Date of Hearing: June 26, 2018

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Ed Chau, Chair
SB 822 (Wiener) – As Amended June 25, 2018

SENATE VOTE: 23-12

SUBJECT: Communications: broadband Internet access service

SUMMARY: This bill would enact the California Internet Consumer Protection and Net Neutrality Act of 2018, as specified. Specifically, **this bill would**:

1) Make it unlawful for an internet service provider (ISP), insofar as the provider is engaged in providing broadband internet access service (BIAS), to engage in any of the following activities:

    - Blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management practices.

    - Impairing or degrading lawful internet traffic on the basis of internet content, application, or service, or use of a non-harmful device, subject to reasonable network management practices.

    - Engaging in paid prioritization.

    - Unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband internet access service or the lawful internet content, applications, services, or devices of their choice, or an edge provider's ability to make lawful content, applications, services, or devices available to end users. Reasonable network management, as defined, would not be considered a violation of this provision.

2) Require an ISP engaged in the provision of BIAS to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband internet access services sufficient for consumers to make informed choices regarding uses of such services and for content, application, service, and device providers to develop, market, and maintain internet offerings.

3) Specify that nothing in the above provision:

    - supersedes any obligation or authorization a provider of BIAS may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so; or

    - prohibits reasonable efforts by an internet service provider of BIAS to address copyright infringement or other unlawful activity.

4) Prohibit a state agency from contracting with an ISP for the provision of BIAS unless that provider certifies, under penalty of perjury, that it is in full compliance with this bill.

5) Provide that a violation of this bill shall be subject to the remedies and procedures established pursuant to the Consumer Legal Remedies Act (CLRA) under existing law.

6) Define various terms for these purposes, including;

   - "Broadband internet access service" to mean a mass-market retail service by wire or radio in California that provides the capability to transmit data to, and receive data from, all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. BIAS also would be defined to encompass any service in California that provides a functional equivalent of that service or that is used to evade the protections set forth in this bill.

   - "Internet service provider" means a business that provides broadband internet access service to an individual, corporation, government, or other customer in California

   - "End user" to mean any individual or entity that uses a BIAS.

   - "Edge provider" to mean any individual or entity that provides any content, application, or service over the internet, and any individual or entity that provides a device used for accessing any content, application, or service over the internet

   - "Paid prioritization" to the management of an ISP's network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (1) in exchange for consideration, monetary or otherwise, from a third party, or (2) to benefit an affiliated entity.

7) Enact various findings and declarations, including that it is the intent of this act to:

   - ensure that corporations do not impede competition or engage in deceptive consumer practices, and that they offer service to residential broadband internet customers on a nondiscriminatory basis; and

   - protect and promote the internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.

EXISTING LAW:

1) Establishes, pursuant to the federal Communications Act of 1934 (the 1934 Act), as amended, the Federal Communications Commission (FCC) for the purpose of regulating interstate and foreign communication by various means. (47 U.S.C. Sec. 151 et seq.)

2) Generally authorizes the FCC to forbear from applying any regulation or any provision of the 1934 Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the FCC makes specified determinations. Requires the FCC, in making such a determination, to consider whether the forbearance from enforcing the provision or regulation will promote competitive market

conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. States that a state commission may not continue to apply or enforce any provision of this chapter that the FCC has determined to forbear from applying under this section. (47 U.S.C. Sec. 160.)

3) States, as a matter of federal law, that it is the United States' policy 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, and to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the internet and other interactive computer services. (47 U.S.C. Sec. 230.)

4) Requires, as a matter of federal law, that all charges, practices, classifications, and regulations for and in connection with common carrier interstate communication service by wire or radio be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. Further authorizes the FCC to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the 1934 Act. (47 U.S.C. Sec. 201.)

5) Prohibits, as a matter of federal law, any common carrier from making any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage. (47 U.S.C. Sec. 202.)

6) Authorizes the Federal Trade Commission (FTC) to prevent persons, partnerships or corporations, except common carriers, among others, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts of practices in or affecting commerce. (15 U.S.C. Sec. 45(a).)

7) Defines, as a matter of state law, unfair competition to mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising and any act prohibited, as specified. (Bus. & Prof. Code Sec. 17200.)

8) Establishes the CLRA to protect consumers against unfair and deceptive business acts and practices and provides procedures to secure such protections.Provides that the CLRA shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection. (Civ. Code Sec. 1750 et seq.)

9) Declares unlawful, under the CLRA, certain unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. Those methods, acts, and practices, include, among other things, representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. (Civ. Code Sec. 1770.)

10) Provides that any consumer who suffers damage as a result of a practice declared to be unlawful under the CLRA may bring an action against that person to recover the following damages:

    - actual damages, but in no case shall the total award of damages in a class action be less than $1,000;
    - an order enjoining the methods, acts, or practices;
    - restitution of property;
    - punitive damages; and/or
    - any other relief that the court deems proper. (Civ. Code Sec. 1780(a).)

