

No. 450318/17.

Supreme Court, New York County

**Supreme Court of the State of New York
Appellate Division — First Department**

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

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

[PROPOSED] BRIEF FOR AMICUS CURIAE PUBLIC KNOWLEDGE

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Fed. Trade Comm’n v. Febre, No. 94 C 3625, 1996 WL 396117 (N.D. Ill. 1996)	27
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Fink v. Time Warner Cable, 837 F. Supp. 2d 279 (S.D.N.Y. 2011).....	30
FTC v. National Urological Group, 645 F. Supp. 2d 1167 (N.D. Ga. 2008)	37
Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 (N.Y. 2002)	27, 29, 30
Gregory v. Ashcroft, 501 US 452 (1991).....	24
Hubbard v. Gen. Motors, 1996 WL 274018 (S.D.N.Y. 1996).....	32
Lipton v. Nature Co., 71 F.3d 464 (2d Cir. 1995)	26
Maloney v. Verizon Internet Services, 413 Fed. Appx. 997 (9th Cir. 2011)	29
Nikkal Indus. v. Salton, 735 F. Supp. 1227 (S.D.N.Y. 1990).....	32
People v. Applied Card Sys., 27 A.D.3d 104 (N.Y. App. Div. 2005).....	27
Serrano v. Cablevision Sys., 863 F. Supp. 2d 157 (E.D.N.Y. 2012)..	32, 34
Simon v. Cunard Line, 75 A.D.2d 283 (1st Dep’t 1980)	32
Time Warner Cable v. DirecTV, 497 F.3d 144 (2d Cir. 2007)....	26, 33, 35, 36
Walter v. Hughes Communications, 682 F. Supp. 2d 1031 (N.D. Cal. 2010)	30

Other Authorities

AARON SMITH, PEW RESEARCH CENTER, SEARCHING FOR WORK IN THE DIGITAL ERA (2015), http://www.pewinternet.org/files/2015/11/PI_2015-11-19-Internet-and- Job-Seeking_FINAL.pdf	11
Andrew Odlyzko, Bill St. Arnaud, Erik Stallman, and Michael Weinberg, KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE (2012),	

https://www.publicknowledge.org/assets/uploads/documents/UBP_paper_FINAL.pdf	23
BART DE LANGHE AND STEFANO PUNTONI, PRODUCTIVITY METRICS AND CONSUMERS’ MISUNDERSTANDING OF TIME SAVINGS (2015), https://www.colorado.edu/business/sites/default/files/attached-files/jmr_2016_de_langhe_and_puntoni.pdf	22, 23
BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES	6, 7
CAMILLE RYAN AND JAMIE M. LEWIS, CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, AMERICAN COMMUNITY SURVEY REPORTS, COMPUTER & INTERNET USE IN THE UNITED STATES: 2015 (2017), https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf	9
CONNECTED NATION, THE 2012 JOBS AND BROADBAND REPORT: NATIONAL PROJECTIONS ON HOW AMERICAN BUSINESSES USE COMPUTERS AND BROADBAND TO GROW, HIRE, AND THRIVE (2012), http://www.connectednation.org/sites/default/files/connected-nation/files/cn_biz_whitepaper2012_final.pdf	10
JAMES VOLLMAN & ANTHONY CARNEVALE, NATIONAL BROADBAND PLAN BROADBAND ACCESS FOR ALL AMERICANS FACILITATING AN EFFICIENT AND EFFECTIVE LABOR MARKET	6
Jason Koebler, <i>How Big Telecom Gets Away with Rewriting America’s Laws</i> , MOTHERBOARD (Apr. 6, 2016), https://motherboard.vice.com/en_us/article/z43493/how-the-telecom-lobby-rewrites-americas-laws	14
Joel Ebert and Joey Garrison, <i>President Trump Signs Executive Order on Rural Broadband Internet</i> , TENNESEAN (Jan. 8, 2018), https://www.tennessean.com/story/news/politics/2018/01/08/trump-farm-bureau-federation-nashville/1014464001	7
John Bergmayer, <i>We Need Title II Protections in the Uncompetitive Broadband Market</i> , PUBLIC KNOWLEDGE (Apr. 26, 2017), https://www.publicknowledge.org/news-blog/blogs/we-need-title-ii-protections-in-the-uncompetitive-broadband-market	13
National Conference of State Legislatures, Net Neutrality Legislation in States, http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx	25

National Housing Conference, NHC Connectivity Working Group, Broadband Connectivity in Affordable Housing, Policy Recommendations (2015), https://www.ntia.doc.gov/files/ntia/national_housing_conference_boc.pdf	10, 11
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION AND ECONOMICS AND STATISTICS ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, EXPLORING THE DIGITAL NATION: AMERICA’S EMERGING ONLINE EXPERIENCE (2013)	7, 9
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, DIGITAL NATION: EXPANDING INTERNET USAGE (2011), http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf	13
Obama White House Archive, Remarks by the President on Promoting Community Broadband (Jan. 14, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/01/14/remarks-president-promoting-community-broadband	8
POLLY HOLLINGS AND CAROLINE ROPER, QUALITATIVE RESEARCH FOR BROADBAND SPEED, REPORT FOR THE ADVERTISING STANDARDS AUTHORITY (2016), https://www.asa.org.uk/asset/592CBE75-E3A7-43FE-835A53C437035CAB	21, 28
RICHARD PETERSON, PAYING FOR SPEED: MEASURING WILLINGNESS TO PAY IN U.S. BROADBAND MARKETS, UNIVERSITY OF COLORADO BOULDER (2017), https://www.colorado.edu/economics/gradplacement/PetersonJMP.pdf	18
STEVE BAUER, DAVID CLARK, AND WILLIAM LEHR, UNDERSTANDING BROADBAND SPEED MEASUREMENTS (2010), https://www.measurementlab.net/publications/understanding-broadband-speed-measurements.pdf	19
Timothy B. Lee, <i>This is What a Monopoly Looks Like</i> , VOX (Sep. 17, 2014), http://www.vox.com/2014/9/17/6225869/comcast-this-is-what-a-monopoly-looks-like	17
White House, Presidential Executive Order on Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America	

