



**MEMORANDUM**

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**TO: Members, New York State Legislature**

**DATE: 5/12/2021**

**FROM: Bethanne Cooley, Assistant Vice President, State Legislative Affairs**

**RE: Opposition to A.7412 / S.5117**

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On behalf of CTIA, the trade association for the wireless communications industry, I write to respectfully oppose A.7412 / S.5117. The legislation imposes unnecessary and costly regulation of broadband service and Internet Service Providers (ISPs)—including wireless providers. First and foremost, A.7412 / S.5117 is unnecessary, particularly with respect to wireless broadband. Competition has delivered innovation, investment, and massive consumer benefits to wireless consumers – and the COVID-19 pandemic underscored how well this regulatory framework performed as so many Americans shifted work, school, medical care and entertainment to their wireless devices. Rather than incentivizing further wireless deployment at a time when expanding connectivity is paramount, A.7412 / S.5117 would impose new requirements that would only delay network expansions and upgrades or shift resources to regulatory compliance. Moreover, A.7412 / S.5117 violates federal law and is preempted.

**State regulation will damage New York’s economy and hurt consumers**

As an initial matter, A.7412 / S.5117 would impose unnecessary burdens on wireless providers. The legislation broadly directs the Public Service Commission (PSC) to “promulgate rules and regulations necessary to implement effective oversight of broadband and VOIP service.” State regulation of broadband will deter investments in broadband networks, putting New York at a disadvantage relative to other states. Currently, market conditions have enticed the wireless industry to invest significantly in New York’s network to ensure its resiliency, which was proven throughout the entirety of the pandemic, in keeping residents connected despite record levels of internet traffic.<sup>1</sup>

It is also important to note that the operational methods that kept our networks up and running for 4G will not be the same as those for 5G deployments. 5G will require the deployment of new technology throughout New York State, which will entail additional significant network investment throughout the State. Unnecessary state regulation is certain to inhibit that effort. In fact, it will likely divert industry resources from network improvements in New York to states that are not subject to those regulatory challenges and who incentivize network deployment. Network maintenance and technology upgrades require expertise and major investment. Imposing regulation on an already

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<sup>1</sup> USTelecom, Network Performance, <https://www.ustelecom.org/research/network-performance-data/>, last accessed 5/11/2021.



competitive industry, and requiring companies to spend capital on the cost of regulatory compliance – instead of actual investment – makes doing business in any State, including New York, both burdensome and unattractive. Rather, New York should provide incentives that encourage as much investment in network infrastructure and technology upgrades as possible.

Wireless companies fight every day for consumers. The Federal Communications Commission (FCC) has found that nearly 98 percent of Americans have a choice of three or more 4G providers,<sup>2</sup> and providers are rapidly rolling out the next generation of wireless, 5G. Mobile customers can choose from hundreds of devices, multiple operating systems, and millions of apps and services. This competition means that wireless companies must work relentlessly to improve their networks and launch innovative services in order to keep their customers satisfied.

Consumers, in turn, have seen massive benefits from competition, including lower prices, new devices, faster speeds, and “unlimited data” and “free data” services. In fact, the New York PSC’s own investigation demonstrates that New Yorkers are already benefiting from affordable broadband technology, without state regulation. In its most recent study of the telecommunications market, the PSC found that New York’s mobile wireless broadband system had “expanded tremendously,” leading to an increase in consumer subscriptions and a variety of options that provided download speeds in excess of 50 Mbps.<sup>3</sup>

Competition also drives the wireless industry to invest, providing benefits throughout the economy. Since 2010, wireless companies have invested over \$282 billion nationwide to improve speeds, coverage, and quality. In New York, specifically, the wireless industry contributes over \$28 billion to the state’s GDP annually.<sup>4</sup> Those investments mean tangible benefits to consumers. Mobile download speeds increased by *31 times* between 2011 and 2019.<sup>5</sup> At the same time, Americans are paying less for wireless service, including wireless broadband. The decline in wireless prices in 2017 was so significant it drove the average price for core consumer goods down across the economy for the first time since 2010. According to Recon Analytics, between 2011 and 2019, the cost of a personal unlimited voice, text and data plan fell 42 percent,<sup>6</sup> and mobile prices “per megabyte” fell some 98 percent, from 20 cents to one-half of one cent.<sup>7</sup>

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<sup>2</sup> *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269, FCC 21-28 at ¶ 3 (rel. Jan. 19, 2021).

<sup>3</sup> New York Department of Public Service, Office of Telecommunications, *Staff Assessment of Telecommunications Services*, 55 (June 23, 2015).

<sup>4</sup> See: Wireless Impact in New York, <https://www.ctia.org/the-wireless-industry/map/4g>, last accessed 4/29/2021.

