

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
)
Petition for Declaratory Ruling Regarding) WC Docket No. _____
Broadband Speed Disclosure Requirements)
)

PETITION FOR DECLARATORY RULING

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NCTA – The Internet & Television Association and USTelecom respectfully request that the Commission issue a declaratory ruling that confirms and clarifies key aspects of the federal regulatory regime governing broadband speed disclosures. Over the years, the Commission has established a national regime for the measurement and disclosure of access speeds for broadband Internet access services (“BIAS”)—through the issuance of orders, rules, and other guidance, reflecting careful policy determinations based on a voluminous administrative record. And the Commission is poised to launch a proceeding that may further update that regime. However, the Commission’s authority to maintain uniform rules for the industry is threatened by state efforts to mandate different disclosures based on unreliable performance metrics.

The Commission should take action to avoid a patchwork of inconsistent requirements and to protect its authority to maintain a uniform national framework for this interstate service. As explained herein, while the Commission has given BIAS providers flexibility to comply with the Transparency Rule through various types of performance disclosures, it has created a specific safe harbor for BIAS providers that disclose their average downstream and upstream speeds during the period of peak demand. The Commission should prevent this framework from being undermined by issuing a declaratory ruling confirming that a broadband provider’s description of

speeds based on this average peak-hour metric complies with the Commission’s transparency requirements and, unless and until BIAS is no longer classified as a telecommunications service, that such a characterization of actual broadband performance is just and reasonable under Section 201 of the Communications Act. The Commission should further reaffirm that BIAS providers retain flexibility to comply with the Transparency Rule through alternative disclosures beyond this safe-harbor approach. Such a ruling—along with a confirmation that broadband providers can meet these obligations through website disclosures, and a clarification that it is consistent with federal law for broadband providers *also* to advertise maximum speeds—would reinforce the primacy of federal law on these matters and help prevent an inconsistent patchwork of conflicting requirements. Protecting the Commission’s authority to establish national, uniform rules is particularly important at this time, as the Commission is about to launch a proceeding to put in place a national “light-touch framework” to govern BIAS providers and preserve a free and open Internet.

INTRODUCTION

Since at least 2015, multiple broadband providers—including Time Warner Cable (“TWC”), Cablevision, and Verizon—have been subject to law enforcement investigations by certain state attorneys general regarding the providers’ characterization of BIAS download and upload speeds and other performance attributes.¹ These state investigations have sought to determine, among other things, whether the typical advertising practice of offering “up to” a particular speed threshold (*e.g.*, “download speeds up to 50 Mbps”) accurately describes the

¹ See, *e.g.*, Christie Smythe, *Broadband Providers Face New York Scrutiny Over Speed Claims*, Bloomberg (Oct. 26, 2015), available at <https://www.bloomberg.com/news/articles/2015-10-26/broadband-providers-face-new-york-scrutiny-over-speed-claims> (noting that the State of New York had opened investigations into Verizon Communications and Cablevision Systems, in addition to Charter Communications).

“actual” performance of the service. One of these investigations has now led to a lawsuit brought by the Attorney General of the State of New York against Charter and its subsidiary Spectrum Management Holding Company, LLC (“Spectrum”), which merged with TWC in 2016.² The lawsuit seeks to impose state-law liability based on broadband speed characterizations that fall within federal regulatory safe harbors, which the Commission adopted as part of its effort to establish uniform disclosure requirements for the broadband industry. The Commission imposed these uniform disclosures to enable consumers to make apples-to-apples comparisons of different service providers operating across the country.

The New York Complaint illustrates the types of claims that BIAS providers are beginning to face across the country.³ Throughout the period covered by the Complaint, TWC advertised its broadband offerings by informing customers that they could expect to receive “up to” certain speeds (as measured in Mbps). In doing so, TWC relied on the Commission’s open Internet transparency rules, orders, and guidance—and in particular on the safe harbors under the Measuring Broadband America (“MBA”) program,⁴ which evaluates “actual” speeds by

² See Complaint, *New York v. Charter Commc’ns*, No. 450318/2017 (N.Y. Sup. Ct. Feb. 1, 2017) (“New York Complaint”). Attorney General Schneiderman has stated that his office intends to “fill the void” when it believes “federal agencies [have] retreat[ed] from enforcing federal laws.” Bennett Loudon, *Schneiderman Has a Plan for Trump Presidency*, LegalNews.com (Feb. 27, 2017) available at <http://www.legalnews.com/Detroit/1439382>.