(Jan. 8, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-streamlining-expediting-requests-locate-broadband-facilities-rural-america>..... 8

White House, Remarks by President Trump on Agricultural Innovation (June 22, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-agricultural-innovation> 7

YU-HSIN LIU, JEFFREY PRINCE, AND SCOTT WALLSTEN, DISTINGUISHING BANDWIDTH AND LATENCY IN HOUSEHOLDS WILLINGNESS TO PAY FOR BROADBAND SPEED, TECH POLICY INSTITUTE (2017), <https://techpolicyinstitute.org/wp-content/uploads/2017/08/Distinguishing-Bandwidth-and-Latency-in-Households-Willingness-to-Pay-for.pdf> 18, 23

FCC Documents

Applications of Charter Communications, Time Warner Cable, and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, 31 FCC Rcd. 6327 (2016)... 15, 16

COUNCIL OF ECONOMIC ADVISORS, THE WHITE HOUSE, ISSUE BRIEF, MAPPING THE DIGITAL DIVIDE (2015), https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf 11

FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 6, 19

Lifeline and Link Up Reform and Modernization, WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, ¶ 12 (2016).6, 10, 11

Restoring Internet Freedom, *Declaratory Ruling, Report & Order, and Order*, 33 FCC Rcd. 311 (2018)..... 25

INTEREST OF THE AMICUS CURIAE

Public Knowledge is a nonprofit technology policy organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. As part of that mission, Public Knowledge advocates on behalf of consumer interests for balanced and pro-competitive communications policies through grassroots efforts, educating policymakers in Washington, D.C. and around the country, participating in regulatory proceedings, and where appropriate, filing amicus curiae briefs in cases of significance. Communications law, and particularly matters relating to broadband access and consumer rights such as those at issue in the current case, are subject areas in which Public Knowledge has both strong interests and substantial expertise.

INTRODUCTION

Public Knowledge submits this brief to support New York's efforts to protect Charter's customers from deceptive practices. New York has assembled a compelling case showing that Charter's actions were intended to, and did mislead customers, are not preempted by federal law, and cannot be excused as mere puffery or marketing exaggerations.

In this brief Public Knowledge will explain the importance of consumer protection in this area. New York is enforcing generally-applicable consumer protection laws against Charter; these laws apply to business of all kinds that deceive consumers and rightly so. However, given the importance of broadband, the uncompetitive nature of the broadband market, and the technical nature of the product, the enforcement of these general laws with respect to broadband providers is even more vital.

Broadband is an essential service. As the gateway to the Internet, people rely on it to communicate with friends and family, for work, for entertainment, for shopping, and to access government, medical, and emergency information.

The broadband market also has characteristics that require a heightened level of government oversight and involvement. Like many other kinds of infrastructure, there is limited (or no) competition in the broadband market. Consumers cannot “shop around” for different providers, because there may not be any. In such circumstances, the broadband provider’s incentive is to maximize its profits in ways that may harm consumers. Customer service, equipment maintenance, and other matters can easily fall by the wayside, given that companies face no market pressure to improve.

The complex nature of broadband makes this worse. The service is described in terms that customers may only loosely understand. Does a typical customer understand the difference between “speed,” “bandwidth,” and “latency”? When problems arise, they can be difficult to pin down. A customer’s PC or device may be misconfigured. A WiFi signal may be weak because of metal in the walls or other interference. The cable modem may be outdated. A storm may have damaged the wires connecting a customer’s home to the broadband facility. The cable operator’s interconnection with a transit provider or CDN may be congested.

Or the actual Internet service the customer is trying to use may be suffering downtime or glitches. Some of the problems may be a broadband provider's fault, some not, but in either case a customer is often dependent on the broadband provider to identify problems. It is in this context that misleading marketing statements cannot be excused as puffery and are, on the whole, likely to be even more misleading than similar statements regarding other products.

New York's action is also important for other reasons. First, broadband consumer protection has long been shared between states and the federal government. Ignoring this history, Charter has attempted to argue that federal policies should be read broadly to preempt states. Public Knowledge will not address these arguments in detail in this brief, as New York and the court below have ably explained why they are specious. The court here has an opportunity to once again underscore both the legal basis and substantive importance of shared federal/state jurisdiction. Second, this shared jurisdiction is also important when, as now, FCC leadership shows little interest in protecting consumers itself. State authority to police deceptive business

practices is always important but becomes especially vital when the federal watchdog elects to abdicate its responsibilities. If New York is unable to protect its own broadband consumers in this circumstance, there is no reason to believe that the FCC will. Rather, no one will.

ARGUMENT

I. Broadband is Essential Infrastructure

Broadband has quickly evolved from a luxury product to essential infrastructure.¹ It is not just one entertainment or information service among many, but a “critical enabling technology.”² As the FCC has observed, “Much like telephone service a generation ago, broadband has evolved into the essential communications medium of the digital economy continuing to transform the landscape of America even more rapidly and pervasively than earlier infrastructure networks.”³ Thus, poor or inadequate Internet access puts individuals “at a significant disadvantage compared with their peers.”⁴ However, infrastructure markets

¹ See BRETT M. FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 4, 317 (2013).

² JAMES VOLLMAN & ANTHONY CARNEVALE, *NATIONAL BROADBAND PLAN BROADBAND ACCESS FOR ALL AMERICANS FACILITATING AN EFFICIENT AND EFFECTIVE LABOR MARKET* 1 (2009), <https://cew.georgetown.edu/wp-content/uploads/2009/12/09-51-12-04-2009-Anthony-P.-Carnevale-7020351160.pdf>.