11) Authorizes a consumer entitled to bring a claim under the CLRA to file a class action suit on behalf of a class of similarly situated consumers to recover damages or other relief listed above. (Civ. Code Sec. 1781(a).)

12) Provides that any action brought under the specific provisions of the CLRA must be commenced not more than three years from the date of the commission of such method, act, or practice. (Civ. Code Sec. 1783.)

13) Requires, as a matter of California's Public Contract Code, that bidders or persons entering into contracts with the state to sign various statements or certify various matters under penalty of perjury. For example, existing code requires

    - a person that submits a bid or proposal to, or otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of $100,000 or more to certify, under penalty of perjury, at the time the bid or proposal is submitted or the contract is renewed, all of the following:
        - that they are in compliance with the Unruh Civil Rights Act (Unruh);
        - that they are in compliance with the California Fair Employment and Housing Act (FEHA); and
        - that any policy that they have against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, is not used to discriminate in violation of the Unruh or the FEHA, as specified. (Pub. Contract Code Sec. 2010.)
    - Requires specified departments under the State Contract Code to require from all prospective bidders the completion, under penalty of perjury, of a standard form of questionnaire inquiring whether such prospective bidder, any officer of such bidder, or any employee of such bidder who has a proprietary interest in such bidder, has ever been disqualified, removed, or otherwise prevented from bidding on, or completing a federal, state, or local government project because of a violation of law or a safety regulation, and if so to explain the circumstances. (Pub. Contract Code Sec. 10162.)

FISCAL EFFECT: According to the Senate Appropriations Committee, the prior version of this bill had: "On[e]-time costs of $1 million (General Fund and Special Fund) and ongoing costs of $1.8 million annually (General Fund and Special Fund) for Department of Justice (DOJ) staff to conduct necessary enforcement, interface with the public, and communicate with the regulated community."

COMMENTS:

1) **Purpose of this bill**: This bill seeks to enact various net neutrality provisions adopted from FCC regulations that were repealed in 2017. This is an author-sponsored bill.

2) **Author's statement**: According to the author, "[o]n December 14, 2017, the [FCC] voted to abolish Net Neutrality protections, reversing years of careful, bi-partisan work to keep the internet open for free speech, entrepreneurship and innovation. As of June 11th, 2018, there are no longer net neutrality protections[,] even federally.

   Net Neutrality refers to the principle that consumers, not ISPs, get to decide what applications, content and services, we use and access, and that the open internet thrives when consumers, not ISPs, decide what companies are winners and losers online. Under the new FCC order, ISPs are now free to charge 'access fees' to sites and services simply to load for users, create fast and slow lanes that advantage deep-pocketed incumbents and ISPs' own content, and even block legal content that ISPs find[ ] objectionable.

   For more than 15 years – dating back to Republican Chair Michael Powell, the FCC has worked to prevent broadband providers from interfering with consumers rights to use the sites, services, applications and devices of their choosing, which led to a series of new applications that drove demand for faster access, giving ISPs the incentive and revenue to build out their networks. But in 2017, the FCC threw out that model, leaving all Americans, including Californians, without the Net Neutrality protections that allowed us to collectively build the most democratic and entrepreneurial communication network in human framework exists within California law.

   SB 822 reinstates Net Neutrality protections in California and prevents ISPs from engaging in practices that are inconsistent with a free and fair internet—Net Neutrality. […] [SB] 822 puts California at the national forefront of ensuring an open internet. […]"

3) **General background on the internet**: Of relevance to this discussion on SB 822 and the topic of net neutrality (discussed further below) is a basic understanding of the internet through what are known as backbone networks, ISPs, edge providers, and end users (the customers). Backbone networks, as described a federal court in *Verizon v. FCC* (D.C. Cir. 2014) 740 F.3d 623 are "interconnected, long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data." End users wishing to access the internet generally connect to backbone networks by way of the ISPs. In that sense, ISPs are said to provide the "on-ramp" to the internet. Stated another way, "users generally connect to these networks—and, ultimately, to one another—through local access providers like petitioner Verizon, who operate the 'last-mile' transmission lines." (*Verizon* at 628-629.)

   Examples of ISPs are AT&T, Verizon, and Comcast. Today, these ISPs provide that on-ramp through a faster, high speed connection known as "broadband internet access services" (BIAS) or "broadband" for short, compared to the prior "dial up" connections used over

telephone lines by in prior years. In contrast, "edge providers" are companies such as YouTube, Facebook, and Google, which provide content, services, and applications over the Internet that are consumed by the end users.

