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In the Matter of the Alleged Failure of Altice, USA Inc., to Comply with Certain Provisions of the New Jersey Cable Television Act, N.J.S.A. 48:5a-1, Et Seq., and the New Jersey Administrative Code, N.J.A.C. 14:18-1, et seq.	**Before the New Jersey Supreme Court** **Docket No.:086408** On Appeal from a Decision from the Appellate Division Docket No.: A-001269-19

MERIT BRIEF OF PETITIONER APPELLANT NEW JERSEY DIVISION OF RATE COUNSEL

STATE OF NEW JERSEY
DIVISION OF RATE COUNSEL (NJDRC)
Brian O. Lipman, Esq.
Director
Maria T. Novas-Ruiz,
Assistant Deputy Rate Counsel
140 EAST FRONT ST.,4TH FLOOR
PO BOX 003
TRENTON, NEW JERSEY 08625
(609)984-1460
blipman@rpa.nj.gov
mnovas-ruiz@rpa.nj.gov
Attorneys for Appellant Petitioner, NJDRC

On the Brief:
Brian O. Lipman, (No. 026711995)
Maria T. Novas-Ruiz, (No.003591991)

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I. The Appellate Division decision holding that the Cable Communications Policy Act of 1984 ("Cable Act")preempts state consumer protection regulation under N.J.A.C. 14:18-3.8 raises an important question of law that is in conflict with a First Circuit Court decision in Spectrum Ne., LLC v. Frey, 22 F. 4th 287 (First Circuit 2022)that held a similar Maine statute requiring cable operators to grant subscribers pro rata credits or rebates for the days remaining in the billing period after the termination of cable service is neither rate regulation nor preempted by the Cable Act.

II. Unless the Court clearly establishes a high threshold for implied preemption, federal agencies and lower courts may preempt state laws broadly with little tether to statutory text and as in the case herein endanger longstanding vital consumer protections.

STATEMENT OF THE CASE

Petitioner Appellant, the State of New Jersey Division of Rate Counsel ("Rate Counsel") is tasked by statute with representing and protecting the interest of ratepayers in utility matters under N.J.S.A. 52:27EE-49 Rate Counsel was a party participant before the Board and a Respondent in the Appellate Division matter below,(Docket Number A-001269-19). The appeal before this Court arose from the Appellate Division decision in favor of Altice holding that the New Jersey Board of Public Utilities' regulation, under N.J.A.C. 14:18-3.8 (c) requiring that cable operators grant subscribers prorated billing for the days remaining in the

billing period at termination of cable service is rate regulation and thus preempted under the Cable Act. The Appellate Division decision relied heavily on the underlying rational of the New Jersey District Court's decision in a matter that was filed by Altice almost simultaneously with the appellate matter seeking injunction of the Board's Order requiring Altice among other things pro rate customer bills upon termination of cable service as required under N.J.A.C. 14:18-3.8 (c). The New Jersey District Court decision, which relied heavily upon the Maine District Court decision subsequently overruled by the First Circuit, was subsequently vacated for want of jurisdiction under Younger v. Harris, 401 U.S. 37 (1971).

Petitioner Appellant Rate Counsel submits the Appellate decision is in error. If regulations similar to N.J.A.C. 14:18-3.8 in purpose, and intent were in fact deemed rate regulation, there would exist a regulatory gap where neither state franchising authorities nor federal agencies would be able to require cable operators to provide customer credit for service outages or make customers whole under negative option billing situations, important consumer protections that only affect the manner of billing which the federal Cable Act allows. Such an anomalous result runs counter to the public interest purpose and legislative intent behind consumer protection regulations under both state law and the federal Cable Act itself. The regulation in question, N.J.A.C. 14:18-3.8, regulates only the method of billing and does not set or regulate the rate the cable operator has

decided to bill for its service. Therefore, the only feasible conclusion is that N.J.A.C. 14:18-3.8 does not set the rate a cable operator charges for service and is not preempted under the Cable Act.

In addition, the Appellate Division decision is squarely at odds with the First Circuit Court's decision in Spectrum Ne., LLC v. Frey, 22 F. 4th 287 (First Circuit 2022), which held that a similar regulation in Maine was not rate regulation but was a consumer protection regulation not subject to preemption under the federal Cable Act. Id., at 303. A petition for certiorari was filed on June 6, 2022, (No. 21-1539) with the Supreme Court of the United States, awaiting a decision.