³ *Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 11-42, 09-197, 10-90, *Third Report and Order, Further Report and Order, and Order on Reconsideration*, 31 FCC Rcd 3962, ¶ 12 (2016) [hereafter *Lifeline Order*] (citing FCC, *CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN* 3 (2010), <http://www.broadband.gov/plan>).

⁴ NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION AND ECONOMICS AND STATISTICS ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, *EXPLORING*

have a number of characteristics—notably, a tendency toward monopoly, with all its attendant difficulties—that make clear that “government intervention in one form or another”⁵ is needed to protect users. The basic consumer protection New York is engaged in with respect to Charter is an important part of this.

Policymakers now almost unanimously recognize that broadband is important to nearly every aspect of life. President Trump has extolled the virtues of access to “great, great broadband,”⁶ and “ensur[ing] that these students have the broadband Internet access they need in order to succeed and thrive in this new and very modern and very changed economy and world.”⁷ His executive order on broadband deployment notes

THE DIGITAL NATION: AMERICA’S EMERGING ONLINE EXPERIENCE 43 (2013), http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf.

⁵ Frischmann at 10.

⁶ Joel Ebert and Joey Garrison, *President Trump Signs Executive Order on Rural Broadband Internet*, TENNESEAN (Jan. 8, 2018), <https://www.tennessean.com/story/news/politics/2018/01/08/trump-farm-bureau-federation-nashville/1014464001>.

⁷ White House, Remarks by President Trump on Agricultural Innovation (June 22, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-agricultural-innovation>.

that “Americans need access to reliable, affordable broadband internet service to succeed in today’s information-driven, global economy.”⁸ This sentiment is widely shared. President Obama said that “today, high-speed broadband is not a luxury, it’s a necessity,”⁹ and President George W. Bush called for “universal, affordable access to broadband technology.”¹⁰

Various government reports have confirmed these Presidential statements and underscored the need for fast, reliable broadband. A Department of Commerce report found,

Access to computers and a broadband Internet subscription has become increasingly important to Americans in carrying out their day-to-day lives. This technology is used for a variety of activities including accessing health information, online banking, choosing a place to live, applying for jobs, looking up government services, and taking classes. Access to broadband

⁸ White House, Presidential Executive Order on Streamlining and Expediting Requests to Locate Broadband Facilities in Rural America (January 8, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-streamlining-expediting-requests-locate-broadband-facilities-rural-america>.

⁹ Obama White House Archive, Remarks by the President on Promoting Community Broadband (Jan. 14, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/01/14/remarks-president-promoting-community-broadband>.

¹⁰ Alex Keto, *Everyone Should Have Access to Broadband, Bush Says*, Wall Street Journal (Mar. 26, 2004), <https://www.wsj.com/articles/SB108032728080366544>.

Internet also has positive effects on individual empowerment, economic growth, and community development.¹¹

Similarly, the NTIA noted,

[t]he Internet plays a vital role in most Americans' lives, and is increasingly becoming a key tool for job searches and training, for research on health issues, and for active participation in our society. Since its commercialization in the 1990s, the Internet has brought sweeping changes in the way Americans communicate, gather information, conduct commerce, and entertain themselves. Widespread Internet use provides numerous societal benefits, including increased civic engagement, economic growth, and enhanced productivity.¹²

Or again, the FCC:

Accessing the Internet has become a prerequisite to full and meaningful participation in society. For those Americans with access, the Internet has the power to transform almost every aspect of their lives, including their ability to stay in contact with work, friends, and family; to stay abreast of news, to monitor important civic initiatives, to look for a new home, or to make essential financial decisions. Households with school-

¹¹ CAMILLE RYAN AND JAMIE M. LEWIS, CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, AMERICAN COMMUNITY SURVEY REPORTS, COMPUTER & INTERNET USE IN THE UNITED STATES: 2015 1 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf>.

¹² NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION AND ECONOMICS AND STATISTICS ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, EXPLORING THE DIGITAL NATION: AMERICA'S EMERGING ONLINE EXPERIENCE 1 (2013), http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf.

children access the Internet to research issues, check assignments, and complete homework, while people with critical or even routine health needs use the Internet to access information about their condition and stay in touch with health care providers.¹³

As the National Housing Conference sums up, “Most of us use the Internet in all facets of our lives: for work, education, medical care, entertainment, shopping, and innumerable daily tasks.¹⁴ To focus on just one of those points, it is impossible to underestimate how important access to the Internet is for people looking for jobs. The days of circling brief listings in the newspaper’s classified ads are long gone—most jobs are advertising primarily, or exclusively, online. Job-seekers use the Internet to look for jobs and find out information about potential employers,¹⁵ and people without reliable Internet access may not even be able

¹³ *Lifeline Order* ¶ 1 (2016).

¹⁴ National Housing Conference, NHC Connectivity Working Group, *Broadband Connectivity in Affordable Housing, Policy Recommendations* (2015), https://www.ntia.doc.gov/files/ntia/national_housing_conference_boc.pdf.

¹⁵ *Lifeline Order* ¶ 15 (citing CONNECTED NATION, *THE 2012 JOBS AND BROADBAND REPORT: NATIONAL PROJECTIONS ON HOW AMERICAN BUSINESSES USE COMPUTERS AND BROADBAND TO GROW, HIRE, AND THRIVE 2* (2012), http://www.connected-nation.org/sites/default/files/connected-nation/files/cn_biz_whitepaper2012_final.pdf, and noting that in 2012, over 2.5 million U.S. businesses used the Internet

to find out about, or apply for, jobs. Bearing this out, the Pew Research Center found that perhaps 79 percent of Americans used the Internet to look for a job sometime within the past two years,¹⁶ and “[o]ne-third of recent job seekers have reported that the Internet was the most important resource available in finding employment.”¹⁷ As the White House Council of Economic advisors put it in 2015, “[c]losing the digital divide can increase productivity and open ladders of opportunity.”¹⁸

Importantly these benefits are not assured simply because a person has broadband, and a computer or device to access it with. A broadband connection must be reliable as well.¹⁹ Without dependable broadband that functions as it is supposed to, a user cannot look on YouTube

to advertise job openings or accept job applications, including approximately 139,000 businesses that only accept online job applications).

