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*Pro Hac Vice*

**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 (17<sup>th</sup> Floor)**

Defendants.

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1                   **AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY**  
 2                                           **COMMISSIONERS**

3                   **I.       INTRODUCTION & ISSUES TO BE DECIDED**

4                   In conformance with this Court’s August 2, 2016 order, the National Association of  
 5 Regulatory Utility Commissioners (“NARUC”)<sup>1</sup> respectfully submits this Brief as an Amicus of  
 6 this Court. The undersigned counsel for NARUC has read the briefs in this case, and the *Order*  
 7 *of Preliminary Injunction* issued by this Court on May 20, 2016.

8                   The question raised by plaintiffs is whether a “letter agreement”<sup>2</sup> setting forth the  
 9 conditions under which State commissions receive Form 477 subscription data from the Federal  
 10 Communications Commission (FCC), has the force of a law generally applicable to all  
 11 disaggregated telecommunications subscription data in the country, and/or whether the  
 12 confidentiality policies expressed in that letter and in Federal Communications Commission  
 13 (FCC) regulations and decisions conflict with and preempt California confidentiality policies  
 14 applied to that data. Stated differently, do States have the ability to obtain *and to use under state*  
 15 *law* broadband data, including granular, disaggregated, carrier-specific subscription data, which  
 16 telecommunications carriers may (or may not) also submit to the FCC on the FCC’s Form 477?  
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19                   <sup>1</sup>       Founded in 1889, NARUC is a quasi-governmental nonprofit organization incorporated in the  
 20 District of Columbia. NARUC’s members include agencies in the fifty States, the District of Columbia,  
 21 Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service of utility  
 22 intrastate operations. NARUC members ensure that utility services are provided at rates and conditions  
 23 that are just, and reasonable. Both Congress and federal courts have consistently recognized NARUC as a  
 24 proper entity to represent the collective interests of State commissions. See, e.g., 47 U.S.C. § 410(c)  
 25 (1971) (Congress designates NARUC to nominate members to Federal-State Joint Boards to consider  
 26 issues of concern to State regulators and the FCC on universal service, separations, and other issues); See  
 27 also 47 U.S.C. § 254 (1996) (describing functions of the Universal Service Joint Board). See also  
 28 *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).

<sup>2</sup> 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.

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

## 8 **II. BACKGROUND AND STATEMENT OF FACTS**

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

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

19 States also have a range of duties specified in federal statute, for example in 47 U.S.C. §§  
20 254(f) (promote universal service) or 251 (resolve interconnection disputes). Those duties are  
21 difficult or impossible to fulfill without resort to use of State protective orders or confidentiality  
22 rules (e.g., Cal. Pub. Utils. Code § 583) to allow those involved or directly impacted by the State  
23 action access to crucial but business sensitive data.

24 In 2008, Congress passed the Broadband Data Improvement Act (BDIA), an “Act to  
25 improve the quality of Federal and State data regarding the availability and quality of broadband  
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1 services and to promote the deployment of affordable broadband services to all parts of the  
2 Nation.”<sup>3</sup> Like the original 1996 legislation, the Act recognized the need for State action.

3 Specifically, the Act stated that the “Federal Government should also recognize and  
4 encourage complementary State efforts to improve the quality and usefulness of broadband  
5 data.”<sup>4</sup> It required, among other things, the establishment of a State Broadband Data and  
6 Development Grant Program.<sup>5</sup>

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

13 The National Telecommunications and Information Agency (NTIA, under the  
14 Department of Commerce) was the primary administrator for BTOP, although Congress  
15 specified that the data collection was to be done by the States.<sup>8</sup> After the Governor designated  
16 the California Public Utilities Commission (CPUC) as the “Eligible Entity” in California (not all  
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18 <sup>3</sup> 47 U.S.C. §§ 1301, 1303. The Broadband Data Improvement Act of 2008, Pub. L. No. 110-385,  
19 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-1304) is online at:  
20 [http://frwebgate.access.gpo.gov/cgi-](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ385.110)  
[bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ385.110](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ385.110)

21 <sup>4</sup> 47 U.S.C. § 1301(d).

