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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

NEW CINGULAR WIRELESS PCS, LLC d/b/a AT&T MOBILITY, a Delaware limited liability company; PACIFIC BELL TELEPHONE COMPANY d/b/a AT&T CALIFORNIA, a California corporation; CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION, a 501(c)(6) exempt trade association; COMCAST PHONE OF CALIFORNIA, LLC, a Delaware limited liability company; COX CALIFORNIA TELCOM, LLC, a Delaware corporation; CTIA-THE WIRELESS ASSOCIATION®, a District of Columbia non-profit corporation; CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, a Delaware general partnership; MCI COMMUNICATIONS SERVICES, INC., a Delaware corporation,

Plaintiffs,

vs.

MICHAEL PICKER, President of the California Public Utilities Commission, in his official capacity; MIKE FLORIO, Commissioner of the California Public Utilities Commission, in his official capacity; CARLA J. PETERMAN, Commissioner of the California Public Utilities Commission, in her official capacity; LIANE M. RANDOLPH, Commissioner of the California Public Utilities Commission, in her official capacity; and CATHERINE J.K. SANDOVAL, Commissioner of the California Public Utilities Commission, in her official capacity,

Case No. 3:16-cv-02461(VC)

AMICUS BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: September 29, 2016
Time: 10:00 a.m.
Court: The Hon. Vince Chhabria
Courtroom: 4 (17th Floor)

Defendants.

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AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

I. INTRODUCTION & ISSUES TO BE DECIDED

In conformance with this Court's August 2, 2016 order, the National Association of Regulatory Utility Commissioners ("NARUC")[1] respectfully submits this Brief as an Amicus of this Court. The undersigned counsel for NARUC has read the briefs in this case, and the *Order of Preliminary Injunction* issued by this Court on May 20, 2016.

The question raised by plaintiffs is whether a "letter agreement"[2] setting forth the conditions under which State commissions receive Form 477 subscription data from the Federal Communications Commission (FCC), has the force of a law generally applicable to all disaggregated telecommunications subscription data in the country, and/or whether the confidentiality policies expressed in that letter and in Federal Communications Commission (FCC) regulations and decisions conflict with and preempt California confidentiality policies applied to that data. Stated differently, do States have the ability to obtain *and to use under state law* broadband data, including granular, disaggregated, carrier-specific subscription data, which telecommunications carriers may (or may not) also submit to the FCC on the FCC's Form 477?

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[1] Founded in 1889, NARUC is a quasi-governmental nonprofit organization incorporated in the District of Columbia. NARUC's members include agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service of utility intrastate operations. NARUC members ensure that utility services are provided at rates and conditions that are just, and reasonable. Both Congress and federal courts have consistently recognized NARUC as a proper entity to represent the collective interests of State commissions. See, e.g., 47 U.S.C. § 410(c) (1971) (Congress designates NARUC to nominate members to Federal-State Joint Boards to consider issues of concern to State regulators and the FCC on universal service, separations, and other issues); See also 47 U.S.C. § 254 (1996) (describing functions of the Universal Service Joint Board). See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "Carriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations the ICC issued to create the "bingo card" system). See *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985).

[2] It is unclear which "letter agreement" is at issue here, as the CPUC apparently did not sign the agreement proffered by plaintiffs, but an earlier and different version of same.

NARUC addressed this question to the FCC in a 2009 *Petition for Clarification or Declaratory Ruling that No Order or Regulation Issued by the FCC Limits State Authority to Collect Data Directly from any Broadband Infrastructure or Service Provider* (NARUC Petition), attached as **Exhibit A**. The FCC then sought and received comments from telecommunications carriers (including plaintiffs in this action) and State commissions, subsequently issuing a 2010 *Memorandum Opinion and Order,* attached as **Exhibit B,** declaring that State collection and use of broadband data was not preempted by federal law.