³ To be clear, this Petition does not ask the Commission to make *factual* findings regarding the speeds that any particular BIAS provider has delivered to customers at any time in any specific area. Rather, the Petition seeks a declaratory ruling on aspects of the applicable federal *legal* requirements governing broadband speed disclosures.

⁴ *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd 9411, 9414-15 (2011) (“2011 Guidance”) (designating participation in the MBA program as a safe harbor for the disclosure of actual Internet access speeds pursuant to the Commission’s transparency rule).

measuring mean or median peak-period throughput speeds⁵—to substantiate these performance claims.⁶ The New York Complaint, however, relies on different, unofficial measurement tools as its basis for alleging that TWC subscribers “received speeds that were consistently well below the speeds that they paid for.”⁷ Those alternative tools include speed tests offered to the public by Ookla (Speedtest.net) and M-Labs (the Internet Health Test or IHT),⁸ as well as the so-called “80/80” metric reported by MBA—one of a number of measurements MBA reports—which assesses what 80% of a broadband provider’s customers experienced 80% of the time during peak broadband traffic periods.⁹ The Complaint seeks to impose substantial liability under state laws addressing unfair and deceptive trade practices, false advertising, and fraud.

Such state-level actions are causing significant uncertainty, confusion, and potential unwarranted liability. Among other things, these actions threaten to undermine the Commission’s authority to address transparency and speed measurement issues at the federal level, by treating characterizations blessed by the Commission as simultaneously actionable under state law. Moreover, these actions undercut the Commission’s policy of allowing BIAS providers flexibility to decide which metrics should substantiate their speed claims, given the

⁵ See *id.* at 4; see also *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5673 ¶ 166 (2015) (“*2015 Open Internet Order*”) (indicating that broadband providers should convey information on actual speeds by disclosing the “*average performance over a reasonable period of time during times of peak usage*” (emphasis added)).

⁶ See, e.g., Fed. Commc’ns Comm’n, *2016 Measuring Broadband America Fixed Broadband Report* (rel. Dec. 1, 2016), available at <http://data.fcc.gov/download/measuring-broadband-america/2016/2016-Fixed-Measuring-Broadband-America-Report.pdf> (“*2016 MBA Report*”) (finding that TWC delivered median download speeds well over 110% of advertised maximum speeds in all but one of its speed tiers during peak-traffic hours).

⁷ New York Complaint ¶ 208.

⁸ *Id.* ¶¶ 206, 210.

⁹ See *id.* ¶ 203.

variety of factors that might affect performance in any individual case and the imprecision inherent in any speed-measurement tool. The Commission should take prompt action to prevent BIAS providers that follow the Commission’s guidance from being subjected to such inconsistent standards.

Specifically, and as explained further herein, the Commission should issue a declaratory ruling confirming that a BIAS provider’s disclosure of its average downstream and upstream speeds during the period of peak demand complies with the Commission’s transparency rules and is just and reasonable under Section 201 of the Communications Act (insofar as BIAS remains classified as a telecommunications service). The Commission also should reaffirm that BIAS providers retain flexibility to comply with the Transparency Rule through alternative disclosures beyond this safe-harbor approach, and that broadband providers can meet these disclosure obligations by posting the required information on the provider’s website (or by relying on the broadband label developed by the Consumer Advisory Committee and approved by the Commission). Finally, the Commission should clarify that it is consistent with federal law for broadband providers to advertise the maximum (“up to”) speeds available to subscribers on a particular tier, so long as the provider otherwise meets its obligations under the Commission’s transparency requirements. Issuing such a declaratory ruling will help prevent the imposition of liability based on idiosyncratic standards that conflict with this Commission’s transparency regime.

DISCUSSION

I. THE COMMISSION HAS ESTABLISHED A UNIFORM REGULATORY REGIME GOVERNING BROADBAND SPEED DISCLOSURES

Since 2010, the Commission has regulated BIAS providers’ descriptions of Internet access speeds, and over time has developed a unified regime that balances the twin goals of

technical accuracy and usefulness to consumers. As discussed below, that regime accords substantial flexibility to BIAS providers in disclosing broadband speed information, and the Commission has emphasized repeatedly that providers can satisfy the requirement to disclose “actual” speeds to consumers by providing an online disclosure of *average* performance during times of peak usage. This approach is consistent with the Commission’s recognition in other contexts of the inherent difficulties associated with attempting to predict the “actual” speed that any particular customer will experience at a given time—and provides a strong basis for issuing a declaratory ruling rebutting state-level efforts to mandate different disclosures.

