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SUBJECT

Communications: broadband Internet access service

DESCRIPTION

This bill would codify portions of the recently-rescinded Federal Communications Commission rules protecting "net neutrality." This bill would prohibit broadband Internet access service providers from engaging in certain practices, including impairing or degrading lawful Internet traffic, engaging in "paid prioritization," and engaging in deceptive or misleading marketing practices. It would also provide persons damaged by violations of this bill access to the robust enforcement mechanisms laid out in the Consumer Legal Remedies Act. This bill would also prohibit state agencies from contracting with such providers unless they commit to not engage in the prohibited practices.

BACKGROUND

Overview of the Internet: Understanding the Series of Tubes

There are four major participants in the operation of the Internet marketplace that are relevant herein: backbone networks, Internet service providers (ISPs), edge providers, and end users--the customers. Backbone networks are interconnected, long-haul fiber-optic links, high-speed routers, and data centers capable of transmitting vast amounts of data. These networks are operated by many independent companies from around the world. Customers wishing to access the Internet generally connect to these networks through local ISPs, such as Verizon or Comcast. ISPs are said to provide the "on-ramp" to the Internet. Whereas users previously relied on dial-up connection over telephone lines, most customers now generally access the Internet through much faster "broadband," high-speed communication technologies such as cable modem service. ISPs that provide these broadband Internet access services are referred to as BIAS providers. Edge providers provide content, services, and applications over the Internet that are consumed by the end users. Companies like Amazon, Google, and Facebook are examples of edge providers.

One federal court provided a simplified example of how this all works together:

> when an edge provider such as YouTube transmits some sort of content—say, a video of a cat—to an end user, that content is broken down into packets of information, which are carried by the edge provider's local [ISP] to the backbone network, which transmits these packets to the end user's local [ISP], which, in turn, transmits the information to the end user, who then views and hopefully enjoys the cat.
>
> These categories of entities are not necessarily mutually exclusive. For example, end users may often act as edge providers by creating and sharing content that is consumed by other end users, for instance by posting photos on Facebook. Similarly, broadband providers may offer content, applications, and services that compete with those furnished by edge providers.

(*Verizon v. FCC* (D.C. Cir. 2014) 740 F.3d at 645-647.)

It should be noted that some edge providers can bypass or take shortcuts along the backbone networks and provide their content more directly to ISPs through "peering connections" and "content delivery networks" (CDNs). For example, Netflix has built its own CDN to deliver all of its video traffic, including 90 percent of it being delivered through direct connections between its CDN and local ISPs. (*See* Netflix Media Center, *How Netflix Works With ISPs Around the Globe to Deliver a Great Viewing Experience* (Mar. 17, 2018) <https://media.netflix.com/en/ company-blog/how-netflix-works-with-isps-around-the-globe-to-deliver-a-great viewing-experience> [as of Jan. 22, 2018].)

"Net Neutrality"

Net neutrality is the concept that the Internet should be an open and level playing field. The theory is that ISPs should not discriminate against lawful content, but treat all Internet traffic the same regardless of source and whether the content is in competition with that of the ISP. There is reasonable concern, explained in further detail below, that without rules against it, ISPs will limit, block, or degrade the quality of the content being transmitted to the end user, or create special "fast lanes" for the ISP's preferred content. Another troubling practice is known as "paid prioritization" in which BIAS providers will offer to prioritize Internet traffic for some edge providers for compensation and at the detriment of other edge providers and end users. Under commonly-accepted net neutrality principles, these practices are anathema to an open Internet.

As discussed in more detail below, these are not simply speculative concerns. One major BIAS provider admitted to a federal appellate court that without FCC rules prohibiting accepting fees from edge providers in return for either excluding their competitors or for granting prioritized access to end users, it "would be exploring those commercial arrangements." (*Verizon v. FCC* (D.C. Cir. 2014) 740 F.3d 623, 645-646.) There is also extensive evidence that major BIAS providers have intentionally interfered with customers' access to certain Internet content and have threatened to withhold the

free flow of traffic from certain edge providers unless compensated. (*See Comcast Corp. v. FCC* (D.C. Cir. 2010) 600 F.3d 642; Peter Svensson, *Comcast Blocks Some Internet Traffic* (Oct. 19, 2007) <http://www.washingtonpost.com/wpdyn/content/article/2007/10/19/AR2007101900842.html> [as of Jan. 22, 2018]; Timothy Lee, *Five big US Internet providers are slowing down Internet access until they get more cash* (May 5, 2014) Vox <https://www.vox.com/2014/5/5/5683642/five-big-internet-providers-are-slowing-down-internet-access-until> [as of Jan. 22, 2018]; Sam Thielman, *Major Internet providers slowing traffic speeds for thousands across US* (June 22, 2015) The Guardian < https://www.theguardian.com/technology/2015/jun/22/major-internet-providers-slowing-traffic-speeds> [as of Jan. 22, 2018]; Timothy Karr, *Net Neutrality Violations: A Brief History* (Apr. 25, 2017) < https://www.freepress.net/blog/2017/04/25/net-neutrality-violations-brief-history> [as of Jan. 22, 2018].)