II. BACKGROUND AND STATEMENT OF FACTS

Section 706 of the Telecommunications Act of 1996, required the FCC "*and each State commission*" to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by utilizing "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a).

Certainly, it is difficult to see how a State could conduct a proceeding on "price cap regulation, regulatory forbearance," or "other regulating methods" without access to sensitive information. It is also difficult to see how a State could protect the due process rights of others affected by such proceedings without providing, as the FCC frequently does, access to sensitive data to those impacted pursuant to a protective order.

States also have a range of duties specified in federal statute, for example in 47 U.S.C. §§ 254(f) (promote universal service) or 251 (resolve interconnection disputes). Those duties are difficult or impossible to fulfill without resort to use of State protective orders or confidentiality rules (e.g., Cal. Pub. Utils. Code § 583) to allow those involved or directly impacted by the State action access to crucial but business sensitive data.

In 2008, Congress passed the Broadband Data Improvement Act (BDIA), an "Act to improve the quality of Federal and State data regarding the availability and quality of broadband

services and to promote the deployment of affordable broadband services to all parts of the Nation."[3] Like the original 1996 legislation, the Act recognized the need for State action.

Specifically, the Act stated that the "Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data."[4] It required, among other things, the establishment of a State Broadband Data and Development Grant Program.[5]

This Grant Program received significant funding in 2009, when Congress enacted the American Recovery and Reinvestment Act of 2009 (ARRA), part of which created the Broadband Technology Opportunities Program (BTOP), allocating $4.7 billion for development, planning, adoption, and expansion of broadband services in the United States.[6] A key component of BTOP was the allocation of up to $350 million, pursuant to the BDIA, "for the purposes of developing and maintaining a broadband inventory map."[7]

The National Telecommunications and Information Agency (NTIA, under the Department of Commerce) was the primary administrator for BTOP, although Congress specified that the data collection was to be done by the States.[8] After the Governor designated the California Public Utilities Commission (CPUC) as the "Eligible Entity" in California (not all

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[3] 47 U.S.C. §§ 1301, 1303. The Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-1304) is online at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ385.110

[4] 47 U.S.C. § 1301(d).

[5] 47 USC § 1304(b) ("Establishment of a State Broadband Data and Development Grant Program").

[6] The ARRA is online here - https://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf, and NTIA's role is described here: https://www.ntia.doc.gov/page/2011/american-recovery-and-reinvestment-act-2009.

[7] ARRA, *supra,* at H.R. 1-14, Division B, Title VI.

[8] NTIA's website describes this role. *See* http://www2.ntia.doc.gov/information.

"Eligible Entities" were state regulatory commissions), the CPUC received a series of ARRA/BTOP grants under the Broadband Data and Development Grant Program.[9] Although Eligible Entities could receive aggregated Form 477 information from the FCC (as reflected in the "Eligible Entities" decision that issued on the same day as the NARUC decision),[10] under the NTIA/BTOP grants Eligible Entities were also directed to request information directly from the carriers.[11] Eligible Entities were given the option (and later the direction) to enter into Nondisclosure Agreements (NDAs) with carriers, such as the NDA filed in this action, in order to facilitate the collection of this data.[12]

Notwithstanding such NDAs, it quickly became clear that industry was going to resist State attempts to collect broadband data, on preemption grounds *inter alia*, or insist that they were only "voluntarily" complying with the Eligible Entity's NTIA data requests.[13]

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[9] These grants are partially reflected on NTIA's website, particularly the entry relating to "Data Collection, Integration, and Validation": http://www2.ntia.doc.gov/grantee/california-public-utilities-commission.

[10] *In re Providing Eligible Entities Access to Aggregate, Form 477 Data,* 25 FCC Rcd 5059 (April 26, 2010).