22 <sup>5</sup> 47 USC § 1304(b) (“Establishment of a State Broadband Data and Development Grant  
23 Program”).

24 <sup>6</sup> The ARRA is online here - [https://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-](https://www.gpo.gov/fdsys/pkg/BILLS-111hr1enr/pdf/BILLS-111hr1enr.pdf)  
25 [111hr1enr.pdf](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-](https://www.ntia.doc.gov/page/2011/american-recovery-and-reinvestment-act-2009)  
26 [recovery-and-reinvestment-act-2009](https://www.ntia.doc.gov/page/2011/american-recovery-and-reinvestment-act-2009).

27 <sup>7</sup> ARRA, *supra*, at H.R. 1-14, Division B, Title VI.

28 <sup>8</sup> NTIA’s website describes this role. See <http://www2.ntia.doc.gov/information>.

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

9 Notwithstanding such NDAs, it quickly became clear that industry was going to resist  
 10 State attempts to collect broadband data, on preemption grounds *inter alia*, or insist that they  
 11 were only “voluntarily” complying with the Eligible Entity’s NTIA data requests.<sup>13</sup>

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12  
 13 <sup>9</sup> These grants are partially reflected on NTIA’s website, particularly the entry relating to “Data  
 14 Collection, Integration, and Validation”: <http://www2.ntia.doc.gov/grantee/california-public-utilities-commission>.

15 <sup>10</sup> *In re Providing Eligible Entities Access to Aggregate, Form 477 Data*, 25 FCC Rcd 5059 (April  
 16 26, 2010).

17 <sup>11</sup> See Technical Appendix in NTIA’s Notice of Funds Availability, 74 Fed. Reg. 32545, 32557  
 18 (July 8, 2009), at [https://www.ntia.doc.gov/files/ntia/publications/fr\\_broadbandmappingnofa\\_090708.pdf](https://www.ntia.doc.gov/files/ntia/publications/fr_broadbandmappingnofa_090708.pdf)

19 <sup>12</sup> *Id.* at 32550; see also NDA attached as Exhibit 2 to July 12, 2016 Amato Declaration [Docket  
 20 #92-4], providing *inter alia* that the NDA would be interpreted under California law (at ¶ 14).

21 <sup>13</sup> The July 30, 2009 NTCA comments, at 5-6, filed in WC Docket 07-38, are instructive: “[S]ome  
 22 providers may have inadvertently included confidential information that they would not have otherwise  
 23 disclosed had they known about the possible data release (to State commissions). (emphasis added), at:  
 24 [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=7019934056](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=7019934056). Compare,  
 25 Dissent of California Public Utilities Commissioner Geoffrey Brown, *Order Adopting Report In*  
 26 *Fulfillment Of Senate Bill 1563* Decision 05-05-013 May 5, 2005, online at:  
 27 [http://docs.cpuc.ca.gov/published/Final\\_decision/46430.htm](http://docs.cpuc.ca.gov/published/Final_decision/46430.htm), noting “carriers will tell you point blank . . .  
 28 California has no right to subsidize DSL because DSL is an interstate service . . .” See also, *February 27,*  
 29 *2007 Position Statement: Cable Telecommunications Association of Maryland, Delaware and the District*  
 30 *of Columbia on Maryland House Bill Number 1069* - a bill that combined a net neutrality mandate with  
 31 explicit broadband information collection requirements. The CTA, at page 1, claimed the bill is  
 32 “preempted by federal law” and, at page 2, is “solving a non-existent problem”, stating, “[t]he FCC  
 33 already collects information by zip code and posts detailed reports twice a year regarding the availability  
 34 of broadband service. Commercial services . . . also monitor and report the data transmission rates of

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

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

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

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 17 broadband providers.” See also, *February 27, 2007 Position Statement: The Maryland Tech Council, on*  
 18 *Maryland House Bill Number 1069* claiming, with respect to the entire bill, that “the [FCC] and the [FTC]  
 19 currently exert authority over broadband and the Internet because the Internet communications are  
 20 predominately interstate and international. Any attempt to regulate the Internet at the state level would  
 21 prove impossible and most likely exceeds state authority.” The advocacy documents do not – on their  
 22 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.