A. The Commission’s Transparency Requirements for BIAS Providers Reflect a Carefully Crafted Federal Policy Framework

The Commission’s Transparency Rule, initially adopted in the *2010 Open Internet Order* and still in place today, requires that BIAS providers “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[.]”¹⁰ As part of the performance-related disclosure obligations under the Transparency Rule, the Commission included a requirement that BIAS providers describe the “expected and actual access speed[s]” delivered to consumers.¹¹ At the time, the Commission refrained from setting specific requirements for how such disclosures should be made. Instead, it recognized that “the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models.”¹²

¹⁰ 47 C.F.R. § 8.3.

¹¹ *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17938 ¶ 56 (2010) (“*2010 Open Internet Order*”).

¹² *2010 Open Internet Order* at 17938-39 ¶ 56.

The Commission also made clear that its Transparency Rule did not require broadband providers to include additional disclosures in their promotional or advertising materials.¹³ In the Notice of Proposed Rulemaking that preceded the *2010 Open Internet Order*, the Commission had sought comment on whether to require that “broadband providers publicly disclose their practices on their websites *and in promotional materials*.”¹⁴ But the rule ultimately adopted in the *2010 Open Internet Order* did not extend to promotional materials; rather, the Commission indicated that BIAS providers may comply with their obligations under the Transparency Rule by “prominently display[ing] or provid[ing] links to disclosures on a publicly available, easily accessible website” and “at the point of sale.”¹⁵ The Commission notably “anticipate[d] that broadband providers may be able to satisfy the transparency rule through a single disclosure.”¹⁶

In the years following the adoption of the *2010 Open Internet Order*, the Commission issued guidance regarding methods of compliance with the transparency obligations relating to broadband speed disclosures. In doing so, the Commission consistently explained that BIAS providers may disclose “actual” speeds by providing an online description of *average* performance during times of peak usage. In 2011, for instance, the Commission informed BIAS providers that they could comply with the Commission’s rules by disclosing “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.”¹⁷ The guidance also reaffirmed that BIAS providers can satisfy their

¹³ *Id.* at 17939-40 ¶ 57.

¹⁴ *Id.* (emphasis added) (citing *Preserving the Open Internet*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13110 ¶ 126 (2009)).

¹⁵ *Id.*

¹⁶ *Id.* at 17940 ¶ 58.

¹⁷ *2011 Guidance* at 9414-15.

obligations under the Transparency Rule ““through a single disclosure,””¹⁸ clarifying that providers “can comply with the point-of-sale requirement by, for instance, directing prospective customers at the point of sale, orally and/or prominently in writing, to a web address at which the required disclosures are clearly posted and appropriately updated.”¹⁹

Then, in 2014, the Enforcement Bureau issued an advisory addressing, in a limited way, the interplay between the Transparency Rule and advertisements. That guidance reaffirmed once again that BIAS providers can “satisfy the Transparency Rule by providing sufficient information in a single disclosure posted on its website.”²⁰ And in discussing advertisements, the 2014 Guidance indicated only that they should be “accurate” and should not “contradict[]” service descriptions elsewhere.²¹ Where BIAS providers’ advertisements rely on the same safe-harbor approach that they use for their web-based disclosures pursuant to the Transparency Rule—in each case characterizing expected broadband speeds based on the average peak-period metric from MBA data—there of course can be no contradiction between the two. The guidance further clarified that “the Transparency Rule requires accuracy wherever statements regarding network management practices, performance, and commercial terms appear—in mailings, on the sides of buses, on website banner ads, or in retail stores,” asserting its own jurisdiction undertake enforcement proceedings for “inaccurate assertion[s]” in broadband advertisements.²²

¹⁸ *Id.* at 9413 (quoting *2010 Open Internet Order* at 17940 ¶ 58).

¹⁹ *Id.* at 9414.