FACTS AND PROCEDURAL HISTORY

In May 2016, the New Jersey Board of Public Utilities ("Board") approved the merger/acquisition of Cablevision Systems Corporation and Cablevision Cable Entities ("Cablevision") by Altice N.V. ("Altice"). In The Matter of the Verified Joint Petition of Altice N.V. and Cablevision Systems Corporation and Cablevision Cable Entities for Approval to Transfer Control of Cablevision Cable Entities, Docket No. CM15111255,("Merger Order" dated May 25, 2016). The Merger Order affirmed Altice would abide by all regulatory requirements and existing Board Orders connected to the provision of cable service in New Jersey. In 2011, Cablevision sought certain regulatory flexibility in the provision and method of

billing, a sample bill was provided to the Board as part of that filing. In the Matter of the Petition of Cablevision Systems Corporation for Relief Pursuant to N.J.A.C. 14:18-16.7, Order Docket No. CO11050279 ("Relief Order"). (RCa6 - RCa5)The Board's 2011 Relief Order confirmed Cablevision would continue to prorate customer bills as required under N.J.A.C. 14:18-3.8 (c). Thereafter, Cablevision continued to prorate customer bills until Altice (f/k/a Cablevision) stopped in October 2016. The Board issued an Order to Show Cause in December 2018 and in November 2019, a Cease-and-Desist Order ordering Altice to issue refunds and as penalty remit a one-time non-recoverable contribution totaling $10,000 towards the Altice Advantage Internet program to provide low-cost internet services to eligible New Jersey customers and certain reporting requirements. (RCa60-61).

Altice moved before the Board for a Stay of the Board's Cease and Desist Order. Rate Counsel filed opposition to Altice's request on December 7, 2019. The Board denied Altice's Motion to Stay on December 20, 2019. In addition, on November 26, 2019, Altice appealed the Board's November 13, 2019, Order to the Superior Court, Appellate Division. (Docket Number A-001269- 19). On December 13, 2019, Altice also filed a Complaint in the Federal District Court of New Jersey. (Docket Number 19-CV21371). On December 23, 2019, the federal court dismissed the Altice Complaint for lack of subject matter jurisdiction. On January 3, 2020, Altice filed a Motion for Reconsideration and an Amended

Complaint before the Federal District Court. On January 29, 2020, the Federal District Court entered an Order for a preliminary injunction as to the individually named Commissioners. The Board filed a Motion for Reconsideration with the Federal District Court which was denied on March 10, 2020. The Board appealed the preliminary injunction to the Third Circuit Court of Appeals on April 9, 2020. On May 13, 2020, Altice filed for a stay of the New Jersey Superior Court, Appellate Division matter, which was denied May 13, 2020.

On March 23, 2021, the Third Circuit vacated the New Jersey District Court's decision holding that New Jersey's proration requirement is preempted under the Cable Act and directed dismissal of the complaint under Younger v. Harris, 401 U.S. 37 (1971). Altice USA, Inc. v. Fiordaliso, 2021 WL 1138152 (D.N.J. Mar. 23, 2021).

On October 15, 2021, the Appellate Division adopting the decision of the New Jersey District Court, held that N.J.A.C. 14:18-3.8 was rate regulation preempted by the Cable Act. On November 23, 2021, the Petitioner Appellant Board filed for Certification with the New Jersey Supreme Court and Petitioner Appellant Rate Counsel joined in that request. Certification was granted by the Court on September 13, 2022. On September 26, 2022, Respondent Altice requested permission to file merit briefs. On October 21, 2022, the Court granted

the filing of merits briefs due November 14, 2022, for Petitioner and December 5, 2022, for Respondent.

SUMMARY ARGUMENT ON APPEAL

This Court should find that N.J.A.C. 14:18-3.8, requiring cable operators grant subscribers prorated billing for the days remaining in the billing period at termination of cable service is not rate regulation, and is not preempted by the Cable Act.

A. Standard of Review

The Court's standard of review of a legal determination is de novo. "[W]e owe no deference 'to the Appellate Division's or trial court's interpretive conclusions' about the meaning of a statute," DCPP v. J.R.-R., 248 N.J. 353, 368 (2021) (quoting DCPP v. Y.N., 220 N.J. 165, 177 (2014)).

The Merits

At issue in this Petition is whether, in light of the First Circuit Court's recent decision in Spectrum Ne., supra, New Jersey consumer protection regulation, found at N.J.A.C. 14:18-3.8 (c), which requires prorated billing is not rate regulation and not preempted under the Cable Act.

ARGUMENT

I. Consumer Protection Regulation such as N.J.A.C. 14:18-3.8 Is Not Rate Regulation and is Not Preempted under the Cable Act, the Appellate Division Decision Should be Reversed.