23 <sup>14</sup> NARUC responded to the FCC’s initial BDIA notice - *Comment Sought on Providing Eligible*  
 24 *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*”)  
 25 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>.

26 <sup>15</sup> See Attached Exhibit A, at 9 (Appendix A, last “Resolved” paragraph).

1 by the FCC Limits State Authority to Collect Data Directly from any Broadband Infrastructure  
2 or Service Provider (**Exhibit A**).<sup>16</sup>

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

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

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

13 Instead, AT&T argued that many States lacked, under State law, jurisdiction to collect  
14 data on broadband infrastructure and services, and argued additionally that duplicative State data  
15 requests would be "burdensome."<sup>18</sup>

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

20 \_\_\_\_\_  
21 <sup>16</sup> The Petition is also found online at <https://ecfsapi.fcc.gov/file/7020243428.pdf>.

22 <sup>17</sup> (Emphasis added.) The FCC's Public Notice assigned WC Docket No. 09-193 to the Petition.  
23 The Public Notice is online at <https://ecfsapi.fcc.gov/file/7020243876.pdf>. All comments are online at:  
24 [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](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).

25 <sup>18</sup> AT&T Comments, found at <https://www.fcc.gov/ecfs/filing/6015395111/document/7020244289>.

26 <sup>19</sup> Verizon Comments, found at <https://www.fcc.gov/ecfs/filing/6015395131/document/7020244311>

1 “voluntary” data collection programs, and that “US Telecom member companies are providing a  
2 separate set of broadband data to the Commission twice a year via their Form 477 filings.”<sup>20</sup>

3 USTA and Verizon noted with approval the confidentiality requirements attendant to  
4 States’ receipt of 477 data directly from the FCC (with no mention of a “direct employees only”  
5 clause).<sup>21</sup>

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

9 Congress intended the States to play a key role in the effort to  
10 promote the nationwide deployment and adoption of advanced  
11 services. For states to ensure ubiquitous broadband deployment  
12 within their borders, state commissions must obtain an accurate  
13 understanding of broadband availability and subscribership in their  
14 respective territories. As far as the CPUC has been able to  
15 determine, the FCC to date has not issued any order limiting the  
16 authority of states to collect data directly from broadband facility  
17 and service providers. An FCC declaratory ruling acknowledging  
18 no such limit of state authority will help facilitate state efforts to  
19 identify unserved and underserved areas within their borders...

16 California has embarked on its own broadband data collection  
17 efforts over the past few years. For example, the California  
18 Legislature enacted the Digital Infrastructure and Video  
19 Competition Act of 2006 (DIVCA) creating a state video franchise  
20 scheme for video service within the state, as well as giving the  
21 CPUC the authority to collect and utilize broadband subscribership  
22 and availability data from holders of state video franchises.  
23 Further, the CPUC has developed its own rules, following  
24 enactment of DIVCA.<sup>22</sup>

21 Those comments also specified that the CPUC would often direct carriers to provide their  
22

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

26 <sup>21</sup> AT&T Comments, *supra*, at 4; Verizon Comments, *supra*, at 3; USTA Comments, *supra*, at 4.

27 <sup>22</sup> CPUC Comments, at 2-3, at <https://www.fcc.gov/ecfs/filing/6015395164/document/7020244355>.

1 477 data responses directly to the State agency (in part to reduce the “burden” about which the  
2 carriers regularly complain).<sup>23</sup>

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

7 The NARUC Petition was inspired by the frustration of state  
8 officials in their efforts to begin preparing for the National  
9 Telecommunications and Information Administration ("NTIA")  
10 State Broadband Data and Development Grant Program. That  
11 Program funds projects that collect state-level broadband mapping  
12 data, develop state level broadband maps, aid in the development  
13 and maintenance of a national broadband map and fund statewide  
14 initiatives aimed at broadband planning activities. It was  
15 established by the American Recovery and Reinvestment Act of  
16 2009<sup>4</sup> and the Broadband Data Improvement Act. Nevertheless,  
17 state officials have been encountering some resistance to their  
18 initial efforts to begin collecting data for the NTIA grants. In the  
19 past, as described by the NARUC Petition, some state efforts had  
20 been rebuffed on the grounds that state action was preempted by  
21 actions of the FCC.<sup>24</sup>

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

25 \_\_\_\_\_  
26 <sup>23</sup> *Id.* at 4.