[11] *See* Technical Appendix in NTIA's Notice of Funds Availability, 74 Fed. Reg. 32545, 32557 (July 8, 2009), at https://www.ntia.doc.gov/files/ntia/publications/fr_broadbandmappingnofa_090708.pdf

[12] *Id.* at 32550; *see also* NDA attached as Exhibit 2 to July 12, 2016 Amato Declaration [Docket #92-4], providing *inter alia* that the NDA would be interpreted under California law (at ¶ 14).

[13] The July 30, 2009 NTCA comments, at 5-6, filed in WC Docket 07-38, are instructive: "[S]ome providers may have inadvertently included confidential information that they would not have otherwise disclosed had they known about the possible data release (to State commissions). (emphasis added), at: http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934056. *Compare,* Dissent of California Public Utilities Commissioner Geoffrey Brown, *Order Adopting Report In Fulfillment Of Senate Bill 1563* Decision 05-05-013 May 5, 2005, online at: http://docs.cpuc.ca.gov/published/Final_decision/46430.htm, noting "carriers will tell you point blank . . . California has no right to subsidize DSL because DSL is an interstate service . . ." See also, *February 27, 2007 Position Statement: Cable Telecommunications Association of Maryland, Delaware and the District of Columbia on Maryland House Bill Number 1069* - a bill that combined a net neutrality mandate with explicit broadband information collection requirements. The CTA, at page 1, claimed the bill is "preempted by federal law" and, at page 2, is "solving a non-existent problem", stating, "[t]he FCC already collects information by zip code and posts detailed reports twice a year regarding the availability of broadband service. Commercial services . . . also monitor and report the date transmission rates of

In response to these industry advocacy efforts, at its 2009 summer meeting in Seattle, NARUC passed a resolution to address these issues. A copy of that resolution is appended to the attached NARUC Petition (**Exhibit A**). The resolution first asks the FCC, "in accord with the requirements of the Broadband Data Improvement Act[14] to provide requesting States with raw data from the relevant current Form 477 submissions from broadband service providers.

Significantly, in terms of the issues raised by the Plaintiffs in this litigation, the resolution also asks the FCC to "immediately grant a petition for declaratory ruling affirming that: (1) it is an important aim of federal policy to expand the scope of available broadband services data; and (2) the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State. . ."[15]

Pursuant to the NARUC Resolution, on September 25, 2009, the undersigned filed a *Petition requesting FCC Clarification or Declaratory Ruling that No Order or Regulation Issued*

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broadband providers." See also, *February 27, 2007 Position Statement: The Maryland Tech Council, on Maryland House Bill Number 1069* claiming, with respect to the entire bill, that "the [FCC] and the [FTC] currently exert authority over broadband and the Internet because the Internet communications are predominately interstate and international. Any attempt to regulate the Internet at the state level would prove impossible and most likely exceeds state authority." The advocacy documents do not – on their face distinguish between information collection and the net neutrality statements. The industry coalition was successful in defeating the entire measure and, apparently, gained considerable traction by the generic claim of preemption, although the legal memorandum associated with the lobbying had a narrower focus. A copy of both position statements are attached as Appendices to the NARUC Petition, as they are not available online.

[14] NARUC responded to the FCC's initial BDIA notice - *Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data As Required by the Broadband Data Improvement Act*, Public Notice, DA 09-1550, July 17, 2009, 74 Fed. Reg. 36446 (July 23, 2009) ("*Public Notice*") available online at: http://edocket.access.gpo.gov/2009/E9-17579.htm. NARUC's July 30, 2009 comments are online at: https://www.fcc.gov/ecfs/filing/6015086532/document/7019934240.

[15] *See* Attached Exhibit A, at 9 (Appendix A, last "Resolved" paragraph).

by the FCC Limits State Authority to Collect Data Directly from any Broadband Infrastructure or Service Provider (**Exhibit A**).[16]

On October 22, 2009, the FCC issued a Public Notice seeking comment on NARUC's Petition, noting that "it is unclear ***what basis, if any, there might be for a claim*** that the Commission has preempted State-mandated collection of data regarding broadband infrastructure and services," and inviting "any party claiming that such state data collection is preempted to explain in detail the basis for its claim."[17]

On November 2, 2009, AT&T, Verizon, and the U.S.Telecom Association (USTA, an industry group representing the large incumbent carriers) all filed comments urging the denial or dismissal of the NARUC Petition.