¹⁶ *Lifeline Order* ¶ 1 (citing AARON SMITH, PEW RESEARCH CENTER, SEARCHING FOR WORK IN THE DIGITAL ERA 2 (2015), http://www.pewinternet.org/files/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf (finding the Internet as a top resource for many of today’s job hunters)).

¹⁷ *Lifeline Order* ¶ 1.

¹⁸ COUNCIL OF ECONOMIC ADVISORS, THE WHITE HOUSE, ISSUE BRIEF, MAPPING THE DIGITAL DIVIDE 1 (2015), https://www.whitehouse.gov/sites/default/files/wh_digital_divide_issue_brief.pdf.

¹⁹ National Housing Conference, NHC Connectivity Working Group, Broadband Connectivity in Affordable Housing, Policy Recommendations 2 (2015), https://www.ntia.doc.gov/files/ntia/national_housing_conference_boc.pdf.

for home repair videos, might not be able to access an employment website, or may not be able to email medical records to a medical office.

High-bandwidth, low-latency broadband connections are not just important for accessing video entertainment or for gaming (though the importance of these functions should not be underestimated). A user might need to use remote desktop software to access work email or documents, or to use Skype to conduct a video job interview. As the capabilities of broadband increase the demands on it increase as well, and users feel pressure to upgrade their broadband connections from time to time.

State consumer enforcement can help ensure that customers actually get what they are paying for.

Finally, the benefits of reliable broadband are not limited just to individuals, but redound to the economy at large. Having widely-deployed, fast, reliable broadband “can impact our nation’s job base, productivity, competitiveness, economic growth, and ultimately, our

standard of living.”²⁰ New York’s action to protect broadband consumers is not just about righting the wrongs that particular users may have suffered, but about securing New York’s place in the national and global economy.

II. Because the Broadband Market is Uncompetitive, It Requires Greater Attention from Consumer Protection Authorities

Broadband is an essential and basic service, but broadband markets are imperfect. In particular, they are typically not very competitive,²¹ which means among other things that (unless consumer protection authorities step in) providers can get away with offering poor service, selling outdated equipment, and charging excessive rates.

There are many causes for this. In general, markets with high fixed capital costs and low marginal costs tend toward concentration or

²⁰ NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, *DIGITAL NATION: EXPANDING INTERNET USAGE* 28 (2011), http://www.ntia.doc.gov/files/ntia/publications/ntia_internet_use_report_february_2011.pdf.

²¹ John Bergmayer, *We Need Title II Protections in the Uncompetitive Broadband Market*, PUBLIC KNOWLEDGE (Apr. 26, 2017), <https://www.publicknowledge.org/news-blog/blogs/we-need-title-ii-protections-in-the-uncompetitive-broadband-market> (collecting various figures).

monopoly, since established providers can spread their costs over many customers and selectively lower prices wherever a new provider tries to compete. Getting access to rights-of-way, permits to dig up streets, and access to utility poles can be a difficult undertaking. Incumbents lobby against new laws that make it easier for new entrants²² or for communities to build out their own broadband. And, investors may simply not be willing to risk their money on funding new competition, especially when it might disrupt the large profit margins unchallenged monopolists can enjoy.

Whatever the cause, consumers, and the state of New York, face a stark reality. As the FCC found when analyzing the merger between Time Warner and Charter that led to today's company (referred to as "New Charter"),

Sixty-six percent of New Charter customers seeking [broadband] with at least a 25 Mbps download speed will have no alternative option at that speed. Even at a slower speed, the competitive landscape is sparse—twenty-four percent of New

²² See Jason Koebler, *How Big Telecom Gets Away with Rewriting America's Laws*, MOTHERBOARD (Apr. 6, 2016), https://motherboard.vice.com/en_us/article/z43493/how-the-telecom-lobby-rewrites-americas-laws.

Charter customers will lack any alternative for [broadband] with at least a 10 Mbps download speed. Only eleven percent of New Charter customers would have more than one alternative offering 10 Mbps or faster service. Between this lack of alternatives and high switching costs, New Charter is unlikely to lose many [broadband] subscribers if the company were to adopt [unfavorable] retail terms ...²³

It bears emphasizing that even though a customer may have alternative options for Internet access in the broadest sense, except for those customers lucky enough to have a fiber alternative,²⁴ these are not adequate substitutes for Charter's service.²⁵ (Nor are such alternatives

²³ Applications of Charter Communications, Time Warner Cable, and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, 31 FCC Rcd. 6327, ¶ 67 [hereafter *FCC Charter Order*] (2016). See also *FCC Charter Order* ¶ 60 (“We observe that the state of local competition for fixed BIAS is already poor for most customers at all but the slowest download speeds, and the transaction will not alter that competitive landscape.”)

²⁴ *FCC Charter Order* ¶ 57 (“Evidence in the record confirms that fiber, FTTP, and FTTN are reasonable substitutes for cable [broadband], while other technologies are not.”).

²⁵ *FCC Charter Order* ¶ 53 (“[B]oth the empirical and economic evidence demonstrate that consumers find that legacy DSL, satellite, and mobile wireless are generally not close substitutes for the Applicants’ cable [broadband] offerings, while fiber to the premises (FTTP) and, perhaps to a lesser extent, fiber to the node (FTTN) [broadband] are reasonable substitutes.”)

likely to emerge soon.²⁶) For example, many consumers already subscribe to both mobile Internet access and fixed home service. That consumers purchase both products already demonstrates that mobile is not a substitute for fixed service²⁷—and an analysis of the relative costs of using both services, which are billed in different ways, provides part of the reason why. The FCC calculated for instance that “it would cost an average Netflix subscriber using the [Charter’s] cable [broadband] many hundreds of dollars each month to view that same Netflix programming over a wireless provider.²⁸

The lack of competition is also borne out by low churn numbers—because switching providers is either difficult or impossible, very few people do it.²⁹ This is not a characteristic of a market with healthy competition.