27 <sup>24</sup> Comments of Public Service Commission of the District of Columbia, at 1-2, available at  
28 <https://www.fcc.gov/ecfs/filing/6015497776/document/7020347179>.

<sup>25</sup> 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).

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

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

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

15 Notwithstanding any provision of Federal or State law to the  
16 contrary, an eligible entity shall treat any matter that is a trade  
17 secret, commercial or financial information, or privileged or  
18 confidential, as a record not subject to public disclosure except as  
19 otherwise mutually agreed to by the broadband service provider  
20 and the eligible entity. This paragraph applies only to information  
21 submitted by the [Federal Communications] Commission or a  
22 broadband provider to carry out the provisions of this chapter and  
23 shall not otherwise limit or affect the rules governing public  
24 disclosure of information collected by any Federal or State entity  
25 under any other Federal or State law or regulation.

26 (Emphasis added)

27 This provision on its face does not “limit or affect” State rules governing public  
28 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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<sup>26</sup> Comments of the District of Columbia, *supra*, at 2, quoting the NARUC Resolution attached as Appendix A to the NARUC Petition (emphasis added).

1           Commenters supporting NARUC cited the obvious facial inconsistency of suggesting such  
2 a “voluntary” approach to data access, given Congress’s clear specifications of State  
3 commission obligations to ensure universal service, promote broadband availability and  
4 deployment, and reduce the digital divide.<sup>27</sup>

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

8           In the 2013-2015 time frame, broadband mapping reverted from the NTIA-sponsored  
9 collection by the States to the FCC, but many states, California included, continued State  
10 broadband mapping programs inspired by the NTIA program.<sup>28</sup>

### 11 **III. ARGUMENT**

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

13           On April 10, 2010, the FCC issued a Memorandum Opinion and Order, rejecting the  
14 carriers’ arguments about burden and confusion allegedly created by separate State broadband  
15 data collection systems, specifying that the Commission had “not preempted or otherwise  
16 precluded the States from mandating that broadband providers file data or other information  
17 regarding broadband infrastructure or services.”<sup>29</sup>

18           As reflected in **Exhibit B**, the FCC’s *NARUC Petition Order* recognized the connection  
19 between the carriers’ jurisdictional objections and the hitherto “voluntary” conception of the data

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

25 <sup>28</sup> Cf., *In re Modernizing the FCC Form 477 Data Program*, Report and Order, 28 FCC Rcd 9887  
26 (2013), at ¶2.

27 <sup>29</sup> *In re National Association of Regulatory Utility Commissioners Petition for Clarification or  
28 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*).



1 collection:

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

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

10 The FCC concluded “[c]lassifying broadband Internet access service as an information  
11 service or finding that this service is jurisdictionally interstate, however, does not by itself  
12 preclude mandatory State data-gathering efforts... In fact, *Congress recognized* in the BDIA that  
13 State broadband data gathering can be ‘complementary’ to federal efforts.”<sup>31</sup>

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

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

19 Although the FCC did not specifically address the BDIA confidentiality requirements in  
20 47 U.S.C. 1304(h)(2) in its response to NARUC, it did make clear that State agencies have  
21 substantial latitude and discretion in broadband data collection:

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

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25 <sup>30</sup> *Id.* at ¶ 3 (footnotes omitted, here and below, except as otherwise noted).

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

1 collection that is already underway at the federal level. States  
2 seeking to collect broadband-related data are fully competent to  
3 address these policy arguments and craft balanced broadband  
4 information collections that supplement, rather than interfere with,  
5 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.*<sup>32</sup>

6 There have been no such petitions.

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

9  
10 ***Adopting Plaintiff’s construction is inconsistent with the duties assigned by  
Congress to State Commissions.***

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

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

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20 <sup>32</sup> *Id.* at ¶ 11 (emphasis added).