The Federal Communications Commission under President Obama implemented robust net neutrality rules in a 2015 Open Internet Order that included prohibitions on blocking access to legal content, applications, and services; impairing or degrading lawful Internet traffic; and favoring some Internet traffic over other traffic in exchange for consideration (paid prioritization). However, the FCC under the current President recently released its order rescinding these rules and again exposing end users and edge providers to these troubling practices.

In response, several states have introduced their own legislation to protect net neutrality. This bill would implement the net neutrality rules established in the 2015 Open Internet Order for ISPs providing BIAS within California and would prohibit state agencies from contracting with ISPs unless they commit to net neutral practices. This bill would also provide enforcement mechanisms to ensure those harmed by violations are able to seek redress.

CHANGES TO EXISTING LAW

Existing federal law, the Communications Act of 1934 (the Act), as amended, establishes 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.)

Existing federal law defines "information service" to mean the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. Federal law defines "telecommunications" to mean the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received and defines "telecommunications carrier" to mean any provider of telecommunications services, except that such term does not include aggregators of telecommunications services, as defined. A telecommunications carrier is treated as a

common carrier only to the extent that it is engaged in providing telecommunications services, except that the FCC shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage. (47 U.S.C. Sec. 153.)

Existing federal law 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 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.)

Existing federal law authorizes the FCC, with some exceptions, to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services if the FCC makes specified determinations. It 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. It also 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.)

Existing federal law requires 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. Existing law authorizes the FCC to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act. (47 U.S.C. Sec. 201.)

Existing federal law prohibits 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.)

Existing federal law requires every telecommunications carrier to protect the confidentiality of proprietary information of its customers, with some specified exemptions. (47 U.S.C. Sec. 222.)

Existing federal law establishes duties on telecommunications carriers regarding interconnectivity, including an obligation to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. (47 U.S.C. Secs. 251, 256.)

Existing federal law establishes procedures for negotiation, arbitration, and approval of interconnection agreements among telecommunications carriers. (47 U.S.C. Sec. 252.)

Existing federal law requires every telecommunications carrier that provides interstate telecommunications services to contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the FCC to preserve and advance universal service. Existing federal law states that only eligible telecommunications carriers, as provided, shall be eligible to receive specific federal universal service support. Federal law authorizes a state to adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state. (47 U.S.C. Sec. 254.)

Existing federal law requires the FCC and each state commission with regulatory jurisdiction over telecommunications services to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. (47 U.S.C. Sec. 1302.)

Existing federal law empowers the Federal Trade Commission (FTC) to prevent persons, partnerships or corporations, except common carriers, and specified 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).)

Existing California law, the Consumers Legal Remedies Act (CLRA), protects consumers against unfair and deceptive business practices and provides procedures to secure such protection. (Civ. Code Sec. 1750 et seq.)

Existing California law makes unlawful certain unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction that are intended to result or that result in the sale or lease of goods or services to any consumer, including misrepresentations of the person's products or those of competitors and false or misleading advertising. (Civ. Code Sec. 1770.)

Existing California law provides that any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 of the Civil Code may bring an action against that person to recover or obtain any of the following:

- actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000);
- an order enjoining the methods, acts, or practices;
- restitution of property;
- punitive damages; and

- any other relief that the court deems proper. (Civ. Code Sec. 1780(a).)

Existing California law additionally provides that consumers who are senior citizens or disabled persons, as defined, may seek and be awarded, in actions pursuant to Section 1780(a) of the Civil Code (CLRA actions), in addition to the remedies specified therein, up to five thousand dollars ($5,000) where the trier of fact makes certain findings. (Civ. Code Sec. 1780(b).)

Existing California law provides that CLRA actions may be commenced in the county in which the person against whom it is brought resides, has the person's principal place of business, or is doing business, or in the county where the transaction or any substantial portion thereof occurred. Courts are required to award court costs and attorney's fees to a prevailing plaintiff in such actions. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith. (Civ. Code Sec. 1780(d)-(e).)

Existing California law provides that any consumer entitled to bring a CLRA action may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of the consumer and such other similarly situated consumers to recover damages or obtain other relief as provided. (Civ. Code Sec. 1781.)

Existing California law defines "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 by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code (False Advertising Law). (Bus. & Prof. Code Sec. 17200 (Unfair Competition Law).)