4) **Net neutrality**: The term "net neutrality" refers to "internet openness"; the concept that the internet highways should be an open and equally available to all, and that no internet "traffic" should be given preference or prioritized over other traffic. A widely cited example of a violation of net neutrality principles was the ISP Comcast's throttling (*i.e.*, secret slowing) of uploads from peer-to-peer file sharing applications. (Svensson, MSNBC, *Comcast blocks some Internet traffic: Tests confirm data discrimination by number 2 U.S. service provider* (Oct. 19, 2007).) Comcast did not stop blocking these protocols, like BitTorrent, until the FCC ordered them to stop, "marking the first time that any U.S. broadband provider has ever been found to violate Net neutrality rules." (McCullagh, CNET, *FCC formally rules Comcast's throttling of BitTorrent was illegal* (Aug. 20, 2008).) The FCC's decision was ultimately appealed by Comcast on the basis that the order fell outside the scope of the of commission's authority under the Communications Act of 1934 (*Comcast Corp. v. FCC* (2010) 600 F.3d 642.) The U.S. Court of Appeal for the District of Columbia agreed, vacating the decision.

   Of particular relevance to this bill, are several orders issued by the FCC in the last decade relating to such net neutrality-related practices, including the 2015 Open Internet Order, which reclassified internet access as a common carrier telecommunications service (in other words, a public utility), and the partial repeal of that order on December 14, 2017, whereby the FCC, under new leadership, once again reclassified internet access as an information service and under the purview of the FTC, instead.

5) **FCC's 2010 conduct rules against blocking and unreasonable discrimination**: In 2009, the FCC began "a public process to determine whether and what actions might be necessary to preserve the characteristics that have allowed the Internet to grow into an indispensable platform supporting our nation's economy and civic life, and to foster continued investment in the physical networks that enable the Internet." As a result of that process, in 2010, the commission issued a set of regulations to move towards the establishment of the internet neutrality, or net neutrality, concept. Specifically, that 2010 FCC order prohibited blocking and unreasonable discrimination and, in doing so, laid out how broadband providers have acted to limit the openness of the internet:

   > These dangers to Internet openness are not speculative or merely theoretical. Conduct of this type has already come before the Commission in enforcement proceedings. As early as 2005, a broadband provider that was a subsidiary of a telephone company paid $15,000 to settle a Commission investigation into whether it had blocked Internet ports used for competitive VoIP applications. In 2008, the Commission found that Comcast disrupted certain peer-to-peer (P2P) uploads of its subscribers, without a reasonable network management justification and without disclosing its actions. Comparable practices have been observed in the provision of mobile broadband services. After entering into a contract with a company to handle online payment services, a mobile wireless provider allegedly blocked customers' attempts to use competing services to make purchases using their mobile phones. A nationwide mobile provider restricted the types of lawful applications that could be accessed over its 3G mobile wireless network.

(FCC, Report and Order, *Preserving the Open Internet Broadband Industry Practices* (Dec. 23, 2010) WC Docket No. 07-52, FCC 10-201, p. 21, internal citations omitted.)

A 2014 federal appeals court ruling, however, ultimately struck down those 2010 rules. (*See Verizon*, discussed further in Comment 6, below.)

6) **FCC's 2015 Open Internet Order, generally**: Immediately after the 2010 rules pertaining to net neutrality were struck down, the FCC issued a new order, noting that "[t]hreats to Internet openness remain today. The record reflects that broadband providers hold all the tools necessary to deceive consumers, degrade content, or disfavor the content that they don't like. The 2010 rules helped to deter such conduct while they were in effect. But, as Verizon frankly told the court at oral argument, but for the 2010 rules, it would be exploring agreements to charge certain content providers for priority service. Indeed, the wireless industry had a well-established record of trying to keep applications within a carrier-controlled "walled garden" in the early days of mobile applications. That specific practice ended when Internet Protocol (IP) created the opportunity to leap the wall. But the [FCC] has continued to hear concerns about other broadband provider practices involving blocking or degrading third-party applications." (FCC, Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet* (Mar. 12, 2015) GN Docket No. 14-28, FCC 15-24, pp. 4-5 <https://docs.fcc.gov/public/attachments/FCC-15-24A1_Rcd.pdf> [as of Jun. 20, 2018], internal citations omitted) (hereinafter "2015 Open Internet Order").).

Indeed, the March 12, 2015 Open Internet Order, made clear:

> The open Internet drives the American economy and serves, every day, as a critical tool for America's citizens to conduct commerce, communicate, educate, entertain, and engage in the world around them. The benefits of an open Internet are undisputed. But it must remain open: open for commerce, innovation, and speech; open for consumers and for the innovation created by applications developers and content companies; and open for expansion and investment by America's broadband providers. For over a decade, the Commission has been committed to protecting and promoting an open Internet. […]
>
> …the overwhelming consensus on the record, is that carefully-tailored rules to protect Internet openness will allow investment and innovation to continue to flourish. Consistent with that experience and the record built in this proceeding, today we adopt carefully-tailored rules that would prevent specific practices we know are harmful to Internet openness— blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness. We also enhance our transparency rule to ensure that consumers are fully informed as to whether the services they purchase are delivering what they expect. (*Id*. at p. 3.) To that end, the FCC issued rules, which included "practices which invariably harm the open Internet—Blocking, Throttling, and Paid Prioritization […]." (*Id*. at p. 7.)
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> No blocking is the principle that consumers who subscribe to a retail BIAS must get what they have paid for—access to all (lawful) destinations on the internet. No throttling guards against degradation targeted at specific uses of a customer's broadband connection based on source, destination, or content. It is necessary both to fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet, and to avoid gamesmanship designed to