²⁰ *FCC Enforcement Advisory, Open Internet Transparency Rule, Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606, 8607 n.5 (2014) (“*2014 Guidance*”).

²¹ *Id.* at 8607 & n.5.

²² *Id.* at 8607.

In the *2015 Open Internet Order*, the Commission adopted further clarifications to, and “enhancements” of, its Transparency Rule. On the issue of broadband speed measurement and disclosure, the Commission indicated—consistent with past guidance—that it “expect[s] that network performance will be measured in terms of *average* performance over a reasonable period of time and during times of peak usage.”²³ Notably, the Commission again declined “to otherwise codify specific methodologies for measuring the ‘actual performance’ required by the existing transparency rule,” finding instead that “there is benefit in permitting measurement methodologies to evolve and improve over time.”²⁴

The Commission’s latest guidance on these issues came in 2016. A public notice issued in May 2016 gave BIAS providers additional flexibility in disclosing broadband speed information to consumers. While the Commission had previously directed providers to disclose the “mean” speed from obtained from speed tests, the 2016 guidance indicated that providers may also satisfy their transparency obligations by disclosing either “median speed” or “a range of actual speeds that includes the median speed.”²⁵ The Commission similarly reaffirmed the propriety of disclosing ranges of speeds as part of its efforts in 2016 to simplify broadband disclosures for consumers. The Commission’s Consumer Advisory Committee proposed, and the Commission approved, a consumer broadband label designed to give consumers a “simple-to-understand format” for learning about a broadband service. This format also provides an

²³ *2015 Open Internet Order* at 5673-74 ¶ 166 (emphasis added).

²⁴ *Id.*

²⁵ *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 31 FCC Rcd 5330, 5333 (2016) (“*2016 Guidance*”).

express safe harbor for providers who issue the label to consumers.²⁶ Notably, the broadband label provides “typical speed” upstream and downstream using the FCC’s median or range and notes that “individual experience may vary.”²⁷

In addition to these required disclosures, the Commission has undertaken its own efforts to improve broadband speed measurement techniques. In 2010, the Commission established the MBA program to “measure the actual speed and performance of broadband service,” with the expectation that “the data generated . . . will inform Commission efforts regarding disclosure.”²⁸ This program has been developed through an open, collaborative process led by the Commission’s Office of Engineering and Technology and Consumer and Governmental Affairs Bureau. The Commission developed an “open methodology,” “built on principles of openness and transparency” to collect, analyze, and disclose comprehensive, provider-based data about broadband access speeds.²⁹ In 2011, the Commission designated participation in the MBA program as a safe harbor for the disclosure of actual access speeds for purposes of the Transparency Rule.³⁰ The MBA program’s results are published annually on the Commission’s website, and participating BIAS providers incorporate the results on their own websites.³¹

²⁶ *Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels*, Public Notice, 31 FCC Rcd 3358 (2016).

²⁷ *Id.* at 3363.

²⁸ *2010 Open Internet Order* ¶ 58 n. 188.

²⁹ Fed. Comm’n Comm’n, *Measuring Broadband America – Open Methodology*, <https://www.fcc.gov/general/measuring-broadband-america-open-methodology> (last visited Apr. 6, 2017).

³⁰ *2011 Guidance* at 4-5

³¹ *See, e.g.*, CenturyLink, *Internet Service Disclosure (Consumer Short Version)*, <http://www.centurylink.com/aboutus/legal/internetservicedisclosureshort.html>; Charter Broadband Label Disclosure, available at https://www.charter.com/content/dam/spectrum/residential/en/pdfs/policies/Spectrum_Broadband_Label_1.13.pdf;

Consistent with the Commission’s flexible approach regarding broadband speed disclosures under the Transparency Rule, the MBA reports include various measurements of network performance, but focus primarily on average broadband speeds during peak periods of demand.³² Notably, while MBA reports have *also* published so-called “80/80” results developed by the Commission’s third-party contractor SamKnows (which exclude the top 20th percentile of individual performers and then again exclude the top 20th percentile of remaining results), nowhere in any order or interpretive guidance has the Commission ever pointed to the 80/80 metric as an appropriate measure of actual broadband performance. To the contrary, the Commission has expressly endorsed common reliance on the average speed metric as “harmonious and consistent reporting metric for use across all broadband technologies with transparency disclosure obligations under the rules for the Open Internet.”³³