Existing California law, the False Advertising Law, makes it unlawful to engage in false or misleading advertising and requires certain disclosures, including in direct customer solicitations. (Bus. & Prof. Code Sec. 17500 et seq.)

Existing California law, the False Advertising law, makes it unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or

misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Existing law makes any violation of these provisions a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both imprisonment and fine. (Bus. & Prof. Code Sec. 17500.)

Existing California law provides that any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Business and Professions Code Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state. (Bus. & Prof. Code Sec. 17203.)

Existing California law requires actions for relief pursuant to the Unfair Competition Law be prosecuted exclusively in a court of competent jurisdiction and only by the following:

- the Attorney General;
- a district attorney;
- a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance;
- a city attorney of a city having a population in excess of 750,000;
- a city attorney in a city and county;
- a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association with the consent of the district attorney; or
- a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (Bus. & Prof. Code Sec. 17204.)

Existing California law, the Public Contract Code, requires that bidders or persons entering into contracts with the state to sign various statements or certify various matters under penalty of perjury. For example, the existing code:

- authorizes a state entity to require, in lieu of specified verification of a contractor's license before entering into a contract for work to be performed by a contractor, that the person seeking the contract provide a signed statement which swears, under penalty of perjury, that the pocket license or certificate of licensure presented is his

or hers, is current and valid, and is in a classification appropriate to the work to be undertaken. (Pub. Contract Code Sec. 6100(b).)

- 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.)
- requires every bid on every public works contract of a public entity to include a noncollusion declaration under penalty of perjury under the laws of the State of California, as specified. (Pub. Contract Code Sec. 7106.)
- requires every contract entered into by a state agency for the procurement of equipment, materials, supplies, apparel, garments and accessories and the laundering thereof, excluding public works contracts, to require a contractor to certify that no such items provided under the contract are produced by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor, or exploitation of children in child labor. The law further requires contractors ensure that their subcontractors comply with the Sweat Free Code of Conduct, under penalty of perjury. (Pub. Contract Code Sec. 6108.)

This bill would establish the California Internet Consumer Protection and Net Neutrality Act of 2018 and state its intent is 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.

This bill would define "broadband Internet access service" (BIAS) 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. It would also 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 chapter. "Edge provider" would be defined to mean any individual or entity in California that provides any content, application, or service over the Internet, and any individual or entity in California that provides a device used for accessing any content, application, or service over the Internet. "Internet service provider" (ISP) would be defined to mean a business that provides BIAS to an individual, corporation, government, or other customer in California. This bill would define "paid prioritization" to mean 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 from a third party, or (2) to benefit an affiliated entity.

This bill would make it unlawful for an ISP that provides BIAS to engage in any of the following activities:

- blocking lawful content, applications, services, or nonharmful 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 nonharmful device, subject to reasonable network management practices;
- engaging in paid prioritization, or providing preferential treatment of some Internet traffic to any Internet customer;
- unreasonably interfering with, or unreasonably disadvantaging, either a customer's ability to select, access, and use BIAS or lawful Internet content, applications, services, or devices of the customer's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to a customer;
- engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content 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.

This bill would make the remedies and procedures of the CLRA available for violations of its provisions. This bill would also make clear that it does not preclude enforcement of the rights granted therein pursuant to the Unfair Competition Law (Business & Professions Code Section 17200 et seq.) and the False Advertising Law (Business & Professions Code Section 17500 et seq.).

This bill would prohibit state agencies from contracting with an ISP for the provision of BIAS unless that ISP certifies, under penalty of perjury, that it will not engage in the activities made unlawful by this bill.

This bill would make its provisions severable.

COMMENT

1. Stated need for the bill

According to the author:

> Last month, the Trump Administration Federal Communications Commission (FCC) on a split, partisan vote, repealed strong consumer protection rules for Internet neutrality enacted by the Obama Administration. These rules were intended to protect consumers from unscrupulous business practices and usurious charges for broadband Internet service. States like Washington, New York, and New Jersey have announced efforts to enact state laws to protect consumers by establishing their own net neutrality laws.
>
> SB 460 will preserve the heart of the FCC's net neutrality rules. It will prevent Internet service providers from engaging in deceptive, discriminatory, or anti-

competitive business practices. This bill sets clear, reasonable standards for Internet service providers and offers necessary protections for both online businesses and consumers.

2. Evolution of BIAS oversight

The Federal Communications Commission (FCC) is a federal agency created by the Communications Act of 1934, which was later amended by the Telecommunications Act of 1996. The enabling statute and those providing the FCC's mission and operation are found in Chapter 5 of Title 47 of the United States Code. The purpose of the FCC is to regulate interstate and international communications by radio, television, wire, satellite and cable in the United States. The agency is directed by five commissioners appointed by the President of the United States and confirmed by the United States Senate, with no more than three commissioners from the same political party. The FCC is tasked with promoting the development of competitive networks, as well as ensuring universal service, consumer protection, public safety, and national security.