avoid the no-blocking rule. No paid prioritization prohibits "fast lanes" on the internet highways whereby a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, services, or devices. (*Id*.) These principles are all embodied in the current bill, as is another concept of "unreasonable interference." This standard, as described by the 2015 order, "protects free expression, thus fulfilling the congressional policy that 'the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'" (*Id*. at 9, internal citation omitted.)

7) **FCC Restoring Internet Freedom Order 2017:** On December 14, 2017, the FCC, under the new leadership of the Trump administration, repealed the Obama-era net neutrality protections in the 2015 Open Internet Order and preempted any conflicting state laws. This put ISPs and technology companies back on the same national regulatory playing field as they were *before* 2015: the FTC. Effectively, the repeal removed FCC restrictions on blocking, throttling, and prioritization, as long as such practices are publicly disclosed.

   As a result, any power to take action has reverted back to the FTC. However, unlike the FCC, the FTC is not able to create hard-and-fast rules that ISPs must follow, though the FTC does have authority to prevent deceptive and unfair practices so that it can force companies to live up to the promises they place in their terms of service. In other words, if an ISP promises a "neutral" network and then fails to deliver, the FTC could presumably take action. Stated another way, the FTC's actions are more limited to when a broadband provider deceives the public.

8) **Net neutrality is a consumer protection issue:** As stated by the *Verizon* court, "[p]roponents of net neutrality worry about the relationship between broadband providers and edge providers. They fear that broadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers' access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers. Thus, for example, a broadband provider like Comcast might limit its end-user subscribers' ability to access the *New York Times* website if it wanted to spike traffic to its own news website, or it might degrade the quality of the connection to a search website like Bing if a competitor like Google paid for prioritized access." (*Verizon* 740 F.3d at 629.) In that regard, the individuals who suffer from the loss of net neutrality are not limited to the edge providers; it affects the end user customers as well. Indeed, the consequences of creating fast lanes that users can access for a fee is that it will disproportionately impact some people over others, and impact their ability to find jobs, get health care, do well in school, go on to higher education, get better paying jobs, start businesses, and so forth. Rural areas will likely be hit harder than urban areas, but again, even in urban areas, accessibility issues will remain. Poor and working class people, and communities of color reportedly have a far more disproportionate lack of access to the internet than affluent communities.

   Arguably, the repeal of net neutrality will aggravate such systematic divides/issues. On the heels of the FCC's decision to repeal the net neutrality protections in 2017, it was warned that this deregulation could "force working class people to pay for internet access twice: once for basic access, and again for equitable access. That's a direct challenge to social mobility. Not only would that complicate the process of applying for jobs or for college admission, it

would also put an obstacle in the path of people trying to start their own businesses." (Jones, The New Republic, *Who Loses in the War Against Net Neutrality?* (Dec. 15, 2017).)

Ultimately, offering different levels of services or different quality of service such as throttling or blocking lawful content, without clearly advertising that the services will come with such speed changes or content regulations, and when promising neutral and open networks, is arguably a form of false and deceptive business practice in violation of the Consumer Legal Remedies Act, as recognized by this bill.

9) **Prior committee's amendments removed application to interconnection and zero-rating**: This bill was previously heard on June 20, 2018, in the Assembly Committee on Communications and Conveyance where the bill was narrowed by that committee to remove various provisions, including prohibitions against ISPs engaging in the following activities:

- Speeding up, slowing down, altering, restricting, interfering with, or otherwise directly or indirectly favoring, disadvantaging, or discriminating between lawful internet traffic on the basis of source, destination, internet content, application, or service, or use of a nonharmful device, or of class of internet content, application, service, or nonharmful device, subject to reasonable network management practices.

- Requiring consideration from edge providers, monetary or otherwise, in exchange for access to the ISP's end users, including, but not limited to, requiring consideration for either of the following: (1) transmitting internet traffic to and from the ISP's end users; or (2) refraining from specified prohibited activities.

- Engaging in *third-party* paid prioritization.

- Engaging in application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties.

- Zero-rating[1] some internet content, applications, services, or devices in a category of internet content, applications, services, or devices, but not the entire category.
- Engaging in application-specific differential pricing.

- Engaging in practices with respect to, related to, or in connection with, ISP traffic exchange that have the purpose or effect of circumventing or undermining the effectiveness of this section.

