DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 27, 2007

The Honorable Mary Ann Love
165 Lowe House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Love:

You have asked for advice concerning House Bill 1069, "Public Service Commission - Broadband Internet Service." Specifically, you have asked whether the bill would be preempted by federal law or regulations, or would violate the Commerce Clause. For the reasons that follow, it is my view that a portion of the bill, if read as a regulatory measure, would raise significant federal preemption issues, and could be found to violate the Commerce Clause.

House Bill 1069 provides that "the General Assembly finds:"

> That a broadband provider that offers broadband Internet service to the public should not provide or sell to Internet content, application, or service providers, including any affiliate of a broadband service company, any service that provides, degrades, or gives priority to any packet source over that company's broadband Internet access service based on its source, ownership, or destination; and
>
> That the principle stated in item (1) of this section should apply to broadband service from the network side of equipment on the customer's premises up to an including the Internet Exchange Point closest to the customer's premises.

Ordinarily a "finding" of the General Assembly would impose no substantive requirement on any person. However, you have asked that I assume, for purposes of your question, that this portion of the bill has substantive effect.

The bill also requires that the Public Service Commission ("the PSC") adopt regulations requiring broadband Internet providers to submit a report quarterly to the PSC that would identify where the broadband provider provides services, broken down by nine-digit zip code, the percentage of households in the provider's service territory that are offered service and the percentage that subscribe, the upload and download data transmission speeds in the provider's service territory, the average price per megabyte of download and upload data transmission speeds in the broadband provider's service territory, and new services and upgrades to existing services in the provider's

service territory. The reports are to be published by the PSC on its website. These provisions are clearly intended to have substantive effect.

There are a variety of technologies available for the provision of broadband Internet access, the most common of which are cable and digital subscriber line ("DSL"). *BellSouth Telecommunications, Inc. v. Cinergy Communications*, 297 F.Supp.2d 946, 950 (E.D.Ky. 2003). Other ways of transmitting high-speed Internet data into homes, including terrestrial- and satellite-based wireless networks, are also emerging. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

It is generally established that state legislation may be preempted by federal law in any one of three ways. State law may be expressly preempted by the provisions of a federal statute. *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 299 (1988). It may seek to legislate in an area in which Congress has acted with such thoroughness as to indicate an intent to occupy the field. *Id.* at 300. Or it may be preempted because there is a conflict between the provisions of state and federal law such that it is impossible to comply with both, or the operation of the state law would "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* State law can also be preempted in these same ways by valid federal regulations. *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

Title II of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, subjects all providers of "telecommunications services" to mandatory common-carrier regulation. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Under Title II, telecommunications carriers must charge just and reasonable, nondiscriminatory rates to their customers, design their systems so that other carriers can interconnect with their communications networks, and contribute to the federal "universal service" fund. *Id.* Information service providers on the other hand, are not subject to mandatory regulation as common carriers.[1] *Id.*

The Communications Act itself does not expressly preempt State regulation of either telecommunications services or information services. However, it is generally seen as intended to permit the FCC to preempt the field with respect to regulation of interstate telecommunications services as common carriers. *Public Service Com'n of Maryland v. F.C.C.*, 909 F.2d 1510, 1515

---

[1] The distinction between telecommunications services and information services is drawn by the Telecommunications Act of 1996, Pub.L. 104-104, amendments to 42 U.S.C. § 153, but reflects a similar distinction drawn by the FCC in its *Computer Inquiry* proceedings. *See Petition for Declaratory Ruling*, 19 F.C.C.R. 3307 (WC Docket No. 03-45, February 19, 2004) at fn 60 and related text. *Southwestern Bell Telephone v. Missouri Public Service Com'n*, 461 F.Supp.2d 1055 (E.D.Mo. 2006).

(C.A.D.C. 1990).[2] Moreover, the Act states that "it is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 42 U.S.C. § 230(b)(2).

FCC regulations and statements also have not expressly preempted State regulation of broadband providers. However, it seems likely that the FCC would conclude that imposition of common carrier like requirements such as those in the first portion of House Bill 1069 would stand as an obstacle to the accomplishment of the full purposes and objectives of the FCC, and arguably those of Congress as well.