²⁶ *FCC Charter Order* ¶ 63 (“We find that it is unlikely that other competitors will emerge in a timely manner.”).

²⁷ *FCC Charter Order* ¶ 56.

²⁸ *FCC Charter Order* ¶ 56.

²⁹ *See FCC Charter Order* ¶ 64 (“New Charter’s ability to adopt terms on residential [broadband] that could harm OVDs or other edge providers is enhanced by the low risk of subscribers switching to other providers if it did so.”); ¶ 65 (“[broadband]

One result of a lack of competition is poor customer service. As

Timothy B. Lee writes,

One of the great things about competition is it gives companies a sense of urgency about customer service. Bad customer service causes customers to switch to a competitor, which shows up in the company's bottom line.³⁰

Monopolies do not have this urgency. As a result, “monopolies let customer service problems fester.”³¹ When poor customer service slides into outright deception, as New York alleges in this case, consumer protection authorities must step in.

III. Because Consumers Are at an Informational Disadvantage With Regard to Broadband, They Require Greater Attention From Consumer Protection Authorities

Consumers value broadband speed, as revealed by their buying decisions. Yet they typically have little information about the real-world speeds of various providers, and little understanding of what those

subscribers infrequently switch providers.”); ¶ 66, 67 (“Switching [broadband] providers can be a difficult consumer experience...A lack of alternatives at the local level also likely leads to low churn among ... subscribers.”).

³⁰ Timothy B. Lee, *This is What a Monopoly Looks Like*, VOX (Sep. 17, 2014), <http://www.vox.com/2014/9/17/6225869/comcast-this-is-what-a-monopoly-looks-like>.

³¹ *Id.*

speeds mean for their actual use. Typically, consumers rely on broadband providers themselves for this information. In this environment, consumer protection authorities are important to ensure that providers do not use misleading metrics to deceive consumers and charge them more than they should.

Speed sells. Consumers all over the state of New York and the United States find themselves paying higher prices for supposedly higher speeds. Study after study shows that customers “highly value bandwidth enhancements,” and are thus willing to pay more for such improvements.³² As MIT researchers have written,

Broadband speed has emerged as the single most commonly cited metric for characterizing the quality of broadband offerings. There are now a number of sites and organizations that measure the speed (and other characteristics) of a user's

³² YU-HSIN LIU, JEFFREY PRINCE, AND SCOTT WALLSTEN, DISTINGUISHING BANDWIDTH AND LATENCY IN HOUSEHOLDS WILLINGNESS TO PAY FOR BROADBAND SPEED, TECH POLICY INSTITUTE 38 (2017), <https://techpolicyinstitute.org/wp-content/uploads/2017/08/Distinguishing-Bandwidth-and-Latency-in-Households-Willingness-to-Pay-for.pdf> ; *see also* RICHARD PETERSON, PAYING FOR SPEED: MEASURING WILLINGNESS TO PAY IN U.S. BROADBAND MARKETS, UNIVERSITY OF COLORADO BOULDER 33 (2017), <https://www.colorado.edu/economics/gradplacement/PetersonJMP.pdf> (“consumer’s valuations of download speed increase as speeds increase, although consumers are willing to pay less for each additional Mbps”).

broadband service.... The data generated by such tests is often aggregated and reported in the trade press and in government reports and plays a role both in policy formulation and in decision-making by individual consumers.³³

At the same time, however, customers typically have relatively little information on broadband speed, much less other important metrics, such as latency. The FCC's National Broadband Plan observed,

Fixed broadband consumers ... have little information about the actual speed and performance of the service they purchase. Marketing materials typically feature “up to” peak download and upload speeds, although actual performance experienced by consumers is often much less than the advertised peak speed. This disparity confuses consumers and makes it more difficult for them to compare the true performance of different offers. That hinders consumer choice and competition. It also reduces incentives for service providers to invest in better performing networks.³⁴

Additionally, an FCC working paper found that, of customers who switched broadband provider, “43% said the advertised connection speed was the major reason behind the choice.”³⁵ The emphasis here

³³ STEVE BAUER, DAVID CLARK, AND WILLIAM LEHR, UNDERSTANDING BROADBAND SPEED MEASUREMENTS 5 (2010), <https://www.measurementlab.net/publications/understanding-broadband-speed-measurements.pdf>.

³⁴ FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN 44 (2010) <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

³⁵ National Broadband Plan 44.

should be on “advertised.” Because customers make purchasing decisions based on broadband speed—that is whether to change provider (assuming an alternative is available) or to upgrade to a higher tier—broadband providers market the speed of their services heavily and may have a tendency to exaggerate or deceive.

However, despite the fact that consumers value broadband speed highly, they do not necessarily have the background to understand precisely what broadband speed is—or the ability to find out when (or by how much) their ISPs are under-delivering. Consumer protection authorities can and should step in to fill that gap.

Recent research confirms that users do not fully understand broadband speed even though they value it highly. The U.K.’s Advertising Standards Authority (ASA) conducted an important study focused on how consumers understand broadband advertising. After conducting thorough surveys of consumers of varying levels of knowledge, ASA concluded that the “growing concern that the potential difference between

advertised broadband speeds and the speeds that customers actually receive might result in consumers being misled.”³⁶ The ASA further found, among other things, that:

- “Those with less knowledge did not always understand the difference between speed and reliability.”³⁷
- “[Surveyed users] with more broadband speed knowledge understand that there are factors that can impact on speeds achieved but typically anticipate that they will achieve a speed close to the speed advertised.”³⁸
- “Although varied across typologies, overall levels of knowledge and awareness of broadband speeds was low across participants. Many did not understand what speed they needed to carry out their online tasks.”³⁹

These findings are highly relevant to New York’s case here.