Significantly, none of these parties identified any specific law, FCC regulation or pronouncement that preempted State data collection and use.

Instead, AT&T argued that many States lacked, under State law, jurisdiction to collect data on broadband infrastructure and services, and argued additionally that duplicative State data requests would be "burdensome."[18]

Verizon urged the FCC to reject NARUC's effort "to expand the role of states over broadband data collection in ways that would ignore the interstate nature of broadband services, complicate the process of collecting consistent and useful data, or create unnecessary new burdens."[19] USTA noted that its members were cooperating with the NTIA and other

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[16] The Petition is also found online at https://ecfsapi.fcc.gov/file/7020243428.pdf.

[17] (Emphasis added.) The FCC's Public Notice assigned WC Docket No. 09-193 to the Petition. The Public Notice is online at https://ecfsapi.fcc.gov/file/7020243876.pdf. All comments are online at: https://www.fcc.gov/ecfs/search/filings?q=%28proceedings.name:%28%2809-193*%29%29%20OR%20proceedings.description:%28%2809-193*%29%29%29&sort=date_disseminated,DESC; or at https://www.fcc.gov/ecfs/ (proceed'g 09-193).

[18] AT&T Comments, found at https://www.fcc.gov/ecfs/filing/6015395111/document/7020244289.

[19] Verizon Comments, found at https://www.fcc.gov/ecfs/filing/6015395131/document/7020244311

"voluntary" data collection programs, and that "US Telecom member companies are providing *a separate set of broadband data to the Commission* twice a year via their Form 477 filings."[20]

USTA and Verizon noted with approval the confidentiality requirements attendant to States' receipt of 477 data directly from the FCC (with no mention of a "direct employees only" clause).[21]

On November 2, 2009, the Michigan Public Service Commission and the California Public Utilities Commission (CPUC) filed separate Comments supporting the NARUC Petition. The CPUC noted that:

> Congress intended the States to play a key role in the effort to promote the nationwide deployment and adoption of advanced services. For states to ensure ubiquitous broadband deployment within their borders, state commissions must obtain an accurate understanding of broadband availability and subscribership in their respective territories. As far as the CPUC has been able to determine, the FCC to date has not issued any order limiting the authority of states to collect data directly from broadband facility and service providers. An FCC declaratory ruling acknowledging no such limit of state authority will help facilitate state efforts to identify unserved and underserved areas within their borders…
>
> California has embarked on its own broadband data collection efforts over the past few years. For example, the California Legislature enacted the Digital Infrastructure and Video Competition Act of 2006 (DIVCA) creating a state video franchise scheme for video service within the state, as well as giving the CPUC the authority to collect and utilize broadband subscribership and availability data from holders of state video franchises. Further, the CPUC has developed its own rules, following enactment of DIVCA.[22]

Those comments also specified that the CPUC would often direct carriers to provide their

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[20] Verizon Comments, *supra;* USTA [Opening] Comments, at 2 (emphasis added), available at https://www.fcc.gov/ecfs/filing/6015395129/document/7020244310.

[21] AT&T Comments, *supra,* at 4; Verizon Comments, *supra,* at 3; USTA Comments, *supra,* at 4.

[22] CPUC Comments, at 2-3, at https://www.fcc.gov/ecfs/filing/6015395164/document/7020244355.