The Cable Act, among other things, prohibited the regulation of rates for upper tiers of cable service. Thereafter, the Cable Television Consumer Protection and Competition Act of 1992 amended the Cable Act and under section 623(1) allowed local franchising authorities to regulate the rates for the basic cable service tier and equipment, for cable systems not subject to "effective competition." Cable Television Consumer Protection and Competition Act of 1992, Pub, L. No. 102-385, 106 Stat. 1460 (1992); 47 U.S.C. § 543(a)(2)(A). In June 2015, the FCC adopted a rebuttable presumption that cable operators are subject to effective competition. Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, MB Docket No. 15-53, Report and Order, 30 FCC Rcd. 6574,

6592, para. 27. (2015). In New Jersey, Altice is subject to effective competition and the regulation of its rates is prohibited.

However, a determination that a cable operator is subject to effective competition does not prohibit a state franchising authority from enacting and enforcing consumer protection regulations not specifically preempted under the Cable Act, N.J.A.C. 14:18-3.8 is such a regulation.

The preemption inquiry begins with the assumption that Congress did not intend to supersede a state statute unless that was Congress' clear and manifest purpose. In re Reglan Litig., 226 N.J. 315, 328 (2016). The federal government's preemption of state law is "rooted" in the U.S. Constitution's Supremacy Clause. Metro. Edison Co. v. Pa. Pub. Util. Comm'n, 767 F.3d 335, 341 (3d Cir. 2014). As the Supreme Court of the United States has explained, federal law may preempt state law in one of three ways. Murphy v. Nat 'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018) First, federal law may *expressly* preempt state law by stating which state laws are preempted. Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582 (2011) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'") (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)). Second, federal law preempts any *conflicting* state law. Such conflict preemption occurs when either, (1)

"compliance with both federal and state regulations is a physical impossibility" or (2) the "challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona v. United States, 567 U.S. 387, 399 (2012)(internal quotations and citations omitted). Lastly, federal law may preempt an entire *field* of state regulation by occupying that field "so comprehensively that it has left no room for supplementary state legislation." *Murphy*, 138 S. Ct. at 1480 (quoting R.J. Reynolds Tobacco Co. v. Durham Cty., 479 U.S. 130, 140 (1986)). In this regard, the Court has required a plain statement from Congress authorizing the preemption. In particular, the Court has said that Congress must be "unmistakably clear in the language of the statute" if it intends to preempt state law in a way that would upset the "usual constitutional balance" between states and the federal government. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242(1985)). The Court has applied this clear statement rule, for instance, to preemption that would infringe on states' management of their own officers and subdivisions. *Gregory*, 501 U.S. at 460 ("Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.") (internal citations and quotations omitted); Nixon v. Mo.

Mun. League, 541 U.S. 125(2004)) ("[T]he liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions . . . . Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires."). Id.

A. There is no express, conflict, or field preemption of N.J.A.C.14:18-3.8

The Cable Act and the Cable Competition Act affirm a state's right to enact "any consumer protection law, to the extent not specifically preempted by this subchapter." 47 U.S.C. § 552(d)(1) (emphasis added). Thus, a State or local franchise authority has authority under the Act to establish consumer protections, enforce customer service and performance requirements on cable companies. The Act specifically recognizes under subsection (d) that:

> nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter" . . . or "to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b)" . . . or "prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that

> imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section." 47 U.S.C. § 552(d)(1) and (2).

The manner and methods of billing is what is addressed under N.J.A.C. 14:18-3.8, nothing more. The regulation does not set or alter the rate determined and set by a cable operator as payment for the provision of its service. The regulation is a consumer protection standard adopted to safeguard consumers against unfair [or] deceptive business practices. The Cable Act contains no express prohibition or law preempting the adoption and enforcement of the requirements under N.J.A.C. 14:18-3.8 by a state commission or franchising authority. 47 U.S.C. § 552(d)(1) and (2). To underscore, protecting consumers from unconscionable billing practices is at the heart of State consumer protection laws.

Likewise, there is no conflict preemption. The Cable Competition Act under 47 U.S.C. §552(c)(1) and §552(c)(2) reaffirms a state's concurrent authority to enact consumer protection laws that meet or exceed the federal standards. For example, the Cable Competition Act's contains similar consumer protections that do not conflict. Thus, in discussing "negative option billing" (a practice whereby a cable operator charges a customer for service, equipment or upgrades not requested) the D.C. Circuit Court noted that regulations enacted that prohibit "negative option billing," were deemed consumer protection provisions rather than rate regulation and such regulations are not preempted under the Act. Time Warner

Entm't Co., L.P. v. F.C.C., 56 F.3d 151, 193 (D.C. Cir. 1995) citing to Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, ("Cable Competition Act") Third Order on Reconsideration, 9 F.C.C.R. 4316,4360-4361 (1994))Id., at 194. The Court further noted that "because the prohibition against negative option billing is directed entirely at the terms of purchase and sale other than rates, the Commission's interpretation is reasonable," and "that Congress did not preempt state negative option billing laws either expressly or through occupation of the field." Id. It further noted it is against public policy to charge customers for service they will not receive. Other examples of regulations not considered rate regulation are those requiring outage refunds and/or credits upon termination of service, which the Board has the authority to enforce under 47 C.F.R. § 76.309 (c)(3)(i) and (ii).