The FCC's authority to regulate Broadband Internet Access services (BIAS) has hinged on the official classification of such services as either "information services" or as "telecommunications services," as those terms are understood by the Communications Act of 1934, as amended (the Act). The importance of the classification to the role of the FCC is paramount:

> The Act, as amended by the Telecommunications Act of 1996, 110 Stat. 56, defines two categories of regulated entities relevant to these cases: telecommunications carriers and information-service providers. The Act regulates telecommunications carriers, but not information-service providers, as common carriers. Telecommunications carriers, for example, must charge just and reasonable, nondiscriminatory rates to their customers, 47 U.S.C. §§ 201-209, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal "universal service" fund, § 254(d). These provisions are mandatory, but the Commission must forbear from applying them if it determines that the public interest requires it. §§ 160(a), (b). Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications, *see* §§ 151-161.

(*Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.* (2005) 545 U.S. 967, 975-976.)

Guided by the principles of open access, competition, and consumer choice, the FCC, in 2005, adopted the "Internet Policy Statement." The Internet Policy Statement detailed four guiding principles designed to carry out the policy of the United States as stated in the Act, namely the preservation of the competitive free market for the Internet and the fostering of widespread deployment of advanced telecommunications capability to all Americans. The adopted principles were:

- to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice;
- to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement;
- to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network; and,
- to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.

The Internet Policy Statement guided the FCC's subsequent handling of Broadband Internet Access services (BIAS). In fact, the principles espoused therein were incorporated into several merger orders and licensing agreements. The FCC conditioned its approval of these transactions on compliance with the Internet Policy Statement. However, BIAS was classified as an "information service" at that time, limiting the basis for FCC oversight to its ancillary authority pursuant to Title I of the Act.

In 2010, the FCC, in furtherance of Internet Policy Statement principles, took action against Comcast for interfering with its customers' use of peer-to-peer networking applications, and Comcast brought suit, contending the FCC acted outside of the authority vested in it by the Act. (*See Comcast Corp. v. FCC* (D.C. Cir. 2010) 600 F.3d 642.) The FCC argued it had authority to so regulate Comcast, then classified as an information service provider, under its Title I ancillary authority. The D.C. Circuit Court disagreed and found the agency's actions were outside the parameters of its authority. It found the general statements of policy upon which the FCC relied did not create the "statutorily mandated responsibilities" that would justify the agency's action against Comcast.

In response, the FCC issued a "Notice of Inquiry," which, among other things, contemplated the possible reclassification of BIAS. The FCC received written feedback from over 100,000 commenters, held public workshops, and convened a "Technological Advisory Process with experts from industry, academia, and consumer advocacy groups." As a result of that process, the FCC issued the "2010 Open Internet Order." In that order, the FCC found that "the Internet has thrived because of its freedom and openness—the absence of any gatekeeper blocking lawful uses of the network or picking winners and losers online." While the 2010 Open Internet Order maintained BIAS as an information service, it codified the principles laid out in the Internet Policy Statement in order to provide "greater clarity and certainty regarding the continued freedom and openness of the Internet." The order established three rules:

- Transparency. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services;
- No blocking. Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services; and
- No unreasonable discrimination. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.

The 2010 Open Internet Order made the case for these rules by laying out the real and present danger to an open Internet, arguing that "broadband providers endanger the Internet's openness by blocking or degrading content and applications without disclosing their practices to end users and edge providers, notwithstanding the Commission's adoption of open Internet principles in 2005." The FCC pointed to the financial incentives for ISPs to engage in these activities and the limited choices most consumers have for the provision of BIAS.

However, Verizon challenged the 2010 Open Internet Order in the D.C. Circuit Court, again with an argument that the FCC had exceeded its regulatory authority and violated the Act. (*See Verizon v. FCC* (D.C. Cir. 2014) 740 F.3d 623.) The D.C. Circuit vacated the no-blocking and antidiscrimination rules because it found that they impermissibly regulated broadband providers as common carriers, which conflicted with the FCC's prior classification of BIAS as an "information service" rather than a telecommunications service, again exceeding their ancillary authority. However, the court upheld the transparency rule as within the FCC's Title I authority. It also ruled that the FCC reasonably interpreted the Act to empower the FCC "to promulgate rules governing broadband providers' treatment of Internet traffic." Particularly relevant here, the D.C. Circuit Court also found the FCC provided ample justification for the rules in the 2010 Open Internet Order and that the need for them was supported by substantial evidence:

> Equally important, the Commission has adequately supported and explained its conclusion that, absent rules such as those set forth in the Open Internet Order, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment. First, nothing in the record gives us any reason to doubt the Commission's determination that broadband providers may be motivated to discriminate against and among edge providers. The Commission observed that broadband providers—often the same entities that furnish end users with telephone and television services—"have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating telephone and/or pay-television services."... Broadband providers also have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users. Indeed, at oral