<sup>5</sup> Recon Analytics, *The 4G Decade: Quantifying the Benefits*, <http://reconanalytics.com/wp-content/uploads/2020/07/The-4G-Decade.pdf>, last accessed 4/18/2021.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



Perhaps the best evidence regarding the resiliency of today’s mobile broadband networks is the experience of the past year. As the ways we live and work changed seemingly overnight in response to COVID-19, America’s wireless networks were able to handle dramatic increases in traffic. The pandemic has seen voice traffic increase from 20 to 40 percent on wireless networks (which account for nearly 80 percent of voice connections in the United States). COVID-19 also drove significant increases in wireless broadband demand, with mobile data traffic up nearly 20 percent.<sup>8</sup> Mobile hotspot use has soared, and application use has skyrocketed. One nationwide provider found customers were using their mobile device’s hotspot nearly 40 percent more than average to share that mobile data connection with other devices.<sup>9</sup>

As the above makes clear, New Yorkers have benefited substantially from wireless competition – competition that has relied on the restrained regulatory approach that A.7412 / S.5117 would overturn. Even aside from competition, though, the bill’s aggressively regulatory approach is unnecessary because wireless providers are already bound by CTIA’s “Consumer Code for Wireless Service” (the “Code”).<sup>10</sup> Originally developed in 2003, the Code is periodically reviewed to ensure it reflects the industry’s innovations and consumers’ needs and expectations. Signatories to the Code have committed to help consumers make informed choices when selecting their wireless service, and to fulfill key obligations contemplated by A.7412 / S.5117. For example, wireless providers agree to “disclose to consumers at point of sale and on their web sites,” information regarding coverage areas, any activation or initiation fees, monthly charges, the amount of voice, messaging and data provided under a particular plan, any material prohibitions or network management practices relating to broadband internet service, late fees, termination fees, and other matters. The Code also obviates the need for regulation in other areas by imposing duties with respect to privacy, fees, and customer notifications.<sup>11</sup>

### **Federal law preempts State Regulation of Broadband Internet Access and VoIP**

A.7412 / S.5117 is also preempted by federal law in its attempt to regulate information services that are inherently interstate in nature. A.7412 / S.5117 attempts to establish and enforce unlawful state oversight and regulation of broadband internet access service (BIAS) and voice over internet protocol service (VoIP). Federal law preempts both in multiple respects. The FCC has exclusive jurisdiction over all interstate and foreign communication and, because broadband internet has been determined a “multi-state service,” the FCC has ruled that heavy-handed regulation would harm investment in and deployment of broadband service for consumers. Under Democratic and Republican leadership alike,

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<sup>8</sup> See CTIA, *How Wireless Kept Americans Connected During COVID-19*, at 3–4 (June 23, 2020) (noting that voice traffic and texting increased 20–40 percent, and mobile data traffic rose nearly 20 percent during the pandemic), <https://api.ctia.org/wp-content/uploads/2020/06/How-Wireless-Kept-Americans-Connected-During-COVID-19-2.pdf> (COVID-19 Wireless Connectivity Study).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> CTIA, *Consumer Code for Wireless Service*, <https://www.ctia.org/the-wireless-industry/industry-commitments/consumer-code-for-wireless-service>.

<sup>11</sup> See *id.*



the FCC has concluded that broadband internet access is jurisdictionally interstate.<sup>12</sup> Likewise, courts have ruled that “because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States” in an unlawful manner.<sup>13</sup> Thus, it is virtually impossible to identify any internet traffic that begins and ends in a single state. Consequently, state regulation of broadband internet access is preempted, particularly where it conflicts with federal policy.<sup>14</sup>

A.7412 / S.5117 also conflicts with federal law limiting state regulation of mobile services. Section 332(c)(3)(A) of the Communications Act of 1934, as amended, provides that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service.”<sup>15</sup> These categories – “commercial mobile service” and “private mobile service” – together encompass all mobile offerings, including mobile broadband. A.7412 / S.5117’s requirements are so onerous that they could constitute regulation of “market entry.” They, therefore, are preempted by federal law.

### **Broadband Providers in NYS are already providing relief to consumers**

Lastly, broadband providers in New York State have instituted numerous programs to help those who have experienced financial hardship during the pandemic. Many providers have already voluntarily rolled out discounted broadband programs to low-income customers, particularly for work and education purposes. Further, many of the providers targeted by this change in law have already taken the FCC’s “Keep Americans Connected Pledge” and have publicly promised their ongoing voluntary support to ensure that individuals’ access to communication networks is not impaired in any way due to the pandemic and the hardships that have arisen from it.<sup>16</sup> Additionally, New York State’s broadband providers have already taken significant steps to provide relief to their consumers, without legislation directing them to do so, and will continue providing high-quality, reliable and responsive service during this emergency. In fact, the rate of disconnection of our broadband customers was lower after the declared state of emergency than it was before it. And, most notably, the federal Emergency Broadband Benefit, slated for roll out beginning May 12, will provide low income households with a \$50 per month benefit for broadband service as well as a \$100 benefit for the purchase of a connected device.

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<sup>12</sup> See *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5803 ¶ 431 (“Today, we reaffirm the Commission’s longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes.”) (2015); *Restoring Internet Freedom, Declaratory Ruling, Report and Order*, 33 FCC Rcd 311, ¶¶ 2, 18, 65 (2018). The D.C. Circuit affirmed these classifications. See *Mozilla Corp. v. FCC*, 940 F.3d 1, 18-45 (D.C. Cir. 2019).

<sup>13</sup> See *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003).

<sup>14</sup> See, e.g., *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (explaining that “state law stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of” the federal regulatory framework is preempted, and “[f]ederal regulations have no less pre-emptive effect than federal statutes”).

<sup>15</sup> 47 U.S.C. § 332(c)(3)(A).

<sup>16</sup> <https://www.fcc.gov/keep-americans-connected>



In short, then, A.7412 / S.5117 is unnecessary with respect to wireless providers both because competition is protecting and promoting consumer interests and because wireless providers already are subject to voluntary commitments that render additional regulation superfluous.

For all the reasons described herein, we respectfully request that A.7412 / S.5117 not advance.