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[1] To the extent that various stakeholders have argued that zero rating is beneficial to low income communities and have presented a very recently conducted study to that end, it should be noted that this practice has been highly controversial. As many others have alleged, the practice in fact has "been a great way for companies to give their own services an unfair advantage in the increasingly competitive streaming video market. You might recall that the FCC was just about to declare AT&T's behavior on this front anti-competitive under its net 2015 neutrality protections when the Trump administration took over the FCC and decided to deep six the rules." (Bode, Motherboard, *AT&T Rewrites History, Claims Killing Net Neutrality Will Provide 'Enormous Benefits'* (Dec. 4, 2017).) "In its letter to AT&T, the FCC said it had 'reached the preliminary conclusion that these practices inhibit competition, harm consumers, and interfere with the 'virtuous cycle' needed to assure the continuing benefits of the Open Internet.' In its letter to Verizon, the FCC said the company's FreeBee Data 360 plan "has the potential to hinder competition and harm consumers.'" (Gustin, Motherboard, *FCC Hits Verizon, AT&T on Zero-Rating, But It Might Be Too Late*: *A zero-rating crackdown may quickly be reversed by Trump's FCC* (Dec. 2, 2016).)

- Engaging in deceptive or misleading marketing practices that misrepresent the treatment of internet traffic, content, applications, services, or devices by the Internet service provider, or that misrepresent the performance characteristics or commercial terms of the BIAS to its customers.

- Advertising, offering for sale, or selling BIAS without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.

- Failing to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its BIAS sufficient for consumers to make informed choices regarding use of those services and for content, application, service, and device providers to develop, market, and maintain internet offerings.

The prior version of the bill also had significantly more detailed provisions governing contracts between public entities and ISPs for BIAS that sought to ensure that the service be rendered consistent with specified net neutrality requirements. That provision was pared back to the self-certification provision in this bill, which is consistent with many other provisions under existing law, whereby state contracts require some form of self-certification from government vendors that the vendor is in compliance with California law.

Staff notes that the prior committee's amendments were opposed by the author and most supporters who appeared to testify and primarily argued that they "weakened" if not "eviscerated" the bill by gutting the provisions relating to zero-rating and interconnection. Various opponents who opposed the then-"in print" version of SB 822, based on claims that it went beyond President Obama's "FCC Order," continued to oppose the "as-amended" version of the bill because they believed it still "goes beyond the 2015 Obama Order," arguing that the Obama Order was "similar to but not identical to" the bill as amended that morning. (*See* Comment 10 for more.)

The California Cable & Telecommunications Association (CCTA) writes in opposition that the newly amended version of "SB 822 is an overly simplistic attempt to codify the basic principles of net neutrality without the benefits of the definitions and guidance provided by the FCC. SB 822 is missing the essential guidance and clarifications from the FCC 'Restoring Internet Freedom' Order."

10) **Inconsistent interpretations as to what is in the 2015 FCC Order can be easily resolved**: Staff notes that while the FCC "final rules" are relatively short and in "black and white," they began on well over 280 pages into a 300-plus page order which informed the interpretation and operation of those "final rules." To codify just the technical verbiage of the "final rules" at the end of a 313 page order and present that as the FCC's net neutrality rules to protect and preserve an open internet for consumers, as the FCC understood those same rules, would at best be misinformed about how FCC rules operate, and disingenuous at worst. While stakeholders on both sides continue to debate individual sentences from the order before various committees, including this one, one thing is clear: as reflected in CCTA's opposition (*see* Comment 9 above), the current version of this bill requires companies who wish to comply with the law to fill in the blanks that would have been answered by some of those omitted pages. Inversely, and of particular relevance to this Committee, the current version of this bill leaves consumers with potentially fewer protections than the FCC intended when it

fleshed out the final rules in the order. However, the complexities of the debate aside, there appears to be a relatively easy solution to resolve this matter.

Given the intent of the prior committee to better maintain consistency with the FCC rules but not go beyond the actual net neutrality protections put in place by FCC in 2015, and given that the proponents and opponents of this bill and net neutrality, more generally, cannot agree to a consistent interpretation of what was included in the FCC order that was repealed in 2015, the author may wish to consider an amendment that would remove all room for debate in the Legislature by paring the current language down to the following three straightforward and unambiguous elements:

(1) require ISPs providing BIAS in California to comply with the *Protecting and Promoting the Open Internet* Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, released on March 12, 2015 (unambiguously consistent with what the FCC passed);

(2) prohibit any state agency in California from contracting with an ISP for the provision of BIAS unless that provider certifies, under penalty of perjury, that it is in full compliance with that order as it was in place on December 31, 2015 (a modification of the current version of this bill); and

(3) provide that a violation of this bill shall be subject to the remedies and procedures established pursuant to the Consumer Legal Remedies Act under existing law (already in the current version of this bill).

11) **Procurement provision now the primary basis of claims that bill goes beyond 2015 Open Internet Order**: Staff notes that the claims that this bill goes beyond the 2015 Open Internet Order appear to center (at least in part) on the fact that this bill contains a provision that requires vendors that wish to contract with state agencies to self-certify that they are in compliance with the bill's net neutrality standards. While it is true that the 2015 Open Internet Order did not contain a similar provision on government procurement, that does not mean that this bill cannot justifiably include those additional requirements.