> argument Verizon's counsel announced that "but for [the Open Internet Order] rules we would be exploring those commercial arrangements." . . . Although Verizon dismisses the Commission's assertions regarding broadband providers' incentives as "pure speculation," . . . those assertions are, at the very least, speculation based firmly in common sense and economic reality.
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> Moreover, as the Commission found, broadband providers have the technical and economic ability to impose such restrictions. Verizon does not seriously contend otherwise. In fact, there appears little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic. . . . The Commission also convincingly detailed how broadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers. Because all end users generally access the Internet through a single broadband provider, that provider functions as a "'**terminating monopolist**'" with power to act as a "gatekeeper" with respect to edge providers that might seek to reach its end-user subscribers. As the Commission reasonably explained, this ability to act as a "gatekeeper" distinguishes broadband providers from other participants in the Internet marketplace—including prominent and potentially powerful edge providers such as Google and Apple—who have no similar "control [over] access to the Internet for their subscribers and for anyone wishing to reach those subscribers."
>
> To be sure, if end users could immediately respond to any given broadband provider's attempt to impose restrictions on edge providers by switching broadband providers, this gatekeeper power might well disappear. . . . For example, a broadband provider like Comcast would be unable to threaten Netflix that it would slow Netflix traffic if all Comcast subscribers would then immediately switch to a competing broadband provider. But we see no basis for questioning the Commission's conclusion that end users are unlikely to react in this fashion. . . . Moreover, the Commission emphasized, many end users may have no option to switch, or at least face very limited options: "[a]s of December 2009, nearly 70 percent of households lived in census tracts where only one or two wireline or fixed wireless firms provided" broadband service.

(*Verizon v. FCC*, 740 F.3d at 645-647 (internal citations omitted; emphasis added).)

Following this ruling, the FCC issued a Notice of Proposed Rulemaking in May 2014, to respond to the lack of conduct-based rules to protect and promote an open Internet. The FCC took proactive steps to facilitate public engagement in response to the Notice, including the establishment of a dedicated email address to receive comments, a mechanism for submitting large numbers of comments in bulk, and the release of the entire record of comments and reply comments in a machine-readable format, so that researchers, journalists, and other parties could analyze and create visualizations of the record. The FCC also hosted a series of roundtables covering a variety of topics related to the open Internet proceeding, including events focused on different policy

approaches to protecting the open Internet, mobile broadband, enforcement issues, technology, broadband economics, and the legal issues surrounding the Commission's proposals. The result of this process was the "2015 Open Internet Order."

The FCC hailed the order as putting into place "strong, sustainable rules, grounded in multiple sources of our legal authority, to ensure that Americans reap the economic, social, and civic benefits of an open Internet today and into the future." As discussed above, these rules made clear that BIAS providers could not block or throttle lawful Internet traffic or engage in paid prioritization.

However, just five months into the Trump Administration, the FCC, led by the newly appointed Commissioner Ajit Pai, issued another notice of proposed rulemaking, starting the process for overturning the carefully crafted provisions of the 2015 Open Internet Order. In December 2017, in a break from the decade of working to ensure an open Internet free from discrimination and interference, the FCC voted to reclassify BIAS back to an information service and roll back the net neutrality protections. The official order, the dubiously entitled "Restoring Internet Freedom Order," was published on January 4, 2018. It will take official effect when published in the Federal Register, which is expected to happen shortly.

Despite the FCC's commitment over the last decade and a half to maintaining an open and free Internet, the recent order removes the rules that protect edge providers and end users from discriminatory practices by BIAS providers. As the D.C. Circuit Court found, without these rules, "broadband providers represent a threat to Internet openness." This bill would fill the void in order to respond to that threat. This bill would make it unlawful to engage in any of the following activities:

- blocking lawful content, applications, services, or nonharmful 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 nonharmful device, subject to reasonable network management practices;
- engaging in paid prioritization, or providing preferential treatment of some Internet traffic to any Internet customer;
- unreasonably interfering with, or unreasonably disadvantaging, either a customer's ability to select, access, and use BIAS or lawful Internet content, applications, services, or devices of the customer's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to a customer;
- engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content to its customers; or
- advertising, offering for sale, or selling BIAS without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.

These protections are central to preserving net neutrality and maintaining an open and free Internet. They ensure that everyone is given the ability to communicate and access information on a level playing field.

Staff notes that under the 2015 Open Internet Order the bright line rules prohibiting throttling or blocking Internet content and traffic were subject to "reasonable network management." The order provided the following definition:

> A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.