The legal rationale that defines regulations prohibiting negative option billing, outage credits and refunds as consumer protection regulation and not rate regulation is equally applicable to the requirement that cable operators grant subscribers prorated billing for the days remaining in the billing period at termination of cable service under N.J.A.C. 14:18-3.8 (c). The regulation does not change the rate the cable operator chooses to bill a customer for service but is aimed and "directed entirely at the terms of purchase and sale" Id., Cable

Competition Act, Third Order on Reconsideration, 9 F.C.C.R. at 4360-4361, to protect customers from being charged for services they will never receive [or no longer wish to receive, as is the case here]. Altice in the matter below noted that it (Altice) continues to provide service throughout the entire month even where a customer has requested service be terminated before the end of a billing cycle. Therefore, the customer is paying for the services provided. This argument is specious and disingenuous as it ignores the reality of customers that are no longer at the geographical location where the service is provided, customers who have passed and are no longer able to enjoy the service, [and] customers who have simply opted to forego cable service altogether or are receiving the service from a new source. Altice's admission confirms that their billing practice is intended to slam customers with unsolicited continued service. A customer requesting cancellation of service on day two of a billing cycle will be charged for a full month of service, maximizing profits for the cable operator at great public harm and cost to captive customers. The practice is unconscionable and deceptive and affirms the important underlying public policy purpose served by N.J.A.C. 14:18-3.8. Once more, the critical distinction here is that the practice in question involves solely and exclusively billing, not the setting of rates. The former is subject to State regulation in the public interest, the latter is preempted by the federal Act.

B. There is no conflict with the Filed-Rate Doctrine and no preemption thereunder

Similarly, proration billing under N.J.A.C. 14:18-3.8 does not run counter to the filed-rate doctrine. It is well established that, pursuant to the "filed-rate" doctrine, in a situation where a filed tariff rate, term or condition differs from a rate, term, or condition set in a non-tariffed carrier-customer contract, the carrier is required to assess the tariff rate, term, or condition. See Armour Packing Co. v. United States. 209 U.S. 56(1908) (Armour Packing): American Broadcasting Cos. Inc. v. FCC. 643 F.2d 818 (D.C. Cir. 1980); see also Aero Trucking. Inc. v. Regal Tube Co. 594 F.2d 619 (7th Cir. 1979); Farley Terminal Co. Inc. v. Atchison. T.& S.F. Rv. 522 F.2d 1095 (9th Cir.), cert, denied. 423 U.S. 996 (1975).

There are two principles underpinning the doctrine. First, the principle of "non justiciability" holds that the courts should not undermine agency rate-making authority by upsetting approved rates; and second, the principle of "nondiscrimination" holds that litigation should not become a means for certain ratepayers to obtain preferential rates through litigation. A claim that implicates either principle is barred. Consequently, if a carrier unilaterally changes a rate by filing a tariff revision, the newly filed rate becomes the applicable rate unless the revised rate is found to be unjust, unreasonable, or unlawful under the Cable Act. See 47 U.S.C. § 201(b); see also, Maislin Industries, U.S. Inc. v. Primary Steel Inc.

497 U.S. 116 (1990). Under the doctrine, "the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." Cent. Office Tel., 524 U.S. at 222 (quoting Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915)).[1] The doctrine "embodies the policy which has been adopted by Congress in the regulation of interstate [telecommunications services] in order to prevent unjust discrimination." Id., Maxwell, 237 U.S. at 97.

The filed-rate doctrine is not applicable to the facts herein as the prorated billing requirement under N.J.A.C. 14:18-3.8 does not challenge or alter the underlying rate set by Altice, nor creates a competitive preference for Altice's competitors as the regulation applies equally to all cable service operators in New Jersey. There is, in point of fact, no rate regulation or setting of rates through the Board's enforcement of N.J.A.C. 14:18-3.8. (RCb18-22 and RCb31-32).