477 data responses directly to the State agency (in part to reduce the "burden" about which the carriers regularly complain).[23]

On November 9, 2009, the District of Columbia and a small rural telephone company, Southeast Telephone (mislabeled in the FCC docket as a Ms. Thacker) filed reply comments in support of the NARUC Petition, seconding the California and Michigan opening comments. The District of Columbia Comments described the problems that led to the NARUC Petition:

> The NARUC Petition was inspired by the frustration of state officials in their efforts to begin preparing for the National Telecommunications and Information Administration ("NTIA") State Broadband Data and Development Grant Program. That Program funds projects that collect state-level broadband mapping data, develop state level broadband maps, aid in the development and maintenance of a national broadband map and fund statewide initiatives aimed at broadband planning activities. It was established by the American Recovery and Reinvestment Act of 20094 and the Broadband Data Improvement Act. Nevertheless, state officials have been encountering some resistance to their initial efforts to begin collecting data for the NTIA grants. In the past, as described by the NARUC Petition, some state efforts had been rebuffed on the grounds that state action was preempted by actions of the FCC.[24]

Indeed, carriers routinely claimed that because broadband had been classified as an interstate service and/or an information service, States had no jurisdiction to collect the data.[25] This position is inconsistent on its face with the explicit requirements of Section 706, quoted *supra*.

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[23] *Id*. at 4.

[24] Comments of Public Service Commission of the District of Columbia, at 1-2, available at https://www.fcc.gov/ecfs/filing/6015497776/document/7020347179.

[25] AT&T Comments, *supra*, at fn. 6 ("Because many broadband services, including broadband Internet access service, are interstate information services, such state commissions would lack jurisdiction to impose data reporting obligations on providers of these services"). In 2015, the FCC reclassified broadband as a *telecommunications* (not information) *service*; the D.C. Circuit recently affirmed this decision in *USTA v. FCC*, 2016 U.S. App. LEXIS 10716 (June 14, 2016). In so doing, the FCC effectively confirmed that the specific reservations of State authority with respect to service quality, public health and safety, and universal service Congress specified for "telecommunications services" in 47 U.S.C. §253(b).

The District of Columbia comments quoted the NARUC Resolution which instigated the NARUC Petition for declaratory ruling:

> that the FCC has not asserted any general preemption of any State actions requiring broadband service providers to submit specific information, at an appropriate level of granularity as determined by the State, on broadband service locations, speeds, prices, technology and infrastructure within the State, *provided such State agrees to provide a minimum level of data confidentiality and protection as required by the [Broadband Data Improvement Act]* at 47 U.S.C. § 1304.[26]

The referenced confidentiality provisions do not apply here. According to the Statute, they only apply to States only when (i) they are acting as "Eligible Entities" and (ii) receive the data directly from the FCC and (iii) the data is submitted specifically for the purposes of the BDIA - See 47 U.S.C. § 1304(h)(2):

> Notwithstanding any provision of Federal or State law to the contrary, an eligible entity shall treat any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and the eligible entity. This paragraph applies only to information submitted by the [Federal Communications] Commission or a broadband provider *to carry out the provisions of this chapter* and *shall not otherwise limit or affect the rules governing public disclosure of information collected by any Federal or State entity under any other Federal or State law or regulation.*
>
> (Emphasis added)

This provision on its face does not "limit or affect" State rules governing public disclosure of information collected by the State for other purposes. The CPUC has specified why it is collecting this data – to which it is clearly entitled to as a matter of State law. The agency is not acting as an "eligible entity" below nor was the data surrendered to respond to the BDIA.

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[26] Comments of the District of Columbia, *supra*, at 2, quoting the NARUC Resolution attached as Appendix A to the NARUC Petition (emphasis added).

Commenters supporting NARUC cited the obvious facial inconsistency of suggesting such a "voluntary" approach to data access, given Congress's clear specifications of State commission obligations to ensure universal service, promote broadband availability and deployment, and reduce the digital divide.[27]

On November 9, 2009, USTA, CTIA, and NCTA filed reply comments. None took issue with, or pointed out any confidentiality problems caused by the ongoing broadband data collection programs as described in the CPUC's opening comments.