For the paid prioritization rule, the 2015 Open Internet Order included an exception when the BIAS provider could prove that the practice "would provide some significant public interest benefit and would not harm the open nature of the Internet." The BIAS provider was required to seek a waiver for such an exception from the FCC, which would seek public comment and conduct its own investigation.

In order to maintain consistency with the 2015 Open Internet Order, the author may wish to amend the bill to include language that: (1) provides a clear definition of "reasonable network management"; (2) extends the reasonable network management exception to Section 1776(d) and Section 12122(d); and (3) provides for the "public interest benefit" exception as it relates to paid prioritization.

3. Enforcement mechanisms

In addition to prohibiting certain practices by BIAS providers, this bill would make the remedies and procedures of the Consumer Legal Remedies Act (CLRA) available for violations of its provisions. The CLRA was enacted "to protect the statute's beneficiaries from deceptive and unfair business practices," and to provide aggrieved consumers with "strong remedial provisions for violations of the statute." (*Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) These "strong remedial provisions" would now be extended to Internet consumers in California when BIAS providers run afoul of this bill's bright line rules. Consumers who suffer any damage as a result of the unlawful practices specified in this bill would have a right of action under the CLRA to recover damages and other remedies, including actual damages; an order to enjoin the unlawful practices; restitution; punitive damages; or any other relief that the court deems proper. (Civ. Code Sec. 1780.) Additionally, under this bill, mechanisms for securing remedies on a class wide basis would be provided to consumers, and courts would be authorized to award attorney's fees to prevailing plaintiffs. (Civ. Code Secs. 1780, 1781.) This bill would therefore place power in the hands of consumers, and even edge providers, to hold BIAS providers responsible for violations of net neutrality.

This bill goes further and would also make clear that it does not preclude enforcement of the rights granted in this bill pursuant to the Unfair Competition Law (Business & Professions Code Section 17200 et seq.) and the False Advertising Law (Business & Professions Code Section 17500 et seq). These laws have a broad scope. The Unfair

Competition Law provides remedies against defendants who engage in "unfair competition," which is broadly defined to mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising. (Bus. & Prof. Code Sec. 17200.) Unfair competition also includes any act prohibited by the False Advertising Law, which makes it unlawful to engage in false or misleading advertising and requires certain disclosures, including in direct customer solicitations. (Bus. & Prof. Code Secs. 17200, 17500 et seq.)

The Unfair Competition Law provides that a court "may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (Bus. & Prof. Code Sec. 17203; s*ee also Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1146.) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against a violator. (Bus. & Prof. Code Sec. 17203; 17206.) By making paid prioritization, throttling or blocking Internet traffic, or otherwise unreasonably interfering with a customer's ability to utilize the full benefits of BIAS unlawful, the remedies afforded under the Unfair Competition Law would also be available to address any violations. These laws would extend the power to enforce this bill's provisions by not only allowing harmed customers or edge providers the right to bring action, but places enforcement power in the hands of state and local government entities. Violations of the Unfair Competition Law can be prosecuted by all of the following:

- the Attorney General;
- a district attorney;
- a county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance;
- a city attorney of a city having a population in excess of 750,000;
- a city attorney in a city and county;
- a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association with the consent of the district attorney; or
- a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (Bus. & Prof. Code Sec. 17204.)

4. Preemption

The supremacy clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(U.S. Const., art. VI, cl. 2.) This provision forms the basis of Congress' authority to preempt state laws. There are several forms such preemption may take.

The simplest form is "express preemption," which occurs when Congress explicitly preempts state law in its enactment of federal law. Congress can also preempt state law implicitly. Field preemption exists when federal law creates "a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" (*Barnett Bank, N.A. v. Nelson* (1996) 517 U.S. 25, 31 (quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230).) "Conflict preemption" exists where federal law actually conflicts with state law and compliance with both state and federal law is impossible or where the state law impedes the realization of the full purposes and objectives of Congress. (*California v. ARC America Corp.* (1989) 490 U. S. 93, 100.)

Federal preemption is not limited to federal statutes, as federal regulations may also supersede state law. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612.) However, an agency may only preempt state law when the relevant regulations are within the scope of the agency's statutory authority and are not arbitrary. (*Id.*; *see also Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1475, fn. 6.)

As part of the Restoring Internet Freedom Order, the FCC included a provision concerning preemption:

> [W]e conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.
>
> We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order. Among other things, we thereby preempt any so-called "economic" or "public utility-type" regulations, including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.