In March of 2002 the FCC issued a Declaratory Ruling concluding that broadband Internet service provided by cable companies is an information service and not a telecommunications service and therefore not subject to mandatory Title II common carrier regulation. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002). In this ruling, the Commission concluded that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market." Declaratory Ruling 4802, ¶6. This ruling was upheld by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

Not long after the decision in *Brand X*, the Commission issued a similar ruling with respect to broadband Internet access provided through DSL. *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853 (September 23, 2005). The ruling expressly seeks to "[develop] a consistent regulatory framework across platforms by regulating like services in a similar functional manner," *id.* at 14855, and states that the "appropriate framework" for regulation of DSL is "one that is eligible for a lighter regulatory touch," *id.* at 14856. Specifically, the FCC determined that DSL is an information service, and that carriers would be permitted to offer the service on a common carrier basis or a non-common carrier basis. The FCC stated that this classification was consistent with the holding of *Brand X*, and also would "move closer to crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services," and "best enable" providers "to embrace a market-based approach to their business relationships with ISPs, providing the flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs." *Id.* at 14899. The FCC found insufficient evidence in the record to support a specific prohibition on blocking or otherwise denying access to any lawful Internet content, applications or services, but agreed that such limits would be inconsistent with statutory goals, and stated that they would not hesitate to take action if evidence were presented. *Id.* at 14904. Finally, the FCC found that retention of the nondiscriminatory access requirement would "[impede] deployment of innovative wireline broadband services taking into

---

[2] Such preemption is not, however, automatic. *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006); *Verizon North Inc. v. Telnet Worldwide, Inc.*, 440 F.Supp.2d 700, 714 (W.D.Mich. 2006)

account technological advances and consumer demand." *Id.* at 14904-14905.[3]

In short, both the federal statute and FCC policy strongly favor allowing the broadband market to grow without common carrier type regulations. Moreover, the FCC has expressly considered and rejected a requirement that DSL services be made available on a non-discriminatory basis to other ISPs, finding that such a requirement would impede progress in the development of the Internet. This type of intentional rejection can support a finding of conflict preemption. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). But the general conflict with the stated policies of Congress and of the FCC would also be likely to lead to a decision by the FCC to preempt any attempt on the part of a State to impose the type of requirements discussed in the first portion of the bill. *See Vonage Holdings Corp. v. Minnesota Public Utilities Com'n*, 290 F.Supp.2d 993 (D.Minn. 2003).

The information requirements present a somewhat different question. Such a requirement would place no restrictions on the functioning of broadband Internet services in the market, but would simply require that they make certain information available to the PSC on a quarterly basis. No provision of federal law or FCC regulation either specifically bars such a requirement or sets out any requirement or policy that information collection would necessarily impede. Moreover, the public availability of such information could arguably advance competition.

I have found no case or ruling on this specific type of information requirement, but disclosure requirements are not inherently preempted by the Act or the regulations. *See Qwest Corp. v. Scott*, 380 F.3d 367 (8th Cir. 2004) (Requirement that Qwest provide WorldCom with reports concerning the provision of certain telecommunications services). On the other hand, a request for information may be found to be preempted if the information sought is "unnecessary," or if the collection of the information would place an undue burden on the entity. *Verizon Wireless (VAW) LLC v. Sahr*, 457 F.Supp.2d 940, 956-957 (D.S.D. 2006); *see also Petition for Declaratory Ruling*, 19 F.C.C.R. 3307, 3323 (WC Docket No. 03-45, February 19, 2004). I lack the knowledge of the industry that would be necessary to make this determination. Thus, I cannot say that the reporting requirement would be preempted.

Finally, it is my view that a substantive provision implementing the policy statement of House Bill 1069 could violate the Commerce Clause. Even if the application of this provision alone would not have a significant adverse effect on interstate commerce, it is well-established that State laws that impose inconsistent state to state regulation on an area of interstate commerce will be found to violate the Commerce Clause. *Morgan v. Virginia*, 328 U.S. 373, 386 (1946); *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 169 (S.D.N.Y. 1997). While not all regulations affecting

[3] The PSC had already held that it lacked the authority to set rates for DSL services or otherwise regulate DSL service. *CloseCall America, Inc. v. Verizon Maryland Inc.*, 95 Md.P.S.C. 399, 2004 WL 3235313 (Case No. 8927; Order No. 79638 November 30, 2004).

the Internet are subject to this analysis, *MaryCle v. First Choice*, 166 Md.App. 481 (2006), it is my view that market regulation of the Internet imposes this risk. *See Petition for Declaratory Ruling*, 19 F.C.C.R. 3307, 3317 (WC Docket No. 03-45, February 19, 2004).

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
love07.wpd