In the 2013-2015 time frame, broadband mapping reverted from the NTIA-sponsored collection by the States to the FCC, but many states, California included, continued State broadband mapping programs inspired by the NTIA program.[28]

III. ARGUMENT

The FCC has not preempted existing State procedures for collection/treatment of data.

On April 10, 2010, the FCC issued a Memorandum Opinion and Order, rejecting the carriers' arguments about burden and confusion allegedly created by separate State broadband data collection systems, specifying that the Commission had "not preempted or otherwise precluded the States from mandating that broadband providers file data or other information regarding broadband infrastructure or services."[29]

As reflected in **Exhibit B**, the FCC's *NARUC Petition Order* recognized the connection between the carriers' jurisdictional objections and the hitherto "voluntary" conception of the data

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[27] *See, e.g.*, Comments of Southeast Telephone Inc, a small rural telephone company in Connecticut, at 2 ("The best way to ensure that consumers have access to broadband at competitive prices from a variety of providers in even the most rural areas of the nation, is to allow the states take care of what they know best - their state"), available at https://ecfsapi.fcc.gov/file/7020347194.pdf.

[28] *Cf., In re Modernizing the FCC Form 477 Data Program*, Report and Order, 28 FCC Rcd 9887 (2013), at ¶2.

[29] *In re 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*, 25 FCC Rcd 5051 (April 26, 2010), at ¶ 1 (*NARUC Petition Order*).

collection:

> This reliance on voluntary submissions has made it difficult, if not impossible, for any given State to obtain comprehensive and reliable information on broadband deployment and adoption within its borders. The record indicates that States accepted a voluntary submission regime in part because of uncertainty as to whether the Commission had preempted State broadband data collection efforts.[30]

FCC acknowledged that Congress recognized State collection regimes in the BDIA.

The FCC concluded "[c]lassifying broadband Internet access service as an information service or finding that this service is jurisdictionally interstate, however, does not by itself preclude mandatory State data-gathering efforts… In fact, ***Congress recognized*** in the BDIA that State broadband data gathering can be 'complementary' to federal efforts."[31]

Indeed, such Congressional recognition necessarily indicates that, even in 2008, Congress understood that States had authority to collect and use such data. This is not surprising give the explicit text of Section 706.

No carrier has successfully petitioned the FCC for preemption of a State data collection regime or use of sensitive data in the context of a State proceeding.

Although the FCC did not specifically address the BDIA confidentiality requirements in 47 U.S.C. 1304(h)(2) in its response to NARUC, it did make clear that State agencies have substantial latitude and discretion in broadband data collection:

> We also reject the suggestion that a declaration of non-preemption will subject broadband providers to multiple onerous and disparate reporting requirements that add little value to the broadband data

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30 *Id.* at ¶ 3 (footnotes omitted, here and below, except as otherwise noted).

31 *Id.* at ¶ 9, citing 47 U.S.C. §§ 1301(4) and 1304, *inter alia*.

> collection that is already underway at the federal level. States seeking to collect broadband-related data are fully competent to address these policy arguments and craft balanced broadband information collections that supplement, rather than interfere with, federal information collection efforts. Even so, *to the extent that State data collection regimes thwart any federal policies or requirements, providers may petition the Commission to preempt any conflicting State regulation*.[32]

There have been no such petitions.

This is not a surprise as preemption of State authority to collect and allow access subject to protective orders would undermine the State role Congress specified.

Adopting Plaintiff's construction is inconsistent with the duties assigned by Congress to State Commissions.

The concerns that led NARUC to petition the FCC in 2009 are the same concerns that animate this *Amicus Brief*.

State commissions need and use this data in myriad ways to full the tasks Congress assigned. Even NTIA recognized implicitly that States could collect broadband data and share it with consultants and others in a secure and confidential manner to promote competition and secure universal and affordable broadband access.[33] The undersigned is not aware of any carrier that has petitioned the FCC to preempt direct State collection and use of such data, including confidentiality regimes, pursuant to State law.[34]

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[32] *Id.* at ¶ 11 (emphasis added).