This State has many public policies in place that it simultaneously supports by ensuring that public funds are not spent in a manner that contravenes those exact same public policies. For example, the state prohibits discrimination both in terms of the Unruh Civil Rights Act and the Fair Employment and Housing Act. It also requires vendors who contract with the state to self-certify that they are in compliance with those laws and do not engage in other protected-activities (such as the right to boycott) in a manner that would be discriminatory in violation of those laws. (*See* AB 2844 (Bloom, Ch. 581, Stats. 2016.) While those "good government" procurement laws often follow years after the underlying public policy is enacted, that is not a requirement. Nor is it a requirement that the procurement provisions be part of the 2015 FCC Order in order to be an appropriate public policy for the State of California, should this Legislature choose to enact the net neutrality regulations of that Order. Indeed, as a matter of public policy, should the Legislature elect to enforce net neutrality rules in California, it arguably should not spend millions of taxpayer dollars in information technology and telecommunications contracts investing in companies that violate those laws.

Notably, this provision, as recently amended, does not place onerous requirements on state agencies to make determinations about the compliance of vendors with the law. As a

practical matter, it merely requires vendors to self-certify, under penalty of perjury, on a single document that would be included as part of their bid, that they are in compliance.

12) **Preemption:** The Supremacy Clause of Article VI of the U.S. Constitution establishes that wherever there is a conflict between federal and state law, the U.S. Constitution, federal statutes, and U.S. Treaties are "the supreme law of the land" and therefore take precedence.

The issue of federal preemption under the Supremacy Clause is one of both express preemption (when a federal statute explicitly confirms Congress's intention to preclude state law) and implied or "field" preemption (which can arise in two ways: (1) where the federal law is so pervasive as to imply that Congress intended to "occupy the field" in that area of law; or (2) where there is a "conflict" between federal and state law such that the two laws cannot logically co-exist or that state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress).

In opposition to (the prior version of) this bill, the CCTA writes:

> SB 822 violates the Interstate Commerce Clause by proposing to impose state specific restrictions on an inherently interstate service. Establishing a California specific Internet neutrality law is bad policy and contrary to federal law. When the FCC adopted the "Restoring Internet Freedom" Order, it included clear federal preemption language to prohibit states from regulating the Internet inconsistent with the federal regulatory objectives. In fact, the provisions the bill proposes was equally preempted by the 2015 Open Internet Order, as it too, recognized that state-level regulation of the Internet is unworkable.

Ultimately, the Restoring Internet Freedom Order appears to be on shaky legal ground, as it currently faces challenge from the Attorneys General of 22 states and the District of Columbia (including the Attorney General of California) and could be overturned by the courts. Specifically, in January, the Attorneys General for California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Virginia, and the District of Columbia filed suit, against the FCC and the Restoring Internet Freedom Order, contending that the FCC's decision to rescind the 2015 Open Internet Order was unlawful. (*See* Protective Petition for Review (Jan. 16, 2018) <https://www.oag.ca.gov/system/files/attachments/press_releases/petition_-_filed.pdf> [as of Jun. 20, 2018].)

Their suit alleges that the order was, "arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act […], violates federal law, including but not limited to, the Constitution, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; conflicts with [specified] notice-and-comment rulemaking requirements […], and is otherwise contrary to law."

As noted in prior policy committees, the preemption provision is made particularly vulnerable when considering that the FCC's process in implementing the Restoring Internet Freedom Order make it susceptible to legal challenge and repeal. Indeed, given the compromised public comment and inadequate notice of proposed rulemaking, some, including the Attorney General of New York who is spearheading the lawsuit, have argued

that the "move to repeal the rules included an unlawful preemption of state and local regulations." (Shaban and Fung, Washington Post, *More than 20 states are suing the FCC over its net neutrality decision* (Jan. 16, 2018) <https://www.washingtonpost.com/news/the-switch/wp/2018/01/16/more-than-20-states-are-suing-the-federal-communications-commission-over-its-net-neutrality-decision/?utm_term=.c833df7d1f2a> [as of Jun. 20, 2018].)

If the 2017 order repealing net neutrality is overturned, and if this bill were to codify the 2015 Open Internet Order in part or in whole (as suggested in Comment 9, above), it would certainly undermine, if not obviate, the preemption arguments against this legislation, given that the federal law would revert back to the 2015 Open Internet Order.