The consumer protections delineated under N.J.A.C. 14:18-3.8 are measured billing methods and well within the customer service requirements and consumer protection parameters permitted under the federal regulation. 47 U.S.C. § 552(d). The Cable Act and Cable Competition Act affirm that States retain jurisdiction and

[1] On December 3, 1993, the Negotiate Act of 1993 Pub. L. 103-180, 107 Stat. 2024 ("Act") was passed amending amending Title 49 of the United States Code. The Act reverses the portion of the Maislin decision which eliminated the "unreasonable practice" affirmative defense as to claims involving rates on shipments prior to September 30, 1990. This does not affect the Maislin holding regarding the "filed-rate" doctrine and the case at bar. Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1374 (E.D. Ark 1994).

concurrent authority on consumer protection regulation and customer service. Id. The requirements under N.J.A.C. 14:18-3.8 are not in conflict with any federal regulation nor do they frustrate congressional intent in this field. There is no federal preemption of N.J.A.C. 14:18-3.8.

The Appellate Division's decision should be vacated, and the Board Order should be sustained.

II. The Court should be guided by Spectrum Ne., LLC v. Frey, 22 F.4th 287 and find no federal preemption of N.J.A.C. 14:18-3.8, and reverse the Appellate Division decision below.

The facts and regulatory requirements of the Maine statute addressed by the First Circuit in Spectrum Ne., LLC v. Frey, 22 F. 4th 287 [2] are analogous to the New Jersey matter before this Court. In reversing the judgment below, the First Circuit Court held "the Maine law is not a law governing" rates for the provision of cable service" but rather governs a period after the provision of cable service and is a "consumer protection law" that is not preempted." Id., at 303.

A. Customer service requirements are exempt under the Cable Act

[2] The Appellate Division relied heavily upon the New Jersey District Court decision, which in turn relied heavily upon the reasoning of the Maine District Court in Spectrum Northeast, LLC v. Frey, 496 F.Supp.3d 507 (D.Me. 2020). Spectrum Ne. overruled the Maine District decision, and consequently the Appellate Division decision should be in serious doubt.

In affirming that "customer service requirements" are exempt from preemption under 47 U.S.C. § 552(d)(2), the First Circuit held that the Maine statute does not regulate "rates for the provision of cable service." Spectrum Ne., 22 F.4th, at 301. The First Circuit Court's is highly persuasive authority and is dispositive on the question of preemption. It unquestionably establishes that the actions taken by the New Jersey Board of Public Utilities are not preempted and reversal of the Appellate below is warranted.

The First Circuit decision is a well-reasoned analysis of the law that applies in this situation and merits the fullest consideration by this Court. The facts of the Spectrum Ne case are relevant and bear review herein. As noted by the First Circuit, Maine enacted a statute requiring cable operators pro rata credit/refund to subscribers upon cancellation of service for the days remaining in the billing period after the termination of cable service:

> On March 18, 2020, Maine adopted "An Act to Require a Cable System Operator to Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber" ("Pro Rata Act") into law. As relevant here, the legislation amended Me. Stat. tit. 30-A, § 3010, titled "Consumer rights and protection relating to cable television service," to add: "A franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period." Me. Stat. tit. 30-A, § 3010(1-A) (2021). The Pro Rata Act also requires that cable providers notify consumers of their right to a pro rata credit in "nontechnical language, understandable by the general public."

> Id. § 3010(2- A). The Act was to become effective on June 16, 2020. According to the Pro Rata Act's sponsor in the Maine House of Representatives, the purpose of the statute was to "reform unfair cable company billing practices" by requiring Maine "cable providers . . . to pro-rate charges when a customer disconnects service." In the legislator's view, the Pro Rata Act would "protect cable customers from paying for service they do not receive."
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> Spectrum Ne, 22 F.4th, at 289.

In applying the facts to the law, the First Circuit Court concluded that the structure and legislative history of the Cable Act and its amendments compel a finding of no preemption of Maine's Pro Rata Act. The First Circuit court's review and analysis is applicable here and the same conclusion should be reached in New Jersey by this Court.

B. Pro-rated credits/refunds for days remaining in the billing cycle post termination of service is not rate regulation.

The First Circuit Court noted, in no uncertain terms the principle that under the provisions of the Cable Act "the rates for the provision of cable service . . . shall not be subject to regulation by the [Federal Communications] Commission or by a State or franchising authority under this section." § 543(a)(2) and noted the Cable Act here neither defines "rates" nor "rates for the provision of cable service." Spectrum Ne. 22 F.4th, at 292. Given this statutory silence, the First Circuit review was guided by and applied the plain and ordinary meaning of terms,

informed by the purpose and history of the Cable Act. The First Circuit Court aptly noted,

> the plain and ordinary meaning of the term "rate"--that a "rate" is "the amount charged for a particular product; [] as defined by a particular unit of measurement in relation to the product." As the FCC has explained, in a different context (addressed infra), [A] "rate" has no significance without the element of service for which it applies. . . . the term "rate"is defined in the dictionary as an "amount of payment or charge based on some other amount." In this regard also, the Supreme Court has recently stated: "Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached." Sw. Bell Mobile Sys., Inc., 14 F.C.C. Rcd. 19,898, 19,906 (1999) (internal citations omitted) (citing Webster's Third New International Dictionary (1993); AT&T Co. v. Cent. Off. Tel., Inc., 524 U.S. 214, 223 (1998)). Thus, as the FCC acknowledged, a "rate" depends not only on the price charged, but also on the type and amount of service provided.
>
> Spectrum Ne. 22 F.4th, at 292.