A 2015 study on consumer understanding of Internet speed related to time-saving metrics by Bart De Langhe and Stephano Puntoni is also insightful. The study evaluates consumers’ understanding of an

³⁶ POLLY HOLLINGS AND CAROLINE ROPER, QUALITATIVE RESEARCH FOR BROADBAND SPEED, REPORT FOR THE ADVERTISING STANDARDS AUTHORITY [*hereafter ASA Report*] 7-8 (2016), <https://www.asa.org.uk/asset/592CBE75-E3A7-43FE-835A53C437035CAB>.

³⁷ *ASA Report* 6.

³⁸ *ASA Report* 7.

³⁹ *ASA Report* 22.

increase in broadband speed in relation to whether or not they were willing to pay an increased price for varying higher speeds. The study further analyzes consumer understanding of Internet speeds when described using technical metrics (*e.g.* 25 Mbps, as most ISPs advertise) versus time metrics (320 seconds to download 1 GB).

Langhe and Puntoni found that consumers were more willing to pay for higher speeds when they were given time metrics over technical metrics. They write that when “information about time savings [was] provided through product experience or through metrics that linearly related to time savings, consumers value[d] time savings... and [were] willing to spend less”⁴⁰ when broadband was described in other terms. The authors note that their study confirms the idea that most marketing “tend[s] to start from the assumption that consumers can easily and accurately translate changes in the common [technical] metric to changes in relevant benefits. However, our findings suggest that this

⁴⁰ BART DE LANGHE AND STEFANO PUNTONI, PRODUCTIVITY METRICS AND CONSUMERS’ MISUNDERSTANDING OF TIME SAVINGS 22 (2015), https://www.colorado.edu/business/sites/default/files/attached-files/jmr_2016_de_langhe_and_puntoni.pdf.

assumption is incorrect.”⁴¹ Thus, despite the fact that customers tend to find diminishing returns for broadband speed over a certain threshold,⁴² ISPs may be able to upsell consumers on more expensive plans by advertising broadband primarily in terms that customers understand less. Langhe and Puntoni note that because consumers do not “realize that [technical] increases imply ever-smaller time savings...companies profit from the prominence of [technical] metrics in today’s marketplace.”⁴³

Consumers have neither the time nor the energy to become experts on the technical and economic realities of broadband service. In fact, as with the customer preference for flat rates over metered plans, users can find the “mental accounting” necessary to keep track of the details of broadband service tiring in itself.⁴⁴ Yet, they still must make buying decisions, so they go with the information they have, typically carrier-provided and—as New York demonstrates—often misleading.

⁴¹ De Langhe and Puntoni 24.

⁴² Liu, Prince, and Wallsten 38; Peterson 33.

⁴³ De Langhe and Puntoni 24

⁴⁴ Andrew Odlyzko, Bill St. Arnaud, Erik Stallman, and Michael Weinberg, KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE 41-43 (2012), https://www.publicknowledge.org/assets/uploads/documents/UBP_paper_FINAL.pdf.

IV. State Enforcement Plays an Important Role in Protecting Consumers

States are and should continue to be free to enforce their generally-applicable consumer protection laws against companies of all kind, including broadband companies. There are many advantages to the federal system, which allows state and federal authorities to work in complementary ways to promote the general welfare. As the Supreme Court wrote,

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 US 452, 457-58 (1991). This is all the more important in the case of broadband when, as now, the federal policy framework lacks important consumer protections.⁴⁵ Various states, for instance, have introduced or proposed new consumer protections in light of the FCC’s rollback of its Open Internet rules.⁴⁶ Unlike in that case, the enforcement of longstanding consumer protection law against broadband providers does not require a new policy framework or legislation. However these actions underscore states’ continuing important role in the broadband marketplace.

V. Charter’s Statements Do Not Amount to “Puffery”

Because consumers rely on statements by their broadband providers and because of other characteristics of the broadband market described above, it is all the more important that this Court prevent Charter from excusing its deceptive advertising as “mere puffery.” Puffery is

⁴⁵ Restoring Internet Freedom, *Declaratory Ruling, Report & Order, and Order*, 33 FCC Rcd. 311 (2018).

⁴⁶ See National Conference of State Legislatures, Net Neutrality Legislation in States, <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx>.

either “a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion” or “an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying.” *Time Warner Cable v. DirecTV*, 497 F.3d 144, 160 (2d Cir. 2007) (internal citations omitted). A statement is not puffery if it can be proven true or false. *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 644 (S.D.N.Y. 2011); *Bader v. Siegel*, 238 A.D.2d 272, 272 (N.Y. App. Div. 1997); see also *Lipton v. Nature Co.*, 71 F.3d 464 (2d Cir. 1995). Spectrum-TWC’s specific statements guaranteeing speeds “up to’ certain maximum” megabits per second (Mbps), “absolutely no buffering” and “that the promised speeds would be delivered anywhere in their homes, at any time, and on any number of devices, regardless of whether the subscriber connected by wire or wirelessly,” (The People of The State of New York v. Charter Commc’ns, 2018 N.Y. Slip Op. 30253(U) [Sup. Ct. NY Cnty. 2018] [hereafter Trial Order]), are precisely the sorts of statements that can be proven true or false and upon which a reasonable buyer would be justified in relying.

A. Reasonable Buyers Rely on Promised Speed When Selecting an Internet Service Provider.

Even though advertisements using “up to” language do not guarantee individual outcomes, “[s]uch express claims are presumed to be material, i.e. likely to affect a consumer’s choice or conduct regarding a product, and, within reason, to mean what they say.” *Fed. Trade Comm’n v. Febre*, No. 94 C 3625, 1996 WL 396117, at *2 (N.D. Ill. July 3, 1996). New York courts also recognize that reasonable consumers routinely rely on “up to” statements in advertisements and offer letters. *E.g. Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 324 (N.Y. 2002) (“[C]ontrary to defendants’ representations, the service was slow and unreliable . . . [T]he DSL connection rarely, if ever approached the high speed expressly represented by defendants.”) (internal citations omitted); *People v. Applied Card Sys.*, 27 A.D.3d 104, 108 (N.Y. App. Div. 2005) (holding that, where a credit card company promised a \$1,000 or \$2,500 credit limit but provided a credit limit that was less than \$400, “a reasonable consumer would be misled in believing that the ‘up to’ amount boldly displayed on the solicitation letter was representative of a likely amount that a consumer would receive.”).