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

23 <sup>34</sup> Even where the State gets Form 477 data directly from the FCC, the FCC orders make clear the  
24 disclosures (and concerns about confidentiality) are associated with the few States whose State “freedom  
25 of information act” laws are more lenient than the federal standard. They are not a concern when a state  
26 has “appropriate protections in place (which may include confidentiality agreements or designation of  
27 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).

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

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

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11 <sup>35</sup> See, e.g., the May 17, 2013 FCC decision, *In the Matter of Petition of U.S. Telecom for*  
12 *Forbearance Under 47 U.S.C. 160(c) from Enft of Certain Legacy Telecommunications Regulations*, 28  
13 F.C.C. Rcd. 7627, 7653–54 (2013), where the FCC cites an earlier 2008 order as explaining:

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

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

28 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.}

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30 <sup>36</sup> Compare, *Additional Parties Seeking Access to Data & Info. Filed in Response to the Bus. Data*  
31 *Servs. Data Collection*, DA16-833, 2016 WL 4006465, at \*1 (OHMSV July 25, 2016)

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

1 advance universal service,”<sup>38</sup> and to encourage deployment “of advanced telecommunications to  
2 all Americans.”<sup>39</sup> The plaintiff’s proposed interpretation is inconsistent with that State role.

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5 ***Adopting Plaintiff’s construction is inconsistent with the Section 601(c) rule against  
6 implied preemption.***

7 Federal Court’s have long held that there is a presumption against finding preemption of  
8 State authority when construing a statute. *See, e.g., N.L.R.B. v. Pueblo of San Juan*, 276 F.3d  
9 1186, 1195 (10th Cir. 2002) citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Statutes  
10 are entitled to the presumption of non-preemption.”).<sup>40</sup> 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  
12 most ambitious cooperative federalism regulatory program to date”); *see also* 47 U.S.C. § 252(e)  
13 (requiring State approval of all interconnection agreements between incumbent local exchange and  
14 competitive carriers).

14 <sup>38</sup> See, 47 U.S.C. §§ 254 (f) (State universal service programs), 410(c) and 254 (a) (State  
15 Commissioners nominated by NARUC act as federal Administrative law judges to address crucial issues  
16 of universal service policy), 254 (b) (Congress mandates that the FCC explicitly base its policies to  
17 advance universal service (which includes both “advanced” and “information” services) on the existence  
18 of State mechanisms), 214(e) (States designate *telecommunications carriers* to receive federal subsidies),  
19 251(f) (States can exempt rural *carriers* from certain Title II requirements.)

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

22 <sup>40</sup> The “presumption” is often stated as follows:

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

1 included a new rule of statutory construction that applies to the telecommunications provisions  
2 of the Communications Act (Title II) by its express terms. Section 601(c)(1) of the 1996 Act,  
3 captioned “NO IMPLIED EFFECT”, provides “[t]his Act and the amendments made by this Act  
4 shall not be construed to modify, impair, or supersede . . . State, or local law unless expressly so  
5 provided in such Act or amendments.” {emphasis added}. 47 U.S.C. § 152 (note), Pub. L. No.  
6 104-104, (Section 601(c)(1)).<sup>41</sup> This section, by its express terms, requires the FCC and Courts  
7 to “construe” preemptive portions of the Act narrowly. Amici respectfully suggests Congress’  
8 addition of what can only be a specific rule for how to construe the Act should require more than  
9 a perfunctory citation/analysis parroting case-law on “the presumption against preemption.”  
10 Congress included explicit rules presumably to assure a more rigorous overview than already  
11 available via Court precedent. There is no statutory provision providing the FCC with authority  
12 to preempt in the cited circumstances. There is no FCC requirement that properly construct can  
13 apply to the circumstances presented.

#### 14 **IV. Conclusion:**

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

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*Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194-95 (2009) (second and third alterations in  
25 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))).

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

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

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August 3, 2016

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**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**

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**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**