[33] The NTIA website and the Amato Declaration both reflect that the CPUC used Cal State Chico to help analyze the data. *See* http://www2.ntia.doc.gov/grantee/california-public-utilities-commission; Amato Declaration at ¶5 {Docket #92-4).

[34] Even where the State gets Form 477 data directly from the FCC, the FCC orders make clear the disclosures (and concerns about confidentiality) are associated with the few States whose State "freedom of information act" laws are more lenient than the federal standard. They are not a concern when a state has "appropriate protections in place (which may include confidentiality agreements or designation of information as proprietary under state law)." *In the Matter of Local Competition & Broadband Reporting*, 15 F.C.C. Rcd. 7717, 7761 (2000), reaffirmed *In the Matter of Providing Eligible Entities Access to Aggregate Form 477 Data*, 25 F.C.C. Rcd. 5059, 5062 (2010).

The interpretation pressed by plaintiffs is inconsistent with the scheme presented in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), the FCC's statements in the appended declaratory order, and elsewhere,[35] and the FCC's own release of data of even greater sensitivity to a much broader scope of entities subject to protective order.[36]

Public service (or utility) commissions, like California's, have been charged by Congress with enforcing crucial elements of a federal framework designed to protect consumers and competition for the entire telecommunications sector. The 1996 Act requires the FCC to work hand-in-glove with State Commissions to open local markets to competition,[37] to "preserve and

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[35] *See, e.g.,* the May 17, 2013 FCC decision, *In the Matter of Petition of U.S. Telecom for Forbearance Under 47 U.S.C. 160(c) from Enf't of Certain Legacy Telecommunications Regulations*, 28 F.C.C. Rcd. 7627, 7653–54 (2013), where the FCC cites an earlier 2008 order as explaining:

> in the *AT&T Cost Assignment Forbearance Order*, "we do not in this Order preempt any state accounting requirements adopted under state authority."[] Similarly here, we do not preempt states' ability to establish intrastate cost allocations for its own purposes, and our forbearance from the Cost Assignment Rules does not otherwise affect a state's ability to do so.[] In the *AT&T Cost Assignment Forbearance Order*, the Commission stated that "[w]e believe that AT&T, working cooperatively with the state commissions in its region, can develop methods of separating costs, satisfying any remaining need states have for jurisdictional separations information."[] AT&T confirmed that this arrangement has worked since 2008.[] We also recognize that some price cap carriers have operating companies that are regulated on a rate-of-return basis on the state level or for whom alternative regulation periodically requires cost-based accounting data. {footnotes omitted}

Obviously to arrive at "intrastate" allocations, one must examine all costs. In the very next paragraph, albeit in a slightly different context, the FCC goes on to

> remind price cap carriers that section 251 of the Act requires such carriers "to continue to provide to state commissions, on request, any accounting data that states need to implement our pricing methodologies."[] We emphasize that forbearance adopted herein does not impact the states' ability to require carriers to submit such data.
> *Id*. {Footnote omitted.}

[36] *Compare, Additional Parties Seeking Access to Data & Info. Filed in Response to the Bus. Data Servs. Data Collection,* DA16-833, 2016 WL 4006465, at *1 (OHMSV July 25, 2016)

[37] See, e.g., *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412, 124 S. Ct. 872 at 876, 882 (2004); *Weiser, Philip, Federal Common Law, Cooperative Federalism, and the*

advance universal service,"[38] and to encourage deployment "of advanced telecommunications to all Americans."[39] The plaintiff's proposed interpretation is inconsistent with that State role.

Adopting Plaintiff's construction is inconsistent with the Section 601(c) rule against implied preemption.