This is with good reason. Crediting “up to” statements as indicative of the likely performance a consumer is to experience comports with consumer expectations. While participants in the ASA Study “expected companies to companies to promote their products and services in the most positive light . . . they did not expect to be misled.”⁴⁷ Indeed, only those with “more knowledge anticipated that they would not receive the top speed advertised,” and they assumed they “would achieve close to it.” Less savvy consumers simply “overlooked the phrase ‘up to.’”⁴⁸ Like the consumers in *Applied Card*, who expected credit limits closer to \$1,000 or \$2,500 and who were surprised when they received substantially lower \$400 credit limits, TWC-Spectrum consumers expecting speeds of “up to” twenty to 300 Mbps were likely surprised to learn that the modems TWC-Spectrum provided them with could not even reliably attain twenty Mbps—much less three hundred—and that TWC-Spectrum failed to sufficiently maintain its network to make the promised speeds possible. (Trial Order 2).

⁴⁷ ASA Study 5.

⁴⁸ ASA Study 6.

This case is distinct from *Maloney v. Verizon Internet Services*, a case cited by Charter. There, consumers' Internet connections failed to attain the promised speeds due to consumer-specific reasons, including "computer configuration, the condition of [consumers'] telephone line[s], and the wiring inside [consumers'] location[s]." 413 Fed. Appx. 997, 999 (9th Cir. 2011). Moreover, Verizon provided a disclaimer informing consumers that their Internet might not reach advertised speeds for the foregoing reasons. By contrast, here TWC-Spectrum, through its failure to provide adequate modems and to maintain its network, was responsible for the failure to meet the promises made to consumers. *See Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (N.Y. 2002) ("Plaintiffs assert that the service they purchased was defective due to malfunctions largely or wholly within defendants' control. They further assert that defendants knew this to be the case and that defendants' promotional representations were therefore knowingly deceptive. As pleaded, this is sufficient.")

Fink v. Time Warner Cable, cited by Charter, is similarly inapposite. In that case, the District Court for the Southern District of New

York ruled twice against plaintiffs who alleged that they “did not receive high-speed Internet service that was ‘up to 3 times the speed on most standard DSL packages and up to 100x faster than dial up’” and that they lacked the promised “always-on connection,” because they were only unable to access particular sites, such as Skype, on the Internet; the Plaintiffs failed to establish that their “overall Internet connections did not provide the promised speeds.” *Fink v. Time Warner Cable*, 837 F. Supp. 2d 279, 283 (S.D.N.Y. 2011) (emphasis original); see also *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 644 (S.D.N.Y. 2011). By contrast, in the current cases TWC-Spectrum’s customers were unable to achieve close to the promised speeds across their overall Internet connections, because TWC-Spectrum declined to provide them with modems capable of achieving those speeds. Indeed, this case is more similar to *Walter v. Hughes Communications* and *Goshen*, both cited favorably by the Fink court. In *Walter*, individuals “who repeatedly monitored the speed of their overall connections alleged that their average connection speeds were much slower than the maximum speed advertised by the defendant . . .” *Fink*, 837 F. Supp. 2d at 284 (citing

Walter, 682 F. Supp. 2d 1031, 1043-44 (N.D. Cal. 2010)). And, in *Goshen*, as here, “plaintiff’s allegations pertained to their Internet as a whole.” *Fink*, 837 F. Supp. 2d at 284 (citing *Goshen*, 98 N.Y.2d at 324).

Perplexingly, the only argument Charter mounts to suggest that its promise of “no buffering” is mere puffery is that “because no Internet access technology can have literally no lag or buffering, a reasonable customer would understand these claims to convey that TWC’s network . . . has no noticeable buffering or slowdowns.” (Charter Br. at 57). This argument is ill-placed when consumers complained of noticeable buffering and slowdowns. Whether the threshold is no buffering or no noticeable buffering, it is clear both the statement can be proven true or false, *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 644 (S.D.N.Y. 2011); *Bader v. Siegel*, 238 A.D.2d 272, 272 (N.Y. App. Div. 1997); *see also Lipton v. Nature Co.*, 71 F.3d 464 (2d Cir. 1995), and that TWC-Spectrum failed to live up to this promise.

B. Charter’s Case Comparisons are Inapposite.

Charter string cites a number of cases to provide examples of puffery. First, each of the claims these cases points to is subjective and/or exaggerated and therefore distinct from TWC-Spectrum’s precise and

verifiable promises of speeds “up to’ certain maximum” megabits per second (Mbps), “absolutely no buffering” and “that the promised speeds would be delivered anywhere in their homes, at any time, and on any number of devices, regardless of whether the subscriber connected by wire or wirelessly,” (Trial Order 2, 4). See *Fink*, 810 F. Supp. 2d at 644 (“terms like ‘blazing fast’ and ‘fastest, easiest [way to get online]”); *Serrano v. Cablevision Sys.*, 863 F. Supp. 2d 157, 167 (E.D.N.Y. 2012) (“High Speed Internet,” “Faster Internet,” “blazing fast speed,” and “Optimum Online’s lightning-fast Internet access takes the waiting out of the Web”); *Nikkal Indus. v. Salton*, 735 F. Supp. 1227, 1231 (S.D.N.Y. 1990) (“it’s better!”); *Hubbard v. Gen. Motors*, No. 95 Civ. 4362, 1996 WL 274018, at *7 (S.D.N.Y. 1996) (Chevrolet trucks are “like a rock,” “popular,” and “the most dependable, long-lasting trucks on the planet”); *Simon v. Cunard Line*, 75 A.D.2d 283, 288 (1st Dep’t 1980) (“the greatest ship in the world” and “everything about the Queen lives up to the high standards you would expect aboard the greatest ship in the world”).