B. The Commission’s Approach to Broadband Speed Disclosures Aligns With Its Findings on Speed Measurements in Other Contexts

Around the same time the Commission was implementing and refining these transparency measures in the open Internet context, the Commission also considered whether and how to require reporting of “actual” speeds in the context of its Form 477 data reporting proceeding. And over the years, the Commission has consistently concluded that the significant variability relating to customer equipment, network congestion, and issues external to BIAS providers’ networks precludes a precise and uniform measurement of the “actual” speeds available to consumers at any given time. These findings confirm the wisdom of the

Frontier Commc’ns Corp., Fixed Broadband Consumer Disclosure, <https://frontier.com/shop/internet/bbdisclosure>; Midcontinent Commc’ns, Broadband Facts, https://www.midco.com/contentassets/84ffa43897e543f6a6c945da22c2f7e3/midcobroadbandfactslabel_0816.pdf.

³² *See, e.g., 2016 MBA Report* at 7.

³³ *Id.*

Commission’s focus on average peak-period speeds as the optimal way to represent “actual” speeds.

As far back as 2004, the Commission sought public comment on whether to collect information about the speed “actually observed by end users.”³⁴ In response to the 2004 NPRM, the Commission concluded that there was no “methodology or practice that could be applied, consistently and by all types of broadband filers, to measure the information transfer rates actually observed by end users.”³⁵ Again in 2007, the Commission sought public comment on whether and how to collect information on “actual speeds of broadband services.”³⁶ In response to the 2007 NPRM, the Commission again concluded no effective mechanism existed to gather and publicize such data and, while seeking more information in the form of a Further Notice of Proposed Rulemaking, it recognized that “factors beyond the control of service providers may compromise the ability of service providers to report actual speeds experienced by consumers.”³⁷

Yet again in 2011, the Commission sought comment on whether it should continue to collect data only on advertised speeds, or should instead “provide information about actual speeds by geographic area, or speeds that extend beyond the access network (for example, end-

³⁴ *Local Telephone Competition and Broadband Reporting*, Notice of Proposed Rulemaking, 19 FCC Rcd 7364, 7368 ¶ 7 (2004).

³⁵ *Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340, 22353 ¶ 27 (2004).

³⁶ *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data*, Notice of Proposed Rulemaking, 22 FCC Rcd 7760, 7770 ¶ 21 (2007) (“2007 Data Collection NPRM”).

³⁷ *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol Subscriber Data*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9702, 9709–10 ¶¶ 22, 36 (2008) (“2008 Broadband Data Report and Order”).

to-end speeds that reflect an end user’s typical Internet performance).”³⁸ While in the intervening years the Commission had instituted the MBA program, it affirmed its earlier conclusions that no methodology or practice existed to accurately monitor and report on the “actual” Internet speeds any particular customer may experience.³⁹ Moreover, the Commission expressly rejected proposals to measure “actual” speeds through complex analyses of “contention ratios” and other congestion-based metrics, finding such measures “impractical” and unhelpful to consumers.⁴⁰ The upshot of these consistent conclusions is that providing an online description of average speeds during peak-usage periods represents an eminently reasonable and consumer-friendly way for BIAS providers to describe Internet access speeds in conformity with the Transparency Rule.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO ADDRESS STATE EFFORTS TO IMPOSE DIFFERENT DISCLOSURE OBLIGATIONS ON BROADBAND PROVIDERS

Notwithstanding this well-developed body of Commission precedent and the longstanding classification of BIAS as an interstate service,⁴¹ some state attorneys general have recently initiated investigations and litigation regarding performance descriptions by BIAS providers that comply fully with the Commission’s rules, orders, and guidance—on the grounds that these federally compliant disclosures violate state law. The Commission thus should issue a declaratory ruling that confirms and clarifies key aspects of the federal regulatory regime

³⁸ *Modernizing the FCC Form 477 Data Program*, Notice of Proposed Rulemaking, 26 FCC Rcd 1508, 1531 ¶ 59 (2011).

³⁹ *Modernizing the FCC Form 477 Data Program*, Report and Order, 28 FCC Rcd 9887, 9906-07 (2013).

⁴⁰ *Id.* at 9908 ¶ 41.