13) **Arguments in support**: In support of the prior version of this bill, the ACLU wrote:

> Strong enforceable net neutrality provisions ensure an open Internet for all Californians, free from interference by ISPs that would otherwise be empowered to hinder competition and limit choices. Net neutrality is the simple principle that ISP customers, not the ISP itself, should choose what apps, services, and websites they want to use. It enables competition by ensuring that small start-ups have a level playing field with incumbent services with deep pockets. It prevents ISPs from choosing winners and losers online based on their own interests. And it allows marginalized voices, who often have the fewest resources to 'play to play,' to leverage the Internet to build communities and create societal change […]
>
> There is ample evidence that, without net neutrality protections, competition and access to online services will suffer. Prior to the FCC's Open Internet Order, there were multiple instances of ISPs using their position as the gateway to the Internet to block or otherwise deter access to certain services. AT&T refused to allow Apple iPhone users to use FaceTime, the company's video call app, unless subscribers paid for a more expensive data plan—while allowing other video calls to proceed unhindered. A North Carolina-based ISP blocked access to Vonage, a popular Voice over IP telephone service, in order to favor its own offering. Comcast slowed traffic from [P2P] file sharing service BitTorrent without notice to its customers. […]
>
> With the federal government abdicating its responsibility, it falls to states like California to take the lead in protecting access to the entirety of the Internet.

14) **Arguments in opposition**: CCTA writes, "[w]hile the members of CCTA are committed to providing an open Internet, CCTA members cannot support this proposal which is inconsistent with the federal regulatory framework governing ISPs, is federally preempted and may harm the customer experience. SB 822 will also likely result in costly, lengthy litigation with zero benefits for broadband customers." CCTA argues that "[w]ith the potential of a cadre of government attorneys and private parties making their own interpretation of the law subjecting Internet companies to a patchwork of potentially conflicting requirements across all of the different jurisdictions in which it operates, SB 822 would actually harm consumers by stifling innovation and investment. The increased burdens of compliance would inevitably result in increased cost for the delivery of broadband service, making it financially untenable to deploy broadband in rural areas of the State."

A coalition of opponents including AT&T, Verizon, Frontier Communications, T-Mobile, CTIA, CalChamber, the Civil Justice Association of California, San Gabriel Valley Economic Partnership, CCTA, The Chamber Greater Coachella Valley, Tracfone, CenturyLink, CalCom, California Manufacturers & Technology Association, Sprint, and Consolidated Communications write that "[o]ne of the fallacies at the heart of SB 822 is the false presumption that one side of the net neutrality debate actually opposes an open Internet. The above named organizations want to express our continued support for an open Internet where companies do not block, throttle, or otherwise interfere with customers' ability to go where they wish on the Internet. But rather than furthering that policy, SB 822 would create regulations that will disrupt the Internet, make network management untenable, and ultimately harm consumers."

15) **Removal of support**: Due to the shortened timeframe between the last hearing and the hearing before this Committee, this analysis may not reflect all updated positions. That being said, the California Association of Realtors has formally removed their registered support of this bill, due to the recent amendments. The Bay Area Students Activists has taken a "support if amended" asking this Committee to restore the language that was previously contained in the bill as of June 11, 2018. Staff notes that in order to preserve the integrity of the institution and the committee hearing process, it is improper for one committee to wholly undo the exact amendments of the prior committee.

16) **Double-referral**: This bill was heard in the Assembly Communications & Conveyance Committee on June 20, 2018, and passed on a vote of 8-2.

REGISTERED SUPPORT / OPPOSITION:

Support (prior version, unless noted otherwise)

18MillionRising.Org
3scan
8Circuit Studios
Alliance of Californians for Community Empowerment (ACCE) Action
Access Humboldt
American Civil Liberties Union (ACLU) California
Ad Hoc Labs
AdRoll
ADT Security Services
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Sustainable Business Council
Angel Investment Capital
AppliedVR
Asian Americans Advancing Justice
Bay Area Student Activists (support if amended)
California Association of Competitive Telecommunications Companies (CALTEL)
California Association of Nonprofits
California Clean Money Campaign
California Common Cause
California Conference Board
California Educational Technology Professionals Association (CETPA)

California Faculty Association
California Freedom Coalition
California Labor Federation
California Low-Income Consumer Coalition
California Public Interest Research Group
California State Student Association
California Teamsters Public Affairs Council
California Voices for Progress
CallFire
Canvas
CCTV Center for Media & Democracy
CD 4 Indivisible Network
Center for Democracy & Technology
Center for Media Justice
Center for Media Justice
Center for Rural Strategies
Chute
City and County of San Francisco, Mayor Mark E. Farrell
City of Emeryville, Mayor John Bauters
City of Los Angeles, Mayor Eric Garcetti
City of Oakland, Mayor Libby Schaaf
City of Sacramento, Mayor Darrell Steinberg
City of San Jose, Mayor Sam Liccardo
Climate Solutions Net
Coalition for Human Immigrant Rights (CHIRLA)
Cogent Communications
Color of Change
Common Cause
Common Sense Kids Action
Computer-Using Educators
Community Tech Network
Consumer Attorneys of California
Consumer Union
Contextly
County of San Mateo
County of Santa Clara
Courage Campaign
Creative Action Network
CreaTV San Jose
CREDO Action
Daily Kos
Degreed
Demand Progress Action
Democracy for America
Disability Rights Educations and Defense Fund
DLT Education
DroneTV.Com
Electronic Frontier Foundation (EFF)
Engine