Federal Court's have long held that there is a presumption against finding preemption of State authority when construing a statute. *See, e.g., N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Statutes are entitled to the presumption of non-preemption.").[40] Moreover, in the 1996 Act, Congress

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Enforcement of the Telecom Act, 76 N.Y.U.L.Rev. 1692, 1694 (2001) (describing the 1996 Act as "the most ambitious cooperative federalism regulatory program to date"); *see also* 47 U.S.C. § 252(e) (requiring State approval of all interconnection agreements between incumbent local exchange and competitive carriers).

[38] See, 47 U.S.C. §§ 254 (f) (State universal service programs), 410(c) and 254 (a) (State Commissioners nominated by NARUC act as federal Administrative law judges to address crucial issues of universal service policy), 254 (b) (Congress *mandates* that the FCC explicitly base its policies to advance universal service (which includes both "advanced" and "information" services) on the existence of State mechanisms), 214(e) (States designate *telecommunications carriers* to receive federal subsidies), 251(f) (States can exempt rural *carriers* from certain Title II requirements.)

[39] See, 47 U.S.C. § 1302(a) which specifies the FCC and each State Commission "with regulatory jurisdiction over telecommunications services" "shall encourage" the deployment of advanced telecommunications capability." Among the methods suggested by Congress for reach that goal – "price cap regulation" and "forbearance". It is difficult to discern how such proceedings could be conducted or justified without not access to the data sought here or without presenting opportunity for stakeholders affected by the proposed action to weigh in based on the factual information provided to the relevant state commission, where appropriate, subject to protective order. The same due process considerations and required access to data surround all the other State duties referenced in the previous footnote.

[40] The "presumption" is often stated as follows:

> [I]n all pre-emption cases, and particularly in those in which Congress has "legislated ... in a field which the States have traditionally occupied," ...we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

included a new rule of statutory construction that applies to the telecommunications provisions of the Communications Act (Title II) by its express terms. Section 601(c)(1) of the 1996 Act, captioned "NO IMPLIED EFFECT", provides "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede . . . State, or local law unless expressly so provided in such Act or amendments." {emphasis added}. 47 U.S.C. § 152 (note), Pub. L. No. 104-104, (Section 601(c)(1)).[41] This section, by its express terms, requires the FCC and Courts to "construe" preemptive portions of the Act narrowly. Amici respectfully suggests Congress' addition of what can only be a specific rule for how to construe the Act should require more than a perfunctory citation/analysis parroting case-law on "the presumption against preemption." Congress included explicit rules presumably to assure a more rigorous overview than already available via Court precedent. There is no statutory provision providing the FCC with authority to preempt in the cited circumstances. There is no FCC requirement that properly construct can apply to the circumstances presented.

IV. Conclusion:

Even without application of the Section 601(c) rule against implied preemption, it is apparent the relevant rules do not, by their own terms, apply to data collected pursuant to State law. Moreover, limiting State use of this data, which utilizes protective orders, can only cripple State utility commissions tasked with specific responsibilities both by Congress and their State legislatures, undermine State disaster/emergency planning efforts, assure that State universal service programs are inefficiently targeted, and infringe on the due process rights of others impacted by State commission orders.

Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 1194-95 (2009) (second and third alterations in original) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*,331 U.S. 218, 230 (1947)).

[41] Section 601 is most easily found where the Act is reproduced in its entirety – e.g., https://transition.fcc.gov/Reports/tcom1996.pdf.

In these circumstances, the Court should reject Plaintiffs' arguments, and grant summary judgment in favor of the CPUC.

Respectfully Submitted,

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Pro Hac Vice

APPENDIX A

NARUC Petition for Clarification or Declaratory Ruling that No Order or Regulation Issued by the FCC Limits State Authority to Collect Data Directly from any Broadband Infrastructure or Service Provider

APPENDIX B

FCC Memorandum Opinion & Order
In re NARUC Petition for Clarification or Declaratory Ruling
That No Order or Regulation Issued by the FCC
Limits State Authority to Collect Data Directly
from any Broadband Infrastructure or Service Provider