⁴¹ *See, e.g., Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, ¶ 59 (2002) (“*Cable Modem Declaratory Ruling*”); *see also 2015 Open Internet Order* ¶ 431.

governing broadband speed disclosures, in order to dispel the significant uncertainty and confusion illustrated by these state-level actions. As explained below, such a declaratory ruling would advance the public interest and is well within the Commission’s authority.

A. The Commission’s Declaratory Ruling Should Clarify Key Aspects of the Commission’s Transparency Requirements

The Commission should begin by confirming that (a) a broadband provider’s disclosure of average broadband speeds during periods of peak demand is sufficient to comply with the requirement under Section 8.3 of the Commission’s rules to disclose accurate information regarding the provider’s speed performance, (b) such disclosures are otherwise just and reasonable within the meaning of Section 201(b) of the Communications Act (to the extent it continues to apply to BIAS providers), and (c) broadband providers retain flexibility to comply with the Transparency Rule through means other than this safe-harbor approach. As explained above, the Commission has imposed uniform national obligations relating to BIAS providers’ disclosures of broadband speeds since 2010.⁴² And the Commission has consistently made clear that BIAS providers may fulfill those requirements by providing descriptions of “*average* performance over a reasonable period of time and during times of peak usage.”⁴³ Indeed, the Commission has *encouraged* BIAS providers to do so,⁴⁴ going so far as to establish an explicit safe harbor for BIAS providers participating in the MBA program, indicating that a BIAS

⁴² See 47 C.F.R. § 8.3 (requiring broadband providers to give consumers “accurate information regarding the network ... performance ... of broadband Internet access services”).

⁴³ *2015 Open Internet Order* at 5673-74 ¶ 166 (emphasis added).

⁴⁴ *See id.*

provider's disclosure of such average performance is considered reasonable and otherwise satisfies its obligations under federal law.⁴⁵

Despite this precedent, there appears to be considerable uncertainty among state-level officials about the extent to which the Commission's regulations comprehensively govern broadband speed measurement and disclosure.⁴⁶ As litigation proceeds in New York, there is a significant risk that other jurisdictions will commence their own parallel actions, arguing that state law mandates the disclosure of broadband speeds measured under approaches that diverge from those approved and encouraged by the Commission.⁴⁷ Thus, after years of pursuing a consistent nationwide approach to speed measurement and disclosure, the Commission may soon find that its rules are but one set of standards among many across various states and judicial districts. Such a patchwork of disclosure requirements would cause substantial confusion not only for BIAS providers, which would need to tailor their disclosures on a state-by-state or jurisdiction-by-jurisdiction basis, but also for consumers, who would be exposed to a barrage of different disclosures based on complex metrics that vary from area to area, undermining the Commission's express preference for a "harmonious and consistent reporting metric for use across all broadband technologies."⁴⁸

This risk of inconsistent state regulation of broadband is especially problematic in light of the Commission's consistent finding that BIAS is fundamentally an *interstate* service subject to exclusive federal regulation, regardless of whether it has been classified as a

⁴⁵ See *supra* at 9-10.

⁴⁶ See *supra* at 2-5.

⁴⁷ Indeed, this has already begun to occur. See, e.g., Complaint, *Hart v. Charter Commc'ns*, No. No. 8:17-CV-00556 (C.D. Cal. Mar. 28, 2017), ECF No. 1-1.

⁴⁸ *2016 MBA Report* at 7.

“telecommunications service” or an “information service.”⁴⁹ Thus, to prevent states from undermining federal authority in this area and to advance the public interest by allowing consumers to “make informed decisions” based on one unified national approach,⁵⁰ the Commission should reaffirm that a BIAS provider’s disclosure of average broadband speeds during periods of peak demand is fully compliant with applicable law.

The Commission should also rule, to the extent that BIAS providers continue to be subject to Title II of the Communications Act,⁵¹ that a provider’s adherence to the Commission’s open Internet disclosure requirements comports with its duty to engage in just and reasonable practices with respect to such disclosures under Section 201(b). In the *2015 Open Internet Order*, the Commission classified BIAS as a “telecommunications service” subject to Title II of the Communications Act,⁵² and thus subjected BIAS providers to the requirement in Section 201(b) that all “practices . . . in connection with such communication service” must be “just and reasonable.”⁵³ At the same time, however, the Commission indicated that its open Internet rules, presumably including the Transparency Rule, “reflect the Commission’s interpretation of

⁴⁹ See *supra* n.41.