Engineers and Scientists of California (ESC)
Equal Rights Advocates
Etsy
Evensi
EveryLibrary
Expa
Faithful Internet
Fight for the Future
Flip The Fourth
Founder Academy
Foursquare
FREE GEEK
Free Press
Friends of the Millbrae Public Library
Girl Groove
GitHub
GoGo Technologies
Golden
Greenpeace USA
Gusto
Hackers/Founders
Heartwood Studios
HelloSign
High Fidelity
Homebrew
Honorable Anna G. Eshoo, Member of Congress
Honorable Dave Jones, State Insurance Commissioner (current version)
Honorable Nancy Pelosi, Member of Congress
Ifixit
INCOMPAS
Indivisible CA-25 Simi Valley Porter Ranch
Indivisible Beach Cities
Indivisible CA: StateStrong
Indivisible CA-33
Indivisible CA-43
Indivisible Chapter Change Begins With ME
Indivisible North San Diego County
Indivisible Sacramento
Indivisible San Diego Central
Indivisible San Diego Districts 52/53
Indivisible Santa Cruz
Indivisible Sausalito
Indivisible San Francisco
Indivisible Sonoma County
Inflect
International Federation of Professional & Technical Engineers (IFPTE) Local 21 AFL-CIO
Internet Creators Guild
Jockeys Guild
Kaizena

Karma+
Latino Coalition for a Healthy California
Libib, Inc.
Loungebuddy
Mallonee & Associates
Manargy
May First/People Link
Mechanics' Institute Library
Media Alliance
Media Mobilizing Project
Medium
Milo Magnus
Mindhive
MinOps
Miracle Mile Democratic Club
Mobile Citizen
National Consumer Law Center
National Digital Inclusion Alliance
National Hispanic Media Coalition
New America's Open Technology Institute
NextGen California
New Media Rights
Nonprofit Technology Network
Normal Heights Indivisible
Oakland Privacy
Office of Ratepayer Advocates – ORA
Onfleet
Oregon Citizens' Utility Board
OpenMedia
Pacific Community Solutions, Inc.
Pactio
Patreon
PEN America
People Demanding Action
Pilotly
Point.com
Privacy Rights Clearinghouse
Progressive Technology Project
Public Knowledge
Reddit
REELY
RootsAction.Org
San Bernardino County District Advocates for Better Schools
San Francisco Unified School District
SEIU California
Service Employees International Union California (SEIU)
Shotwell Labs
Silicon Harlem
Small School Districts' Association

Sonos
Starsky Robotics
SumOfUs
SV Angel
Tech Goes Home
Tersorio
The Butcher Shop
The Greenlining Institute
The Monger
The Run Experience
The Utility Reform Network (TURN)
Tostie Productions
Twilio
UFCW Western State Council
Underdog Media
United Auto Workers, Local 5810
United Food and Commercial Workers International Union (UFCW)
UNITEHERE!
Unwired
Upgraded
Utility Workers Union of America AFL-CIO
Venntive
VividSeats
Western Center on Law and Poverty
Woopie Media
World Wide Web Foundation
Writers Guild of America West
Numerous Individuals

Opposition (prior version, unless noted otherwise)

Advancing The Seed, Inc.
AT&T(current version)
BizFed Los Angeles County
California Asian Pacific Chamber of Commerce
California Cable & Telecommunications Association (current version)
California Chamber of Commerce (current version)
CalCom (current version)
California Hispanic Chamber of Commerce
California Latino Leadership Institute
California Manufacturers & Technology Association (current version)
CenturyLink (current version)
Civil Justice Association of California (current version)
Coachella Valley Economic Partnership
Congress of California Seniors
Consolidated Communications Inc. (current version)
CTIA (current version)
Frontier Communications (current version)
Greater Coachella Valley Chamber of Commerce

Jesse Miranda Center for Hispanic Leadership
Latin Business Association
Latino Coalition for Community Leadership
Los Angeles Area Chamber of Commerce
Macedonia Community Development Corporation
Mexican American Opportunity Foundation
Mexican American Opportunity Foundation
National Asian American Coalition
National Diversity Coalition
NCTA – The Internet & Television Association
North Orange County Chamber
OASIS Center International
Orange County Business Council
Organization for Chinese Americans – East Bay
San Gabriel Valley Economic Partnership (current version)
Small Business Development Corporation of Orange County
Southern Christian Leadership Conference of Southern California
Sprint (current version)
The Chamber Greater Coachella Valley (current version)
The Chamber of Commerce Alliance of Ventura and Santa Barbara Counties
T-Mobile (current version)
TracFone (current version)
USTelecom
Valley Industry and Commerce Association
Verizon (current version)
Two individual

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