In the matter herein, Altice argues that N.J.A.C. 14:18-3.8 regulates rates because it forces Altice to sell its service by the day. (Respondent's Ab26). Altice's interpretation and application of the regulation is incorrect in several respects. The regulation does not itself establish, set or control the tariff for Altice service. The rate is determined exclusively by Altice and N.J.A.C. 14:18-3.8 does not interfere or change the rate that Altice has determined is appropriate for its service. N.J.A.C. 14:18-3.8 does not set or adjust the amount, degree, or rate of the service. Because a requirement to prorate is not controlling the creation of or the components of the

rate itself, it cannot be defined as rate regulation. Moreover, the regulation concerns requirements at termination of service.

Likewise, the arguments presented by the parties in Spectrum Ne are closely similar, if not the same arguments currently under review in this appeal. In Spectrum Ne, Spectrum argued that to provide the pro-rated credits required under the Maine statute "it must measure the quantity of service it provides in daily increments [during the last month of service], rather than monthly increments" [Citing to Appellees' Br. 19.] Spectrum Ne. 22 F.4th, at 292-293. The Attorney General's position contended that Maine's Pro Rata Act did not "force a cable provider "to sell its product by 'daily' rates rather than a 'monthly' rate," but instead, the law "merely - requires [Spectrum] to refund customers for the portion of their final monthly billing cycle, at the rate charged by [Spectrum], in which they did not receive cable service," [citing to Appellant's Br. 17– 18.], further noting that "[A]lthough the Cable Act prohibits states from setting rates for the provision of cable service, the statute does not prohibit states from protecting citizens from being charged for cable services that are never provided." [citing to Appellant's Br. 21–22.] Spectrum Ne. 22 F.4th, at 292-293. In addressing the arguments presented the First Circuit applied a focused narrow reading of the Cable Act noting that under,

> [t]he language "provision of cable service" most naturally refers to the amount a subscriber is charged for receiving cable service, i.e., the price per month or per channel, or for equipment required to receive the subscribed-to programming of the cable service. In our view, the rate for "the provision of cable service" is not naturally read to encompass a termination rebate. A termination event ends cable service, and a rebate on termination falls outside the "provision of cable service." Thus, the plain language of § 543 excludes the time after provision of service--i.e., the only time when Maine's Pro Rata Act applies.
>
> Spectrum Ne. 22 F.4th,at 293.

The First Circuit Court's discussion and finding are relevant, and unquestionably on point to the matter herein. The proration requirement under N.J.A.C. 14:18-3.8 directing pro-rated credits/refunds for days remaining in the billing cycle post termination of service is not rate regulation.

C. The Court should employ a narrow reading of Section 543(a) of the Cable Act

In discussing the appropriateness of applying a narrow reading of the scope of § 543(a)(1)'s expressly preemptive ban, the First Circuit found it useful to employ a hypothetical focusing on the "difference between a hypothetical state law that would cap the amount that a cable operator could charge a customer on an ongoing monthly basis for cable service and the Maine law." Spectrum Ne. 22 F.4th, at 293-294. The First Circuit found,

> There is no question that § 543(a)(1)'s preemption of a state regulation of "the rates for the provision of cable service," § 543(a)(1), would encompass the hypothetical state law that sets a $50 cap. In fact, we do not understand Maine to suggest otherwise. But, Maine's termination-rebate law differs from that hypothetical monthly cap on what may be charged for cable service because it regulates only the charge that the cable operator may impose on a customer for the month in which that customer has terminated--i.e., when the cable operator no longer provides-- "cable service." It is difficult to conclude that Maine's termination rebate law regulates "the rates for the provision of cable service," § 543(a)(1) (emphasis added), even though there can be no question that the posited measure that imposes the $50 monthly cap would. The history of the Cable Act confirms the correctness of this interpretation."
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> Spectrum Ne. 22 F.4th, at 293.

The First Circuit's analysis applies equally to the New Jersey facts and regulation and reliance thereon is well-placed and on point.