⁵⁰ *2016 Guidance* at 5338.

⁵¹ Chairman Pai has proposed to reinstate an information-service classification for BIAS and to reexamine the Commission’s Open Internet rules, and the Commission is scheduled to vote on that proposal on May 18, 2017. See *Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC-CIRC1705-05 (Apr. 27, 2017). However, the Chairman also has made clear that existing law will continue to apply to BIAS providers at least until any new order is adopted. This petition seeks clarification only with respect to the Commission’s existing Transparency Rule and whatever federal authority it deems applicable in any forthcoming order. Such a ruling will also ensure that whatever actions the Commission takes in its forthcoming proceeding will be protected against inconsistent state regulation.

⁵² See *2015 Open Internet Order* ¶ 308.

⁵³ 47 U.S.C. § 201(b); see also *2015 Open Internet Order* ¶ 441-52 (declining to forbear broadly from Section 201(b)).

how [S]ections 201 and 202 apply in [the broadband] context”⁵⁴—thus suggesting that compliance with the open Internet rules also reflects compliance with Sections 201 and 202 in the provision of retail broadband service. Accordingly, for the reasons noted above, the Commission should clarify that a BIAS provider that complies with the Transparency Rule also is in compliance with Section 201(b) vis-à-vis its open Internet disclosures.

In conjunction with these rulings, the Commission should further confirm that broadband providers can meet their disclosure obligations by posting the required information on the provider’s website or by employing the broadband label recommended by the Consumer Advisory Committee. As noted above, since adopting its Transparency Rule in 2010, the Commission has required broadband providers to disclose required technical performance information through a “single disclosure” on a “publicly available, easily accessible website” to which consumers can be directed at the point of sale.⁵⁵ Even in addressing the interplay between the Transparency Rule and advertisements,⁵⁶ the Commission has never required BIAS providers to advertise particular metrics—especially not metrics that diverge from the average peak-period speed information the Commission has deemed representative of actual speeds—but has instead attempted to ensure that consumers can “make informed decisions prior to making a final purchasing decision at all potential points of sale.”⁵⁷ This approach is eminently sensible. In proceeding after proceeding, the Commission has concluded that many factors impact the measurement of “actual” speeds.⁵⁸ Conveying in a thirty-second advertisement or on a web

⁵⁴ *2015 Open Internet Order* ¶ 450.

⁵⁵ *2010 Open Internet Order* ¶¶ 57-58.

⁵⁶ *See 2014 Guidance* at 8607 & n.5.

⁵⁷ *2016 Guidance* at 5338.

⁵⁸ *See supra* at 11-13.

banner ad the nuanced technical information that is required to understand the factors involved in broadband speed delivery would be impracticable, and ultimately would only confuse rather than inform consumers. Indeed, the recently approved broadband label does not include such detailed technical information, but instead identifies “typical” speeds and includes a hyperlink to the provider’s network management disclosures for more information.⁵⁹ The Commission thus should reaffirm that broadband customers can receive all information necessary to make an informed decision by reviewing the Commission’s required disclosures prior to purchasing Internet service.

Finally, the Commission should confirm that it is consistent with federal law for broadband providers to advertise the maximum (“up to”) speeds available to subscribers on a particular tier, so long as the provider otherwise meets its obligations under the Commission’s transparency rules. While the Commission has always required BIAS providers to disclose “actual” and “expected” speeds at the point of sale, it has never required broadband providers to limit their truthful advertisements of expected maximum speeds, nor to advertise any particular estimate of actual speeds. In fact, the Commission has long acknowledged that broadband providers advertise speeds “up to” a given speed tier.⁶⁰ Almost all BIAS providers advertise their “expected” speeds “up to” a particular threshold—such as up to 50 Mbps downstream and 5 Mbps upstream—and they have long relied on the mean (or, more recently, median) speed test

⁵⁹ See *2016 Guidance*, App’x.

⁶⁰ See, e.g., *2007 Data Collection NPRM* ¶ 21 (seeking comment on “industry practices for matching advertised ‘up to’ speeds with probable customer experience”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Eleventh Broadband Progress Notice of Inquiry, 30 FCC Rcd 8823 ¶ 58 & n.116 (2015) (noting various ISPs’ practice of advertising maximum “up to” speeds).

results from the MBA program to describe the “actual” performance associated with such maximum advertised speeds.