Clearly this provision represents an attempt by the FCC to explicitly preempt state attempts to restore net neutrality, such as this bill. If the Restoring Internet Freedom Order goes into effect, litigation would likely result from any attempt to enforce the provisions of this bill. However, as indicated above, an agency may only preempt state law when the relevant regulations are within the scope of the agency's statutory authority and are not arbitrary. (*Id.*; *see also Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1475, fn. 6.) Courts are required to hold unlawful and set aside agency action, findings, and conclusions that are "found to be arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity." (5 U.S.C. Sec. 706.)[1]

The Ninth Circuit has made clear that although the FCC has "broad discretionary authority to change its regulatory mind," the FCC cannot expect the courts "simply to rubberstamp its change in policy." (*California v. FCC* (9th Cir. 1990) 905 F.2d 1217, 1230.) The Ninth Circuit made clear that a reviewing court cannot accept an agency's change of course uncritically, but rather it must "set aside agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (*Ibid.*)

The policy goals set for the FCC by statute are "to preserve the vibrant and competitive free market that presently exists for the Internet" 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.) As seen above, these policy goals have guided the FCC for years. These principles are supported by the 2005 Internet Policy Statement, the 2010 Open Internet Order, and the 2015 Open Internet Order. In contrast, the recent Restoring Internet Freedom Order arguably breaks from these policy goals in clear ways. Rather than maximizing user control over what information is received, the order strips away the protections of an open Internet and allows BIAS providers to be "terminating monopolists" acting as the "gatekeepers" of the Internet without any rules to check their unique power. (*Verizon v. FCC*, 740 F.3d at 645-647.) As the D.C. Circuit Court of Appeals has indicated, without net neutrality rules, "broadband providers represent a threat to Internet openness."

Concerns about these new rules and their legality are shared by many across the country. On January 16, 2018, the Attorneys General for the District of Columbia, the States of California, New York, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Mississippi, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the Commonwealths of Kentucky, Massachusetts, Pennsylvania, and Virginia, filed a protective petition for review in the United States Court of Appeals for the District of Columbia Circuit, initiating the states' legal battle against the FCC and the recent Order. A host of public interest organizations have also filed suits challenging the recent FCC order. Underlying these legal challenges is the contention that the FCC's decision to rescind the 2015 Open Internet Order was unlawful and must be overturned. Specifically, the States' Attorneys General allege the order was:

> arbitrary, capricious and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. Sec. 701 et seq.; violates federal law, including but not limited to, the Constitution, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; conflicts with the notice-

[1] An example of this is found in a Sixth Circuit case from February 2015 in which the court overturned the FCC's attempt to preempt state laws restricting the growth of municipal broadband networks as outside of their statutory authority. (*Tennessee v. FCC* (6th Cir. 2016) 832 F.3d 597.)

and-comment rulemaking requirements of 5 U.S.C. Sec. 553; and is otherwise contrary to law.

Certain issues with the FCC's process in implementing the Restoring Internet Freedom Order may also make it susceptible to legal challenge and repeal. There have been reports, including statements from FCC commissioners, that the public comment system was compromised. In addition, the preemption provision may be particularly vulnerable because the required notice of proposed rulemaking that the FCC put out did not seek public comment on preemption of state action.

Given these robust legal challenges and the incongruence between the FCC's recent order and the policies set forth in the Act, there is a reasonable chance the Restoring Internet Freedom Order will be struck down, in whole or in part. Such an outcome will undercut any challenges to this bill based on federal preemption.

5. State contracting with BIAS providers

The Public Contract Code places various requirements on bidders or persons entering into contracts with the state. These usually entail entities signing various statements or certifying various matters under penalty of perjury. For example, the Public Contract Code currently:

- authorizes a state entity to require, in lieu of specified verification of a contractor's license before entering into a contract for work to be performed by a contractor, that the person seeking the contract provide a signed statement which swears, under penalty of perjury, that the pocket license or certificate of licensure presented is his or hers, is current and valid, and is in a classification appropriate to the work to be undertaken. (Pub. Contract Code Sec. 6100(b).)
- 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.)
- requires every bid on every public works contract of a public entity to include a noncollusion declaration under penalty of perjury under the laws of the State of California, as specified. (Pub. Contract Code Sec. 7106.)
- requires every contract entered into by a state agency for the procurement of equipment, materials, supplies, apparel, garments and accessories and the laundering thereof, excluding public works contracts, to require a contractor to certify that no such items provided under the contract are produced by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor, or exploitation of children in child labor. The law further

requires contractors ensure that their subcontractors comply with the Sweat Free Code of Conduct, under penalty of perjury. (Pub. Contract Code Sec. 6108.)

Courts have repeatedly recognized a distinction between states acting as market regulators and states operating as market participants, recognizing the states' ability to themselves operate freely in the free market. (*Dep't of Revenue v. Davis* (2008) 553 U.S. 328, 339.)

