.[754]

8. Disability Access Provisions

205. The Communications Act provides the Commission with authority to ensure that consumers with disabilities can access broadband networks regardless of whether broadband Internet access service is classified as telecommunications service or information service. The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)[755] already applies a variety of accessibility requirements to broadband Internet access service.[756] In particular, to ensure that people with disabilities have access to the communications technologies of the Twenty-First Century, the CVAA added several provisions to the Communications Act, including Section 716 of the Act,[757] which requires that providers of advanced communications services (ACS)[758] and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so.[759] These mandates already apply according to their terms in the context of broadband Internet access service.[760] The CVAA also adopted a requirement, in section 718, that ensures access to Internet browsers in wireless phones for people who are blind and visually impaired.[761] In addition, the CVAA directed the Commission to enact regulations to prescribe, among other things, that networks used to provide ACS "may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS]."[762] Finally, new section 717 creates new enforcement and recordkeeping requirements applicable to sections 255, 716, and 718.[763] Section 710 of the Act addressing hearing aid compatibility and implementing rules

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[754] Some commenters note that section 253(c), 47 U.S.C. § 253(c), preserves certain state authority over telecommunications services. But that provision has no relevance here, given our finding that broadband Internet access service is an information service. Although section 253(c) recognizes that states have historically played a role in regulating telecommunications services, there is no such tradition of state regulation of information services, which have long been governed by a federal policy of nonregulation.

[755] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (codified in various sections of Title 47) (CVAA), *amended by* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (technical corrections).

[756] *Title II Order*, 30 FCC Rcd at 5828, para. 473. Congress adopted the CVAA after recognizing that "Internet-based and digital technologies . . . driven by growth in broadband . . . are now pervasive, offering innovative and exciting ways to communicate and share information." S. Rep. No. 111-386, at 1 (2010); H.R. Rep. No. 111-563, at 19 (2010). Congress thus clearly had Internet-based communications technologies in mind when enacting the accessibility provisions of Section 716 (as well as the related provisions of sections 717-718) and in providing important protections with respect to advanced communications services (ACS).

[757] 47 U.S.C. § 617(f) ("The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 of this title on the day before October 8, 2010. Such services and equipment shall remain subject to the requirements of section 255 of this title.").

[758] ACS means: "(A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service." 47 U.S.C. § 153(1).

[759] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.*, CG Docket No. 10-213 et al., Second Report and Order, 28 FCC Rcd 5957, para. 1 (2013) (*Section 716 Implementation Order*).

[760] *Section 716 Implementation Order*, 28 FCC Rcd at 5960-61, para. 7.

[761] 47 U.S.C. §§ 617, 619.

[762] 47 U.S.C. § 617(e)(1)(B); *see also* 47 CFR § 14.20(c).

[763] 47 U.S.C. § 618.

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THE COUNCIL
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Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: EVAN HINES

Address: 2 MTC 5TH FLOOR BKLYN NY

I represent: DOITT

Address: 2 MTC 5th FL BKLYN NY

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 3/15/18

(PLEASE PRINT)

Name: JOHN WINKER

Address: 15 MTC BKlyn NY 11201

I represent: Dept of IT : Telecom DoITT

Address: 15 MTC BKlyn NY 11201

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: MICHAEL PASTOR

Address: 15 Metrotech, Brooklyn, NY 11201

I represent: DOITT

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 3/17/18

(PLEASE PRINT)

Name: Jelani Anglin & Eugene Lynch

Address: 150 Court st

I represent: Good Call

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

DOITT Budget

Date: 3/15/2018

(PLEASE PRINT)

Name: Lance VanArsdale

Address: 158-11 Harry Van Arsdale Jr. Ave Flushing, NY

I represent: Local Union No. 3, IBEW

Address: Same as above

Please complete this card and return to the Sergeant-at-Arms

Topic:
311 call center

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 3/15/18

(PLEASE PRINT)

Name: Ralph Palladino

Address: 125 Barclay Street NY NY 10007

I represent: 2nd Vice-President, Local 1549, DC37

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

03/15/18

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 1120

☐ in favor ☐ in opposition

Date: 03/15/18

(PLEASE PRINT)

Name: Annette Hentz

Address: 2 MetroTech, Bklyn 11201

I represent: NYC Dept. of InfoTech + Telecom

Address: 2 MetroTech, Bklyn 11201

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 03/15/18

(PLEASE PRINT)

Name: Samir Saini

Address: 2 MetroTech, Bklyn 11201

I represent: NYC Dept of InfoTech + Telecom

Address: 2 MetroTech, Bklyn 11201

Please complete this card and return to the Sergeant-at-Arms

Topic:
311 call center

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 3/15/18

(PLEASE PRINT)

Name: Brunetta Tanner

Address: 125 Barclay Street NY NY 10007

I represent: 311 Chapter Chair, Local 1549, DC37

Address: _____

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 3/15/18

(PLEASE PRINT)

Name: Eddie Douglass

Address: 125 Barclay Street NY NY 10007

I represent: Council Rep, DC37 Clerical Division

Address: _____

Please complete this card and return to the Sergeant-at-Arms