The allegations in the New York Complaint illustrate the need for such a ruling. Notwithstanding the Commission’s intention to establish a safe harbor for industry-standard disclosures of mean or median broadband speeds, the Complaint relies on *different* measures derived from Speedtest.net (alleged to be “one of the most popular tests”), the SamKnows “‘80/80’ consistent speed” test (alleged to be a “key performance indicator”), and the Internet Health Test, which the Attorney General’s office used to collect its own data.⁶¹ But the Commission has never required the use of any of these metrics, and for good reason; academic literature and the Commission’s own findings confirm the many faults present in even the best-designed speed tests.⁶² While no test is perfect, the Commission’s MBA program avoids many of the fundamental flaws that undermine the reliability of Speedtest.net and the Internet Health Test as a measure of broadband network performance.⁶³ Rather than condoning a patchwork of

⁶¹ New York Complaint ¶¶ 198, 203, 204.

⁶² See, e.g., Letter from Rajender Razdan, Electronics Engineer, Electromagnetic Compatibility Division/OET, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 12-264 (Jan. 7, 2016) (noting that the MBA program decided to “remove the M-Lab server results from the 100 Mbps tier” due to systematic testing errors); see also Steven Bauer, William Lehr, Merry Mou, *Improving the measurement and analysis of gigabit broadband networks* (Mar. 31, 2016), <https://ssrn.com/abstract=2757050> or <http://dx.doi.org/10.2139/ssrn.2757050> (finding that commonly available Internet speed tests include varied assumptions and methodologies that can result in wildly different results, even in controlled laboratory environments).

⁶³ Unlike the Commission’s MBA test, which relies on the SamKnows methodology, Speedtest.net and the Internet Health Test run from a user’s device such as a laptop, tablet, or smartphone. Users are entirely self-selected and choose when to perform the test. Critically, because these tests do not account for competing user traffic, any simultaneous use of the network connection will detract from the test result. For example, if a user subscribes to a service offering up to 20 Mbps and runs the test while

state requirements that mandate advertisements based on unproven tests, the Commission should confirm that a BIAS provider may advertise the maximum speeds available on each tier, so long as it otherwise complies with the Transparency Rule.

B. The Commission Has Authority To Issue the Requested Declaratory Ruling

The Commission has clear authority to issue a declaratory ruling to resolve such controversies. The Administrative Procedure Act authorizes the Commission to “issue a declaratory order or terminate a controversy or remove uncertainty,”⁶⁴ and Section 1.2 of the Commission’s rules provides that the agency may issue such a “declaratory ruling” on its own motion or at the request of an interested party.⁶⁵ Courts have repeatedly confirmed the Commission’s authority in this regard.⁶⁶

Moreover, the Commission has specifically explained that it will use its authority to address scenarios where, as here, inconsistent state actions threaten the comprehensive federal regulatory regime governing BIAS providers. For instance, in the *2015 Open Internet Order*, the Commission “announce[d] [its] firm intention to exercise [its] preemption authority to preclude states from imposing obligations on [BIAS] that are inconsistent with the carefully tailored regulatory scheme” created by the Commission’s rules.⁶⁷ Here, the Commission should confirm

also consuming 5 Mbps of streaming video, the test will report a maximum result of 15 Mbps.

⁶⁴ 5 U.S.C. § 554(e).

⁶⁵ 47 C.F.R. § 1.2(a).

⁶⁶ *See, e.g., Qwest Services Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) (holding that the “Commission is authorized to issue a declaratory ruling ‘to terminate a controversy or remove uncertainty’” (internal citations omitted)) (citing *American Telephone and Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

⁶⁷ *2015 Open Internet Order* ¶ 433; *see also Comput. & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (“[T]he [FCC’s] jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.”).

that BIAS providers that comply with the federal safe harbor for describing broadband speeds are not required to make additional or alternative disclosures.

CONCLUSION

For the foregoing reasons, NCTA and USTelecom respectfully request that the Commission issue a declaratory ruling clarifying the broadband speed measurement and disclosure requirements for BIAS providers as set forth above, and confirming that acting in accordance with these requirements is acting in compliance with controlling federal law.

Respectfully submitted,

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