For example, in *Nikkal*, a case brought under the Lanham Act, not New York state law, 735 F. Supp. 1227, 1235, the district court for the

Second Circuit reasoned that Salton’s advertising claims about its ice cream maker were puffery, because “there is no basis, other than a subjective one, upon which to determine how firm ice cream must be to be considered ‘acceptable.’” *Id.* at 1234. Similarly, in *Hubbard*, the challenged advertising claims, “that Suburbans are ‘like a rock’, ‘popular’ and ‘the most dependable, long-lasting trucks on the planet’, are generalized and exaggerated claims . . . [T]hese statements make no reference whatsoever to the type or quality of the vehicle’s braking system.” 1996 WL 274018, at *7.

By contrast, TWC-Spectrum’s claims were not subjective, generalized, or exaggerated. Rather, they were objective, specific, and verifiable. Did the speeds approach the promised Mbps? Was there buffering? Were the promised speeds (or close to them) delivered anywhere in the home, at any time, on any number of devices, wirelessly and by wire? These claims are more analogous to the claims about the quality of a vehicle’s braking system, which the *Hubbard* court strongly suggested would not be considered puffery. *Id.*

In fact, TWC-Spectrum’s claims have more in common with DirecTV’s advertisements in *Time Warner Cable v. DirecTV*, 497 F.3d 144

(2d Cir. 2007). In that case, DirecTV’s television ads, which stated, “You’re just not gonna get the best picture out of some fancy big screen TV without DIRECTV,” made “the explicit assertion that it is impossible to obtain ‘the best picture’ . . . from any source other than DIRECTV.” Although DirecTV made the sort of sweeping statement TWC-Spectrum made when it promised “no buffering” and quality service throughout the home, on multiple devices, wired, and wirelessly, the Second Circuit found that DirecTV’s statement was “flatly untrue,” because it could “be proven literally false.” *Id.* at 154. It is similarly flatly untrue that consumers experience no buffering and that TWC-Spectrum delivers the promised speeds anywhere in the home, at any time, and on any number of devices, regardless of whether the subscriber connected by wire or wirelessly. This, too, can “be proven literally false.” *Id.*

Even if the statements in these cases were otherwise similar to TWC-Spectrum’s, Charter has cherry-picked quotations in cases that are otherwise not on point. For example, in *Simon*, Charter quotes dicta in a case that otherwise pertains to class certification. 75 A.D.2d at 288. In fact, the *Simon* court does not even characterize Cunard’s statements

as puffery, but rather states equivocally that they “may be considered” puffing. *Id.*

Serrano is similarly inapposite, because “the business practice at issue—Cablevision’s discretionary restriction of bandwidth or suspension of internet service—was fully disclosed in the Terms of Service and Acceptable Use Policy.” 863 F. Supp. 2d at 167. Whether or not the advertising used constituted puffery is an afterthought for the court. *Id.* ([T]o the extent that Plaintiffs allege . . .”). TWC-Spectrum does not argue that it included a similar disclaimer in its terms of service.

C. Charter’s Reliance on the SamsKnows Test Ignores the Context in which Individuals Consider Internet Speed and Reliability.

Charter also argues that its promises of speed and reliability, if not puffery, are accurate. It cites the SamKnows test, which “install[s] a custom piece of hardware with specially designed pre-loaded test software . . . behind their modem” to test Internet speeds and which found that TWC-Spectrum achieved the promised speeds. (Charter Br. 11). But, this ignores the maxim that “[f]undamental to any task of interpretation is the principle that text must yield to context.” *Time Warner Cable*, 497 F.3d at 157. The *Time Warner Cable* court referenced *Avis Rent*

A Car System v. Hertz, 782 F.2d 381 (2d Cir. 1986). In that case, Hertz advertised that it had “more new cars than Avis has cars.” 497 F.3d at 156 (citing 782 F.2d at 381-82). This was not true. “Hertz only had about 97,000 [new] cars, whereas Avis had a total of approximately 102,000 cars. However, 6776 cars in Avis’s fleet were in the process of being sold” and were no longer available to rent. *Id.* The Second Circuit recognized that, while Hertz’s advertisement was technically false, both Hertz and Avis “made their reputations as companies that rent cars, not companies that sell or merely own cars’ . . . Taking this context into consideration . . . the claim . . . could only be understood as referring to the companies’ rental fleets.” *Id.* at 156-57 (citing 782 F.2d at 385). Similarly, Internet subscribers expect to be able to reach the Internet at the promised speeds in their own homes, using the equipment provided by their ISP. Whether or not an ISP meets the promised speeds using an artificial test that does not include the ISP-provided modem is irrelevant to their experience and buying decisions.

D. Even if Puffery is Present, This Does Not Excuse Deception

Charter concedes the assumption that “the trial court was correct that a handful of TWC’s” promises “are actionable.” (Charter Br. at 54). It then seems to argue that if others of its claims were puffery, they shield it from liability for the misleading statements. This turns the traditional rule on its head. Rather, when there is a combination of puffery with “concrete, factual statements and phrases . . . [the] fact that puffery is present cannot serve as a shield for the advertisements’ deceptive factual representations.” *FTC v. National Urological Group*, 645 F. Supp. 2d 1167, 1206 (N.D. Ga. 2008). Charter should be liable for promises of speeds “up to’ certain maximum” Mbps, “absolutely no buffering” and “that the promised speeds would be delivered anywhere in their homes, at any time, and on any number of devices, regardless of whether the subscriber connected by wire or wirelessly,” (Trial Order 2, 4), even if other statements are considered puffery.

VI. Conclusion

This Court should dismiss Charter's appeal or affirm the Supreme Court's decision denying Charter's motion to dismiss.

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