People v Charter Communications, Inc.
2018 NY Slip Op 30253(U)
February 13, 2018
Supreme Court, New York County
Docket Number: 450318/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
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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

E N T E R,

O. PETER SHERWOOD J.S.C.