This bill would prohibit state agencies from contracting with an ISP for the provision of BIAS unless that ISP certifies, under penalty of perjury, that it will not engage in certain activities, including interfering with customers' access to Internet content or favoring some traffic over other traffic in exchange for compensation. This provision of the bill would harness the state's power as a market participant to decide the terms upon which it will enter into a contract in order to protect the principles of net neutrality. Several other states are looking to implement similar rules for state government contracts. In addition, on January 22, 2018, Governor Steve Bullock of Montana signed an executive order declaring that any ISP with a state government contract cannot block or charge more for faster delivery of websites. (Cecilia Kang, *Montana Governor Signs Order to Force Net Neutrality* (Jan. 22, 2018) New York Times <https://www.nytimes.com/2018/01/22/technology/montana-net-neutrality.html> [as of Jan. 22, 2018]. In response to concerns about the legality of such an action, a former enforcement chief for the FCC stated: "There is a long history of government using its procurement power to get companies to adopt requirements, and this is no different. This action by Governor Bullock will provide immediate relief."
While the section of this bill that provides a right of action against BIAS providers for engaging in unlawful practices (Section two) directly conflicts with the preemption clause of the Restoring Internet Freedom Order and would therefore be fairly susceptible to arguments regarding federal preemption, the section governing government contracts with BIAS providers (Section three) would be more insulated from such challenges. States generally have control over their decisions when contracting for goods and services. Because this bill would make clear that its provisions are severable, even if Section two were struck down as preempted, California could still protect net neutrality through its role as a market participant.

"In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant. (Jo*hnson v. Rancho Santiago Cmty. College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1022.) Federal law ordinarily preempts only state regulation of a defined field. Not all state law constitutes regulation. There may be no regulation and hence no preemption in circumstances when the state is acting in the marketplace in a proprietary rather than regulatory mode. (Fri*ends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 705.) This section of the bill would specifically target state contracts for the "provision of broadband internet access service." This provision would not regulate the industry, but simply place parameters for agencies contracting for these services.

6. Arguments for and against net neutrality in California

A number of groups submitted letters to the Senate Energy, Utilities, and Communications Committee in response to a prior version of the bill. The Greenlining Institute wrote in support of the bill:

> Net neutrality ensures that people of color can tell their stories without fear of censorship, it ensures that they can access the resources and online networks necessary to overcome decades of discriminatory redlining. For communities of color, net neutrality is also essential [] for closing the digital divide. Without net neutrality, prices for open internet access will rise and media companies will invest less in diverse content and more in paying large broadband providers for priority access – resulting in an even wider digital divide.

The Utility Reform Network stated its belief that "California must act on net neutrality and ensure that there are comprehensive consumer protections that prohibit broadband internet service providers from restricting access to the internet, imposing discriminatory charges for internet access, or otherwise inhibiting open access to internet services."

However, a number of technology associations and BIAS providers wrote in opposition to the bill. AT&T argued that the bill is "unnecessary to maintain an open Internet." It stated that it is committed to the principles of net neutrality as indicated by its Web site. A coalition of business and industry groups wrote that they do not believe the bill "will operate to promote or protect an open Internet. Rather, the bill opens the door to the creation of a patchwork of state regulations that will stymie innovation, as well as have the potential to undermine the backbone of California's Internet economy."

Support: ADT Security Services; The Greenlining Institute; The Utility Reform Network

Opposition: Asian Pacific Islander American Public Affairs Association; AT&T; Black Business Association; California Cable & Telecommunications Association; California Chamber of Commerce; California Manufacturers & Technology Association; Carmel Valley Chamber of Commerce; Central City Association of Los Angeles; Coalition for Responsible Community Development; Consolidated Communications; CTIA; Frontier Communications; Greater Coachella Valley Chamber of Commerce; Greater Los Angeles African American Chamber of Commerce; Imperial Valley LGBT Resource Center; Inland Empire Economic Partnership; Jobs and Housing Coalition; LEAD Netroots; Monterey Hospitality Benefits Group, Inc.; Music Changing Lives; Oceanside Chamber of Commerce; Orange County Business Council; Orange County Hispanic Chamber of Commerce; Pacific Grove Chamber of Commerce; RightWay Foundation; Santa Ana Chamber of Commerce; Sprint; T Mobile; TechNet; Tracfone; Valley Industry & Commerce Association; Verizon; Young Visionaries Youth Leadership Academy

HISTORY

Source: Author

Related Pending Legislation: SB 822 (Wiener, 2018) would state it is the intent of the Legislature to enact legislation to effectuate net neutrality in California utilizing the state's regulatory powers and to prevent Internet service providers from engaging in practices inconsistent with net neutrality. This bill is currently in the Senate Rules Committee.

Prior Legislation: None Known

Prior Vote:

Senate Appropriations Committee (Ayes 5, Noes 2)
Senate Appropriations Committee (Ayes 7, Noes 0)
Senate Energy, Utilities and Communications Committee (Ayes 7, Noes 2)

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