In further addressing the merits of the conclusion that the preemption of "rates for the provision of cable service" does not extend to the regulation of termination rebates, the First Circuit discussed four aspects of the structure and legislative history which merit full consideration by this Court. The First Circuit observed,

> 1) The legislative history of the 1984 Cable Act does not suggest a concern with, or a purpose to preempt, state regulation of termination fees or termination rebates. Nor does it suggest that the term "rates for the provision of cable service" includes termination fees or termination rebates. 47 C.F.R. § 76.922(a). The focus in the later amendments was

> similarly on monthly rates for basic cable service and not on termination fees and termination rebates.
>
> Spectrum Ne. 22 F.4th, at 296-298.

The First Circuit noted that FCC regulations set the "maximum monthly charge per subscriber for a tier of regulated programming services," 47 C.F.R. § 76.922(a) but do not discuss or address termination rebates or termination fees. Spectrum Ne. 22 F.4th, at 298. The First Circuit "found no reference at all to termination rebates, and the only reference to disconnection fees in the context of rate regulation was in a footnote in the context of an FCC rule requiring local authorities to have "specified or approved the initial rates" charged to subscribers by a cable company "for installation of equipment and regular subscriber services" (a rule abandoned by the FCC in 1976);citing to 10 47 C.F.R. § 76.31(a)(4) (1972). Spectrum Ne. 22 F.4th, at 299-300.

In noting the absence of congressional treatment and discussion of credits or rebates upon termination of service in the Cable Act, the First Circuit Court underscored that,

> 2) The congressional silence concerning termination fees or rebates is particularly significant because Congress required regulation of rates for installation of equipment for basic cable service (in the absence of effective competition).
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> Spectrum Ne. 22 F.4th, at 299.

As observed by the First Circuit, the Cable Act "as amended under 1992 Amendments, § 543 states, "The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for(A) installation and lease of the equipment used by subscribers to receive the basic service tier . . . . § 543(b)(3)." Spectrum Ne. 22 F.4th, 299. Further highlighting the important distinction that installation fees were viewed as rates "for the provision of cable service" and termination fees were not." . . . "Congress did not address prices or rates for service termination even though Congress well knew service termination occurred and addressed the disposition of cable wiring "upon termination of service." 47 U.S.C. § 544(i)." Id.

Additionally, the First Circuit reviewed the congressional legislative history finding,

> 3) The Cable Act established a federal preference for competition through market forces because such competition would "keep the rates for basic cable services reasonable in that market without the need for regulation." H.R. REP. NO. 98-934, at - 30 - 25; S. REP. NO. 98-67, at 5, 17, 22. Congress barred state regulation only where "marketplace forces would determine and control rates." S. REP. NO. 98-67, at 22. Congress acknowledged multiple potential sources of competition including "multipoint distribution services, subscription television stations, videodiscs and cassettes, master antenna television and satellite master antenna television systems, low power television stations, and direct satellite-to-home broadcast systems." Id., at 5.
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> Spectrum Ne. 22 F.4th, at 300.

The First Circuit found Spectrum had not argued that pro rata termination credits would be controlled by effective competition, and further found that Maine's Pro Rata Act encourages competition by prohibiting cable companies from creating artificial barriers to switching between competitors by charging consumers beyond termination of service. Citing to Finneran, 954 F.2d at 100 (noting how Congress' purpose "to allow market forces to control [] rates" was frustrated by excessive cable downgrade charges that "insulate cable companies from market forces") Spectrum Ne. 22 F.4th, at 300. The First Circuit noted that the Finneran court considered whether New York could regulate rates charged "to customers wishing to downgrade to a less expensive level of cable service" by limiting such downgrade charges "to the company's actual cost." 954 F.2d at 92–93. The Second Circuit determined that such downgrade fees for stepping from a higher tier of cable service to a lower tier did not constitute regulation of "rates for the provision of cable service" and were not preempted by § 543, Id. at 102, finding that "Congress left regulation of complete disconnections to the states." Id. at 101. and explained, "we think Congress meant to pre-empt only those state rules that regulate rates charged by cable companies for providing services to customers." Id. at 102. Spectrum Ne. 22 F.4th, at 301-302. Thus, because "a reduction in service is not a provision of service, and since the FCC has not spoken clearly on the matter," the court concluded "that the Cable Act does not expressly pre-empt state

regulation of downgrade charges." Id. at 100. Spectrum Ne. 22 F.4th, at 302. The First Circuit in Spectrum Ne. noted that although Congress thereafter amended the Cable Act to require that "charges for changing the service tier selected shall be based on the cost of such change," § 543(b)(5)(C), like the New York regulation in Finneran, 954 F.2d at 93, such congressional action does not undermine the reasoning of the court in Finneran but simply demonstrates that Congress was persuaded to address the same problem the statute at issue in Finneran addressed, but at the federal level. Spectrum Ne. 22 F.4th, at 302. Most importantly, Congress explicitly did so.

These are the same issues under the same section of the Cable Act under review by the Court herein. The same analysis should be applied by this Court. New Jersey's pro-rata regulation is applied equally to all cable operators in the state and safeguards against anticompetitive practices among carriers and under the Finneran analysis do not constitute regulation of "rates for the provision of cable service" and were not preempted under § 543 of the Cable Act. Spectrum Ne. 22 F.4th, at 302. The First Circuit lastly underscored that,

4) Congress in the 1984 Cable Act and amendments contemplated that the states could continue to adopt and enforce "consumer protection" laws. Spectrum Ne. 22 F.4th, at 300.

The First Circuit decision states that a narrow reading of the scope of the preemption provision is favored noting "[I]t makes sense in light of the Cable Act's provision regarding "consumer protection laws" to read the scope of expressly preemptive provisions in a manner that accounts for Congress' evident intent to protect state "consumer protection laws" from preemption absent their being "specifically preempted." Spectrum Ne. 22 F.4th, at 301. Further observing that "[I]f the outage-rebate measure is not preempted because it is a "consumer protection law," then it must be because such an outage-rebate requirement also is not "specifically preempted by" § 543(a). And, if that is so, then it must also follow that Maine's termination-rebate requirement in the Pro Rata Act, too, is both not "specifically preempted" by § 543(a) and is a "consumer protection law", pointedly commenting,

> Maine's limited termination-rebate law in the Pro Rata Act protects against the kind of deceptive business practices that consumer protection laws typically target. There are reasons to be concerned that consumers will not recognize that they are being required to pay as much for the days of non-service following termination as they pay for all the preceding days in which the service is provided, just as there are reasons to be concerned that consumers will not recognize that they are signing up to pay for non-service during outages in which the service is not being provided. And the termination-rebate requirement in the Pro Rata Act is at no risk of being preempted under the general provision for state laws "inconsistent with this chapter," § 556(c), because § 552(d)(1) preserves any "consumer protection law" from preemption unless it is

> "specifically preempted." "[W]e find the Pro Rata Act is not specifically preempted under § 543(a). . ."
> Spectrum Ne. 22 F.4th, at 301.

Similarly, to the facts of Spectrum Ne., the New Jersey billing requirements under N.J.A.C. 14:18-3.8 are not preempted under the Federal Cable Act and are consistent with federal law. The New Jersey regulation under the section heading "Method of Billing" provides under subsection (a) that "bills for cable television service be rendered monthly, bimonthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service." Subsection (c) acknowledges that a cable operator may require advance payment of its tariff rate, reaffirms that "initial and final bills shall be prorated as of the date of the initial establishment and final termination of service." The New Jersey regulation does not affect the rate charged by the cable operator, but only ensures that the cable operator will only charge a subscriber for the time in which service is actually provided. (RCb18; Rcb50) This Court should not be swayed by the argument that because service continues beyond the date the customer requested cancellation the customer is enjoying the service. By not disconnecting customers when customers request cancellation, Altice is engaging in deceptive business practices by slamming customers with continued unrequested, unwanted or unneeded service. The New Jersey regulation at issue herein is not preempted by the Cable Act.

Altice's actions flagrantly circumvent New Jersey consumer protection regulation enacted specifically to protect against such deceptive business practices.

Petitioner Appellant Rate Counsel anticipates that unless this Court clearly establishes a high threshold for implied preemption, federal agencies and lower courts may preempt state laws broadly with little tether to statutory text and, as in the case herein, endanger longstanding vital consumer protections. The First Circuit analysis and conclusion in Spectrum Ne. are applicable herein. This Court should find that the New Jersey Board of Public Utilities' requirement to grant subscribers pro rata credits or rebates for the days remaining in the billing period after the termination of cable service under N.J.A.C. 14:18-3.8 is not rate regulation and not preempted under the Cable Act.

CONCLUSION

For the reasons addressed herein the Supreme Court should find that N.J.A.C. 14:18-3.8 is not preempted under the Cable Act and reverse the Appellate

Division's decision of October 15, 2020 and reinstate the New Jersey Board of Public Utilities' Decision and Order below.

Respectfully submitted,

State of New Jersey
Division of Rate Counsel

/s/ Brian O. Lipman
Brian O. Lipman, Esq.
Director
Maria Novas-Ruiz, Esq.
Assist. Deputy Rate Counsel
140 E. Front St.,4th Fl.
P.O. Box 003
Trenton, New Jersey 08625
Appellant Petitioner, NJDRC

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